Case C-469/19

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:

19 June 2019

Referring court:

Bundesgerichtshof (Federal Court of Justice, Germany)

Date of the decision to refer:

14 May 2019

Applicant and appellant:

All in One Star Ltd

Subject matter of the main proceedings

Appeal against the refusal to enter a branch of a company registered in the United Kingdom in the German commercial register, which was based on the fact that, when the application was made for the branch's entry in the commercial register, the amount of the company's share capital was not indicated and no assurance was provided that instruction had been received regarding the unrestricted duty that exists under national German law to provide information to the court

Subject matter and legal basis of the reference

Subject matter: Interpretation of Article 30 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law and of Articles 49 and 54 TFEU

Legal basis: Article 267 TFEU

Questions referred

1. Does Article 30 of Directive (EU) 2017/1132 preclude a national provision under which the indication of the amount of share capital or a comparable capital

value is required for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register?

2. a) Does Article 30 of Directive (EU) 2017/1132 preclude a national provision under which, when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register, the managing director of the company has to provide an assurance that there is no barrier to his personal appointment under national law in the form of a prohibition, ordered by a court or public authority, on practising his profession or trade, corresponding in whole or in part with the object of the company, or in the form of a final conviction for certain criminal offences and that, in this respect, he has been instructed of his unrestricted duty to provide information to the court by a notary, a representative of a comparable legal advisory profession or a consular officer?

b) If Question 2a is answered in the negative:

Do Articles 49 and 54 TFEU preclude a national provision under which the managing director of the company has to provide such an assurance when applying for a branch of a limited liability company with registered office in another Member State to be entered in the commercial register?

Provisions of EU law and EU case-law cited

TFEU, Articles 49 and 54;

Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46; 'Directive 2017/1132'), Article 30;

Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36; 'Directive 89/666'), Article 2;

Judgment of the Court of Justice of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126 ('*Centros* judgment'), paragraph 38;

Judgment of the Court of Justice of 30 September 2003, *Inspire Art*, C-167/01, EU:C:2003:512 ('*Inspire Art* judgment'), paragraphs 69, 70, 106, 133, 135 and 140;

Judgment of the Court of Justice of 1 June 2006, *innoventif*, C-453/04, EU:C:2006:361 ('*innoventif* judgment'), paragraph 33 et seq.

Provisions of national law cited

Handelsgesetzbuch (German Commercial Code; HGB) as amended on 1 November 2008 (law of 23 October 2008, BGBl. I p. 2026), Paragraphs 13e and 13g;

Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Law on limited liability companies; GmbHG) as amended on 1 November 2008 (law of 23 October 2008, BGBl. I p. 2026), Paragraphs 6, 8, 10 and 82;

Gesetz über das Zentralregister und das Erziehungsregister (Law on the central register and correctional register; BZRG) as amended on 29 July 2017 (law of 18 July 2017, BGBl. I p. 2732), Paragraphs 41 and 53.

Brief summary of the facts and procedure

1 All in One Star Ltd. ('All in One Star') is a private company limited by shares with registered office in Great Bookham (United Kingdom) which was entered in the Commercial Register of Companies House for England and Wales in Cardiff on 30 October 2013. It applied for a branch to be entered in the commercial register at the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, Germany) (the court of registration) in March 2014. The court of registration informed All in One Star that the application could not be allowed for the following reasons inter alia: The amount of the share capital of All in One Star was not indicated, contrary to the provisions of Paragraph 13g(3) of the HGB in conjunction with Paragraph 10(1), sentence 1, of the GmbHG. Furthermore, although the director and sole shareholder of All in One Star had provided assurance in the application that there was nothing to prevent him personally from being appointed as an organ of the company under Paragraph 6(2), sentence 2, point 2 and point 3, and sentence 3, of the GmbHG, he had not provided assurance that he had also been instructed in this respect of his unrestricted duty to provide information to the court, contrary to Paragraph 13g(1) and (2), sentence 2, of the HGB in conjunction with Paragraph 8(3) of the GmbHG.

2 The Oberlandesgericht (Higher Regional Court) dismissed All in One Star's appeal against the court of registration's objections. This is opposed by All in One Star with an appeal to the referring court.

Brief summary of the basis for the reference

First question referred

3 The question is raised as to whether All in One Star's obligation, provided for under the relevant German legislation, to indicate the amount of its share capital or a comparable capital value when registering its branch is compatible with Article 30 of Directive 2017/1132.

4 The fact that Directive 2017/1132 did not come into effect until 20 July 2017 and therefore in the course of the appeal proceedings does not preclude its application to the registration of the branch of All in One Star, because the referring court has to apply the law in force when it issues its ruling in the appeal proceedings.

5 Article 30 of Directive 2017/1132 contains a catalogue of documents and particulars which may have to be disclosed under the law of one Member State for branches of companies from other Member States. In Article 30 thereof, the indication of the amount of the share capital or a comparable capital amount is not expressly mentioned in either the compulsory items of disclosure in paragraph 1 or the optional items of disclosure in paragraph 2. Therefore, a Member State could be prevented under the Directive from demanding the indication of the company's share capital for the registration of the branch.

6 Such a precluding interpretation could be supported by the fact that, in the *Inspire Art* judgment (paragraphs 69 and 70), the Court of Justice ruled in relation to Article 2 of Directive 89/666 — the predecessor, corresponding in terms of content, to Article 30 of Directive 2017/1132 — that the catalogue of disclosure measures therein is exhaustive and the Member States are unable to provide for disclosure measures for branches other than those laid down in the text of Directive 89/666. This case-law should also apply accordingly to the rule, unchanged in terms of content, in Article 30 of Directive 2017/1132.

7 Furthermore, Directive 2017/1132 expressly stipulates the disclosure of a capital value in the case of the company itself (Article 14(e)) and in the case of the registration of branches of companies from third States (Article 37(e)). It might have to be concluded therefrom that the duty to indicate a capital value was deliberately dispensed with in the case of branches of companies from a Member State.

8 Recital 18 of Directive 2017/1132 could also suggest that the directive deliberately refrains from providing for an — even optional — obligation to indicate the company's capital for branches from Member States, because that information can be obtained within the European Union through application to the register of the company in the Member State.

9 However, with regard to the *innoventif* judgment (paragraph 33 et seq,), the referring court is inclined to regard the demand for disclosure of the share capital or a capital value comparable thereto as being in accordance with the directive if that indication is also part of the company's instrument of constitution, the full disclosure of which may be demanded under Article 30(2)(b) of Directive 2017/1132.

10 It can be gathered from the *innoventif* judgment that it is compatible with Directive 89/666 or the successor provisions in Directive 2017/1132 to demand the disclosure of a particular or document which, although not expressly mentioned in the catalogue of disclosure measures of the directive, is part of one

of those particulars or documents, namely of the company's instrument of constitution mentioned in the catalogue of optional disclosure measures, and therefore would inevitably likewise have to be disclosed upon full disclosure thereof.

Second question referred

11 With regard to the court of registration's second objection concerning the lack of assurance provided by the director of All in One Star regarding his instruction pursuant to Paragraph 13g(1) and (2), sentence 2, of the HGB in conjunction with Paragraph 8(3) of the GmbHG, the question firstly arises as to whether the provisions of Directive 2017/1132 regarding disclosure duties in the case of branch registrations are applicable to this indication (Question 2a). Should that not be the case, the question arises as to whether the demand for such assurance is in breach of the freedom of establishment under Articles 49 and 54 TFEU (Question 2b).

Question 2a

12 As the director of All in One Star only provided an assurance in the branch application that none of the personal appointment obstacles set out in Paragraph 8(3), sentence 1, in conjunction with Paragraph 6(2), sentence 2, points 2 and 3, and sentence 3, of the GmbHG applied to him, but not that he had also been instructed of his unrestricted duty to provide information pursuant to Paragraph 8(3) of the GmbHG, the application does not meet the requirements of Paragraph 13g(2), sentence 2, of the HGB in conjunction with Paragraph 8(3) of the GmbHG.

13 It is in question whether Article 30 of Directive 2017/1132 precludes the obligation, prescribed under national German law, to provide assurance regarding the instruction received. That depends on whether the assurance concerning indications regarding the personal suitability of the company's managing director is even covered by the scope of Directive 2017/1132.

14 When it introduced the obligation to provide assurance of the instruction received into national German law, the German legislature assumed that the provision was not covered by the scope of Directive 89/666 in force at that time, because that directive did not contain any rules on the suitability of a company's representative and was confined to providing for a duty of disclosure in respect of the appointment, termination of office and particulars of the representatives.

15 In the opinion of the referring court, an exemption of indications regarding the personal suitability of the managing director from the scope of Directive 89/666 or Directive 2017/1132 that is now in force, in view of the exhaustive character, is however not without doubt.

16 Neither Directive 86/666 nor Directive 2017/1132 contains an express exception for indications concerning the personal suitability of the company's representatives. Under Article 1 of Directive 2017/1132, its subject matter instead extends generally to the area of the 'disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State'. In addition, recital 22 of Directive 2017/1132 (like the recitals of Directive 89/666 before it) makes it clear that the directive in no way affects disclosure requirements for branches under other provisions of, for example, employment law on workers' rights to information and tax law, or for statistical purposes. A corresponding clarification in respect of indications regarding the personal suitability of the company's representatives is, in contrast, not to be gathered from the recitals. An argument against this exemption from the scope of the directive is also the fact that the directive certainly also contains rules regarding the disclosure of personal information as, under Article 30(1)(e) of Directive 2017/1132 (and Article 2(1)(e) of Directive 89/666), the appointment, termination of office and particulars of the company's representatives are to be disclosed in the case of branches of companies from other Member States. Having regard thereto, it appears questionable to assume that all other personal information, in particular regarding the personal suitability of a managing director, should from the outset not be covered by the scope of the directive.

17 Should the obligation to provide the assurance pursuant to Paragraph 13g(2), sentence 2, in conjunction with Paragraph 8(3) of the GmbHG fall within the scope of Directive 2017/1132, it would be contrary to the directive. This is because the obligation to provide such assurance is neither one of the admissible disclosure measures under Article 30 of that directive, nor can it be subsumed — unlike the company's share capital — under one of the admissible disclosure measures set out in the directive. As, according to the *Inspire Art* judgment, the directive's catalogue of disclosure measures is exhaustive, the directive would therefore preclude the demand for such an assurance. According to the *Inspire Art* judgment (paragraph 106), there can be no justification for this breach of the disclosure provisions of the directive. Therefore, the court of registration should not refuse All in One Star's application for registration for this reason.

Question 2b

18 Should the obligation to provide assurance pursuant to Paragraph 13g(2), sentence 2, in conjunction with Paragraph 8(3) of the GmbHG not fall within the scope of Directive 2017/1132, the question arises as to its compatibility with European primary law, specifically the freedom of establishment pursuant to Articles 49 and 54 TFEU.

19 The obligation to provide the assurance constitutes a restriction of the freedom of establishment guaranteed in Articles 49 and 54 TFEU because, without that assurance, no entry in the commercial register takes place and the entry is therefore made dependent on additional conditions and thereby at least potentially made more difficult.

20 According to the case-law of the Court of Justice (see, for example, *Inspire Art* judgment, paragraph 133), national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the TFEU must, if they are to be justified, fulfil four strict conditions: they must be applied in a non-discriminatory manner, be justified by imperative requirements in the public interest, and be suitable for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.

21 The referring court has doubts as to whether these conditions are met in the case of the assurance at issue in the main proceedings, which is demanded of managing directors of companies with registered office in a Member State pursuant to Paragraph 13g(1) and (2) of the HGB in conjunction with Paragraph 8(3) of the GmbHG.

22 It is true that Paragraph 13g(1) and (2) of the HGB in conjunction with Paragraph 8(3) of the GmbHG is applied in a non-discriminatory manner, as the managing directors of domestic companies are equally obliged to provide such assurance (Paragraph 8(3) of the GmbHG). The provision also serves imperative requirements in the public interest, namely creditor protection and protection of fair trading from unsuitable representatives of a company, as the application and examination procedure for the court of registration is made easier through the provision of the assurances, in that the court's own searches that would otherwise be required regarding any existing obstacles to appointment are rendered unnecessary.

23 However, the provision could go beyond what is necessary for attaining those objectives, because the managing directors of the foreign company are thereby subjected to a duty of declaration that is even subject to punishment (Paragraph 82(1), point 5, of the GmbHG). In this respect, it must be taken into consideration that all foreign companies established abroad with foreign management staff and also maintaining an actual main establishment there are also covered by the provisions of Paragraph 13g(2), sentence 2, and Paragraph 13e(3), sentence 2, of the HGB. Ongoing knowledge of the domestic legal situation in relation to obstacles to appointment of managing directors of domestic companies cannot be assumed of that group of people, which means that truthful assurance would, simply as a matter of fact, probably only be possible with difficulty for foreign managing directors familiar with the law of the State of establishment. It would also have to be checked in the individual case by the foreign managing director whether circumstances which did not preclude his appointment as managing director under the local legislation could nevertheless lead to a prohibition of appointment under German law. When implementing Directive 89/666 in 1992/1993, the German legislature therefore also still assumed that the provision of Paragraph 8(3) of the GmbHG was not appropriate for managing directors of foreign companies, and therefore deliberately refrained from extending that duty of assurance to foreign companies at that time.

24 The *Centros* judgment (paragraph 38) in particular also speaks against justification of the national provision at issue. This is because, in the present case, the obligation to provide the assurance pursuant to Paragraph 8(3) of the GmbHG is solely intended preventively to ensure that, by way of the branch establishment, domestic obstacles to appointment are not circumvented and people who are not suitable for properly taking care of business matters do not act as representatives of the company domestically. It therefore (only) serves preventively to combat possible abuses of the freedom of establishment and deceit by company representatives who are unsuitable under domestic law. However, according to the *Centros* judgment, that cannot justify a refusal to register the branch application.