

Case C-278/22**Summary of the request for a preliminary ruling****Date lodged:**

22 April 2022

Referring court:

Upravni sud u Zagrebu (Croatia)

Date of the decision to refer:

12 April 2022

Applicant:

ANTERA d.o.o.

Other party to the proceedings:

Hrvatska agencija za nadzor financijskih usluga

[...]

Upravni sud u Zagrebu (Administrative Court in Zagreb) [...], in the administrative court proceedings initiated by the applicant: ANTERA d.o.o., [...] Zagreb [...], [...]

[...]

against the other party to the proceedings: Hrvatska agencija za nadzor financijskih usluga Republike Hrvatske (Croatian Agency for the Supervision of Financial Services of the Republic of Croatia), [...] Zagreb [...], [...]

[...]

seeks interpretation of Article 49 TFEU and Article 2(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [...]

Subject matter of the main proceedings and succinct presentation of the facts

1. The applicant, ANTERA d.o.o., [...] Zagreb [...], lodged with this court a complaint concerning the lawfulness of the decision of the Hrvatska agencija za nadzor financijskih usluga (Croatian Agency for the Supervision of Financial Services) [...] of 14 February 2019 ('the contested decision').
2. The contested decision prohibits the applicant from conducting leasing transactions without having the authorisation to engage in that activity. The decision requires the applicant to provide the other party to the proceedings with a report on the measures undertaken, together with the evidence supporting the statements contained in the report, as proof of compliance with the decision, namely, to provide the other party to the proceedings, within eight days of receipt of the decision, with proof that an application has been lodged with the court registry to delete the following activity areas: 'leasing of motor vehicles', 'rental and leasing of cars and lorries (with or without a driver)' and 'rental and leasing of bicycles, scooters, etc.'
3. It is not in dispute between the parties that the applicant is a subsidiary of a parent company from another Member State where that company provides services of the same type as those at issue in the present case. It is likewise not in dispute between the parties that the applicant has registered the provision of the aforementioned services in the Republic of Croatia without having obtained authorisation to provide them from the other party to the proceedings in accordance with Article 8(1) of the Zakon o leasingu (Leasing Law).
4. During an extraordinary audit conducted by the other party to the proceedings, it was found that the applicant had entered into three long-term rental agreements (involving four cars) and subsequently, at the express request of its customer, had acquired the cars by purchasing them from the supplier, thereby acquiring ownership of the cars, and had made them available for customers to use.
5. Based on those facts, the other party to the proceedings concluded that this business model in fact amounted to leasing, and that the company was in effect engaging in leasing activities without a valid authorisation.
6. Contrary to the view of the other party to the proceedings on which the contested decision is based, the applicant considers that the above action by the other party to the proceedings infringed its rights guaranteed by the *acquis communautaire*. The applicant considers that the Republic of Croatia was not within its rights to equate an operating lease with a financial service and, consequently, to make the provision of operating leasing services, and also the provision of car rental services, subject to the supervision of the other party to the proceedings (HANFA) in accordance with the powers conferred on it by the Zakon o Hrvatskoj agenciji za nadzor financijskih usluga (Law on the Croatian Agency for the Supervision of Financial Services).

Provisions of Croatian law relied on

7. Article 15(1) of the Law on the Croatian Agency for the Supervision of Financial Services (*Narodne novine*, Nos 140/05, 154/11 and 12/12) provides that, for the purpose of exercising its public prerogatives, the agency is authorised to issue implementing rules under that Law, under laws that regulate the capital market, investment funds and other funds, the acquisition of joint stock companies, pension insurance companies, insurance and reinsurance **as well as financial services**, and also under other laws if those laws authorise it to do so.

8. Article 15(2) of the Law on the Croatian Agency for the Supervision of Financial Services provides that, **for the purpose of exercising its public prerogatives, the agency is authorised to supervise the activities of the entities subject to its supervision, which are specified in paragraph (1) of that Article**, and also of legal entities engaging in factoring services, in so far as those are not provided by banks within the framework of their registered activities, and also to impose measures aimed at eliminating identified illegalities and irregularities.

9. Article 3(1) of the Leasing Law (*Narodne novine*, No 141/13) provides that a leasing company is a commercial company with its registered office in the Republic of Croatia, **entered in the court register on the basis of an authorisation to engage in leasing activities, which is issued by the agency under the terms and conditions set forth in the Leasing Law**.

10. Article 4(1) of the Leasing Law provides that leasing is a legal transaction whereby the lessor acquires a leased asset in such a manner that he or she purchases it from a supplier and acquires ownership of the leased asset, and subsequently allows the lessee to use the leased asset for a certain period, and the lessee undertakes to pay a fee for that use.

10. Article 5(1) of the Leasing Law provides that, depending on the subject matter and characteristics of the lease, the lease may be a finance lease or an operating lease.

11. Article 5(2) of the Leasing Law provides that a finance lease is a legal transaction whereby the lessee, during the period of use of the leased asset, pays a fee to the lessor which takes into account the total value of the leased asset, bears the cost of depreciation of the leased asset, and by means of a buy-out option may acquire ownership of the leased asset for a fixed price which, at the time of exercising that option, is less than the actual value of the leased asset at that time, and the risks and benefits of ownership of the leased asset are largely transferred to the lessee.

12. Article 5(3) of the Leasing Law provides that an operating lease is a legal transaction whereby the lessee, during the period of use of the leased asset, pays a specified fee to the lessor, which need not take into account the total value of the leased asset, the lessor bears the cost of depreciation of the leased asset, and the lessee does not have a contractual buy-out option, and the risks and benefits of

ownership of the leased asset largely remain with the lessor, that is to say, they are not transferred to the lessee.

13. Article 6(1) of the Leasing Law provides that **leasing activities may be carried out by a leasing company referred to in Article 3 of that Law**, a leasing company from a Member State referred to in Article 46 of that Law and a branch of a leasing company from a third country referred to in Article 48 of that Law.

Provisions of European Union law relied on

14. The first paragraph of Article 49 TFEU prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. This prohibition also applies to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

15. Pursuant to the second paragraph of Article 49 TFEU freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

16. Pursuant to Article 2(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('Directive 2006/123/EC'), the directive applies to services supplied by providers established in a Member State.

17. Pursuant to Article 2(2)(b) of Directive 2006/123/EC, the directive does not apply to the following activities: **financial services**, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC.

18. Pursuant to recital 33 of Directive 2006/123/EC, the services covered by the directive concern a wide variety of ever-changing activities, including business services such as management consultancy, certification and testing; facilities management, including office maintenance; advertising; recruitment services; and the services of commercial agents. The services covered are also services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; distributive trades; the organisation of trade fairs; **car rental**; and travel agencies. Consumer services are also covered, such as those in the field of tourism, including tour guides; leisure services, sports centres and amusement parks; and, to the extent that they are not excluded from the scope of application of the

Directive, household support services, such as help for the elderly. Those activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet.

19. Annex I to Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ('Directive 2013/36/EU'), contains a list of activities subject to mutual recognition, and only financial leasing (and not operating leasing) is mentioned in point 3 thereof.

Succinct presentation of the reasoning in the request for a preliminary ruling

29. Analysing the legal standards indicated above, the Administrative Court in Zagreb notes that Directive 2013/36/EU, which regulates the activities of credit institutions, only mentions financial leasing, and it does not cover operating leasing.

30. Applying the *a contrario* argument, since the aforementioned Directive 2013/36/EU indicates that only financial leasing is a financial service, then Directive 2006/123/EC should apply to operating leasing.

31. It is clear from Article 2 and recital 33 of Directive 2006/123/EC, which are cited above, that that directive does not apply to financial leasing, but it does apply to a wide range of services covering a wide variety of activities, including car rental, which can be considered to constitute operating leasing.

32. The court observes that it is apparent from the aforementioned provisions of national law that the Republic of Croatia (in connection with the audit carried out by the other party to the proceedings) has equated operating leasing with a financial service, even though EU law does not stipulate that that service constitutes a financial service.

33. The court points out that, according to settled case-law of the Court of Justice of the European Union, a restriction on freedom of establishment within the meaning of Article 49 of the Treaty on the Functioning of the European Union includes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment that is guaranteed by the founding treaties. In the case at issue, the national provision may prevent or discourage the applicant and persons from other Member States wishing to establish themselves in the Republic of Croatia from engaging in rental or operating leasing activities.

Question referred for a preliminary ruling

39. In the light of the foregoing, the Administrative Court in Zagreb has doubts as to the interpretation of EU law concerning whether the laws providing for the audit of operating leasing services by the Croatian Agency for the Supervision of Financial Services render the market of the Republic of Croatia less attractive with respect to the exercise of the freedom of establishment guaranteed by the founding treaty.

40. In order to be able to consider this plea, the Administrative Court, pursuant to Article 45(2)(1) of the *Zakon o upravnim sporovima* (Law on Administrative Court Proceedings) (*Narodne novine*, Nos 20/10, 143/12, 152/14, 29/17 and 110/21), by order [...] of 12 April 2022, stays the administrative court proceedings and applies to the Court of Justice for an interpretation of EU law within the following scope:

1. Do operating leasing and/or long-term car rental services fall within the scope of Directive 2006/123/EC (the Services Directive), as indicated in the Handbook on implementation of the Services Directive of 13 March 2008 issued by the Directorate-General for the Internal Market and Services? Should an entity that engages in operating leasing (but not financial leasing) and/or long-term car rental be considered a financial institution within the meaning of Article 4(1)(26) of Regulation (EU) No 575/2013?

2. If the answer to the first question above is in the affirmative and the answer to the second question is in the negative, is granting the Hrvatska agencija za nadzor financijskih usluga (Croatian Agency for the Supervision of Financial Services) (HANFA) the power to supervise the provision of operating leasing and/or long-term car rental services pursuant to Article 6(1) of the Leasing Law, and to impose additional requirements and restrictions on undertakings that engage in such activities, compatible with Article 49 of the Treaty on the Functioning of the European Union, read in conjunction with Articles 9 to 13 of Directive 2006/123/EC?

3. Must Article 49 of the Treaty on the Functioning of the European Union and Articles 9 to 13 of Directive 2006/123/EC, in circumstances such as those at issue in the present dispute, in which a parent company from one Member State wishes to provide in another Member State, through a subsidiary, services of the same type as those which it provides in the original Member State, be interpreted as permitting a national law (the Leasing Law) to impose additional requirements and restrictions on the subsidiary and thereby hinder or render less attractive engaging in the activity in question?

[...]