

Case C-422/19

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:

31 May 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

27 March 2019

Applicant, appellant and appellant on a point of law:

KH

Defendant, respondent and respondent in the appeal on a point of law:

Hessischer Rundfunk

Subject matter of the main proceedings

Monetary policy, euro banknotes as legal tender, payment of radio and television licence fees in cash

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Does the exclusive competence that the European Union, pursuant to Article 2(1) TFEU, in conjunction with Article 3(1)(c) TFEU, enjoys in the area of monetary policy for the Member States whose currency is the euro preclude a legal act of one of those Member States that provides for an obligation on the part of public authorities of the Member State to accept euro banknotes in the fulfilment of statutorily imposed payment obligations?

2. Does the status as legal tender of banknotes denominated in euro, as established in the third sentence of Article 128(1) TFEU, the third sentence of Article 16(1) of Protocol (No 4) on the statute of the European System of Central Banks and of the European Central Bank and the second sentence of Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro contain a prohibition precluding public authorities of a Member State from refusing fulfilment of a statutorily imposed payment obligation in such banknotes, or does EU law leave room for provisions that exclude payment in euro banknotes for certain statutorily imposed payment obligations?

3. If the first question is answered in the affirmative and the second question is answered in the negative:

Can a legal act of a Member State whose currency is the euro which is adopted in the context of the European Union's exclusive competence in the area of monetary policy be applied to the extent to which, and for so long as, the European Union has not made use of its competence?

Provisions of EU law cited

Treaty on the Functioning of the European Union (TFEU), specifically Articles 2, 3 and 128

Protocol (No 4) on the statute of the European System of Central Banks and of the European Central Bank ('statute of the ESCB and the ECB'), specifically Article 16

Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1), specifically Article 10

Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ 2010 L 83, p. 70)

Provisions of national law cited

Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany; 'the GG'), specifically Article 31

Gesetz über die Deutsche Bundesbank (Law on the German Bundesbank; 'the BBankG'), specifically Paragraph 14

Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), specifically Paragraphs 286 and 293 to 295

Rundfunkbeitragsstaatsvertrag (State Treaty on radio and television licence fees; 'the RBStV'), which the federal *Land* of Hesse approved by law of 23 August 2011, specifically Paragraphs 2, 7, 9 and 10

Statutes of Hessischer Rundfunk (the public broadcaster for the federal *Land* of Hesse) on the payment of radio and television licence fees; ‘the Licence fee statutes’), specifically Article 10

Brief summary of the facts and procedure

- 1 The applicant is the owner of a residential property located in the region of the defendant, a federal *Land* broadcasting organisation governed by public law. He is for that reason obliged to pay to the defendant a radio and television licence fee pursuant to Paragraph 2(1) of the RBStV.
- 2 The applicant offered to pay the radio and television licence fee in cash, but the defendant refused that offer, referring to Article 10(2) of its Licence fee statutes. Pursuant to that provision, the radio and television licence fee may be paid only by way of cashless payment — by direct debit, individual transfer or standing order.
- 3 By decision of 1 September 2015, the defendant set overdue radio and television licence fees of EUR 52.50 for the second quarter of 2015 and a surcharge of EUR 8 for late payment. By decision of 31 March 2016, the defendant rejected the applicant’s objection.
- 4 The applicant brought an action, requesting that the two decisions referred to above be annulled. In the alternative, he requested a declaration establishing that he is entitled to pay radio and television licence fees to the defendant in cash. The action was unsuccessful at first and second instance.
- 5 The applicant continues to seek the same form of order by way of the appeal on a point of law brought before the referring court. As his grounds, he asserts that the second sentence of Paragraph 14(1) of the BBankG and the third sentence of Article 128(1) TFEU each make provision for an unconditional and unrestricted obligation to accept euro banknotes as a means for the settlement of monetary debts. This obligation, he argues, may be restricted only by a contractual agreement between the parties or on the basis of authorisation under federal or EU legislation. This is also the case if reasons of practicability militate in favour of the exclusion of cash payments in the context of mass procedures.

Brief summary of the basis for the request

- 6 The outcome of the dispute turns on a decision of the Court of Justice on the interpretation of the Treaties.

Assessment of the dispute under national law

- 7 The defendant’s decisions — the annulment of which the applicant seeks by means of his main request — prove to be unlawful under national law.

- 8 It is true that the applicant is obliged to pay a radio and television licence fee as the owner of a residential property pursuant to Paragraph 2(1) of the RBStV. The obligation to pay radio and television licence fees, which is tied to residential properties in the private sector, is, in principle, compatible with the Basic Law, as determined by the Bundesverfassungsgericht (Federal Constitutional Court) by judgment of 18 July 2018. Pursuant to Paragraph 7(3) of the RBStV, the applicant's licence fees for the period at issue — from 1 April 2015 to 30 June 2015 — fell due in the middle of that period, that is to say, on 15 May 2015. As the time of payment is determined by the calendar, formal notice regarding the occurrence of the default was not necessary (cf. point 1 of Paragraph 286(2) of the BGB).
- 9 However, the defendant was in default in acceptance (Paragraph 293 of the BGB) — which rules out default on the part of the debtor — when it issued the contested decisions, as it refused the applicant's offer to make payment for the radio and television licence fees in cash.
- 10 The reason for this is that, pursuant to the second sentence of Paragraph 14(1) of the BBankG, banknotes denominated in euro are 'the sole unrestricted legal tender'. On the basis of a systematic, historical and teleological interpretation of that provision, the referring court concludes that public authorities are obliged to accept euro banknotes if they are intended to meet a statutorily imposed payment obligation. Exceptions cannot automatically be based on reasons of administrative practicability or cost savings, but rather require authorisation by virtue of a federal law.
- 11 Only authorisation under *Land* law exists in the present case, however, since the RBStV, on the basis of which the defendant's Licence fee statutes were adopted, produces effects vis-à-vis the applicant only by virtue of an act of assent of the federal *Land* of Hesse.
- 12 Pursuant to Article 31 of the GG ('Federal law takes precedence over *Land* law'), this authorisation under *Land* law is ineffective as it infringes the provision of federal legislation in the second sentence of Paragraph 14(1) of the BBankG.
- 13 The referring court takes the view that the obligation to accept euro banknotes that is governed in the second sentence of Paragraph 14(1) of the BBankG also applies in relation to so-called mass procedures, such as the collection of the radio and television licence fee. There are no clear indications that the possibility of paying the radio and television licence fee in cash could jeopardise the funding of broadcasting organisations that is required pursuant to the case-law of the Bundesverfassungsgericht. The fact that the costs associated with accepting cash could increase the radio and television licence fee and therefore also burden those obliged to pay the fee who do not make use of the possibility of paying in cash must be accepted on the basis of the situation under the national law.

First question referred

- 14 The referring court is unsure whether the second sentence of Paragraph 14(1) of the BBankG is itself inapplicable because it is not consistent with the European Union's exclusive competence in the area of monetary policy.
- 15 Pursuant to Article 3(1)(c) TFEU, the European Union has exclusive competence in the area of monetary policy for the Member States whose currency is the euro. Under Article 2(1) TFEU, the European Union alone may therefore legislate and adopt legally binding acts in that area; the Member States are able to do so themselves only if so empowered by the European Union or for the implementation of EU acts. Pursuant to Article 2(6) TFEU, the scope of and arrangements for exercising the European Union's competences are to be determined by the provisions of the Treaties relating to each area. Thus, for monetary policy, account must be taken primarily of Article 127 et seq. TFEU.
- 16 The content of the concept of monetary policy referred to in Article 3(1)(c) TFEU, and therefore the scope of the European Union's exclusive competences, has not yet been conclusively clarified. According to the case-law of the Court of Justice (cf. judgments of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 53 et seq., of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 42 et seq., and of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000, paragraph 50 et seq.), the TFEU contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the European System of Central Banks (ESCB) for the purpose of implementing that policy. Under Article 127(1) and Article 282(2) TFEU, the primary objective of the European Union's monetary policy is to maintain price stability. The instruments for maintaining price stability include, for example, setting the key interest rates for the euro area and issuing euro currency (judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 96). Chapter IV of the Statute of the ESCB and of the ECB also sets out the instruments to which the ESCB may have recourse in the framework of monetary policy (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 45, and of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000, paragraph 52). Finally, the Court of Justice has made clear that the fact that a measure may have indirect effects on the stability of the euro is not sufficient for it to be classified as a monetary policy measure (judgments of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 56 and 97, and of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 52).
- 17 On the basis of this case-law, the referring court is unable conclusively to decide whether the exclusive competence of the European Union in the area of monetary policy extends to governing the legal consequences associated with the status of legal tender of euro banknotes — such as, in particular, stipulating an obligation on the part of public authorities to accept euro banknotes — and therefore whether, pursuant to Article 2(1) TFEU, there is a restrictive effect in this respect

for the legislation of the Member States. It is true that the aforementioned obligation does not relate to the objective of maintaining price stability, nor is there a direct connection with the instruments specified in primary law for achieving those objectives. In particular, the right to issue euro banknotes that is conferred on the European Central Bank and the national central banks in Article 128(1) TFEU is not restricted or modified. On the other hand, the case-law of the Court of Justice does leave room for the assumption that rules intended to ensure the acceptance of euro banknotes as legal tender, and therefore the effective functioning of monetary transactions, also belong in the area of monetary policy. However, it is conceivable that, as a measure that is necessary for the use of the euro as a single currency, such a legal act could be based on Article 133 TFEU, and exclusive competence of the European Union could therefore also be assumed in this respect pursuant to Article 2(1) and (6) TFEU.

Second question referred

- 18 The question of whether the German legislature had competence to adopt a provision such as the second sentence of Paragraph 14(1) of the BBankG in the first place owing to the European Union's exclusive competence in the area of monetary policy does not arise if the applicable provisions of substantive EU law actually contain a prohibition precluding public authorities of a Member State from refusing the fulfilment of a statutorily imposed payment obligation by means of euro banknotes. The reason for this is that, in this case also, Paragraph 10(2) of the Licence fee statutes would be unlawful owing to an infringement of superior rules of law, with the result that the applicant's appeal on a point of law would have to be allowed.
- 19 Pursuant to the third sentence of Article 128(1) TFEU and the — identically worded — third sentence of Article 16(1) of the Statute of the ESCB and the ECB, the banknotes issued by the European Central Bank and the national central banks are to be the only such notes to have the status of legal tender within the European Union. Moreover, the second sentence of Article 10 of Regulation No 974/98 provides — at the level of secondary law — that, without prejudice to Article 15 of that regulation, that is to say, after the end of the transitional period, banknotes denominated in euro are to be the only banknotes which have the status of legal tender in all participating Member States. As already stated in respect of German law, compulsory acceptance in respect of banknotes denominated in euro cannot automatically be derived from the term 'legal tender'. The term is defined neither in the relevant primary-law provisions of the TFEU or the Statute of the ESCB and the ECB nor in Regulation No 974/98. Recital 19 of that regulation merely indicates that the EU legislature takes the view that limitations on the possibility of making payments in cash does not automatically affect the status of legal tender of euro banknotes and coins. According to that recital, limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means of payment for the settlement of monetary debts are available.

- 20 It is also unclear how much importance should be attached to Recommendation 2010/191 in this context. It is true that the term ‘legal tender’ is defined in the recommendation, particularly by virtue of the fact that point 1(a) states the following: ‘The creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment.’ Pursuant to points 2 and 3 of the recommendation, refusals thereof are possible only if ‘grounded on reasons related to the “good faith principle”’. Pursuant to the fifth paragraph of Article 288 TFEU, however, recommendations of the institutions of the European Union have no binding force. The legislative history of Recommendation 2010/191 also shows that the adoption of a formal legal act was to be avoided precisely because there was disagreement in relation to the question of whether the European Union has exclusive competence — which it has not yet exercised — to establish a common definition of legal tender and the resulting effects, or whether the national legislatures have legislative competence in that regard.

Third question referred

- 21 The relevance of the first-mentioned question, as to whether the German legislature had competence to adopt the second sentence of Paragraph 14(1) of the BBankG in the first place owing to the European Union’s exclusive competence in the area of monetary policy, must also be answered in the negative if, although an obligation to accept euro banknotes when discharging statutorily imposed payment obligations cannot be gathered from the applicable provisions of substantive EU law, a national provision containing that content can nevertheless be applied to the extent that, and for so long as, the European Union has not made use of its exclusive competence in a conclusive manner.
- 22 It is true that Article 2(1) TFEU provides that, in an area for which the Treaties confer on the European Union exclusive competence, the Member States are able to legislate only if so empowered by the European Union or for the implementation of EU acts. Moreover, it has long been made clear in the case-law of the Court of Justice that EU law takes precedence over legislative measures of the Member States (cf. judgment of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, p. 594). It is also made clear that, in accordance with the principle of the precedence of EU law, the relationship between provisions of the Treaty and directly applicable measures of the institutions, on the one hand, and the national law of the Member States, on the other, is such that those provisions and measures, solely by their entry into force, render automatically inapplicable any conflicting provision of current national law and preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with provisions of EU law (cf. judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 17 and 18). However, the fundamental decisions of the Court of Justice in relation to the primacy of EU law relate to cases in which a national legal act is precluded by a substantive provision of primary or secondary EU law. It cannot be gathered with certainty from the available case-law whether a national legal act can also not be applied if it came

into being merely by breaching the restrictive effect of the exclusive competence of the European Union owing to a lack of legislative action on the part of the latter.

WORKING DOCUMENT