



Reports of Cases

OPINION OF ADVOCATE GENERAL
SÁNCHEZ-BORDONA
delivered on 21 June 2018¹

Case C-342/17

**Memoria Srl,
Antonia Dall'Antonia**
v
Comune di Padova,
intervener:
Alessandra Calore

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Veneto (Regional Administrative Court for the Veneto Region, Italy))

(Reference for a preliminary ruling — Admissibility — Purely internal situation — Restrictions on the freedom of establishment — Rules prohibiting any profitable activity in connection with the storage of cremation urns)

1. For a wide variety of reasons (religion, culture, health), all civilisations have had to address the issue of how to dispose of the mortal remains of the dead. Since time immemorial, many civilisations have chosen to inter the body (*sit tibi terra levis*) in cemeteries or graveyards, which provide a place for burying, remembering and honouring the memory of the deceased. In recent centuries, these facilities have tended to be managed by the public — usually municipal — authorities.

2. It is increasingly common, however, for the body to be cremated. As the — mostly but not exclusively traditional — reservations about this process² evaporate, and its advantages (economic, social and land-use-related, among others) are championed, the practice of cremation is becoming more popular, a fact which raises new issues, such as those relating to storage of the ashes.

3. Death has become the focus of a network of *funeral* services. Most of these are supplied by private undertakings providing the deceased's family members with professional assistance in matters such as, in particular, transferring the remains from the deceased's home or the chapel of rest, as well as other activities and procedures integral to the funeral rites that precede the funeral itself. Alongside these

¹ Original language: Spanish.

² Even the Roman Catholic Church, while maintaining its 'preference [for] the burial of the remains of the faithful', can find no doctrinal grounds for avoiding the practice of cremation. See the Congregation for the Doctrine of the Faith, *Ad resurgendum cum Christo, Instruction regarding the burial of the deceased and the conservation of the ashes in the case of cremation*, 15 August 2016.

funeral services are the *funerary* services in the strict sense,³ which take place within the perimeter of the cemetery and include, in particular, cremation or burial of the body or the ashes and storage of the mortal remains.⁴ The latter services usually fall exclusively to the public — usually municipal — authorities.

4. Nonetheless, in some Member States, private cemeteries are now permitted and, in others (including Italy), the management of public cemeteries may be entrusted to commercial undertakings. This has fuelled the contention that cemeteries have to some extent been *privatised*, a process which has not been without controversy, sparking a debate in which some have pointed up the ‘cultural breakdown’ attendant upon such initiatives. That debate has combined anthropological considerations with arguments that advocate the preservation of public cemeteries as common assets reflecting a community’s collective memory.

5. This reference for a preliminary ruling is itself concerned with whether the municipality of the Italian city of Padua may make the storage of urns containing cremation ashes a service to be provided exclusively by municipal cemeteries (in cases where the family decides not to store them at home).

6. In order to give an answer to the referring court, the Court of Justice will have to look at the prohibition preventing private undertakings from benefiting from the freedom of establishment and the freedom to provide services when carrying out that activity. It will have to examine the reasons, if any, that might justify that restriction, whether they derive from requirements linked to public health (a well-known feature of the Court’s case-law) or from respect for the *pietas*, or filial piety, owed to the deceased, on which, unless I am mistaken, the Court has not previously ruled.

I. Legal framework

A. EU law

1. TFEU

7. Article 49 TFEU provides for the freedom of establishment as follows:

‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

³ In point 52 of the Opinion in *Adolf Truley* (C-373/00, EU:C:2002:207), which concerned the award by a municipal undertaking of a contract for the supply of fittings and fixtures for coffins, Advocate General Alber reiterated the points made by the Austrian Government, which also proposed that ‘a distinction should be made between services in the narrower sense (cemetery management, opening and closing of the grave, lowering of the body or ashes, conduct of exhumations), which are provided by the City of Vienna, and services in the wider sense (laying out the body, funeral rites, transporting the body, washing and dressing the body and placing it in the coffin, taking care of the grave, obtaining certificates, placing death notices in newspapers), which are provided by Bestattung Wien. Only funeral services in the narrower sense satisfy needs in the general interest’.

⁴ In the judgment of 27 February 2003, *Adolf Truley* (C-373/00, EU:C:2003:110, paragraphs 51 to 56), the Court of Justice accepted the differences between the two types of services, even though this was irrelevant to the ruling given in that case.

8. The first paragraph of Article 56 TFEU deals with the free movement of services as follows:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.’

2. *Directive 2006/123/EC*⁵

9. According to Article 1:

‘1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

...’

10. In accordance with Article 2:

‘1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

...’

B. National law

1. *Law No 234/2012*⁶

11. Article 53 provides that Italian citizens are not to be subject to any provisions or practices under Italian law which produce discriminatory effects in relation to the conditions and treatment guaranteed for EU citizens by the Italian legal system.

⁵ Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

⁶ Legge 24 dicembre 2012, n. 234, Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea (Law No 234/2012 of 24 December 2012 making general provision for the participation by Italy in the drafting and implementation of the legislation and policies of the European Union; GURI No 3 of 4 January 2013; 'Law No 234/2012').

2. *Law No 130/2001*⁷

12. Article 3 provides:

'1. In the six months following the enactment of this Law, the [1990 Regulation] may be amended by a regulation adopted pursuant to Article 17(1) of Law No 400 of 23 August 1998, as amended, on a proposal from the Ministry of Health, following consultation of the Ministries of the Interior and Justice, and further to the opinion of the competent parliamentary committees, on the basis of the following principles:

(a) ...

(b) authorisation to perform a cremation shall be granted on the basis of the wish of the deceased as expressed in his lifetime or indicated by a member of his family in one of the following ways:

...

(c) the scattering of ashes, in accordance with the wish of the deceased, shall be permitted only within a part of the cemetery set aside for that purpose, on open ground or on private land; scattering on private land must take place outdoors with the authorisation of the landowner and may not be performed for remuneration; in any event, ashes may not be scattered in residential areas ...; scattering at sea, on lakes and on waterways is permitted in areas free from watercraft and buildings;

d) the ashes shall be scattered by the spouse or by the family member empowered by the executor or by the legal representative of the association, as provided for in subparagraph b, point 2, above, of which the deceased was a member, or, failing that, by a person empowered to do so by the municipality;

...;

(f) unless otherwise indicated by the health authorities, transport of the urn containing the ashes shall not be subject to the precautionary health measures applicable to the transport of corpses;

...

(i) a waiting room in the crematorium shall be furnished in such a way as to permit the performance of funeral rights and to allow those attending to pay their last respects to the deceased in a dignified setting.'

⁷ Legge 30 marzo 2001, n. 130, Disposizioni in materia di cremazione e dispersione delle ceneri (Law No 130/2001 of 30 March 2001 on cremation and the scattering of ashes; GURI No 91 of 19 April 2001; 'Law No 130/2001').

3. 1934 Royal Decree⁸

13. Article 343 provides:

‘The cremation of corpses shall be performed in a crematorium authorised by the *prefetto* (provincial prefect), following consultation of the provincial medical officer. The municipal council shall make available free of charge the land required for construction of the crematorium. Urns containing full cremation remains may be placed in a cemetery, in a chapel or temple belonging to a legal person or in a private columbarium for permanent storage free from desecration.’

4. 1990 Rules on the regulation of mortuary matters⁹

14. Articles 90 and 95 deal with the grant of private graves in cemeteries. Article 92(4) prohibits the grant of plots for private graves to natural or legal persons seeking to profit from or speculate in them.

5. 2010 Veneto Regional Law on funeral matters¹⁰

15. Article 1(1) reads:

‘This Law governs matters relating to the protection of public health in the context of the functions and services associated with the death of any individual in a manner respectful of dignity, religious and cultural beliefs and the right of all individuals to the form of burial or cremation of their choice.’

16. Article 49(2) states:

‘On request, the sealed urn may be entrusted to the authorised persons for storage in the cemetery, for storage in a private location or for scattering.’

6. Padua Municipal Regulation on the funeral service¹¹

17. Article 52 (‘Custody of urns for residential storage’), as amended by Municipal Decision No 2015/0084, is worded as follows:

‘1. Custody of the cremation urn for residential storage shall be granted where the deceased made written provision to this effect in his lifetime. In the absence of such provision, custody may be requested by the spouse or, where there is no spouse, by the closest relative as determined in accordance with Articles 74, 75, 76 and 77 of the Civil Code and, if there is more than one such relative, by the absolute majority thereof.

...

3. The person given custody of the cremation urn may not under any circumstances ask third parties to assume responsibility for its storage. This prohibition shall apply even in cases where the deceased has indicated an express wish to that effect during his lifetime.

⁸ Regio Decreto 27 luglio 1934, n. 1265, Approvazione del testo unico delle leggi sanitarie (Royal Decree adopting the single text of the health laws; GURI No 186 of 9 August 1934; ‘1934 Royal Decree’).

⁹ Decreto del Presidente della Repubblica 10 settembre 1990, n. 285, approvazione del regolamento di polizia mortuaria (Rules on the regulation of mortuary matters, GURI No 239 of 12 October 1990).

¹⁰ Legge Regionale n. 18 del 4 marzo 2010, Norme in materia funeraria, della Regione del Veneto (Veneto Regional Law on provisions relating to funeral matters; BUR No 21 of 9 March 2010).

¹¹ Delibera del Consiglio Comunale di Padova n. 2015/0084 del 30/11/2015 (Albo Pretorio del 4/12/2015 al 18/12/2015).

4. The person given custody of the urn shall store it at home, in a place protected against any desecration or theft. On no grounds may apertures or holes be made in the urn.

5. The funeral service may at any time require the custodian to present the funeral urn for the purposes of verifying the integrity and condition of storage of the urn.

...

9. A custodian may be asked at any time to remove to a cemetery an urn placed in his custody.

10. In addition to the requirements laid down in paragraph 4, cremation urns may not under any circumstances be stored for profit. Consequently, the pursuit of economic activities which have as their object, even if not exclusively, the storage of cremation urns is not permitted on any basis or for any period of time. This prohibition shall apply even in cases where the deceased has indicated an express wish to that effect during his lifetime.'

II. The dispute in the main proceedings and the question referred

18. The company Memoria Srl was formed on 1 December 2014 for the purpose of providing the public with a cremation urn storage service.

19. Memoria Srl offered families whose deceased had been cremated the possibility of having their cremation urns stored in places, other than at home or in a cemetery, where they would be able to pay their respects to their lost loved ones and pay tribute to their memory. It advertised these places as being spaces exclusively intended to house cremation urns in settings which are aesthetically pleasing, secluded, secure and ideally suited to spiritual retreat and prayers in remembrance of the deceased. To that end, families signed contracts transferring the right to use the niches (columbaria) where the urns were stored.

20. From September 2015, Memoria Srl opened the aforementioned facilities for the storage of cremation ashes, which it called 'luoghi della memoria' (places of remembrance) in different parts of city of Padua. Access to the places of remembrance by members of the deceased's family was subject to their acceptance of an internal code of conduct requiring them to comply with rules of good manners, propriety and dignity, a ban on the consumption of alcoholic beverages and an obligation to dress smartly.

21. Antonia Dall'Antonia was a potential customer of Memoria Srl, as she was planning to have her husband's body cremated and his ashes transferred to one of its facilities.

22. On 30 November 2015, the Consiglio Comunale di Padova (Padua Municipal Council) adopted Decision No 2015/0084, which amended the Municipal Regulation on funeral and cemetery services.¹² This amendment made it impossible for persons given custody of funeral urns to commission private commercial services managed outside the ordinary scope of municipal funeral and cemetery services.

23. On 15 February 2016, Memoria Srl and Antonia Dall'Antonia made an application to the Tribunale Amministrativo Regionale per il Veneto (Regional Administrative Court for the Veneto Region, Italy) seeking annulment of Padua Municipal Council Decision No 2015/0084 and compensation for the damage suffered by Memoria Srl. They claimed, in essence, that that decision was incompatible with the provisions of EU law and, in particular, with the principles of freedom of establishment and freedom to provide services.

¹² The provisions of that regulation are set out in point 17 of this Opinion.

24. The referring court expresses doubts as to the applicability of those principles to a measure which is valid only in the territory of the municipality of Padua and does not affect the Italian population in its entirety. It further considers that there do not appear to be any public policy, public security or public health reasons such as to justify that restriction.

25. It was in those circumstances that that court referred the following question to the Court of Justice for a preliminary ruling:

‘Must Articles 49 and 56 of the Treaty on the Functioning of the European Union be interpreted as precluding the application of the following provisions of Article 52 of the Regulation on funeral services of the Municipality of Padua:

“The recipient shall not in any circumstances be permitted to request a third party to keep the funeral urn. This prohibition shall apply even if the deceased expressly stated during his lifetime that such was his wish (subparagraph 3).

It is obligatory to keep the urn solely at the home of the recipient ... (subparagraph 4).

...

In no circumstances may funeral urns be kept for profit. Consequently economic activities relating to, even non-exclusively, the keeping of funeral urns, for whatever purpose and for whatever period, shall therefore not be permitted. This prohibition shall apply even if the deceased expressly stated during his lifetime that such was his wish (subparagraph 10)”?’

26. Written observations have been lodged by Memoria Srl, Padua Municipal Council, the Italian Government and the Commission. With the exception of Padua Municipal Council, all the parties attended the hearing held on 16 April 2018, at which the Court of Justice invited the parties to comment on the potential application of Directive 2006/123.

III. Analysis of the question referred

27. The referring court asks the Court of Justice to determine whether a national provision which prohibits private undertakings from providing funeral urn storage services is compatible with Articles 49 and 56 TFEU.

28. It is settled case-law that the fact that the referring court has limited its questions to the interpretation of certain provisions of EU law does not prevent the Court from providing it with all the elements of interpretation of EU law which may be of assistance to it in adjudicating on the case before it.¹³

29. Moreover, the Court, which is called on to provide answers that are of use to the referring court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it.¹⁴

¹³ Judgments of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 55), and of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 28 and the case-law cited).

¹⁴ Judgments of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 56), and of 1 October 2015, *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:641, paragraph 55 and the case-law cited).

30. On that basis, it must be concluded, in the light of the information contained in the order for reference and the exchange of argument and evidence at the hearing, that the prohibition preventing private undertakings from providing cremation urn storage services must also be examined with reference to Directive 2006/123.

A. The admissibility of the question referred

31. The Italian Government and Padua Municipal Council reject the admissibility of the question referred essentially¹⁵ on two grounds: (a) this is a purely internal dispute with no cross-border components; and (b) the referring court has not included in its order all of the elements of fact and law relevant to the dispute that would enable the Court of Justice to give a proper answer.

32. The first objection is that the dispute in the main proceedings relates to a purely internal situation falling outside the scope of EU law: an Italian company is taking legal action against Padua Municipal Council on account of the application of municipal legislation valid only in the latter's territory. There is therefore no point of cross-border connection to support the raising of questions relating to the fundamental freedoms of the internal market.¹⁶

33. In the light of the case-law of the Court of Justice on purely internal situations, recently consolidated in the judgment in *Ullens de Schooten*,¹⁷ that objection should be dismissed.

34. It is true that, as a general rule, 'the provisions of the FEU Treaty on the freedom of establishment, the freedom to provide services and the free movement of capital do not apply to a situation which is confined in all respects within a single Member State'.¹⁸

35. The Court of Justice nonetheless allows exceptions to be made to that rule, considering itself to have jurisdiction to answer questions referred for a preliminary ruling in the context of purely internal disputes with no apparent cross-border components, where these arise.

36. The first of those exceptions concerns references in which a provision of domestic law extends to the nationals of the Member State in question the same rights as the provisions of EU law confer on nationals of other Member States with a view to avoiding so-called reverse discrimination (discrimination *à rebours*).

¹⁵ The Italian Government also appears to be saying that the reference for a preliminary ruling might be inadmissible because it is premature. It is sufficient to point out that it is the settled case-law of the Court of Justice that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question for a preliminary ruling (judgments of 21 September 2017, *Malta Dental Technologists Association and Reynaud*, C-125/16, EU:C:2017:707, paragraph 29, and of 17 April 2007, *AG-COS.MET*, C-470/03, EU:C:2007:213, paragraph 45).

According to Padua Municipal Council, the request for a preliminary ruling is inadmissible because any answer given by the Court of Justice would be invalid, given that the principles of legal certainty and legitimate expectations prohibit it from calling into question the status of an individual's personal right, such as the right to store one's ashes. However, the provisions of the TFEU governing the freedoms of establishment and movement of services produce vertical direct effect and the principles of legal certainty and legitimate expectations cannot serve as a pretext enabling a national court to apply provisions which are contrary to those provisions (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 42).

¹⁶ The Italian Government relies in its support on the judgment of 13 February 2014, *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2014:74, paragraphs 42 and 43).

¹⁷ Judgment of 15 November 2016 (C-268/15, EU:C:2016:874; 'judgment in *Ullens de Schooten*').

¹⁸ See to this effect the judgments in *Ullens de Schooten*, paragraph 47; of 30 June 2016, *Admiral Casinos & Entertainment* (C-464/15, EU:C:2016:500, paragraph 21); and of 20 March 2014, *Caixa d'Estalvis i Pensions de Barcelona* (C-139/12, EU:C:2014:174, paragraph 42).

37. According to the Court of Justice, ‘the interpretation of the fundamental freedoms provided for in Article 49, 56 or 63 TFEU may prove to be relevant in a case confined in all respects within a single Member State where national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law’.¹⁹

38. In this case, the national court considers, rightly, that Article 53 of Law No 234/2012 prohibits reverse discrimination and triggers the application of Article 49 TFEU to Italian nationals even in purely internal situations, as the Court of Justice, too, has already had occasion to confirm.²⁰

39. Another of the exceptions set out in the judgment in *Ullens de Schooten* is that concerning ‘provisions which apply not only to its own nationals but also to those of other Member States, [where] the decision of the referring court that will be adopted following the Court’s preliminary ruling will also have effects on the nationals of other Member States, which justifies the Court giving an answer to the questions put to it in relation to the provisions of the Treaty on the fundamental freedoms, even though the dispute in the main proceedings is confined in all respects within a single Member State’.²¹

40. As the referring court states, reiterating the arguments put forward by the applicants in the dispute in the main proceedings, it is not inconceivable that an economic operator in another Member State which allows urns to be stored in facilities managed by commercial companies will in future decide to pursue its business in Italian territory. Neither can the possibility be ruled out that a citizen in another Member State may wish to be able to access similar services in Italian territory.

41. I take the view, therefore, that the order for reference demonstrates some connection, albeit tenuous, between the subject matter or the circumstances of the dispute and Articles 49 TFEU and 56 TFEU.²²

42. To the foregoing must be added an argument relating specifically to the applicability, if any,²³ of Directive 2006/123, some of the provisions of which (those contained in Chapter III, relating to the freedom of establishment of providers) ‘must be interpreted as meaning that they also apply to a situation where all the relevant elements are confined to a single Member State’.²⁴

43. The Court of Justice has held in this regard that:

- ‘the wording of those provisions [contained in Chapter III of Directive 2006/123] does not lay down any condition as to the existence of a foreign element’;
- ‘Article 2(1) of [Directive 2006/123] provides, in general terms, without making any distinction between service activities containing a foreign aspect and service activities that have no such aspect, that that directive is to apply to “services supplied by providers established in a Member State”’;
- ‘Article 4(2) and Article 4(5) of Directive 2006/123, which define the concepts of “provider” and “establishment” respectively, make no reference to any cross-border element’;

¹⁹ See to this effect the judgments in *Ullens de Schooten*, paragraph 52; of 5 December 2000, *Guimont* (C-448/98, EU:C:2000:663, paragraph 23); and of 21 June 2012, *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraph 20).

²⁰ Judgment of 21 February 2013, *Ordine degli Ingegneri di Verona e Provincia and Others* (C-111/12, EU:C:2013:100, paragraph 35).

²¹ Judgment in *Ullens de Schooten*, paragraph 51, and of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 35).

²² Judgment in *Ullens de Schooten*, paragraph 54.

²³ For the purposes of the admissibility of the reference, it is sufficient that there should be uncertainty as to the applicability of Directive 2006/123, even if a substantive analysis ultimately shows it not to be applicable.

²⁴ Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110).

- ‘the interpretation that the provisions of Chapter III of Directive 2006/123 are applicable not only to the provider who wishes to become established in another Member State but also to the provider who wishes to become established in his own Member State is consistent with the objectives pursued by that directive’;
- ‘the finding that the provisions of Chapter III of Directive 2006/123 are also applicable in purely internal situations is further supported by an examination of the *travaux préparatoires* of that directive’.²⁵

44. Consequently, the first objection of inadmissibility cannot be upheld.

45. It is also appropriate to dismiss the second, which criticises the order for reference for having failed to include the elements of fact and law essential to enable the Court of Justice to give judgment. In particular, the Italian Government and Padua Municipal Council state that the presentation of the applicable Italian legislation deals only with the Municipal Regulation on funeral services, but omits to describe the higher-ranking internal legislative framework, at national and regional level, of which that regulation forms part.

46. I, on the other hand, consider that the referring court has given an account of the basic elements of national law that prohibit private cremation urn storage services which is adequate for the purposes of examining them in the light of the provisions of EU law an interpretation of which it requires. The conditions laid down in Article 94 of the Rules of Procedure of the Court of Justice are met and the reference for a preliminary ruling satisfies the requirements deriving from the case-law in this field.²⁶

47. The fact that the national court has referred only to the arguments put forward by the applicants in the dispute in the main proceedings and not to those of Padua Municipal Council does nothing to alter that conclusion, since the choice of arguments to include is part and parcel of the national court’s discretion to structure its reference for a preliminary ruling as it wishes.

48. I therefore consider that the reference for a preliminary ruling is admissible.

B. Substance

49. First and foremost, it is necessary to ascertain whether the provisions relating to the freedom of establishment or those relating to the freedom to provide services may be adversely affected in this case. If so, the second step would be to analyse the application of Directive 2006/123 or of the primary law provisions that govern those freedoms (Articles 49 TFEU and 56 TFEU).

50. According to the settled case-law of the Court of Justice, the objective of the freedom of establishment guaranteed by Article 49 TFEU is to allow a national of a Member State to set up a secondary establishment in another Member State to carry on his activities there and thus assist economic and social interpenetration within the European Union in the sphere of activities as self-employed persons.

²⁵ Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraphs 99 to 108).

²⁶ The Court of Justice has repeatedly held that, so far as concerns questions on the interpretation of EU law, which enjoy a presumption of relevance, the national court is responsible for defining the factual and legislative context, the accuracy of which is not a matter for the Court of Justice to determine. The Court may refuse to rule on a question referred by a national court only where, inter alia, it does not have before it the factual or legal material necessary to give a useful answer to the questions raised. See, in particular, judgments of 21 September 2017, *Malta Dental Technologists Association and Reynaud* (C-125/16, EU:C:2017:707, paragraph 28), and of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 20 and the case-law cited).

51. That freedom of establishment is intended to allow a natural or legal person to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom by actually pursuing in the host Member State an economic activity through a fixed establishment for an indefinite period.²⁷

52. As to the freedom to provide services laid down in Article 56 TFEU, it covers all services that are not offered on a stable and continuing basis from an established professional base in the Member State of destination.²⁸

53. In the dispute in the main proceedings, Memoria Srl wishes to provide a cremation urn storage service through a fixed establishment for an indefinite period in the municipality of Padua. Its claim thus falls within the scope of the freedom of establishment.²⁹

54. Any restriction of that freedom can be assessed by examination in the light of a provision of secondary law (Directive 2006/123) or primary law (Article 49 TFEU).

55. If that restriction does not fall within the scope of Directive 2006/123, it need not be subjected to the additional filter of Article 49 TFEU. The requirement to examine a national measure in the light of the provisions of both Directive 2006/123 and the TFEU would be tantamount to introducing a case-by-case examination under primary law and would thus invalidate the selective harmonisation effected by that directive.³⁰

1. Whether the activity at issue falls within the scope of Directive 2006/123

56. The next question is whether the cremation urn storage service falls within the scope of Directive 2006/123, the purpose of which is to facilitate the exercise of freedom of establishment by service providers and the free movement of services.

57. The applicability of that directive would be supported by an initial reading of Article 2 of Directive 2006/123. In accordance with paragraph 1 of that article, that directive 'shall apply to services supplied by providers established in a Member State'. None of the exceptions to that rule, which are set out in paragraphs 2 and 3, relates, explicitly at least, to funeral services in general or to the storage of cremation urns in particular.³¹

58. Given that the cremation urn storage service provided by Memoria Srl could be classified as a self-employed economic activity provided for remuneration,³² the fact that it is caught by the general rule (Article 2(1)) rather than by the exceptions to that rule (Article 2(2) and (3)) would indicate that it should be subject to the provisions of Directive 2006/123.

²⁷ Judgments of 23 February 2016, *Commission v Hungary* (C-179/14, EU:C:2016:108, paragraph 148), and of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraphs 53 and 54 and the case-law cited).

²⁸ Judgments of 23 February 2016, *Commission v Hungary* (C-179/14, EU:C:2016:108, paragraph 150); of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 22); and of 29 April 2004, *Commission v Portugal* (C-171/02, EU:C:2004:270, paragraph 25).

²⁹ This activity is a subcategory of services for the performance of funeral rites and funeral ceremonies, which the Court of Justice has examined on a number of occasions in the light of the provisions on public procurement or VAT. See judgments of 27 February 2003, *Adolf Truley* (C-373/00, EU:C:2003:110), and of 6 May 2010, *Commission v France* (C-94/09, EU:C:2010:253).

³⁰ Judgment of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 38): 'that interpretation would be contrary to the conclusion drawn by the EU legislature in recital 6 in the preamble to Directive 2006/123, to the effect that barriers to freedom of establishment may not be removed solely by relying on direct application of Article 49 TFEU, owing, inter alia, to the extreme complexity of addressing barriers to that freedom on a case-by-case basis. To concede that the 'prohibited' requirements under Article 14 of that directive may nevertheless be justified on the basis of primary law would in fact be tantamount to reintroducing such case-by-case examination, under the FEU Treaty, for all restrictions on freedom of establishment'. See also judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 96).

³¹ This conclusion is borne out by recital 33 of Directive 2006/123, according to which the concept of services covers a wide variety of ever-changing activities. It expressly states that those activities include services provided both to businesses and to consumers.

³² Article 4(1) of Directive 2006/123 provides that, for the purposes of the latter, 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU.

59. According to Article 1(3) of Directive 2006/123, however, that directive ‘does not deal with the abolition of monopolies providing services’. Recital 8 of that directive provides a number of clarifications in this regard: ‘it is appropriate that the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States ... to abolish existing monopolies’.³³

60. The regulation adopted by Padua Municipal Council removes provision of the cremation urn storage service from competition among private operators and makes it the subject of a monopoly. That monopoly is held by the municipal undertaking responsible for the management of funeral services. To this extent, that regulation prevents other undertakings, such as Memoria Srl, from taking up the aforementioned activity.

61. The fact that such monopolies providing services fall outside the scope of Directive 2006/123 is stated by the aforementioned Article 1(3) read in the light of recital 8. So it is that Chapter III of Directive 2006/123, which sets out the rules specifically applicable to the freedom of establishment, contains no provision applicable to such monopolies created by national legislation. Thus:

- Articles 9 to 13 deal with schemes for authorising the right to take up and pursue a service activity, which are clearly different from situations in which the right to take up and pursue that activity is denied to all operators other than the beneficiary of the monopoly;
- Articles 14 and 15 distinguish between prohibited requirements and those subject to evaluation. Prohibited requirements (Article 14(1) to (8)) are not open to justification and Member States must systematically abolish them as a matter of priority. A prohibition such as that laid down by Padua Municipal Council cannot be accommodated within any of those requirements;
- so far as concerns requirements subject to evaluation (Article 15(1)), it falls to the Member States to examine whether, under their legal system, any of the requirements listed in paragraph 2 of that article are imposed and ensure that any such requirements are compatible with the conditions of non-discrimination, necessity and proportionality laid down in paragraph 3. The prohibition against the pursuit for profit of the activity of storing cremation urns which is imposed on operators other than that designated by Padua Municipal Council cannot be brought within the framework of any of the requirements subject to evaluation either.

62. In short, I take the view that a monopoly providing cremation urn storage services such as that at issue in the dispute in the main proceedings does not fall within the scope of Directive 2006/123.

2. Direct application of the provisions of the FEU Treaty

63. If it is not governed by the secondary-law harmonising provision, the restriction on the freedom of establishment must be scrutinised in the light of primary law,³⁴ in particular Article 49 TFEU and the abundant case-law of the Court of Justice interpreting that article.

³³ See the Opinion of Advocate General Bot in *Commission v Hungary* (C-179/14, EU:C:2015:619, points 184 to 190). In point 188, he states: ‘where an activity is not open to competition, in particular because it is carried on by an existing public monopoly, it falls outside the scope of Directive 2006/123’. The same is true, in my opinion, of monopolies on the provision of services established after the entry into force of Directive 2006/123.

³⁴ Michel, V.: ‘Le champ d’application de la directive “services”: entre cohérence et régression?’, *La directive ‘services’ en principe(s) et en pratique*, Bruylant, 2011, p. 49.

64. Domestic legislation which allows the activity of storing funeral urns to be carried on only by a single authorised operator acts by definition as an insurmountable bar to the provision of that service by any other undertaking. The custodian of a cremation urn is able to turn only to the municipal cemetery service provider in order to have his urn stored outside his home and does not have the option of turning to another provider offering that service.

65. Accordingly, in making the pursuit of that activity subject to a regime of exclusive provision by a single operator, Padua Municipal Council restricts not only the freedom of establishment but also the freedom to provide services.³⁵ Article 37 TFEU does not apply to monopolies providing services.³⁶

66. In accordance with Articles 14 TFEU and 106(2) TFEU, pursuit of the activity of storing urns as regulated by the national rules³⁷ might fall within the category of services of general economic interest or within the category of non-economic services of general interest.³⁸

67. In the first of those scenarios, account will have to be taken of the fact that ‘national, regional and local authorities [have a wide discretion] in providing, commissioning and organising’ such services, which they exercise in the light of ‘the differences in the needs and preferences of users that may result from different geographical, social or cultural situations.’³⁹

68. If, on the other hand, that activity were a service of general interest not having an economic character, Article 2 of Protocol 2 (No 26) on services of general interest, annexed to the Treaty of Lisbon, states very pointedly that ‘the provisions of the Treaties do not affect *in any way* the competence of Member States to provide, commission and organise’ such services.⁴⁰

69. The documents before the Court, however, do not contain enough information to make it possible to arrive at a safe conclusion, particularly given that it is for the national authorities to define precisely the objectives entrusted to the providers of those services. It therefore falls to the referring court to dispose of this issue.⁴¹

70. If it decides that Article 106 TFEU is applicable, the referring court will still have to determine whether the activity at issue is subject to the other rules contained in the Treaties (including those relating to the freedom of establishment and its limitations), which will generally be the case unless ‘the application of such rules ... obstruct[s] the performance, in law or in fact, of the particular task’ assigned to the undertaking responsible for managing the service.

35 Judgments of 23 February 2016, *Commission v Hungary* (C-179/14, EU:C:2016:108, paragraph 164), and of 21 September 1999, *Läära and Others* (C-124/97, EU:C:1999:435, paragraph 29).

36 According to the case-law of the Court of Justice, it follows both from the place occupied by Article 37 in the chapter of the Treaty on the elimination of quantitative restrictions and from the wording used in that provision that it refers to trade in goods and cannot relate to a monopoly over the provision of services (judgment of 4 May 1988, *Bodson*, 30/87, EU:C:1988:225, paragraph 10).

37 At the hearing, the Italian Government recognised that the Padua Municipal Council regulation was in keeping with the national legislation, inasmuch as they both prohibit the provision of cremation urns as part of a profit-making activity. Memoria Srl, on the other hand, takes the view that the ban imposed by the Council is not supported by the national rules.

38 In the judgment of 27 February 2003, *Adolf Truley* (C-373/00, EU:C:2003:110), the Court of Justice recognised that activities involving the performance of funeral rites and funeral ceremonies may ‘in fact meet’ a need in the general interest. It went on to say that the ‘existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest *not having an industrial or commercial character*’ (paragraph 66; emphasis added).

39 Article 1 of the Protocol (No 26) on services of general interest, annexed to the Treaty of Lisbon.

40 Emphasis added.

41 In the same vein, the Court held in the operative part of the judgment of 27 February 2003, *Adolf Truley* (C-373/00, EU:C:2003:110) that ‘the national court must assess whether or not there is such a need [in the general interest], taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity’.

71. One way or another, it must be determined whether that restriction of the right of establishment is justifiable on grounds of 'public policy, public security and public health' or for (other) overriding reasons in the general interest, in accordance with the case-law of the Court of Justice. I shall refer only to the grounds cited in the dispute.

(a) *Public health*

72. National authorities which seek to rely on this ground of justification must demonstrate that their legislation is consistent with the principle of proportionality, that is to say that the restriction imposed on that ground is necessary in order to achieve the declared objective, and that that objective cannot be achieved by prohibitions or restrictions that are less extensive, or that are less disruptive of trade within the European Union. A Member State which invokes the public health exception must adduce appropriate evidence or an analysis of the appropriateness and proportionality of the restrictive measure adopted, as well as specific evidence substantiating its arguments.⁴²

73. In my opinion, consistency with that principle has not been demonstrated and the proportionality test has not been passed in this case. As the Commission submits, ashes, unlike mortal remains, are an inert substance from a biological point of view and do not pose a danger to public health. The cremation process, at the end of which the deceased's ashes are handed over to the family, eliminates that danger.

74. It is true that the uncontrolled spreading of ashes contained in cremation urns might raise a minor issue from the point of view of public health. This can be eliminated simply by asking the private undertakings providing the urn storage service to comply with conditions similar to those applicable to public cemeteries. This alternative would be less restrictive of the freedom of establishment than the complete ban on the pursuit of that activity by private undertakings.⁴³

(b) *Respect for the memory of the deceased*

75. Padua Municipal Council cites 'protection of the sense of *pietas* for the deceased and a guarantee of tranquillity and respect for dignity in the urban settings of places of burial' as the ground of justification for its legislation.

76. Respect for the deceased is a common value widely shared by societies in all Member States.⁴⁴ It is not, on the face of it, inconceivable that this might be capable of justifying a restriction on the freedom of establishment⁴⁵ such as that inherent in a ban on the storage of cremation urns as a commercial activity.

⁴² See judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraphs 53 and 54 and the case-law cited) there, concerning the public health exception in the context of the free movement of goods, reliance on which can be extrapolated to the context of Article 52 TFEU. To the same effect, see judgment of 13 November 2003, *Lindman* (C-42/02, EU:C:2003:613, paragraph 25).

⁴³ In fact, according to information from the press, in some Member States, the private activity of storing urns is carried on even by sports clubs, which have installed, or are planning to install, columbaria in their facilities so as to house the cremated mortal remains of their fans. This is said to be the case in Spain (Atlético de Madrid, Real Club Betis Balompié, Espanyol de Barcelona and Barcelona Fútbol Club), in Germany (Hamburger SV) and in the United Kingdom (Everton Football Club).

⁴⁴ At the hearing, it was debated whether the protection of human dignity (Article 2 TEU and Article 1 of the Charter of Fundamental Rights of the European Union) can be extended to the deceased. I don't think a categorical answer to that question, which goes beyond the limits of the present case, is essential for the purposes of resolving this dispute. The fact that the deceased no longer hold rights does not mean, in my opinion, that the dignity they enjoyed while they were alive cannot have an appropriate and legally protectable projection beyond their death. Indeed, that is the ultimate basis for the response, in civil or criminal law, to certain forms of conduct (such as the denial of atrocious crimes) in contempt of living victims.

⁴⁵ The Commission recognised at the hearing that this could be a valid justification, although it considered the ban to be disproportionate.

77. Applying the proportionality test to that hypothetical justification, however, is hampered by at least two difficulties. The first is that respect for mortal remains could also be appropriately guaranteed by a private undertaking if the latter were required to provide the service under conditions similar to those applicable to municipal cemeteries.⁴⁶ There are therefore measures available which are less restrictive than the ban prohibiting commercial undertakings from carrying on that activity.

78. Secondly, there is no reason why the deference owed to the deceased should be diminished if private undertakings offering a cremation urn storage service are declared insolvent or are otherwise wound up or cease trading. The possibility that, in such circumstances, funeral urns might be left unprotected and unmonitored is a risk which the Italian authorities could neutralise by compelling such undertakings to move the urns to public cemeteries or to return them to their owners.

79. It should be recalled that Article 52 of the Padua Municipal Regulation on funeral services allows cremation urns to be stored by the deceased's family members in their homes, although the municipal funeral service may at any time ask the custodian of the urn to present it to them so that they can verify its integrity and condition of storage. Furthermore, a custodian may at any time be asked to move to a cemetery an urn placed in his custody.

80. These same obligations, together with the duty to return urns to municipal cemeteries or to family members, could be imposed on undertakings as a means of averting the risk of urns being left unprotected in the event that the undertaking ceases trading or is wound up. Once again, there is scope for adopting an alternative measure which is less restrictive than the absolute prohibition barring such undertakings from carrying on that activity.

(c) Italian public policy

81. The Italian Government submitted at the hearing that the moral and cultural values predominant in Italy, as reflected in its traditions, make it impossible for activities connected with the storage of mortal remains to be profit-making. The legitimacy of the measure adopted by Padua Municipal Council, which is in keeping with the prohibition in place at national level,⁴⁷ would thus lie in the fact that, according to the scale of values observed in Italian society, urns containing post-cremation ashes are in fact *res extra commercium* and their treatment is incompatible with the profit-making purpose characteristic of business.

82. If this were in fact the case, the measure at issue could be said to be based on an ethical reservation specific to the Italian Republic which does not necessarily need to be adopted by the other Member States.⁴⁸ The absolute prohibition on lotteries and other amusements operated in the United Kingdom on 'moral, religious or cultural' grounds, among others, although not comparable with the prohibition under examination here, was held to be justified by the Court of Justice.⁴⁹

⁴⁶ See in point 20 of this Opinion the steps which Memoria Srl had taken to maintain decorum and dignity at its facilities.

⁴⁷ See footnote 37 to this Opinion.

⁴⁸ Judgment of 14 October 2004, *Omega* (C-36/02, EU:C:2004:614): 'it is not indispensable ... for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected (paragraph 37; emphasis added).

⁴⁹ Judgment of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119, paragraph 60).

83. I mention this precedent because the notion of ‘public policy’ accepted by the Court of Justice in that case and in other cases before and after it requires that ‘the competent national authorities must ... be allowed a margin of discretion within the limits imposed by the Treaty’.⁵⁰ Where a Member State considers it essential to prohibit the commercialisation of certain services such as that at issue here because it considers such commercialisation to be incompatible with values or interests fundamental to its society, the analysis of whether that prohibition is consistent with EU law cannot leave out of account the requirements of national ‘public policy’.

84. Once again, in the absence of other information which the order for reference does not provide, it will be for the national court to determine whether, under its domestic legal system, the prohibition at issue really is one that emanates from Italian ‘public policy’ within the meaning defined above and whether it is the only appropriate and proportionate means of ensuring respect for the relevant values underlying that policy.

IV. Conclusion

85. In the light of the foregoing, I propose that the Court of Justice answer the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale per il Veneto (Regional Administrative Court for the Veneto Region, Italy) as follows:

‘Article 49 of the Treaty on the Functioning of the European Union precludes in principle national legislation such as that at issue in the dispute in the main proceedings, which, on public health grounds or on account of the *pietas* owed to the deceased, prohibits profit-making undertakings from carrying on the activity of storing cremation urns, where there is scope for devising less restrictive means of providing that service which also ensure that those objectives are attained.

The aforementioned prohibition may, however, be justified on national public policy grounds relating to the protection of essential and widely shared cultural or moral interests or values in the Member State in question, if that prohibition is essential for ensuring respect for those interests or values and there is no scope for devising other, less radical measures having the same purpose, which matter is for the referring court to determine.’

⁵⁰ Judgment of 14 October 2004, *Omega* (C-36/02, EU:C:2004:614, paragraph 31).