

Case C-295/23

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:

9 May 2023

Referring court:

Bayerischer Anwaltsgerichtshof (Germany)

Date of the decision to refer:

20 April 2023

Applicant:

Halmer Rechtsanwaltsgesellschaft UG

Defendant:

Rechtsanwaltskammer München

Joined parties:

SIVE Beratung und Beteiligung GmbH

Dr Daniel Halmer, Rechtsanwalt

Subject matter of the main proceedings

Compatibility with EU law (Articles 49 and 63 TFEU, Directive 2006/123) of the requirement in German law that only lawyers and persons practising equivalent professions may be partners in a law company and that partners must be professionally active in the law company – Relevance of clauses of the company's articles of association the purpose of which is to guarantee the independence of the management board, which is reserved for lawyers who are admitted to practise

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

- 2.1 Does it constitute an unlawful restriction of the right to free movement of capital under Article 63(1) TFEU if, under the laws of a Member State, the admission to practise law held by a law company must be withdrawn where
 - 2.1.1 a share in the law company is transferred to a person who does not satisfy the special professional requirements governing the acquisition of a share under the law of the Member State? Under those provisions, a share in a law company may be acquired only by a lawyer or other member of a bar association, a patent attorney, tax consultant, tax representative, auditor or certified accountant, a member of a legal profession from another State who is permitted to provide legal advice in Germany, or a patent attorney, tax consultant, tax representative, auditor or certified accountant of another State who is authorised to carry on that activity in Germany or a doctor or pharmacist;
 - 2.1.2 a partner satisfies the special requirements set out in point 2.1.1., but is not professionally active in the law company?
 - 2.1.3 because of the transfer of one or more shares or voting rights, the majority thereof are no longer held by lawyers?
- 2.2 Does it constitute an unlawful restriction of the right to free movement of capital under Article 63(1) TFEU where a partner who is not entitled to practise a profession in accordance with point 2.1.1. does not have a voting right, even though the company's articles of association contain clauses, in order to protect the independence of legal professionals and of the company's legal activities, under which it is ensured that the company is represented as managing directors or authorised officers only by lawyers, partners and the partners meeting are prohibited from influencing the management board through instructions or indirectly through the threat of disadvantages, partners' resolutions in contravention of those rules are rendered ineffective and the obligation of legal confidentiality is extended to partners and persons acting on their behalf?
- 2.3 Do the restrictions referred to in points 2.1. and 2.2. satisfy the conditions laid down in Article 15(3)(a) to (c) of Directive 2006/123/EC of 12 December 2006, OJ 2006 L 376, p. 36 ('the Services Directive'), for permitted interferences with the freedom to provide services?
- 2.4 In the event that, in the view of the Court of Justice, the applicant's right to free movement of capital (points 2.1. and 2.2.) is not affected and there is no infringement of the Services Directive (point 2.3):

Is the right of the first joined party (S-GmbH) to freedom of establishment under Article 49 TFEU infringed by the restrictions referred to in points 2.1. and 2.2.?

Provisions of European Union law relied on

TFEU Treaty, especially Articles 49 and 63

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, especially Article 15

Provisions of national law relied on

Bundesrechtsanwaltsordnung (Federal Lawyers Code), in the version applicable up to 31 July 2022 ('old version of the BRAO'), especially Paragraph 59a et seq.

Bundesrechtsanwaltsordnung, in the version applicable from 1 August 2022 ('new version of the BRAO'), especially Paragraph 59b et seq.

Succinct presentation of the facts and procedure

- 1 The proceedings concern the lawfulness of the revocation by the defendant of the applicant's admission to practise as a law company.
- 2 The applicant is a law company which is operated in the form of a limited liability entrepreneurial company (UG). Its managing director and sole partner was originally Daniel Halmer.
- 3 By agreement of 31 March 2021, 51 of the 100 shares were transferred by Mr Halmer to S-GmbH, a limited liability company governed by Austrian law which is not admitted to provide legal advice either in Germany or in Austria. At the same time, the articles of association of the UG were amended so as to enable shares to be transferred to a corporation not admitted to practise law and to guarantee the independence of the management board, which is still reserved for lawyers who are admitted to practise.
- 4 By letter of 19 May 2021, the defendant notified the applicant that the transfer of shares to S-GmbH was unlawful under the old version of the BRAO with the result that the applicant's admission to practise law would have to be revoked if the transfer of the shares remained.
- 5 The applicant notified the defendant by letter of 26 May 2021 that the transfer of the shares was to remain. It requested that a decision be adopted.

- 6 By decision of 9 November 2021, the applicant's admission was revoked. An action was brought against that decision at the referring court on 26 November 2021.

The essential arguments of the parties in the main proceedings

- 7 By its action, the applicant alleges that its rights are infringed by the revocation of the admission. It is true that the revocation is consistent with the rules of the old version of the BRAO, as S-GmbH is not a professional within the meaning of Paragraph 59a of the old version of the BRAO. The decision is nevertheless unlawful because those provisions infringe, inter alia, higher-ranking EU law. The revocation of the admission infringes in particular the applicant's right to free movement of capital (Article 63(1) TFEU), S-GmbH's right to freedom of establishment (Articles 49 and 54 TFEU), the applicant's rights under Article 15 of Directive 2006/123 and the rights enjoyed by the applicant, S-GmbH and Mr Halmer under Articles 15 and 16 of the Charter of Fundamental Rights of the European Union.
- 8 The defendant submits that this is a fabricated case. The applicant has not carried on any legal activity. In view of the amount of its share capital of EUR 100, that is not to be expected. The scope of the protection offered by free movement of capital is not affected. The applicant may not rely on the freedom of establishment because the situation in question is purely national. Furthermore, the restrictions which led to the revocation of the admission are justified by Article 65 TFEU and Article 15(2)(c) and Article 15(3) of Directive 2006/123.

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

National legal framework

- 9 Under German law, activity as a lawyer is subject to admission by the bar association. Admission is granted to natural persons who are qualified for judicial office. In addition, companies and groupings of persons can also be admitted to practise the profession jointly. The law applicable at the time of the revocation of admission which is relevant to the assessment in the present case provided for significant restrictions in respect of law companies (Paragraph 59a et seq. of the old version of the BRAO). Under Paragraph 59a of the old version of the BRAO, only the persons referred to in point 2.1.1 of the questions referred for a preliminary ruling are authorised to practise the profession jointly. Paragraph 59c of the old version of the BRAO additionally authorises law companies in the form of corporations to practise the legal profession. Under Paragraph 59e(1) of the old version of the BRAO, partners in such a law company may be only lawyers and professionals in accordance with point 2.1.1. of the questions referred. Under the second sentence of Paragraph 59e(1) of the old version of the BRAO, such persons must, furthermore, be professionally active in the law company. Lastly,

persons who are not permitted to practise their profession in accordance with point 2.1.1. of the questions referred do not have a voting right. If the law company does not satisfy these requirements, it must be denied admission pursuant to Paragraph 59d of the old version of the BRAO. If the conditions subsequently cease to be met, the law company's admission must be revoked (Paragraph 59h of the old version of the BRAO). The responsible bar association does not enjoy discretion in this regard.

- 10 From 1 August 2022, Paragraph 59a et seq. of the old version of the BRAO was replaced by Paragraph 59b et seq. of the new version of the BRAO. The new rules expand the possibilities for professional collaboration for lawyers to further professions, but the prohibition on shareholding by third parties and the obligation to be active in the company continue to apply in modified form.
- 11 By reason of the amendment of the articles of association and the transfer of 51% of the shares in the UG to S-GmbH there are a number of grounds for the (mandatory) revocation of admission under German law:
 - The law company now has a partner which does not carry on an activity in accordance with Paragraph 59a of the old version of the BRAO.
 - S-GmbH also cannot therefore be professionally active for the law company.
 - The majority of shares and voting rights are no longer held by lawyers.

The questions referred for a preliminary ruling

Limitation of free movement of capital

- 12 The notion of free movement of capital covers all transactions related to financial or real capital which do not result directly from movements of goods or services. Those transactions include the acquisition of shares in a legal person governed by private law. The scope of the protection offered by the freedom of establishment is affected only if, through the transaction, the acquirer intends to secure his influence on an undertaking. Particular regard must be had in this regard to the amount of shares to be acquired and the structure of the articles of association (judgment of 20 September 2018, *EV*, C-685/16, EU:C:2018:743). On the basis of these criteria the applicant's right to free movement of capital is restricted. S-GmbH does obtain 51 of 100 shares and thus a majority holding. The articles of association ensure that S-GmbH is nevertheless unable to exert a controlling influence on the applicant.

Compatibility of the restrictions resulting from Paragraph 59a et seq. of the old version of the BRAO with free movement of capital

- 13 The applicant's right to free movement of capital is restricted by Paragraphs 59e, 59a and 59h of the old version of the BRAO. Those provisions preclude the

transfer of shares in a law company to third parties. A transfer of shares is possible only if the acquirer is a professional within the meaning of Paragraph 59a of the old version of the BRAO, if he is active for the company in that capacity and if the majority of shares and voting rights continues to be held by lawyers. Under the second sentence of Paragraph 59e(2) of the old version of the BRAO, a partner who is not entitled to practise a profession within the meaning of Paragraph 59a of the old version of the BRAO does not have a voting right. Those provisions interfere with the applicant's legal position.

- 14 The referring court has doubts whether this interference with free movement of capital can be justified by Article 65 TFEU. Under Article 65(2) TFEU, rules of the Member States which are intended to serve the purpose of maintaining public policy and public security are permitted. Independence of legal advice, compliance with the requirement of transparency and security of professional confidentiality have been recognised by the Court of Justice as public policy and security objectives which can justify a restriction of free movement of capital (judgment of 2 December 2010, *Jakubowska*, C-225/09, EU:C:2010:729). The Court of Justice has not yet ruled, however, whether restrictions on shareholding in a law company, as provided for in Paragraphs 59a, 59e and 59h of the old version of the BRAO, are proportionate with a view to achieving those objectives. In the judgment of 21 April 2005, *Commission v Greece* (C-140/03, EU:C:2005:242, paragraph 34), it set out general conditions in this regard. The finding that national measures are in principle appropriate for ensuring attainment of the objective in the general interest pursued is not sufficient, according to that judgment. Furthermore, the disputed restrictions may not go beyond what is necessary to achieve the objective pursued. There are doubts whether the restrictions in Paragraphs 59a, 59e and 59h of the old version of the BRAO are necessary to guarantee the independence of lawyers.
- 15 These doubts could be valid. The independence of the legal activities of the company's managing directors and authorised representatives is guaranteed by the fact that, under Paragraph 59f(4) of the old version of the BRAO, partners are not permitted to exert influence on the lawyers' activities relating to provision of legal advice, including by accepting or refusing clients. Independence may additionally be safeguarded by provisions in the articles of association. Such provisions are contained in the applicant's articles of association.
- 16 It seems questionable whether the general exclusion of third parties who do not practise a profession within the meaning of Paragraph 59a of the old version of the BRAO is necessary to ensure the independence of legal professionals. The risk that a partner or investor exerts influence on the management board does not depend on whether a partner practises a profession within the meaning of Paragraph 59a of the old version of the BRAO. Economic dependence of legal professionals can occur in the same way where a professional within the meaning of Paragraph 59a of the old version of the BRAO provides substantial capital for the company. The rule also does not protect against a lawyer being economically dependent on an external investor or a major client. At least where the statutory

rules seeking to guarantee the independence of legal professionals are, as in the present case, reinforced by provisions of the articles of association to protect the independence of the legal position of managing directors and their representatives, which means that the partners are not able to influence operational activities, it is not evident that third parties could interfere with the independence of legal advice to any greater extent than professionals in a law company.

- 17 The principle of proportionality under EU law permits interferences with the fundamental freedoms laid down in the Treaties only if the restrictions serve a recognised public policy or general interest objective in a consistent and systematic manner. The restrictions must be non-discriminatory, justified by overriding general interests and appropriate for ensuring attainment of the objectives pursued and may not go beyond what is necessary to attain the objective pursued (judgments of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, and of 15 October 2015, *Tomášová*, C-168/15, EU:C:2016:602).
- 18 From this point of view too, there are reservations whether Paragraphs 59a, 59e and 59h of the old version of the BRAO contain a consistent and systematically logical restriction to safeguard the independence of legal activities and the sound administration of justice. The legislation pursues the objective of ensuring the independence of legal activities by precluding shareholding in the company by persons with purely economic interests, by permitting only persons with professional ties to be members of the company and by requiring them to be active within the company. In principle, the restriction of the group of partners does mean that third parties who do not satisfy those criteria cannot exert an influence on the company as partners. However, this restriction does not meet the requirement of consistency if partners who satisfy the requirements laid down in Paragraph 59e of the old version of the BRAO are able to influence management board activities in the same manner. Paragraphs 59a and 59e of the old version of the BRAO do not contain any quantitative requirements governing the partners' duty to contribute. It is therefore possible that a partner pursues primarily financial interests through his participation and contributes to achieving business objectives only to a lesser extent. Furthermore, it is certainly not ensured that lawyers who are admitted to practise and are partners in the law company contribute substantially to the company.
- 19 The legal questions raised have not yet been clarified in the case-law of the Court of Justice. In its judgment of 21 April 2005, *Commission v Greece* (C-140/03, EU:C:2005:242), which concerned the freedom of establishment, it did recognise that the protection of public health is a legitimate objective by which the freedom of establishment may be restricted. The measures were not proportionate, however, because lesser interferences would also have been sufficient. In the present case, it is guaranteed by Paragraph 59f of the old version of the BRAO and the applicant's articles of association that only lawyers are able to act as managing directors for the law company. This is consistent with what the Court of Justice has considered to be necessary to attain the objective of protecting public

health. Furthermore, those rules contain provisions which ensure the independence of lawyers from partners in carrying out their activities.

- 20 The same conclusion can also be drawn from the judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316), which likewise concerns the freedom of establishment. In that judgment, the Court of Justice found no fault with German legislation under which, with a few exceptions, the operation of a pharmacy is reserved solely for pharmacists. The operation of a pharmacy by a corporation is therefore precluded in principle. The Court of Justice justified this by the particular risks and needs connected with the sale of medicinal products and by health-policy aspects. No such risks exist in respect of legal advice. In addition, by contrast with the operation of pharmacies, the provision of legal advice by corporations is permitted. This shows that in the view of the legislature too, the situation as regards risks is not similar.

Infringement of the applicant's rights under Directive 2006/123

- 21 Under Article 15(2)(c) of Directive 2006/123, Member States are to examine inter alia whether their legal system makes access to a service activity or the exercise of it subject to compliance with non-discriminatory requirements which relate to the shareholding of a company. Under Article 15(3)(c) of the directive, restrictions must be proportionate. That is the case where requirements are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective and it is not possible to replace those requirements with other, less restrictive measures which attain the same result. There are doubts whether the restrictions contained in Paragraphs 59a, 59e and 59h of the old version of the BRAO relating to the acquisition of shares in a law company satisfy those requirements.
- 22 The legal advice activities carried on by the applicant constitute services within the meaning of Article 4(1) of Directive 2006/123. That directive has direct effect in respect of the applicant. It can rely directly on the fact that restrictions are not justified by Article 15(2)(c) and (3)(c) of the directive (judgment of 30 January 2018, *X and Visser*, C-360/15 and C-31/16, EU:C:2018:44, paragraph 130). For the reasons mentioned in paragraphs 14 to 20 above, there are serious doubts whether the restrictions on the acquisition of shares in a law company in Paragraphs 59a and 59e of the old version of the BRAO are proportionate within the meaning of the directive. Rather, the independence of legal activities, the safeguarding of the administration of justice and the obligation of legal confidentiality and thus confidence in the administration of justice must be considered to be adequately protected by the restrictions on the rights of partners laid down in Paragraph 59 et seq. of the old version of the BRAO and in the articles of association.

Compatibility of the restrictions resulting from Paragraph 59a et seq. of the old version of the BRAO with freedom of establishment

- 23 If it not considered that S-GmbH does not seek to exert a controlling influence on the applicant's activities and, accordingly, the applicant's right to free movement of capital may be infringed, consideration must also be given, in addition to an infringement of Directive 2006/123, to an infringement of S-GmbH's right to freedom of establishment (Article 49 TFEU). In this respect too, the interference in the form of the restrictions resulting from Paragraphs 59a, 59e and 59h of the old version of the BRAO could be disproportionate.

WORKING DOCUMENT