Court of Justice of the European Union
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Press and Information

Judgment in Case C-261/20
Thelen Technopark Berlin

Despite the fact that the Court has previously held that the German legislation setting minimum rates for fees for services provided by architects and engineers (the HOAI) is contrary to the Services Directive, a national court, when hearing a dispute between private individuals, is not required, solely on the basis of EU law, to disapply that German legislation

This is, however, without prejudice to, first, the possibility for that court to disapply that legislation on the basis of domestic law in the context of such a dispute, and, second, the possibility, if appropriate, for a party which has been harmed as a result of that legislation not being in conformity with EU law to claim compensation from the German State

In 2016, Thelen, a real estate company, and MN, an engineer, concluded a service contract pursuant to which MN undertook to perform certain services covered by the Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Honorarordnung für Architekten und Ingenieure – HOAI) (German decree of 10 July 2013 on fees for services provided by architects and engineers; 'the HOAI') in return for payment of a flat-rate fee, the amount of which was € 55 025.

One year later, MN terminated that contract and invoiced Thelen for the services performed by way of a final fee invoice. Relying on a provision of the HOAI [1] providing that, for the services which he or she has provided, the service provider is entitled to remuneration at least equal to the minimum rate set by national law, and taking into account the payments already made, MN brought an action before a court in order to claim payment of the remaining amount due – € 102 934.59 – that is to say, a sum greater than that agreed by the parties to the contract.

Thelen, having been partly unsuccessful at first and second instance, has brought an appeal on a point of law (Revision) before the Bundesgerichtshof (Federal Court of Justice, Germany), which is the referring court in the present case. In its reference for a preliminary ruling, that court recalls that the Court of Justice has previously held [2] that that provision of the HOAI is incompatible with the provision of Directive 2006/123 [3] prohibiting, in essence, the Member States from maintaining requirements which make the exercise of a service activity subject to compliance by the provider with fixed minimum and/or maximum tariffs if those requirements do not satisfy the cumulative conditions of non-discrimination, necessity and proportionality. That court has thus decided to put questions to the Court concerning the issue of whether, when assessing the merits of the action brought by a private individual against another private individual, a national court must disapply the provision of national law on which the application is based where that provision is contrary to a directive, in the present case the Services Directive. In that regard, that court notes that an

[1] Paragraph 7 of that decree makes the minimum rates set in the scale laid down in that paragraph mandatory for planning and supervision services provided by architects and engineers, except in some exceptional cases, and renders invalid any agreement concluded with architects or engineers setting fees lower than the minimum rates.
[2] Judgment of 4 July 2019, *Commission* v *Germany*, C-377/17, and order of 6 February 2020, *hapeg dresden*, C-137/18.
[3] The provision in question is Article 15(1), (2)(g) and (3) of 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'). More specifically, under that provision, the Member States must examine whether their legal system makes the exercise of a service activity subject to compliance by the provider with fixed minimum and/or maximum tariffs and must ensure that any such requirements are compatible with the conditions of non-discrimination, necessity and proportionality.

interpretation of the HOAI in conformity with the Services Directive is not possible in the present case.

Findings of the Court

By its judgment, the Court, sitting as the Grand Chamber, rules that **a national court, when hearing a dispute which is exclusively between private individuals, is not required, solely on the basis of EU law, to disapply a piece of national legislation which, in breach** of Article 15(1), (2)(g) and (3) **of the Services Directive, sets minimum rates for fees for services provided by architects and engineers and which renders invalid agreements derogating from that legislation.**

It is true that the principle of the primacy of EU law requires all Member State bodies to give full effect to the various EU provisions. In addition, where the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is unable to interpret national legislation in conformity with EU law, that same principle requires that national court to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means.

However, **a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect. This is, however, without prejudice to the possibility, for that court, or for any competent national administrative authority, to disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect.**

In the present case, the Court recalled that, according to its own case-law, Article 15(1) of the Services Directive is capable of having direct effect, given that that provision is sufficiently precise, clear and unconditional. However, that provision is being relied on, in the present case, as such in a dispute between private individuals for the purpose of disapplying a piece of national legislation which is contrary to that provision. Specifically, in the dispute in the main proceedings, the application of Article 15(1) of the Services Directive would deprive MN of his right to claim rates for fees corresponding to the minimum rates laid down by the national legislation in question. However, the case-law of the Court excludes that provision from being recognised as having such effect in such a dispute between private individuals.

The Court adds that, under Article 260(1) TFEU, if the Court finds that a Member State has failed to fulfil an obligation, that Member State is required to take the necessary measures to comply with the judgment of the Court, with the competent national courts and administrative authorities being required, for their part, to take all appropriate measures to enable EU law to be fully applied, disapplying, if the circumstances so require, a provision of national law which is contrary to EU law. However, **the purpose of judgments finding that there has been such a failure to fulfil obligations is, first and foremost, to lay down the duties of the Member States when they fail to fulfil their obligations, and not to confer rights on individuals. Thus, those courts or authorities are not required, solely on the basis of such judgments, to disapply in a dispute between private individuals a piece of national legislation which is contrary to a provision of a directive.**

By contrast, **a party which has been harmed as a result of national law not being in conformity with EU law could rely on the case-law of the Court in order to obtain, if appropriate, compensation for loss or damage caused by that law not being in conformity with EU law.** According to that case-law, it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with EU law.

The Court emphasises in that regard that, having previously held that the national legislation at issue in the main proceedings is not compatible with EU law, and that maintaining that legislation thus constitutes a failure to fulfil obligations on the part of the

Federal Republic of Germany, that breach of EU law must be regarded as sufficiently serious for the purposes of its case-law relating to the incurring of the non-contractual liability of a Member State for breach of EU law.

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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