



**In Advocate General Maciej Szpunar's view, a national court hearing a dispute between individuals concerning a claim based on a national provision which fixes minimum tariffs for service providers in a manner that is contrary to the Services Directive must disapply such a national provision**

*That obligation results from the specific nature of the provisions of the Services Directive as provisions giving specific expression to the freedom of establishment enshrined in the Treaty and from the need to respect the fundamental right to freedom of contract guaranteed by the Charter of Fundamental Rights of the European Union*

The Services Directive <sup>1</sup> states in particular that Member States are to examine whether their legal system makes access to a service activity or the exercise of it subject to compliance by the service provider with fixed minimum or maximum tariffs. In addition, Member States are to verify that those tariffs are non-discriminatory, necessary and proportionate.

In 2016, MN, who operates an engineering firm, and Thelen Technopark Berlin GmbH entered into an engineering services contract whereby MN undertook vis-à-vis Thelen Technopark Berlin to provide services for a construction project in Berlin. The parties agreed that, for the services performed, MN would receive a flat-rate fee of € 55 025. On the basis of the intermediate invoices issued by MN, Thelen Technopark Berlin paid MN a total of € 55 395.92 gross.

In 2017, after terminating the engineering services contract, MN issued a final invoice for the services performed by him, for an amount exceeding the amount agreed by the parties in the contract, based on the minimum rates under the Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Decree on fees for services provided by architects and engineers) ('the HOAI'). Taking into account the transfers that had already been made and the amount retained under the warranty, he subsequently brought an action against Thelen Technopark Berlin for payment of the balance of the fees due, which amounted to € 102 934.59 gross, together with interest and pre-litigation legal fees.

The action was largely successful at first and second instance.

By judgment of 4 July 2019, <sup>2</sup> the Court of Justice held that, by maintaining the fixed tariffs for planning services provided by architects and engineers laid down by the HOAI, Germany had failed to fulfil its obligations under the Services Directive. In addition, the Court held <sup>3</sup> that the provisions of that directive preclude national legislation which prohibits the agreement in contracts with architects or engineers of fees which are lower than the minimum rates laid down in the HOAI.

In that context, the Bundesgerichtshof (Federal Court of Justice, Germany), hearing the appeal on a point of law in which Thelen Technopark Berlin sought to have the action dismissed in its entirety, referred questions to the Court concerning the interpretation of EU law. That court is called upon to establish, in essence, whether EU law imposes an obligation on a national court

<sup>1</sup> 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).

<sup>2</sup> Judgment of 4 July 2019, *Commission v Germany* (C-377/17).

<sup>3</sup> Order of 6 February 2020, *hapeg dresden* (C-137/18).

hearing a dispute between individuals to disapply a provision of national law, from which the applicant derives its claim, where that provision is contrary to the Services Directive.

In his Opinion, delivered today, Advocate General Maciej Szpunar began by recalling that national courts are required to interpret national law in accordance with directives (consistent interpretation). In doing so, they are required to interpret provisions of national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by that directive. Where a conforming interpretation is not possible, the national court hearing a dispute between individuals must disapply the national provision that is contrary to the directive only in certain situations, inter alia when the need to observe a general principle of EU law, including those given specific expression in the Charter of Fundamental Rights of the European Union ('the Charter'), so requires.

The possibility of an interpretation of the national provision conforming with the directive having been ruled out by the referring court, the Advocate General examined whether there are grounds in the present case for a national court to disapply a national provision which is contrary to a directive in a dispute between individuals.

The Advocate General observed, first of all, that, in adopting the Services Directive, the EU legislature sought to give effect, or specific expression, to two fundamental freedoms of the internal market, one of which is freedom of establishment. In the Advocate General's view, unlike other secondary legislation that harmonises selected, and typically narrow, aspects of freedom of establishment in a given sector, the Services Directive does not serve to harmonise selected aspects of service activities, but rather makes the provisions of the Treaty more specific. Chapter III of the Services Directive <sup>4</sup> gives specific expression to the freedom of establishment laid down in Article 49 TFEU. Therefore, reliance on that chapter in a dispute against another individual should be permissible, just as direct reliance on the freedom of establishment enshrined in the Treaty is permissible in similar situations. At the same time, as is apparent from the judgment of the Court in *X and Visser*, <sup>5</sup> the provisions of Chapter III of the Services Directive also apply to a situation where all the relevant elements are confined to a single Member State. Chapter III of the Services Directive therefore not only gives specific expression to the freedom of establishment enshrined in the Treaty, but also extends its application to purely domestic relations. Consequently, where an interpretation that conforms with EU law is not possible, a national court hearing a dispute between individuals concerning a claim based on a national provision which fixes minimum tariffs for service providers in a manner that is contrary to the Services Directive must disapply such a national provision.

The Advocate General then went on to examine the possibility of disapplying the national provision at issue having regard to the fact that it is contrary to the freedom of contract guaranteed by the Charter. It is clear from the explanations relating to the Charter of Fundamental Rights <sup>6</sup> that that freedom is a constituent part of the freedom to conduct business with which Article 16 of the Charter is concerned. In the Advocate General's view, freedom of contract is a recognised right both in the legal orders of the Member States and in EU law. It confers certain rights on individuals, including the right of parties to a contract to determine the content of their legal relationship by setting the price of a service. In the Advocate General's view, to the extent that it guarantees the parties the freedom to set the price of a service, Article 16 of the Charter is a 'self-executing' provision, that is, it is sufficient in itself to confer upon individuals a right on which they can rely in disputes with other individuals.

According to the Advocate General, freedom of contract entails the individual's right to be free from interference in the autonomy of the will of the parties to a legal relationship, whether potential or already existing. The principal way of interfering in freedom of contract is for the State to impose restrictions on that freedom. Therefore, the only defence against such interference in a dispute with a party to a contract which derives its rights from such a restriction is to raise the objection that the

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<sup>4</sup> Entitled 'Freedom of establishment for providers'.

<sup>5</sup> Judgment of 30 January 2018, *X and Visser* ([C-360/15 and C-31/16](#)).

<sup>6</sup> Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

restriction in question is unlawful. Its lawfulness depends, in turn, on whether it satisfies the conditions for limitations on rights and freedoms laid down in Article 52(1) of the Charter.<sup>7</sup> In the Advocate General's view, the finding of the Court in the judgment of 4 July 2019<sup>8</sup> that the provision of national law at issue establishing a restriction on the right to freely set the price is incompatible with the provision of EU law which sets the limits on the adoption of such provisions means that the provision of national law must be disapplied. Where such conflict occurs, there is no doubt that the restriction, laid down in national law, on the right to freely set the price does not satisfy the conditions laid down in Article 52(1) of the Charter. Consequently, in the Advocate General's view, the national court should disapply the provision of national law at issue, which is contrary to the Services Directive, on the ground that the fundamental right to freedom of contract must be respected as regards the parties' right to set the price.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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<sup>7</sup> 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

<sup>8</sup> Judgment of 4 July 2019, *Commission v Germany* ([C-377/17](#)).