Case C-261/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 June 2020

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

14 May 2020

Appellant in the appeal on a point of law:

Thelen Technopark Berlin GmbH

Respondent in the appeal on a point of law:

MN

Subject matter of the main proceedings

Compatibility with higher-ranking EU law, including the Services Directive, of national legislation on minimum rates for the fees of architects and engineers; direct effect of EU law as between private persons

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU, in particular

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’)

Questions referred for a preliminary ruling

1. Does it follow from EU law, in particular from Article 4(3) TEU, the third paragraph of Article 288 TFEU and Article 260(1) TFEU, that, in the

context of ongoing court proceedings between private persons, Article 15(1), (2)(g) and (3) of Directive 2006/123 on services in the internal market has direct effect in such a way that the national provisions contrary to that directive that are contained in Paragraph 7 of the German Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Decree on fees for services provided by architects and engineers ('the HOAI')), pursuant to which the minimum rates for planning and supervision services provided by architects and engineers laid down in that official scale of fees are mandatory — save in certain exceptional cases — and any fee agreement in contracts with architects or engineers which falls short of the minimum rates is invalid, are no longer to be applied?

2. If Question 1 is to be answered in the negative:

   (a) Does the Federal Republic of Germany's scheme of mandatory minimum rates for planning and supervision services provided by architects and engineers in Paragraph 7 of the HOAI constitute an infringement of the freedom of establishment under Article 49 TFEU or of other general principles of EU law?

   (b) If Question 2(a) is to be answered in the affirmative: Does it follow from such an infringement that the national rules on mandatory minimum rates (in this case: Paragraph 7 of the HOAI) are no longer to be applied in ongoing court proceedings between private persons?

Provisions of EU law cited

The Services Directive, in particular Article 15(1), Article 15(2)(g) and Article 15(3)

Article 49 TFEU (freedom of establishment)

Provisions of national law cited

Bürgerliches Gesetzbuch (German Civil Code; BGB)

Gesetz zur Regelung von Ingenieur- und Architektenleistungen (Law regulating the services of engineers and architects) in the version of 12 November 1984 (BGBl. I p. 1337)

Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Honorarordnung für Architekten und Ingenieure) (Decree on fees for services provided by architects and engineers (Official scale of fees for services provided by architects and engineers)) in the version of 10 July 2013 (BGBl. I p. 2276) ('the HOAI')

Brief summary of the facts and procedure

1 On 2 June 2016, the parties entered into an engineering contract, in which the applicant, who operates an engineering firm, undertook to provide services for a construction project in Berlin. For those services, to which the HOAI is applicable, a flat-rate fee was agreed.

2 After the applicant had terminated the engineering contract, he invoiced, in July 2017, the services that he had provided on the basis of the minimum rates laid down under the HOAI. The resulting fee was significantly higher than the contractually agreed flat-rate fee. The defendant did not pay the invoiced fee in full. By his action, the applicant claims the outstanding balance together with interest and pre-litigation legal fees.

3 The applicant was largely successful before both the Landgericht (Regional Court) and the appeal court. By the appeal on a point of law, for which leave was granted by the appeal court, the defendant continues to seek to have the action dismissed in its entirety.

Brief summary of the basis for the reference

4 The success of the defendant's appeal on a point of law turns on a decision of the Court of Justice of the European Union ('the Court') on the interpretation of the Treaties.

First question referred

5 The dispute turns on whether it follows from the interpretation of EU law, namely from Article 4(3) TEU, the third paragraph of Article 288 TFEU and Article 260(1) TFEU, that, in the context of ongoing court proceedings between private persons, Article 15(1), (2)(g) and (3) of the Services Directive has direct effect in such a way that the national provisions of the HOAI that are contrary to that directive are no longer to be applied to the contract between the parties.

6 In application of those national provisions, the minimum rates of the HOAI for engineering services are, in principle, mandatory, and a flat-rate fee agreement between the parties that falls short of the minimum rates in contracts with engineers is ineffective. This would mean that the applicant would be entitled to payment of the claimed amount on the basis of the minimum rates of the HOAI. Accordingly, the defendant's appeal on a point of law would be unsuccessful.

7 In its judgment of 4 July 2019, *Commission* v *Germany*, C-377/17, EU:C:2019:562, the Court held that, by maintaining fixed tariffs for the planning services of architects and engineers, the Federal Republic of Germany had failed to fulfil its obligations under Article 15(1), (2)(g) and (3) of the Services Directive.

8 In keeping with that judgment, the Court also held, in a preliminary ruling procedure under Article 267 TFEU, that Article 15(1), (2)(g) and (3) of the Services Directive must be interpreted as precluding national legislation which prohibits the agreement in contracts with architects or engineers of a fee that is lower than the minimum fee resulting from the HOAI (order of 6 February 2020, *hapeg dresden*, C-137/18, not published, EU:C:2020:84).

9 Taking account of the aforementioned judgment of the Court of 4 July 2019 (C-377/17), Paragraph 7 of the HOAI (see first question referred) cannot be interpreted in conformity with the directive as meaning that the minimum rates of the HOAI are, in principle, no longer mandatory in relationships between private persons and therefore do not preclude a fee agreement which falls short of the minimum rates. Having regard to the legal basis for authorising the adoption of the HOAI, to its spirit and purpose and to the recognisable intention of the legislature and regulatory body, an interpretation in conformity with the directive in the present case would amount to an interpretation of national law *contra legem* and is therefore out of the question.

10 The decision on the appeal on a point of law therefore depends essentially on the answer to the first question referred (see above). This question is material to the decision to be given. If it were to be answered in the affirmative, the defendant's appeal on a point of law would be successful. This is because the applicant's claim for fees which exists under national law on the basis of the minimum rates of the HOAI — and which exceeds the agreed flat-rate fee — would be unfounded if Paragraph 7 of the HOAI were to be disapplied by virtue of Article 15(1), (2)(g) and (3) of the Services Directive.

11 The Court did not rule on this question in the aforementioned decisions, but expressly left it open. It is a matter of dispute in the case-law and literature, meaning that the correct application of EU law is not so clear from the outset ('acte claire'), nor clarified by case-law to such an extent ('acte éclairé'), as to leave no scope for reasonable doubt.

12 The Chamber is inclined to share the view that the minimum rates of the HOAI continue to apply in ongoing court proceedings between private persons until the national legislature and regulatory body abolishes the mandatory tariff framework.

13 However, the Court has ruled that Article 15 of the Services Directive is also applicable to purely internal situations — such as that in the present dispute (judgments of the Court of 4 July 2019, *Commission* v *Germany*, C-377/17, EU:C:2019:562, and of 30 January 2018, *X and Visser*, C-360/15 and C-31/16, EU:C:2018:44).

14 Moreover, according to the settled case-law of the Court, a directive may in certain cases be relied on directly by individuals against the Member State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly and

the provision of the directive appears, so far as its subject matter is concerned, to be unconditional and sufficiently precise. These requirements are satisfied as regards Article 15(1), (2)(g) and (3) of the Services Directive.

15 According to the decision of the Court in the aforementioned judgment of 4 July 2019 (C-377/17), it is clear, first, that the Federal Republic of Germany did not correctly transpose the requirements of that provision concerning minimum and maximum tariffs by the end of the period prescribed by Article 44(1) of the Services Directive, 28 December 2009. Second, the provision also appears, so far as its subject matter is concerned, to be unconditional and sufficiently precise — as the Court has already held. Accordingly, in that regard, Article 15 of the Services Directive has direct effect, since, in the second sentence of Article 15(1), it imposes on the Member States an unconditional and sufficiently precise obligation to adapt their laws, regulations or administrative provisions so as to make them compatible with the conditions laid down in Article 15(3).

16 This Chamber takes the view that these principles do not, however, mean that Article 15(1), (2)(g) and (3) of the Services Directive leads to the disapplication of the national rules on the mandatory nature of the minimum rates in Paragraph 7 of the HOAI, even in ongoing court proceedings involving only private persons.

17 According to the Court's settled case-law, a directive cannot, in principle, of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed or has been incorrectly transposed were to be extended to the sphere of relations between individuals, that would amount to recognising a power on the part of the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. Accordingly, a directive cannot, in principle, be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive (see, inter alia, judgment of the Court of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43).

18 This Chamber takes the view that, in accordance with that case-law, any direct effect of Article 15(1), (2)(g) and (3) of the Services Directive is precluded in ongoing court proceedings between private persons, so that, to that extent, the provision does not have primacy of application over the national rules on the mandatory nature of the minimum rates in Paragraph 7 of the HOAI.

19 Although Article 15 of the Services Directive does not create obligations for individuals, if the assumption that that provision has direct effect in ongoing court proceedings between private persons were to be accepted, it would mean that the architect or engineer would only be entitled to the lower amount of remuneration agreed with the client and would therefore be deprived of the entitlement, existing under national law, to fees corresponding to the minimum rates of the HOAI. A private person would therefore be deprived of a subjective right that exists under national law.

20 This Chamber takes the view that, in so far as the Court has found in its previous case-law that in certain exceptional cases — where it is impossible to interpret in a way that is consistent with a directive — national provisions which are contrary to EU law are to be disapplied in relations between private persons, those cases do not cover the present dispute. They concern particular situations that are not comparable to the present case (see, inter alia, judgment of the Court of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631).

Second question referred

21 In the event that the first question referred is answered in the negative, the decision to be given in the dispute will turn on the answers to Questions 2(a) and (b) set out above. These questions become material to the decision if non-application of the national rules on mandatory minimum rates in Paragraph 7 of the HOAI does not already result from the direct application of Article 15(1), (2)(g) and (3) of the Services Directive.

22 This is because the defendant's appeal on a point of law would be successful if the non-application of the relevant national rules in ongoing court proceedings between private persons could be derived from an infringement of the freedom of establishment under Article 49 TFEU or of other general principles of EU law.

23 In its aforementioned judgment of 4 July 2019 (C-377/17), the Court expressly left open the question whether the legislation setting mandatory minimum rates for planning services provided by architects and engineers infringes the freedom of establishment. According to the case-law of the Court, an infringement of the freedom of establishment or of other general principles of EU law may, in principle, result in a private person also being able to rely on the failure of national legislation to comply with EU law in ongoing court proceedings against another private person. It is therefore conceivable that national legislation may be disapplied in the event of an infringement of European primary law — even in cases involving a legal dispute between private persons.

24 This Chamber considers that such an infringement of the freedom of establishment cannot be ruled out, even if there are doubts as to whether it is applicable. This is because the HOAI, in the version applicable in the present dispute, applies only to domestic cases. The HOAI expressly defines its scope of application by providing that it governs only the calculation of fees for the basic services of architects and engineers established in Germany, provided that those basic services are covered by that decree and are provided from Germany.

25 The extent to which the purpose of the freedom of establishment requires, in legal relationships between private persons, that national rules on the mandatory nature of minimum rates of the HOAI for a contract such as that in the present case be disapplied may be of significance in the present case.