Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 15 November 2018 [1]

Case C-393/17

Openbaar Ministerie
v
Freddy Lucien Magdalena Kirschstein
Thierry Frans Adeline Kirschstein
joined parties:
Vlaamse Gemeenschap

(Request for a preliminary ruling from the Hof van beroep Antwerpen (Court of Appeal of Antwerp, Belgium))

(Reference for a preliminary ruling — Internal market —Directive 2006/123/EC — Scope of application — Definition of services under EU law — Non-economic services of general interest — Privately funded higher education — Unfair Commercial Practices — Prohibition on non-accredited institutions issuing master's degrees — Criminal sanctions)

I. Introduction

1. Under the law of the Vlaamse Gemeenschap (Flemish Community), only higher education establishments that have obtained an accreditation may award certain degrees. Doing so without that accreditation may lead to criminal prosecution resulting in a prison sentence and/or a fine.

2. Mr Freddy Kirschstein and Mr Thierry Kirschstein run UIBS Belgium, a company established in Belgium that provides higher education services. The Kirschsteins have been prosecuted by the Flemish authorities for issuing certificates with the designation 'master' on at least two occasions between 2006 and 2010 without having obtained the necessary accreditation.

3. The questions referred to the Court, in the specific factual context of the present case, seem to be relatively straightforward: is the prohibition (and criminal sanctions for breach of that prohibition) in national law for a non-accredited higher education institution to award master's degrees compatible with the Services Directive [2] and with the Unfair Commercial Practices Directive? [3]

1 Original language: English.

2 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36, 'the Services Directive').

3 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('the Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22, 'the UCP Directive').

4. Arguably, however, the more complex question in this case is the preliminary issue relating to the material scope of application of both pieces of legislation invoked by the referring court: under EU law, are higher education study programmes 'services'? If so, what kind of services are they? Can they be classified as *non-economic services of general interest*, a category provided for in the Services Directive?

II. Legal framework

A. EU law

1. The Services Directive

5. Recital 34 of the Services Directive reads as follows: 'According to the case-law of the Court of Justice, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a "service" has to be carried out on a case-by-case basis in the light of all their characteristics, in particular the way they are provided, organised and financed in the Member State concerned. The Court of Justice has held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds. These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this Directive.'

6. Article 1 provides that:

'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 affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

…

5. This Directive does not affect Member States' rules of criminal law. However, Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive.'

7. Pursuant to 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;

…

(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty.’

8. Article 4(1) defines ‘service’ as ‘any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty’.

9. According to Article 4(6), the term ‘authorisation scheme’ encompasses ‘any procedure under which a provider or a recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof’.

10. Article 9, which is part of Chapter III on freedom of establishment for providers, is dedicated to authorisation schemes. It provides that:

‘1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective;

…’

11. Pursuant to Article 13(1), ‘authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially’.

2. The Unfair Commercial Practices Directive

12. Article 1 of the UCP Directive provides that ‘the purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests’.

13. Article 2 lays down the relevant definitions:

'For the purposes of this Directive:

(a) "consumer" means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

(c) "product" means any goods or service including immovable property, rights and obligations;

(d) "business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

(e) "to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

…'

14. Article 3 lays down the scope of the directive:

'1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

…

8. This Directive is without prejudice to any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals.'

15. Pursuant to Article 5:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

…

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

16. In point 2 of Annex I a commercial practice that is considered to be unfair in all circumstances is one 'displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation'. Furthermore, point 4 includes among such practices that of 'claiming that a trader … or a product has been approved, endorsed or authorised by a public or private body when he/it has not …'.

17. Under Article 6(1), 'a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case, causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(a) the existence or nature of a product;

(b) the main characteristics of the product, such as … the results to be expected from its use …'.

B. Belgian law

18. Under Article 127(1)(2) of the Belgian Constitution, it is for the communities to regulate education, with the exception of the determination of the beginning and of the end of mandatory schooling, the minimum standards for the granting of diplomas and the attribution of pensions. Pursuant to Article 24(5), the organisation, the recognition and the subsidising of education by the communities are regulated by law or decree.

19. In Flanders, higher education was governed by Decreet van 4 April 2003 betreffende de herstructurering van het hoger onderwijs in Vlaanderen (Decree of 4 April 2003 on the restructuring of higher education in Flanders) ('Decree of 4 April 2003'). Article 25(7) provided as follows: 'Anyone who awards, without being competent to do so, the degrees of bachelor or master, with or without specialisation, doctor (doctor of philosophy, abbreviated to PhD or Dr) or the degrees and titles set out in paragraphs 2, 3, 4, 5 and 5a, shall be punished with a prison sentence of between eight days and three months and a fine of between EUR 125 and EUR 500 or only with one of those penalties.'[4]

20. The Decree of 4 April 2003 was repealed and incorporated into the Codex Hoger Onderwijs (Codex of Higher Education) which was adopted by the Flemish Government on 11 October 2013.[5] The text of Article 25(7) of the Decree of 4 April 2003 has been taken up in Article II.75(6) of that Codex.

III. Facts, proceedings and questions referred

21. United International Business Schools of Belgium BVBA ('UIBS Belgium') is a higher education institution that is not accredited by the competent Flemish authorities. UIBS Belgium is affiliated with the Swiss company Global Education Services Switzerland AG ('GES Switzerland') and with Global Education Services Spain SA ('GES Spain'). According to the order for reference, UIBS Belgium has

4 *Belgisch Staatsblad* 14 August 2003.

5 *Belgisch Staatsblad* 27 February 2014.

acted in a supporting role for those companies by, inter alia, providing local support in Belgium for courses that are coordinated by GES Switzerland on a worldwide basis. Various education programmes are offered on the campuses of UIBS Belgium, notably in Antwerp and Ghent. Upon successful completion of those programmes, students receive a diploma with 'master' in the title.

22. Mr Freddy Kirschstein and Mr Thierry Kirschstein ('the Respondents') are both involved in UIBS Belgium. On 14 December 2015, the Rechtbank van eerste aanleg (Court of First Instance, Antwerp, Belgium) ordered the Respondents to pay a fine of EUR 300 each (as a criminal law penalty) for having breached Article 25(7) of the Decree of 4 April 2003, as they had awarded master's degrees to students at the Antwerp branch of UIBS Belgium, on at least two occasions between 2006 and 2010, without being entitled to do so. They were also ordered to pay, by way of damages, the nominal sum of EUR 1 to the Flemish Community in relation to the latter's civil claim, and to bear the burden of the costs of that claim.

23. On 29 December 2015, the Respondents appealed against the ruling of the Rechtbank van eerste aanleg (Court of First Instance, Antwerp). On the same day, the Openbaar Ministerie (the Public Prosecution Service, Belgium, 'the Appellant') lodged a cross-appeal of only that part of the ruling which concerned the criminal penalty against the Respondents.

24. On appeal, the subject matter of the dispute has crystallised into the question of whether a higher education institution that provides education programmes may confer master's degrees in Flanders by means of the diplomas awarded, even though it has not been given accreditation to do so by the Flemish Community. The Flemish Community considers this to be a matter of public policy for which an enforcement provision for a criminal sentence is appropriate to protect that interest. It argues that the prohibition on non-accredited institutions awarding master's and bachelor's degrees and doctorate titles is an appropriate measure to ensure that it reflects the protection of the quality inherent in those titles. The Flemish Community also contends that the Respondents' practices lead to unfair competition in the labour market in so far as the diplomas and corresponding degrees that are awarded offer entry into the labour market without it being possible to guarantee that those students have attained a certain standard of education.

25. It is within this factual and legal context that the Hof van beroep Antwerpen (Court of Appeal of Antwerp, Belgium) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market be interpreted as precluding the provision in Article II.75(6) of the Codex of Higher Education of 11 October 2013 which imposes a general prohibition on non-accredited educational institutions using the designation "master" on the diplomas they award, where that prohibition is aimed at safeguarding a matter in the general interest, namely, the need to ensure a high standard of education whereby it must be possible to check whether the predefined quality requirements have effectively been met?

(2) Must [Directive 2006/123] be interpreted as precluding the provision in Article II.75(6) of the Codex of Higher Education of 11 October 2013, which imposes a general prohibition on non-accredited educational institutions using the designation "master" on the diplomas they award, where that prohibition is aimed at safeguarding a matter in the general interest, namely the protection of recipients of services?

(3) Does the criminal provision applicable to educational institutions not recognised by the Flemish Government which award ["master's"] diplomas pass the proportionality test in Articles 9(1)(c) and 10(2)(c) of [Directive 2006/123?'

26. Written submissions were lodged by the Respondents, the Flemish Community, the Belgian, German, Italian, Netherlands, Polish, Swedish and Norwegian Governments and the European Commission. The Respondents, the Flemish Community, the Belgian, Swedish and Norwegian Governments and the Commission presented oral argument at the hearing held on 11 July 2018.

IV. Assessment

27. This Opinion is structured as follows. I will begin by making several preliminary remarks on the facts of this case and the applicable national provisions (Section A). I will then address the issue of whether, and to what extent, higher education study programmes may be understood to be 'services' for the purposes of EU law (Section B). With those clarifications in mind, I will turn to the specific questions posed by the referring court: I will first address the issue of the compatibility of the national legislation with the Services Directive, dealing with Questions 2 and 3 together (Section C), before assessing Question 1 regarding the UCP Directive (Section D).

A. Preliminary clarifications

1. Factual context of the main proceedings

28. There are a number of factual uncertainties in the order for reference that could have a bearing on the legal assessment of the case. For that reason, the Court has requested clarification from the referring court (further to Article 101 of its Rules of Procedure) in relation to (i) which entity formally awarded the diplomas in issue, and (ii) the Respondents' functions (within UIBS Belgium) — namely, in what capacity they are now being prosecuted.

29. The referring court's response was that it could not provide a precise answer as to which entity formally conferred the master's degrees, because that factual element is disputed in the main proceedings. It therefore reiterated the submissions of the parties: the Appellant, Openbaar Ministerie, (Public Prosecution Service) argues that UIBS Belgium (established in Belgium) granted the master's degrees. The Respondents argue that the master's degrees were issued by GES Switzerland (based in Switzerland) and by GES Spain (established in Spain). The referring court further stated that both entities appear to be linked to UIBS Belgium as the latter has always acted in a support role for GES Switzerland and GES Spain.

30. In response to the second issue the referring court stated that, at the time of the relevant facts, Thierry Kirschstein was the manager of UIBS Belgium and Freddy Kirschstein was a shareholder of UIBS Belgium. The latter also signed documents in the capacity of 'president' of UIBS Belgium. Thus, under Article 66 of the Strafwetboek (Belgian Criminal Code), they are deemed to be responsible or co-responsible for the delict in question.

31. On the basis of the information provided by the referring court, and in view of the statements made by the parties at the hearing, I shall proceed on the basis of the following assumptions, bearing in mind that the facts are ultimately for the national court to establish.

32. First, there appears to be a complex corporate structure between UIBS Belgium, GES Switzerland and GES Spain. The Respondents stated at the hearing that the three companies are connected. They appear to have common shareholders. Looking at their respective activities, it would seem that *the teaching* activities (including hiring staff, rooms, and ensuring day-to-day operation of the programme) are carried out and administered locally by UIBS Belgium, whereas *the diplomas* were first issued by GES Spain and, subsequently, by GES Switzerland.

33. Second, it is undisputed that these three companies have never received accreditation for their study programmes from a competent public authority in Flanders, nor in any country where they operate.

34. Third, the study programme in question is entirely privately funded. It was confirmed at the hearing that no public entity provided any funding for it.

2. Applicable national provisions

35. Two further clarifications should be made on the temporal scope of application of the rules in question and their material scope.

36. First, the referring court has formulated Questions 1 and 2 with regard to Article II.75(6) of the Codex of Higher Education. Question 3 refers to 'the criminal provision applicable to educational institutions not recognised by the Flemish Government which award ["master's"] diplomas', without further specification as to the exact nature and source of that provision. It nonetheless may be assumed that this also refers to Article II.75(6) of the Codex of Higher Education.

37. However, the facts of the case as presented in the order for reference suggest that the applicable provision of national law is Article 25(7) of the Decree of 4 April 2003, and not Article II.75(6) of the Codex of Higher Education.

38. Article II.75(6) of the Codex of Higher Education was not applicable at the time that the relevant facts occurred. The Respondents are being prosecuted for having illegally awarded master's degrees on at least two occasions in 2009 and 2010, and in any event, before 2010.[6] But Article II.75(6) of the Codex of Higher Education entered into force in 2013. Prior to that, as indicated by the indictment order (mentioned in the referring court's order),[7] the applicable provision was Article 25(7) of the Decree of 4 April 2003. It is on the basis of that provision that the Respondents have been prosecuted.

39. The fact that both provisions allegedly have the same content[8] does not render, in my understanding, Article II.75(6) of the Codex of Higher Education applicable to the case in the main proceedings.

40. For these reasons, my suggestion to the Court would be to provide an answer to the national court based on Article 25(7) of the Decree of 4 April 2003.

41. Second, no matter whether the relevant provision is Article II.75(6) of the Codex of Higher Education or Article 25(7) of the Decree of 4 April 2003, the referring court focuses on the 'criminal law provision' that sanctions the illegal award of certain degrees. That provision, which constitutes the legal basis for the criminal action, is central to Question 3. However, Questions 1 and 2 are wider in scope. They are not limited to the issue of potential criminal sanctions, but touch upon the broader and upstream question of the compatibility of (the) national legislation prohibiting the award of (master's) degrees by non-accredited institutions with EU law.

6 The order for reference indicates that the allegedly illegal activity of the Respondents has occurred on multiple occasions, between 19 October 2006 and 3 July 2010, on dates which apart from 30 June 2009 and 2 July 2010 cannot be determined more precisely.

7 Kamer van inbeschuldigingstelling (Indictment Chamber, Antwerp, Belgium) dated 5 January 2015.

8 Although the exact indents (subsections) of Article 25(7) and Article II.75(6) indeed appear to have the same content, that is apparently not the case for the whole articles (Article 25 and Article II.75, respectively) and the lists of various degrees contained therein, not to mention broader systemic relations of those articles to other provisions of the pieces of legislation in question, which are bound to be different, and may have a bearing on the scope of each of the provisions.

42. This bifurcation in terms of the exact rules referred to, given that the material scope of the two relevant directives is different, led to a discussion in the course of these proceedings as to what exactly the subject matter of the present reference should be. On the one hand, it was suggested that the Court should not address the issue of sanctions (Question 3), because it concerns matters of criminal law that are excluded from the scope of the applicable EU law. On the other hand, it was also suggested that the Court can only address the issue of sanctions, but not examine the underlying accreditation process (Questions 1 and 2), because the questions and the case are concerned only with a national provision that provides for sanctions.

43. Certainly, the delight of eating salami (normally) involves the freedom to decide at which of the two ends one starts slicing it. However, for the purposes of the present case, I would suggest sticking to the questions as posed by the national court, while respecting the inherent logic of the provisions at issue. The focus of the questions is indeed on the sanctions for the breach of a rule of behaviour. However, both of those elements are part of the same legal norm: *if* one is awarding the degree without accreditation (hypothesis), *then* a given consequence will ensue (sanction). Thus, the accreditation process is simply a part of the hypothesis of the applicable legal norm in the present case. It is part of the same package. A high degree of artificiality (or salami cutting at either end) would be needed to state that either an element of the hypothesis (accreditation) or the sanction (fine and/or imprisonment) is not part of the legal norm and thus outside the scope of the present case.

44. Thus, although the issue of the compatibility of the national higher education accreditation procedure with EU law is not per se the subject matter of the present case, those rules will inevitably be touched upon *indirectly*, while answering the questions referred by the national court concerning the sanctions for disregarding those rules.

B. Are higher education study programmes 'services' under EU law?

1. The nature of the 'service': the certificate or the teaching?

45. Part of the discussion that unfolded both in the written procedure and at the hearing aimed at identifying the core of the activity that may potentially amount to 'service' in the present case: is it the award of the master's degree certificate *or* the teaching activity leading to it? The reason for the extensive discussion of this point was not only the *material* applicability of the Services Directive, but also its *territorial* applicability. The various entities potentially awarding the degrees in question are based in different countries, including a state that is not a member of the European Union.[9]

46. According to the Flemish Community and the Belgian Government, the Services Directive is not applicable. GES Switzerland, as the degree-awarding entity, is outside the territorial scope of that directive. For that reason, Questions 2 and 3 are inadmissible.

47. The German Government also deems the issuance of university degrees as the key element, mainly because it opens up access to a profession. For that government, the admission of candidates to a profession that requires certain competences is an activity which is connected with the exercise of official authority. Such activities are nonetheless excluded from the scope of the Services Directive pursuant to Article 2(2)(i). According to the German Government, issuing higher education diplomas is therefore not a service under EU law.

9 Above, points 21, 29, and 32.

48. By contrast, the Swedish Government and the Commission focus on the teaching activity carried out by UIBS Belgium rather than the diploma award by GES Switzerland. According to them, the diploma award is not an autonomous service but must be seen as an ancillary one vis-à-vis the service provided by UIBS Belgium, which is teaching.

49. What is the key activity in higher education? It might be either: (i) the award of the master's degree certificate (to which the teaching activity is ancillary); or (ii) the teaching activity (to which the issuing of the certificate is ancillary). To decide between these two options, the test for identifying the potential service in issue will lie in the determination of the *key component* of such a package. [10]

50. Seen in this light, I agree with the Swedish Government and the Commission. Without wishing to sound too idealistic, I would hope that the key component in (higher) education is teaching and education, not the (mere) issuance of diplomas. A degree is awarded as a formal certification of the acquisition of a certain level of knowledge or competences. It is the official acknowledgement that all the necessary courses have been attended and that all the required exams have been successfully completed, thus attesting to the danger that the graduate might actually have acquired some knowledge as well. But the certificate itself can hardly be seen as the key and predominant element of the activity carried out in higher education study programmes. [11]

51. As a result, my suggestion would be that the key activity in the context of a higher education study programme is the provision of courses (apparently provided by UIBS Belgium), and not the formal award of a certificate (presumably by GES Switzerland).

2. Higher education study programmes — 'services' under EU law?

(a) Education as a 'service' under the Treaty

52. It is undisputed that EU law does not affect the competence of the Member States as regards the content of teaching and the organisation of education systems and their cultural and linguistic diversity, or the content and organisation of vocational training. However, it is also clear that when exercising that competence, Member States must comply with EU law, especially the provisions on the freedom to provide services. [12]

53. Under Article 57 TFEU, an activity shall be considered to be a 'service' where it is 'normally provided for remuneration'. It is settled case-law that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question and is normally agreed upon between the provider and the recipient of the service. [13]

54. In the specific context of education, in order to determine whether there is a service under the Treaties, the Court made a further distinction on the basis of which entity provides that education and the way in which it is financed. The test was first formulated in *Humbel*, [14] and so I shall refer to it as 'the *Humbel* test'.

10 Similarly to the approach relied on by the Court in determining the most relevant freedom of movement applicable (goods or services) See, for example, judgments of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119, paragraph 22), and of 22 January 2002, *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 31).

11 If that were the case, then that would mean for (mainly) privately funded higher education institutions , even those duly accredited and of unquestionable quality, that from the vantage point of EU law, their services consist in issuing diplomas for (financial) remuneration.

12 See judgment of 11 September 2007, *Commission* v *Germany* (C-318/05, EU:C:2007:495, paragraph 86). See already, to that effect, judgment of 13 February 1985, *Gravier* (293/83, EU:C:1985:69, paragraph 19).

13 See, for example, judgments of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paragraph 17); of 22 May 2003, *Freskot* (C-355/00, EU:C:2003:298, paragraph 55); of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 38); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 47).

14 Judgment of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451).

55. The issue in *Humbel* was the request for payment made to a French student of a student fee ('the minerval') for secondary education in Belgium. The request for payment was directed only at (the parents of) foreign nationals. Students who were Belgian nationals were not obliged to pay the minerval. The Court was asked whether the secondary school course, forming part of the national education system, could be qualified as the 'provision of services', enabling the parents of the French student to rely on the Treaty provisions prohibiting the discrimination on the basis of nationality in access to services. [15]

56. The Court ruled that the freedom to provide services under the Treaty could not be relied upon in this case, as no remuneration in the sense of consideration for the services had been rendered. The Court stated that that 'characteristic is … absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents'. [16]

57. Although *Humbel* itself concerned secondary education, that approach has gradually been extended to other forms of education, including higher education. [17]

58. Thus, in a more recent general restatement, the Court noted that there is no remuneration and therefore no 'service' under EU law in the case of courses offered by certain establishments forming part of a system of *public education* and financed, entirely or mainly, by *public funds*, *even if teaching or enrolment fees must sometimes be paid as a contribution to the operating expenses of the system.* [18] Conversely, courses given by educational establishments essentially financed by private funds — by students and their parents — constitute services within the meaning of EU law, since the aim of those establishments is to offer a service for remuneration. [19]

59. There appears to be a twofold rationale that brought about the distinction between publicly and privately financed education. First, the 'social and cultural mission argument': in establishing and maintaining a system of public education mainly financed by public funds, the State does not seek to engage in gainful activity but to fulfil its duties towards its population in the social, cultural and educational fields. [20] Second, sometimes connected to it, and sometimes treated separately, is the 'not–for-profit' argument: (public) education institutions are mainly financed through public funds to carry out non-profitable activities for the general interest of disseminating knowledge and emancipating citizens. In this sense, the activity at issue is not economic in nature. [21]

15 Judgment of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paragraphs 4 and 14).

16 Judgment of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paragraph 18).

17 See judgments of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, paragraph 16), and of 20 May 2010, *Zanotti* (C-56/09, EU:C:2010:288, paragraphs 30 to 35).

18 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 50 and the case-law cited).

19 Judgment of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 40).

20 See judgments of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paragraph 18), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 50).

21 See already the Opinion of Advocate General Slynn in *Humbel and Edel* (263/86, EU:C:1988:151, pages 5379 to 5380).

(b) The Services Directive and non-economic services of general interest

60. The Services Directive rendered this (Treaty-based) picture somewhat more complex. On the one hand, Article 4(1) of the Services Directive explicitly stated that the Treaty definition of what constitutes a service is retained. Thus, a service under the Treaty as well as under the Services Directive ought to be understood to be any self-employed economic activity, normally provided for remuneration, by a provider established in a Member State. [22]

61. In addition, however, Article 2(2) enumerates a number of *specific* activities to which the Services Directive does not apply, such as healthcare services or social services. That provision also contains two *abstract* categories of services that are excluded from the scope of the directive altogether, namely *non-economic services of general interest* [23] and activities which are connected with the *exercise of official authority*. [24]

62. In relation to the latter exception and in particular to the argument raised by the German Government under which the award of university diplomas is the exercise of public authority excluded from the scope of the Services Directive, it can only be restated that the key and determining element of any education is not the award of the degree, but the teaching activity. [25] Thus, in the context of the present case, it is not necessary to examine to what extent awarding a diploma could pertain to the exercise of public power. It suffices to note that, under established case-law, (university) teaching activities, as activities of civil society, are not activities connected with the exercise of official authority. [26]

63. The notion of *non-economic services of general interest* is nonetheless a more difficult one to capture, in particular since the Services Directive clearly states that it understands the basic notion of 'service' in the same way that the Treaty does. Pursuant to Article 57 TFEU, 'services' are 'services' within the meaning of the Treaties 'where they are normally provided for remuneration'. That wording is somewhat confusing inasmuch as it uses the same term (service) in order to refer, on the one hand, to the actual activity of providing services (thus, the *factual* category of services) and, on the other hand, to the *legal* category of services falling within the scope of application of the Treaties (and, by extension, of the Services Directive).

64. This duality means that a service activity (in fact) is not always a service (for the purposes of EU law). In order to be a 'service' under the Treaty, the specific activity under examination must have an economic dimension that is primarily attested by the existence of remuneration or financial consideration, but also — although not necessarily — by the seeking of profit, or/and of being mainly financed by private funds. [27] In other words, the existence of an 'economic nature' is the necessary part of there being a service *legally speaking*.

65. Against this background, I am bound to admit that I am at my wit's ends in trying to decipher the logical, *legal* meaning of the category of 'non-economic services of general interest'. If the legal category of service under EU law is defined by its economic dimension, how can a *non-economic* service, be it of general interest or not, actually be a service within the meaning of EU law? Or, put differently, can there actually be 'non-economic economic activities of general interest'?

22 See, for instance, judgments of 11 July 2013, *Femarbel* (C-57/12, EU:C:2013:517, paragraph 32), and of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 113).

23 Article 2(2)(a) of the Services Directive.

24 Article 2(2)(i) of the Services Directive.

25 Above, point 50.

26 See judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraph 38 and the case-law cited).

27 See for instance, to that effect, judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraphs 32 and 33).

66. The most rational explanation I can make of such terminological challenges is to assume that, by creating this new category, the EU legislature essentially wanted to exclude non-economic *activities* of general interest from the scope of the Services Directive.[28] If that is true, then the exemption laid down by Article 2(2)(a) of the Services Directive is (legally) redundant, because such activities would already be excluded as they would not be services (under the Treaty) in the first place.[29] 'Non-economic services of general interest' thus appear to be only a subset of 'non-services' under EU law.

67. With that terminological clarification in mind, the question remains whether or not higher education falls within the *non-economic services of general interest* exception under the Services Directive, as notably advocated by the Belgian Government.

68. I do not think that it does.

69. First, a number of specific activities, such as healthcare or social services, are expressly and *en bloc* excluded by Article 2(2) of the Services Directive from its scope of application. But that is notably not the case for education(al services). It cannot therefore be held that they are specifically excluded as such from the material scope of application of the Services Directive.

70. Second, in the absence of any such *block exemption* for a given type of activity, then each individual activity — that is, in the context of education, the study programme in question — is to be assessed *individually* in view of the standard case-law of the Court as to whether the conditions contained therein have been met. Thus, contrary to the views advocated by the Belgian Government, education as such cannot fall *as a whole* within the category of non-economic services of general interest. Instead, as also shown in recital 34 of the Services Directive, itself restating the case-law of the Court, a case-by-case assessment is to be carried out.[30] Accordingly, what matters is whether the actual teaching activity provided or study programme followed can qualify as a service, that is whether it is essentially carried out by non-public institutions and financed through private funds.[31]

71. In sum, higher education study programmes may be qualified as services and fall within the scope of the Services Directive, unless, with regard to the specific study programme in question, the *Humbel* exception applies. If it does, such an activity becomes a 'non-service' under the Treaty and should then also be exempted from the applicability of the Services Directive as a *non-economic service of general interest*.

(c) The Humbel test and higher education study programmes

72. That being said, there is, however, no disguising that when looked at closely, the application of the *Humbel* exception to higher education study programmes today raises a number of questions.

28 As also confirmed by the description of what the notion aims at in the *Handbook on Implementation of the Services Directive* (European Commission (Directorate-General for the Internal Market and Services), Office for Official Publications of the European Communities, 2007, p. 11). See also the Commission Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM(2004) 2 final, p. 20).

29 In this sense, see also the Opinion of Advocate General Szpunar in *Hiebler* (C-293/14, EU:C:2015:472, point 37): 'It is stressed in Article 2(2)(a) that the directive does not apply to *non-economic* services of general interest, which is superfluous, given that it is inherent in the definition of a service that it is provided for remuneration.'

30 See also the *Handbook on Implementation of the Services Directive*, pp. 10 and 11, confirming that education cannot be treated as a single unit under EU law, with, however, suggesting a greater generalisation with regard to national primary and secondary education, which would be more likely to pertain to the category of non-economic services of general interest. However, according to the Handbook, it is not possible for Member States to consider *all services* in the specific field of education as non-economic services of general interest.

31 Such a casuistic approach can then logically also entail, in specific circumstances, that a teaching activity within a publicly financed university can also be a service under EU law. See, to that effect, judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraphs 31 to 34).

73. First, on the practical level, what might being *part of a system of public education and financed, entirely or mainly, by public funds* mean in a world in which public universities obtain private funding and donations, and private institutions compete for institutional public funding and research grants? What is *public* in a world in which (even) public universities set up campuses in other Member States, or enter into joint ventures with various other entities, and/or establish spin-off companies to teach and carry out research?

74. However, and perhaps more fundamentally, does the term 'part of the public system of education' necessarily set any requirements for a given legal form and status (such as a 'public' institution as opposed to a 'private' one)? Starting with *Humbel* and most recently confirmed in *Congregación de Escuelas Pías Provincia Betania*, two requirements have been mentioned: (i) *part of a system of public education* and (ii) *financed, entirely or mainly, by public funds*. However, most of the case-law focused on the issue of funding, with the first part of the statement, being 'part of a system of public education', remaining rather unexplored.

75. To such institutionally blurred lines comes the issue of being *mainly financed* from public funds. How much is *mainly*? What is the interrelation between study-programme specific funding and institutional funding and overheads? [32] Especially in social sciences and humanities, it will be the salaries of teaching staff that will represent the greatest part of the costs for running a study programme. What if those are mostly paid from different sources of institutional funding? [33] It is also somewhat unclear whether one should look at the overall budget of the institution or at budget lines corresponding to specific study programmes, bearing in mind that accounting rules may make it impossible to actually determine the exact financing structure of each study programme. [34]

76. Moreover, in a number of Member States, accredited institutions of higher education, irrespective of whether they are public or private as to their legal form, receive state funding for each student enrolled in their accredited study programme. Does such funding, even if in real economic terms it might not cover the majority of actual study costs for each student, turn such a study programme into one mainly financed by public funds, that is a part of a system of public education in a Member State, even if it is offered by an otherwise private and privately funded institution?

77. Second, there is an underlying and deeper ideological level to that practical level. *Humbel* introduced a rather sweeping binary vision of education: the public institutions (or only those publicly funded?) are non-profit-oriented, pursuing the noble aims of imparting knowledge and fulfilling their social, cultural and educational obligations towards the population. By contrast, private institutions (or only those which are mainly privately funded?) provide services, as their goals apparently are different.

78. Such a vision *perhaps* could have been correct in the *1980s* with regard to *secondary* education. It is, however, quite problematic *today* if applied to institutions of *higher* education.

32 It is to be noted that the characterisation as a service under EU law does not require that the activity in issue be paid for by those for whom it is performed. See, for instance, judgments of 26 April 1988, *Bond van Adverteerders and Others* (352/85, EU:C:1988:196, paragraph 16), and of 12 July 2001, *Smits and Peerbooms* (C-157/99, EU:C:2001:404, paragraph 57). Specifically regarding education, see judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 49): 'It is not necessary for that private financing to be provided principally by the pupils or their parents, as the economic nature of an activity does not depend on the service concerned being paid for by those for whom it is performed.'

33 In its judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 51), the Court suggested that an educational establishment carrying out a number of activities shall keep 'separate accounts for the different funds that it receives so as to exclude any risk of cross-subsidisation of its economic activities by means of public funds received for its non-economic activities'.

34 It is to be noted that the judgments of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraphs 31 to 34), and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 63) indeed suggest that the determination of the existence of a service under EU law shall be made at the level of each study programme.

79. It is certainly not questioned that institutions of higher learning do pursue a number of missions. Most of them are indeed not profit-oriented. What is being challenged is the generalisation, which does not differentiate between the many activities that even an ancient and venerable university will carry out today: from pure basic research or educating doctoral students (in need of subsidies), through undergraduate teaching in the national language (with standard enrolment fees), to postgraduate teaching in a foreign language (with a much higher level of fees), to tailor-made weekend courses for managers or interpreters, and/or outright commercialisation of its research output (both with hefty price tags attached).

80. Third, the absence of internal differentiation is connected with the already mentioned absence of *level* differentiation. The statements made by the Court in *Humbel* concerned secondary education. As often happens with the case-law of the Court, that approach has been gradually extended to other types of education, including higher education, without, however, the underlying assumptions that formed its first expression being critically re-assessed in the new context (of higher education).

81. The sharing and imparting of knowledge in the broadest sense and the State's fulfilment of its social and educational role are certainly important aims. However, those public interests are perhaps not of equal weight at all levels of education. The State's interest is indeed imperative at the level of primary education.[35] Today, it might be said to be rather strong at the level of secondary education too, although that is along with some private interests of the student. The balance starts tipping at the level of higher education, where the individual interest of the student in obtaining certain additional qualifications and increasing their 'value' on the job market grows stronger.

82. In terms of coordination of interests in education, and thus potentially defining what might be a non-economic service of *general* interest for those purposes, there is thus a relationship of reverse proportions. The higher the level of education, the less public need and general public interest in receiving that form of education, and the greater the private interest in supplementing one's qualifications. In other words, the imperative cultural and societal mission of the State, which originally formed the *Humbel* exception,[36] becomes weaker.

83. I wish to stress very clearly that there clearly is a general public interest in *having* institutions of higher education. That is, however, different from stating that there is a general interest in any and every person attending university. The fact that an individual chooses to attend a higher education institution is thus likely to a great extent to be the expression of his personal interest.

84. If it were otherwise, then one would indeed be obliged to follow the logic essentially advocated by the Belgian Government in the present case. The *non-economic services of general interest* exception under the Services Directive would effectively mean adding another block exemption into the directive. That would be defined by the type of activity, for whatever type of (higher) education, however financed. This is because it is in the State's interest to have a population that is as educated as possible, and so any education provided will always be in the *general* interest: all educational activities are thus excluded from the Services Directive as non-economic *services of general interest*.[37]

85. Fourth and finally, another reason why the *Humbel* line of case-law should perhaps be approached with caution is the fact that it represents not only a considerable departure from the general approach to the definition of services, but it is also quite singular when compared with other special regimes for specific types of services, in particular healthcare.

35 Finding its expression in the legal duty to follow a certain number of years of primary education.

36 Above, point 59.

37 Logically also including (and thus excluding from the scope of Services Directive) the already mentioned further educational courses for managers (above point 79), or whatever other activities which might clearly be for profit, but where knowledge is disseminated as well.

86. Healthcare is certainly an activity in the public interest, heavily regulated, in which there is usually no direct, full payment made by the patient, but rather the reimbursement of (regulated) costs to the healthcare provider through a third party (whether an insurance company or public insurance schemes). The Court has however explicitly refused to apply the *Humbel* approach to hospital care either provided in kind or free of charge for the patient, namely where clearly no profit was being made. It held that 'the payments made by the sickness insurance funds …, albeit set at a flat rate, are … the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character'. [38]

87. This is surprising since healthcare presents a number of similarities with education. [39] Both are primarily for the Member States to regulate. Both imply policy choices and reflect social values in the way these services are provided. Moreover, although there are variations from one country to another, the financing of healthcare is not dissimilar to publicly financed education. Healthcare services are indeed paid by sickness insurance funds, which, in Europe, are usually financed by bodies that are emanations of the State despite some funds being provided by the patients. The patients' social security contributions are unlikely to be proportionate to the actual cost of the service received.

88. The same is also true, and even more so, when the *Humbel* understanding of economic activity and remuneration is contrasted with the notion of 'economic' in other areas of EU law. In State aid or competition law, the Court has traditionally retained a broad understanding of 'economic activity' as the decisive element to characterise an undertaking. According to the Court, 'the concept of "undertaking" covers any entity engaged in an economic activity, *regardless of its legal status and the way it is financed* … Any activity consisting in offering goods or services on a given market is an economic activity. The fact that the offer of goods or services is made on a 'not-for-profit' basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit'. [40]

(d) Interim conclusion

89. In the present case, although a number of the issues I have just mentioned were raised in the written submissions and at the hearing, it appears undisputed that UIBS Belgium, the company responsible for the teaching activities, is a private entity, financed only by private funds. Thus, also on the basis of the *Humbel* test as it currently stands, UIBS Belgium's teaching activity is provided for remuneration and, therefore, the courses offered by that company are 'services' within the meaning of the Treaty.

90. In my view, those activities also constitute services for the purpose of the Services Directive. Since no specific exclusion from the latter's scope of application applies, and study programmes of higher education financed by students cannot be subsumed under the notion of non-economic services of general interest, then the Services Directive is also (materially) applicable.

38 Judgment of 12 July 2001, *Smits and Peerbooms* (C-157/99, EU:C:2001:404, paragraph 58). It is to be noted that Article 2(2)(f) of the Services Directive now excludes from the scope of the directive 'healthcare services whether or not they are provided via healthcare facilities, and *regardless of the ways in which they are organised and financed at national level* or whether they are public or private'. Emphasis added.

39 In his Opinion in *Humbel*, Advocate General Slynn (see above in footnote 21), emphasised repeatedly the natural analogy that exists between secondary education and healthcare.

40 See judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 41 and paragraphs 45 to 46 and the case-law cited). Emphasis added.

91. Beyond that — relatively straightforward — conclusion, I also suggest, more broadly, that in contrast to some of the arguments voiced in the course of these proceedings, the *Humbel* exception is not applicable to higher education universally, thus being effectively allowed to create another block exemption for any activities carried out by mainly publicly funded higher education institutions. Three points are worth highlighting in that regard.

92. First, what is to be assessed is each individual type of activity (and particularly the *individual study programme*) in order to determine whether it is *economic* in nature.

93. Second, when assessing that economic nature of a given study programme, I would suggest paying less attention to the details of budget lines (where that amount of money comes from exactly and what amount and whether there might not be some mixed private-public funding). The focus should rather be on the *level of study* and the correlating *balance of interests* involved. The earlier in the educational system one goes (primary and secondary education), the more non-economic and indeed social the nature of the education. That would indeed fully justify its exclusion from the notion of services, in particular if it is provided on a non-fee paying basis and is compulsory for everyone.

94. Third and finally, the payment for the study programme and the issue of consideration is to be assessed. However, such an assessment should not be carried out by taking an isolated view of the individual provider, but more contextually, in line with the general case-law on the notion of normal remuneration in the context of services, and in view of the nature of the activity and the relevant market.

95. That implies, *on the one hand*, that the (full economic) cost does not have to be paid (solely and directly) by the customer. Similar to the case-law on healthcare or services in general,[41] what matters is not whether there is a direct payment, but rather whether or not economic consideration is provided for each individual participant, even if it is paid partially indirectly, and is (at least somewhat) commensurate with the amount or number of services provided.

96. *On the other hand*, for such an assessment, the broader nature of the 'market' also matters, not merely the specific institutional set-up of one single service provider. Thus, if for a given type of study programme, there is a vibrant national, European, or even global market, with a number of competing study programmes being offered, it is rather difficult to suggest that by providing something that is already on offer in dozens of other institutions, an institution of higher education, whether part of the national public education system or not, is fulfilling a special and unique social and cultural aim.

97. That being said, two closing remarks are called for.

98. First, it is clear that the fact that some higher education study programmes can constitute services under EU law does not mean (as some might caricature) that the specificity of education is immediately and irreversibly lost. Professors will not be turned into providers and students into clients, certainly not by virtue of EU law. Education is certainly not a service like any other. Thus, similar to other special types of services, like healthcare, specificities can and should be retained.

99. Second, beyond the ideological level that would simply axiomatically deny that higher education could ever constitute a service, on a more practical level, providing services in some cases does not only generate obligations on the part of the service providers, but also bestows rights on them and guarantees protection. Freedom to provide services thus cuts both ways. That might be of particular

41 Above, point 86.

importance for free movement and competition in the area of higher education in the European Union. It should in principle be possible for the institutions of one Member State to become active, should they wish to, on the territory of other Member States, irrespective of their particular national legal and funding status, which is likely to differ and be of limited relevance in the other Member State.

C. Questions 2 and 3

100. By Questions 2 and 3, the referring court enquires into the compatibility of the national legislation, which prohibits non-accredited higher education institutions from issuing master's degrees and allows criminal penalties to be imposed for a breach of that prohibition, with the Services Directive.

1. Applicability

101. Does the Services Directive apply to the course provided by UIBS Belgium? For the Flemish Community and the Belgian Government, which focus on the award of the degree, the directive is not applicable *ratione loci* because the degree-awarding entity, GES Switzerland, is based in a third country and thus cannot avail itself of the freedom of movement under EU law. The Polish Government for its part focuses on UIBS Belgium and considers that the directive is not applicable because there is no cross-border element, all the relevant facts being confined to a single Member State, namely Belgium (purely internal situation).

102. In my view, the Services Directive *is* applicable to the present case.

103. The arguments advanced by the Flemish Community and the Belgian Government have already been addressed:[42] the determining activity at issue is the teaching activity that is carried out by UIBS Belgium, not the formal issuance of the degree certificates, apparently organised by GES Switzerland. The Services Directive is therefore applicable *ratione loci* as UIBS Belgium is established in a Member State.[43]

104. As for the Polish Government's submission, the Court has held, on the one hand, that the organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State.[44] On the other hand, the Court has also recently stated that the provisions of Chapter III of the Services Directive, on freedom of establishment of providers, apply even to a situation where all the relevant elements are confined to a single Member State.[45]

42 Above, points 46 to 51.

43 Since the Services Directive appears to be applicable, it is not necessary to examine in detail the Swedish Government's argument relating to the potential applicability of the Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons (OJ 2002 L 114, p. 6). In any event, the Swedish Government has also correctly noted that the scope of the freedom to provide cross-border services under that Agreement is limited to a right to provide services for a maximum of 90 days per year, but does not grant legal persons a right of establishment.

44 Judgment of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614, paragraph 39).

45 Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110). The same is not the case for the freedom to provide services (paragraph 102).

105. In the present case, it was suggested that courses are provided by a Belgian company in Belgium at the Antwerp and Ghent campuses, and that each campus hires its own staff. It therefore appears, subject to the necessary verifications by the national court, that UIBS Belgium, the service provider, has a permanent and stable activity, and thus an 'establishment' in Belgium.[46]

106. It follows that Chapter III of the Services Directive is applicable, irrespective of whether the situation at hand is purely internal or not. The discussion regarding the applicability of the Services Directive to the present case could stop there since, on the basis of the *X and Visser* judgment, there is no longer a need to identify a cross-border element in order to trigger the applicability of the Services Directive provisions on freedom of establishment.

107. However, for the sake of completeness, it is to be noted that the situation at hand does not actually appear to be purely internal. It presents some cross-border aspects that could in fact render the Services Directive applicable. The first aspect is that there are recipients of services from other Member States: students attending the courses provided by UIBS Belgium may come from all over the European Union.[47] The second aspect derives from company structure. It appears from the Respondents' written submissions that UIBS Belgium has a parent company and/or sister companies in the form of a number of campuses established in other Member States, and that it is closely connected to GES Spain.

2. Substance

108. The Respondents argue that, by requiring an educational institution to obtain accreditation from the Flemish Government before they are allowed to award 'master's' diplomas, the Flemish Community infringes Articles 9 and 10 of the Services Directive. The accreditation procedure laid down in the national decree for authorising the award of 'master's' diplomas does not comply with all the criteria set out in Articles 9 and 10 of the Services Directive.

109. I disagree.

110. Pursuant to Article 9(1) of the Services Directive and the case-law of this Court,[48] Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless that scheme is non-discriminatory, justified by an overriding reason relating to the public interest, and proportionate.

111. As argued by the Commission, the accreditation procedure in the present case can be characterised as an authorisation scheme within the meaning of Article 4(6) of the Services Directive since the exercise of the education services is subject to the acquisition of accreditation issued by the competent authorities.

112. Even if such a procedure does not prevent a higher education institution, such as UIBS Belgium, from offering study programmes on the market, it still limits *how the higher education institution exercises that* by requiring accreditation before the issuance of master's degrees is allowed. Therefore, the accreditation procedure restricts freedom of establishment. It makes it less attractive for students

46 Article 4(5) of the Services Directive defines 'establishment' as 'the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out'.

47 See judgments of 31 January 1984, *Luisi and Carbone* (286/82 and 26/83, EU:C:1984:35, paragraph 16); of 2 February 1989, *Cowan* (186/87, EU:C:1989:47, paragraph 15); and of 20 May 2010, *Zanotti* (C-56/09, EU:C:2010:288, paragraph 26).

48 See, for example, judgments of 6 November 2003, *Gambelli and Others* (C-243/01, EU:C:2003:597, paragraph 65), and of 6 March 2007, *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 49).

to attend those courses, since those courses can never lead to the award of a specific degree, such as a master's degree,[49] thereby hindering the pursuit of the service provider's business. The importance in modern times of obtaining a formal qualification, such as a master's degree, in order to obtain access to a wide range of professions can hardly be disputed.

113. Although it constitutes a restriction of freedom of establishment, the accreditation procedure seems nonetheless to be fully justified and compatible with EU law.

114. First, it has not been argued by any party that the conditions for accreditation are discriminatory. They appear to apply in the same manner to any higher education institution wishing to launch education programmes and to issue master's degrees. In particular, nationality does not seem to play a role. In the present case, it is a *Belgian* company (UIBS Belgium) that has not obtained accreditation from the competent *Belgian* authorities.

115. Second, the accreditation procedure is clearly justified by the objective to ensure a high standard of university education, which is a legitimate public interest objective.[50] It is indeed legitimate to subject the award of *certain* degrees, in particular those that are deemed as *internationally standardised* qualification degrees for a number of professions, to quality requirements and verification, in order to ensure confidence in the quality of the degrees that have been awarded for potential students as well as employees.

116. The same legitimate reason has an additional, external dimension: a high level of (mutual) trust is all the more important for free movement and the setting up of a European Higher Education Area. The bachelor's, master's and doctorate degrees are supposed to be 'standardised' degrees across Europe through the ECTS system.[51] In addition, because degrees are meant to reflect the acquisition of specific qualifications, trust in those degrees is also paramount to guarantee the smooth functioning of mutual recognition of professional qualifications in the European Union.[52]

117. Third and finally, the accreditation procedure appears to be necessary and appropriate to reach the abovementioned aims. I fail to see, unless rather singular approaches were to be contemplated,[53] any less restrictive means as to how to ensure the quality of certain degrees other than prohibiting the award of master's degrees by non-accredited institutions that have not been evaluated and where the quality of their teaching could not have been ascertained.[54]

118. Accordingly, and although it is of course ultimately for the referring court in full knowledge of all the relevant facts to assess, it follows that the accreditation procedure in issue — and its logical extension in the prohibition on awarding degrees without such an accreditation — seems to be compatible with the conditions laid down in Article 9(1) of the Services Directive.

49 To that effect, in another area, see for instance, judgment of 22 January 2002, *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 29).

50 See judgments of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614, paragraph 46), and of 12 December 2013, *Direxta Alta Formazione* (C-523/12, EU:C:2013:831, paragraph 25).

51 See notably the Bologna Declaration of 19 June 1999 — Joint declaration of the European Ministers of Education, as further expanded by the Bergen Conference of European Ministers Responsible for Higher Education, 19 to 20 May 2005 in the Framework for Qualifications of the European Higher Education Area.

52 See in particular Article 53(1) TFEU and Directive 2005/36/EU of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

53 Although often invoked by means of analogy from the free movement of goods case-law, I do not think that the approach of 'just stick a label on it with some information and let the consumer decide' would really be helpful in the area of services, in particular in specific services like education.

54 See also, to that effect, judgment of 12 December 2013, *Direxta Alta Formazione* (C-523/12, EU:C:2013:831, paragraphs 28 and 29). But see, for an example of a disproportionate measure, judgment of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614).

119. It follows from the foregoing that Question 2 should be answered as follows: Directive 2006/123 must be interpreted as not precluding a national provision, which imposes a general prohibition on non-accredited educational institutions using the designation 'master's degree' on the diplomas they award, as long as the accreditation procedure meets the conditions laid down in Article 9(1) of that directive.

3. The national criminal provision

120. Question 3 relates specifically to a criminal law provision penalising the breach of the obligation on non-accredited institutions not to award master's degrees. The Respondents argue that that provision does not pass the proportionality test.

121. According to the Flemish Community and the Belgian Government, that question, which has been raised by the referring court in the light of Article 9(1)(c) and Article 10(2)(c) of the Services Directive, is inadmissible. That is because those provisions relate to the authorisation scheme itself, as opposed to the sanctions attached to the absence of authorisation or the non-respect thereof.

122. For the reasons that I outlined above in my preliminary remarks,[55] I am of the view that the question is admissible. The prohibition on non-accredited institutions awarding degrees, and through that provision the accreditation procedure itself, and the potentially ensuing sanctions for failure to respect that prohibition, are all elements of the applicable legal norm. It must thus be concluded that the third question is admissible.

123. I am of the view that the Services Directive does not preclude the criminal provisions in issue.

124. It follows from Article 1(5) of the Services Directive and from established case-law[56] that, although the directive does not affect Member States' rules of criminal law, Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in the directive. In particular, when a national provision provides for sanctions, the latter must be necessary and proportionate to the gravity of the offence.[57]

125. It has previously been suggested that the accreditation procedure is compatible with the Services Directive. A Member State may therefore lawfully provide for (criminal) sanctions for failure to respect the authorisation scheme.

126. A different question is whether those sanctions in themselves are proportionate. That is again ultimately for the referring court to assess. However, for my part, I have serious difficulty in seeing how the general sanctions provided for in Belgian law to punish what amounts to an/the illegal award of degrees (a maximum three-month prison sentence and EUR 500 fine), subsequently adapted and moderated in view of the circumstances of the individual case, as indeed seems to have occurred in the present case, could be seen as disproportionate.

127. For those reasons, I would suggest answering Question 3 as follows: Directive 2006/123 does not preclude the application of a criminal provision, such as the one in question in the main proceedings, that was put in place in order to penalise the award of degrees by non-accredited institutions, provided that those penalties are proportionate.

55 Above, points 42 to 44.

56 See, for instance, in the context of the Treaty, judgments of 19 January 1999, *Calfa* (C-348/96, EU:C:1999:6, paragraph 17); 6 March 2007, *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 68); and of 15 September 2011, *Dickinger and Ömer* (C-347/09, EU:C:2011:582, paragraph 31).

57 See judgment of 11 November 1981, *Casati* (203/80, EU:C:1981:261, paragraph 27).

D. Question 1

128. By its first question, the referring court enquires about the compatibility of the national law prohibition on non-accredited higher education bodies awarding degrees with the Unfair Commercial Practices Directive.

129. I will first address the issue of the scope of application of that directive before turning to the substance of the question. In my view, the UCP Directive *is* applicable in the present case. However, its provisions might, in fact, be relied upon in order *to justify* rather than to challenge the measures adopted by the national authorities.

1. Scope of application

130. According to the Belgian Government, the UCP Directive does not apply to education. Protection of the quality of degrees is not a 'commercial practice' because the Flemish Community is not a 'trader' within the meaning of that directive. The latter cannot be relied on to protect freedom of business against Member State interferences, but rather against the Respondents' own unfair commercial practice.

131. The Norwegian Government and the Commission also claim that the UCP Directive does not apply to the case at hand, but for a different reason. Article 1 of the UCP Directive states that it covers those national rules that primarily aim at protecting consumers' economic interests. In the present case, as the relevant national rules generally aim at ensuring a public policy objective is met, namely protection of the quality of higher education and maintaining the existing level of trust in the fact that certain degrees reflect a high quality, they do not fall within the scope of application of the UCP Directive. The Norwegian Government in particular argues that even when those rules aim, as a tangential objective, to protect the students' economic interests, they are still not covered by that directive.

132. I understand (and partially share) the intellectual unease that appears to have led, albeit for various reasons, the Belgian Government, the Norwegian Government, and the Commission to deny the applicability of the UCP Directive to the present case. It may indeed seem odd, at first sight, to hold that a national measure in the field of education that may be seen as primarily pursuing a public interest objective (namely the quality of education through an accreditation procedure), falls within the scope of the UCP Directive.

133. However, in view of the broad scope of application of the UCP Directive, as clearly stated in its provisions, read in the light of the extant case-law of the Court, it is impossible to reach a different conclusion.

134. First, in response to the Belgian Government, as already stated above,[58] higher education study programmes can constitute a service under EU law. Now if education may have an economic dimension for the purposes of freedom of establishment or freedom to provide services, it would be rather difficult to conclude that that suddenly stops being the case for the purposes of application of a different piece of EU secondary law (in addition, in relation to exactly the same study programme within the same case). It would be rather inconsistent to simultaneously hold that the Services Directive is applicable while the UCP Directive, resting on similar premisses, is not.[59]

58 Above, points 68 to 88.

59 See also, by analogy, judgment of 17 May 2018, Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen (C-147/16, EU:C:2018:320, paragraphs 56 to 58), where the Court applied Directive 93/13/EEC to a service, which was complementary and ancillary to the educational activity, provided by a higher educational establishment subsidised, for the main part, by public funds, consisting in offering, through a contract, an interest-free, instalment repayment plan in respect of sums owed by a student. Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

135. Second, it is settled case-law that the UCP Directive can be relied on by traders against Member States. The Court has indeed retained a broad approach to the scope of application of that directive. The latter, which aims at contributing to the proper functioning of the internal market,[60] can indeed be relied on by traders *against a national rule* that prohibits or restricts certain commercial practices.[61]

136. Third, in answer to the argument made by both the Norwegian Government and the Commission, what is (allegedly) the *primary* interest pursued by the national legislation as opposed to other secondary or any further interests is not really relevant for the purposes of determining whether the UCP Directive is applicable. It is established case-law that that directive is also applicable when the rule in question does not only (or even mainly) pursue the aim of protecting consumers, but also pursues other interests.[62] The directive is indeed applicable as long as the national legislation in question touches upon consumer protection, as opposed to only competitors' interests,[63] even if its main objective is not consumer protection.

137. Simply put, what matters is that national legislation regulates, with whatever aim in mind, business-to-consumer relationships. In that context, it is immaterial whether the primary interest pursued by the legislature for adopting that legislation was 'public' or 'private'. What matters is that the regulation affects the type of relationships between business and consumers by limiting certain commercial practices as defined by the directive.

138. That must be the case for two additional reasons. First, regulatory aims are difficult to define precisely and easy to reformulate. High-quality education is certainly a matter of public interest. However, students are equally interested in that high quality as consumers of educational services, that is, in their private interests, and as are employers and the labour market at large. All of those different interests are equally plausible with regard to a ban against issuing master's degrees without accreditation. That leads me to the second reason: it would ultimately always be for a Member State itself to declare which of those potentially plausible interests it wishes to (primarily) protect by adopting the regulation in question, an approach that does not carry much favour with the Court in a number of other areas of EU law. It is thus the actual objective and current impact of the rule that matters, not the historical and subjectively stated legislative intent.[64]

139. Thus, I am of the opinion that the national law in question regulates, albeit rather incidentally, the ways in which private undertakings offering educational services may advertise and market their services to potential consumers. The present situation therefore falls within the scope of application of the UCP Directive.

60 See Article 1 of the UCP Directive.

61 See, for example, judgments of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660), and of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669).

62 See, for example, judgments of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraphs 26 to 28), and of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraphs 31 to 34), regarding, respectively, national provisions essentially pursuing the maintenance of pluralism of the press and the independence of the press.

63 See, for instance, judgment of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 30): 'It is only national legislation relating to unfair commercial practices which harm "only" competitors' economic interests or which relate to a transaction between traders that is excluded from the scope of the directive.'

64 In those few areas in which the past legislative intent of the Member States is indeed (stated to be, through the legislation) relevant, the evidentiary problems arising out of that assessment clearly demonstrate why that might not be the best way forward. For an example of a recent discussion of when a national rule is 'specifically aimed' at information society services, and thus becoming a technical regulation that has to be notified pursuant to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), as amended, see my Opinion in *Falbert and Others* (C-255/16, EU:C:2017:608, points 58 to 87).

2. Substance

140. Pursuant to Article 5 of the UCP Directive and in the light of the definitions provided in Article 2, unfair business-to-consumer commercial practices are prohibited. That means any commercial communication, including advertising and marketing by a trader directly connected with the promotion, sale or supply of a product to consumers, which materially distorts or is likely to distort the economic behaviour of consumers. [65] It is established case-law that the practices covered by that directive must be commercial in nature, that is to say, they must originate from traders, and they must be directly connected with the promotion, sale or supply of their products to consumers. [66]

141. In the present case, there appears to be a certain degree of confusion as to the specific 'commercial practice' at stake here. The Respondents claim that their use of the designation 'master's' diploma indisputably forms part of the commercial strategy of their companies, which is sufficient to classify it as a commercial practice, meaning that the directive is applicable to them. Moreover, they are of the view that the award by an unrecognised educational institution of master's degrees is not included in the list of practices that the national legislature may specifically prohibit. In addition, they emphasise that they are not being prosecuted for infringing the prohibition of unfair commercial practices. For its part, the Belgian Government looks at the protection that is conferred by the Flemish legislation for the title of 'master's' course or degree. They consider that this is not a 'commercial practice' within the meaning of the directive because the scope of the national legislation does not overlap with that of the directive.

142. In my opinion, the 'commercial practice' in the present case is the promoting and selling of courses by advertising the possibility to obtain a 'master's' degree or course certificate upon the successful completion of the study programme, by the Respondents (as traders), as part of their commercial activity. Such a practice is the subject of the prohibition, laid down by the Flemish Parliament, on non-accredited institutions from issuing master's degrees. [67]

143. Thus, the role of the Flemish Parliament is of course that of a regulatory public authority and certainly not that of a trader within the meaning of the UCP Directive. It is the public regulator (the Flemish Parliament) that reaches into the market and bans certain types of commercial practices (offering master's courses without the appropriate authorisation) in relations between traders (UIBS Belgium) and consumers (potential students).

144. That being said, I fail to see how banning that commercial practice would in any way infringe the provisions of the UCP Directive. Rather to the contrary: it seems to be doing precisely what the directive requires. The prohibition is indeed designed to protect students (the consumers) from what amounts to an (unfair) business-to-consumer commercial practice that materially distorts or is very likely to distort the economic behaviour of the students by inducing them to think that they can obtain a master's degree upon successful completion of the studies organised by the Respondents.

145. Therefore, it is rather the Respondents' commercial practice that is likely to be viewed as unfair in the circumstances of the present case. As correctly pointed out by the Swedish and Norwegian Governments, such a practice may be considered as unfair 'in all circumstances', in accordance with Annex I to the directive.

65 Stressing the particularly wide definition of the notion of commercial practices, see, for example, judgments of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 21), and of 25 July 2018, *Dyson* (C-632/16, EU:C:2018:599, paragraph 30).

66 See, for example, judgment of 17 October 2013, *RLvS* (C-391/12, EU:C:2013:669, paragraph 37).

67 Analogically see for example judgment of 4 May 2017, *Vanderborght* (C-339/15, EU:C:2017:335, paragraphs 21 to 25), with regard to national legislation prohibiting any advertising relating to the provision of oral and dental care services.

146. It is established case-law that Annex I to the UCP Directive establishes an *exhaustive* list of 31 commercial practices which, in accordance with Article 5(5) of the directive, are regarded as unfair 'in all circumstances'. These practices are the only commercial practices which can be deemed to be unfair without a case-by-case assessment under the provisions of Articles 5 to 9 of the directive. [68]

147. Point 2 of Annex I includes as a commercial practice which is considered unfair in all circumstances, 'displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation'. Point 4 also includes, among such practices, the fact of 'claiming that a trader … or a product has been approved, endorsed or authorised by a public or private body when he/it has not …'.

148. Contrary to the assertions made by the Respondents, an *exhaustive* list in this context means a closed list of generic and generalised situations, expressed at the reasonably and logically appropriate level of abstraction. It would indeed be rather absurd to suggest that because there is no 'point 32' in the list in Annex I, which would state 'Offering enrolment in higher educational study programmes leading to the award of a master's title even if no accreditation has been obtained to this effect from the competent national authorities', that banning such a commercial practice, which could be clearly subsumed under one of the other (abstractly formulated) categories, is incompatible with the directive.

149. It might be added that in the past, the Court has also shown (reasonable and necessary) flexibility when interpreting the categories contained in Annex I. Indeed, it does not only look at the wording but also at the broader context and at the objectives of the UCP Directive in order to determine whether a specific commercial practice shall be deemed unfair in all circumstances. [69]

150. Thus, in the present case, the Respondents' commercial practices can easily be subsumed under points 2 and 4 of Annex I. A master's degree, a degree having certain qualities and professional connotations, can certainly be seen as an *equivalent* to a quality mark. For its part, point 4, as interpreted by the Court, 'refers to the specific cases in which … the applicable rules lay down certain requirements in particular as regards the status of a trader or the *quality* of his products and *provide in this respect for a system of recognition, approval or authorisation*'. [70] The Respondents' commercial practice may easily fit under both. Such a practice thus does not require a case-by-case assessment and may be considered unfair in all circumstances.

151. I therefore suggest that Question 1 be answered as follows: Directive 2005/29 must be interpreted as not precluding a provision of national law that imposes a general prohibition on non-accredited educational institutions using the designation 'master's' (degree or course) on the certificates that they award in order to ensure a high quality of education.

V. Conclusion

152. In the light of the foregoing considerations, I propose that the Court answer the questions posed by the Hof van beroep Antwerpen (Court of Appeal of Antwerp, Belgium) as follows:

– Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('the Unfair Commercial Practices Directive'), must be interpreted as not precluding a

68 See for example judgments of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 56), and of 19 September 2013, *CHS Tour Services* (C-435/11, EU:C:2013:574, paragraph 38).

69 See, for example, judgment of 18 October 2012, *Purely Creative and Others* (C-428/11, EU:C:2012:651).

70 Judgment of 17 January 2013, *Köck* (C-206/11, EU:C:2013:14, paragraph 39). Emphasis added.

provision of national law that imposes, in order to ensure a high quality of education, a general prohibition on non-accredited educational institutions using the designation 'master' on the diplomas that they award;

– Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as not precluding a national provision, which imposes a general prohibition on non-accredited educational institutions using the designation 'master' on the diplomas they award, as long as the accreditation procedure meets the conditions laid down in Article 9(1) of that directive. Nor does it preclude the application of a criminal law provision, such as the one in question in the main proceedings, that was put in place in order to penalise the award of degrees by non-accredited institutions, provided that those penalties are proportionate.