Case C-438/22

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:

4 July 2022

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

4 July 2022

Applicant:

Em akaunt BG EOOD

Defendant:

Zastrahovatelno aktsionerno druzhestvo ‘Armeets’ AD

Subject matter of the main proceedings

Review of the decision as to costs because the court reduced the amount of lawyers’ remuneration sought – a part of the costs – due to excessiveness

Subject matter and legal basis of the request

Whether national courts, when reducing the lawyers’ remuneration of one of the parties, are bound to the tariff for the minimum lawyers’ remuneration set by a lawyers’ organisation, of which lawyers are members on the basis of a statutory obligation

Article 276, first paragraph, TFEU

Questions referred for a preliminary ruling

1. Must Article 101(1) TFEU, as interpreted in the judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, be understood as meaning that

national courts may disapply a rule of national law under which the court is not entitled to order the unsuccessful party to pay the costs for lawyers' remuneration in an amount which is less than a minimum amount set by a regulation adopted only by a professional association of lawyers, such as the Vissh advokatski savet (Supreme Bar Council, Bulgaria), where that regulation is not limited to the attainment of legitimate objectives, not only in relation to the contracting parties but also in relation to third parties who would be ordered to pay the costs of the proceedings?

2. Must Article 101(1) TFEU, as interpreted in the judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, be understood as meaning that the legitimate objectives justifying the application of a rule of national law under which the court is not entitled to order the unsuccessful party to pay the costs for lawyers' remuneration in an amount which is less than a minimum amount set by a regulation adopted by a professional association of lawyers, such as the Supreme Bar Council (Bulgaria), are to be regarded as having been defined by law, and the court may disapply the national rule where it does not find that those objectives are exceeded in the specific case, or, conversely, must it be assumed that the rule of national law is inapplicable unless it is found that those objectives have been attained?

3. Under Article 101(1) TFEU, in conjunction with Article 2 of Regulation (EC) No 1/2003, which party, in a civil dispute in which the unsuccessful party is ordered to pay the costs, is required to establish the existence of a legitimate objective and the proportionality of pursuing it by means of a regulation concerning the lowest possible level of lawyers' remuneration adopted by a professional association of lawyers where a reduction in the lawyers' remuneration is sought on the ground of excessiveness – the party seeking the award of costs or the unsuccessful party seeking a reduction in the remuneration?

4. Must Article 101(1) TFEU, as interpreted in the judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, be understood as meaning that a public authority, such as the Narodno sabranie (National Assembly, Bulgaria), when delegating the adoption of minimum prices to a professional association of lawyers by way of a regulation, must expressly specify the specific methods by which the proportionality of the restriction is to be determined, or must it instruct the professional association to discuss them when adopting the regulation (for example in the explanatory memorandum to the draft or in other preparatory documents), and, if such methods are not taken into account, must the court, where appropriate, disapply the regulation without examining the specific amounts, and is the existence of a reasoned discussion of such methods sufficient to presume that the rule is limited to what is necessary to achieve the legitimate objectives set?

5. If Question 4 is answered in the negative, must Article 101(1) TFEU, as interpreted in the judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, be understood as meaning that the court must assess the

legitimate objectives justifying the application of a rule of national law under which the court is not entitled to order the unsuccessful party to pay the costs for lawyers' remuneration in an amount which is less than a minimum amount set by a regulation adopted by a professional association of lawyers, such as the Supreme Bar Council (Bulgaria), and the proportionality of those objectives, with regard to the effect on the amount specifically provided for in respect of the case concerned, and to disapply that amount where it exceeds what is necessary to achieve the objectives, or must the court investigate, in principle, the nature of the criteria provided for in the regulation for the determination of the amount and the manner in which those criteria manifest themselves, and, if it finds that in certain cases they might exceed what is necessary to achieve the objectives, to disapply the rule in question in all cases?

6. If the guarantee of high-quality legal services is regarded as a legitimate objective of the minimum remuneration, does Article 101(1) TFEU then allow the minimum amounts to be set solely on the basis of the nature of the case (subject matter of the claim), the material interest in the case and, in part, the number of hearings held, without taking into account other criteria such as the existence of factual complexity, the applicable national and international rules, and so forth?

7. If the answer to Question 5 is that the national court is to assess, separately for each case, whether the legitimate objectives of ensuring effective legal protection may justify the application of the legal rule for the minimum amount of remuneration, what criteria must the court use to assess the proportionality of the minimum amount of remuneration in the specific case if it considers that a minimum amount is regulated with the objective of ensuring effective legal protection at national level?

8. Must Article 101(1) TFEU, in conjunction with the third paragraph of Article 47 of the Charter of Fundamental Rights, be interpreted as meaning that, for the purpose of assessing Question 7, account must be taken of rules, approved by the executive, on the remuneration payable by the State to court-appointed lawyers which constitutes – by virtue of a statutory reference – the maximum amount that can be reimbursed to successful parties represented by an in-house legal adviser?

9. Must Article 101(1) TFEU, in conjunction with Article 47 of the Charter of Fundamental Rights, be interpreted as meaning that the national court, for the purpose of assessing Question 7, is required to specify a level of remuneration which is sufficient to achieve the objective of ensuring high-quality legal protection and which it must compare with the level of remuneration resulting from the legal rule, and to state the reasons for the level which it has determined using its discretion?

10. Must Article 101(2) TFEU, in conjunction with the principles of the effectiveness of domestic procedural remedies and the prohibition of abuse of rights, be interpreted as meaning that, where a national court finds that a decision

of an association of undertakings infringes the prohibitions on the restriction of competition by fixing minimum tariffs for its members, without there being any valid reasons for allowing such interference, it is obliged to apply the minimum tariff rates laid down in that decision, since they reflect the actual market prices of the services to which the decision relates, because all persons providing the service in question are required to be members of that association?

Provisions of European Union law and case-law relied on

TFEU, Article 101(1) and (2)

Charter of Fundamental Rights of the European Union, Article 47

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 2

Judgment of 23 November 2017, *CHEZ Elektro Bulgaria*, Joined Cases C-427/16 and C-428/16, EU:C:2017:890

Provisions of national law relied on

Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria), Articles 121, 122, 124 and 134

Grazhdanski protsesualen kodeks (Code of Civil Procedure; 'the GPK'), Articles 78, 162, 248, 280 and 288

Zakon za advokaturata (Law on Lawyers; 'the ZAdv'), Articles 36, 38, 113, 118, 121 and 132

Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on the liability of the State and municipalities for damages; 'the ZODOV'), Articles 1 and 5

Zakon za pravnata pomosht (Law on Legal Aid; 'the ZPP'), Articles 6, 37 and 39

Naredba No 1 ot 9 yuli 2004 g. na Visshia advokatski savet za minimalnite razmeri na advokatskite vaznagrazhdenia (Regulation No 1 of 9 July 2004 of the Supreme Bar Council on the minimum amounts of lawyers' remuneration; 'the NMRAV' or 'Regulation of the Supreme Bar Council'), Articles 2 and 7 and Paragraphs 2a and 3

Naredba za zaplashtaneto na pravnata pomosht (Regulation on the Payment of Legal Aid), Article 25 and Paragraph 2

Tarifa za darzhavnite taksi, koito se sabirat ot sadilishtata po Grazhdanskia protsesualen kodeks (Tariff for fees charged by the courts under the Code of Civil Procedure), Articles 1 and 3

Judgments of the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria; 'the VAS') No 5485 of 2 May 2017 and No 5419 of 8 May 2020; Interpretative Decision No 1 of the VAS of 15 March 2017; judgments of the VAS, No 422 of 13 January 2021, No 4406 of 14 April 2020 and No 14894 of 2 December 2020; order No 875 of the VAS of 22 January 2018; orders of the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria; 'the VKS'), No 199 of 11 May 2022, No 437 of 12 December 2018, No 138 of 15 March 2021 and No 28 of 21 January 2022.

In Bulgarian law of civil procedure, the question of the specific amount of costs is ruled on in the decision concluding the proceedings. Thereafter, it cannot be ruled on by way of a new decision. Unlike the decision on the main heads of claim, which cannot be altered by the same court, Article 248 of the GPK allows for the remedying of errors and omissions in the costs by the same court as a condition for a subsequent appeal.

Article 78 of the GPK provides that the costs incurred by the successful party are to be passed on to the unsuccessful party. Part of the costs is the lawyer's remuneration, which is reimbursed by the unsuccessful party only if its payment is documented. Article 78(5) of the GPK provides for the possibility to reduce that amount only in respect of the lawyers' fee where there is no causal link between the costs required for the defence in the dispute and the amounts actually paid by the successful party. This prevents amounts which had been set at an excessive amount without the participation of the ultimate debtor from being passed on, without the specific reason (generosity, abuse, and so forth) being examined. Such a reduction can only be made by the court on application by the unsuccessful party within the prescribed period. Under that provision, the court may reduce the amount to the minimum amount, but if the case is complex in fact or in law, the court is entitled not to reduce the remuneration or to reduce it to an amount higher than the minimum amount. The agreed amount remains in force as between the representative and the represented successful party.

Succinct presentation of the facts and procedure in the main proceedings

1 The main subject matter of the main proceedings before the referring court is a claim brought by Em akaunt BG EOOD (applicant) against ZAD Armeets AD (defendant) for property insurance compensation for the theft of a passenger car in the amount of BGN 16 112.32 and for compensation for delay in the amount of statutory interest of BGN 1 978.24. The judgment of 16 February 2022 disposed of those issues (before the referring court) and granted the claims in part.

2 In the present case, the applicant was represented by a lawyer who had already requested, in the application initiating proceedings, that the applicant be awarded lawyers' remuneration. A contract for payments to the lawyer in the amount of BGN 1 070 was submitted. In its reply, the defendant objected that the applicant's lawyer's remuneration was excessive.

3 At the first hearing before the court, the case was adjourned. At the following hearing, the written evidence submitted by the parties was accepted, an automotive technical expert was heard, an increase in the claim was allowed, and the case was reserved for judgment. At the same hearing, the parties submitted statements of costs, whereby the applicant claimed BGN 723.62 in State fees, BGN 125 for the expert's report and BGN 1 070 in lawyers' remuneration.

4 In the grounds of the judgment, in the part concerning costs, the referring Chamber considered that, at that time, under market conditions in Bulgaria, high-quality legal counsel could be provided at an hourly rate of BGN 42, that the court estimated that the work for the case amounted to approximately 23 hours and that remuneration of BGN 943 was therefore justified.

5 It is stated in the grounds relating to costs in the referring court's decision that, under Article 78(5) of the GPK, in the event of an objection, the court is to award only that part of the lawyers' remuneration actually paid which is not excessive having regard to the complexity of the case. At the end of that provision, it is stipulated that the court may not award less than the minimum amount under Article 36 of the ZAdv. In accordance with the judgment of the Court of Justice in Case C-427/16, the latter provision would infringe Article 101(1) TFEU, read in conjunction with Article 4(3) TEU, if it is not necessary to achieve the objective pursued. The referring Chamber considers that the setting of minimum tariffs which ensure that the lawyer earns an income enabling him or her to have a decent existence, perform his or her duties to a high standard and be able to undertake further training is proportionate to the legitimate objective of guaranteeing the provision of high-quality legal services to society. The referring Chamber has established that the gross rate up to which the remuneration is not excessive is BGN 42 per hour. In the present case, up to five hours are attributed to the skilled legal work of assessing the evidence and the applicable law, three hours to the consultations with the client, and 12 hours to the drafting of the statement of claim and observations; approximately three hours are required for travelling to and attending two hearings held in open court as well as the follow-ups thereto, with the result that the efforts made are to be valued at approximately BGN 943, on the basis of the above rate.

6 As the defendant chose to be defended by in-house legal adviser, the remuneration for the latter in the present case was fixed at BGN 201, of which the applicant was ordered by the court to pay a portion corresponding to the dismissed part of the action.

7 Both parties challenged the judgment with regard to the issue of insurance, with the applicant's appeal also raising the issue of costs. The applicant subsequently also filed an express application for review with the court of first instance. The applicant relies on a decision of the VKS, according to which the court is bound by the minimum amounts laid down in the Regulation of the Supreme Bar Council. It submits that the phrase 'limited to what is necessary' in the judgment of the Court of Justice also does not mean that the minimum amount necessary to

achieve the legitimate objective must not be exceeded. Moreover, the court should have assessed the factual and legal complexity of the case, not the hourly rate. According to the applicant, the calculation of sufficient income was contrary to the constitutional guarantee of the right to work.

8 The defendant requested that the applicant's application for amendment of the costs be refused.

9 The referring Chamber is therefore obliged under the procedural law to reassess whether the remuneration agreed and paid is excessive.

10 The referring court states that, in practice, there is not a genuinely trackable market in Bulgaria as regards the prices of lawyers' services in the mass-market segment. The vast majority of contracts are formally concluded at the minimum amounts laid down in the Regulation of the Supreme Bar Council. The referring court suspects that, in a not insignificant number of cases, the payment of remuneration in that amount is documented in writing for the purpose of being passed on to the unsuccessful party, without the successful party having actually paid the full amount to his or her lawyer.

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

11 In its judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, the Court of Justice held that the Bulgarian legislation which, first, obliges a person who instructs a lawyer to pay that lawyer remuneration which is not lower than that laid down in a regulation adopted by the lawyers' professional association, the Supreme Bar Council, and, second, obliges the court, when assessing whether the remuneration of the lawyer of the other party in the proceedings is excessive, not to reduce the remuneration below that minimum amount, may infringe the competition rules – Article 101 TFEU. At the same time, the judgment states that such a conflict may not be prohibited by EU law if there are public interest objectives requiring such an approach to the setting of minimum remuneration – by lawyers themselves – and if the manner in which the regulation is adopted is proportionate to those objectives.

12 Thus, the Court of Justice leaves it to the national court to assess whether minimum price thresholds set by a body of an association of undertakings providing a service and having an anti-competitive interest are permissible with regard to those services, that is to say, to formulate exceptions to the fundamental prohibition under Article 101 TFEU. The case-law and legal provisions cited above give the referring Chamber a number of doubts as to how it should apply the Regulation on minimum amounts for lawyers' remuneration and in what way it should determine the non-excessive lawyers' fees payable by the unsuccessful party.

Personal scope of the review – Question 1

13 The ambiguity stems from the fact that the prohibition of decisions and concerted practices is raised indirectly (incidentally). The referring Chamber is not aware of any case in which a dispute has arisen between a lawyer and his or her client as to the lawfulness of the minimum remuneration, but, as mentioned above, there are doubts as to whether the remuneration is actually paid in full by the direct consumers. Nor is there known to be a dispute between a lawyer and the Supreme Bar Council, since lawyers do not have a fundamental interest in challenging the regulation by requesting lower amounts, and disciplinary proceedings under the ZAdv are not subject to judicial review. As stated above, the association, for its part, reacts to any annulment following a request from a third party to have the Regulation on minimum amounts for lawyers' remuneration amended (or for an interpretation declaring that regulation to be invalid).

14 Thus, the interest in reviewing the lawfulness of the minimum amounts does not lie primarily with the consumers of legal services, but with the indirectly affected parties to whom the price is passed on. This also applies to the present case, which is governed by Article 78(5) of the GPK, under which, at the request of the unsuccessful party, the amount which it must reimburse to the successful party from the lawyer's remuneration paid by the successful party may be reduced. Such issues arise in a significant proportion of civil and commercial cases, if not in all of them, because the unsuccessful party always has an interest in being ordered to pay a smaller amount and raises the plea of excessiveness 'by default' (in every case and without a requirement to state reasons), the other party almost always claims costs whose documented amount is not the minimum amount and opposes their reduction, and the amount legally payable is not clearly defined.

15 The referring court requires clarification as to the applicability of the interpretation given in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*. Since the party challenging the amount of the lawyer's remuneration in the present case is not a party to the contract, it is necessary to allay the doubt of some national courts that the judgment of the Court of Justice applies only in certain cases of award of costs and not in others. The referring Chamber takes the view that account must be taken of the fact that, although the judgment of the Court of Justice was delivered in relation to the old version of the provision on fees for in-house legal advisers in Article 78(8) of the GPK, it was precisely the fact that that version referred to the rules on lawyers' remuneration at market rates that was the decisive factor in that case.

16 In the context of Article 36 of the ZAdv, the NMRAV establishes a limit to the freedom of contract between lawyer and client, that is to say, it provides for a prohibition on negotiating, in accordance with the will of the parties, remuneration lower than that resulting from the nature of the defence. However, the reference to the NMRAV in the context of Article 78(5) of the GPK creates a certain tension, because, since the court does not act according to freedom of contract but according to the criterion of fairness of remuneration according to the factual and

legal complexity of the case, it could never set the remuneration at a level which is lower than fair remuneration, with the result that the limit under the regulation can lead only to the setting of remuneration which is higher than fair remuneration. In that regard, it must be stated that the approach followed by the referring Chamber leads, in principle, to remuneration being set not at the lowest possible rate but at a mid-market rate. In more extensive cases, even those in which there is less material interest, that remuneration exceeds the amounts under the NMRAV.

Burden of proof and specificity of the review – Questions 2 to 5

17 Neither the referring Chamber nor the case-law cited expresses any doubts as regards the objective pursued by the legislature, namely to guarantee the quality of legal services. (Certain doubts remain as to the extent to which the measure provided for is in principle suitable for achieving that objective and whether it is the only objective pursued). There cannot be any objection to the absence of an express reference to that objective in the law, in so far as the mere formal mention of a specific objective does not guarantee that it is in fact being pursued and that the measures are proportionate to it.

18 However, there are many different views on the question as to the incidental determination, on a case-by-case basis, of the amount up to which the general interest is guaranteed. Therefore, it must also be examined who was required to assess the appropriate amount of remuneration: the association that acted as a standard-setter when issuing its regulation, or the court seised in relation to the regulation as a whole or the specific manifestation of the regulation.

19 Regulatory control under Bulgarian law is diffuse: the legality of sub-statutory legal acts may be reviewed in special proceedings for annulment before the Administrative Court (Article 185 et seq. of the Administrativnoprotsesualen kodeks (Code of Administrative Procedure)), but also by any court, including a civil court, which decides whether to apply the legal act to a specific case, for the regulation of which the act is intended. (Without being expressly stated in the law or case-law, in the second case, that is to say under Article 15(3) of the Zakon za normativnite aktove (Law on Normative Legal Acts), the courts tend to conduct a formal and substantive examination and to examine only procedural and substantive defects that are directly identifiable without the need to take evidence). At the same time, the Bulgarian court is obliged to ensure the primacy of EU law over Bulgarian laws and sub-statutory acts. In that regard, it is necessary to assess whether, in the assessment prescribed by the Court of Justice as to the existence of a public interest objective and of the proportionality of the measure adopted, the courts seised of a particular civil-law case are required to assess conformity at the time of adoption of the act or must carry out the assessment of the specific legal situation in each individual case pending before them.

20 That issue must also be considered in the light of the need for effective application of EU law. In accordance with the settled case-law of the Court of Justice, the national legislature and the national courts apply EU law in accordance with their national law – referred to as the principle of 'procedural autonomy' (Article 291 TFEU).

21 In accordance with the second sentence of Article 19(1) TEU, national courts are obliged to ensure the effective application of EU law. The case-law has also confirmed the principle that the procedural means of national law must be such as not to make it excessively difficult for legal persons to exercise their rights (see paragraph 5 of the judgment in Case C-33/76, *Rewe* v *Landwirtschaftskammer für das Saarland*, paragraph 47 of the judgment in Case C-224/01, *Köbler*, and paragraph 12 of the judgment in Case C-312/93, *Peterbroeck, Van Campenhout & Cie* v *Belgian State*).

22 On the other hand, most national courts appear to have doubts as to whether the solution adopted in the judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, according to which the provisions of the Regulation of the Supreme Bar Council are in principle contrary to the prohibition under Article 101(1) TFEU, is in fact correct. On the contrary, national courts proceed on the assumption that, unless it is expressly held that those provisions were adopted in breach of the requirements of a legitimate objective and the proportionate pursuit thereof, the NMRAV is applicable. For that reason, the burden of proving such a breach is in principle placed on the party seeking a reduction of the remuneration. This also requires an express answer to the question as to whether there is a presumption that the Regulation on minimum amounts for lawyers' remuneration is inapplicable, and such inapplicability allows for exceptions, or whether, conversely, there is a presumption that that regulation is valid until the contrary is proven. It is also necessary to obtain an answer to the question as to who is required to prove the existence of a legitimate interest and of proportionality in proceedings which are conducted not between a party and his or her lawyer, but between two parties, each of whom uses a lawyer.

23 The question arises as to whether the permissibility of an exception to Article 101 TFEU requires that the legislature itself provides guarantees of proportionality in the adoption of the decision in question by an association such as the Supreme Bar Council, or whether the existence of such guarantees is not a prerequisite for the permissibility of the exception and the proportionality review must be carried out entirely by the court. In the first case, the legislature may entrust the association with the task of determining the amounts, taking into account certain methods (for example, calculation of the lawyers' operating costs, inflation, allocation of those costs to the specific legal activity), and that assessment must be documented in the procedure for adopting the decision (the regulation). In the second case, such an assessment would have to be carried out indirectly on a case-by-case basis, which is difficult in so far as the court hearing individual civil disputes does not have specific data on the activities of lawyers, as independent businesses. The referring court needs guidance as to whether, if such a prior proportionality review is

presumed to be mandatory, the absence of such a review constitutes a sufficient ground for finding that the rule of national law and the decision adopted on that basis are incompatible with the competition rules. Conversely, it would be necessary to assess whether the existence of serious and detailed reasons for the adoption of the NMRAV is sufficient for its application, in the absence of any evidence that those reasons are simulated or logically incorrect.

24 Where the rules of that regulation are based on criteria which, by their nature, do not guarantee the proportionality of restrictions of competition, or which can easily be found not to guarantee such proportionality in certain situations, the court could consider that the national rule obliging it to apply those restrictions is generally inapplicable. This could encourage the association to adopt a legal act that complies with the requirements of EU law. On the other hand, another possible interpretation presupposes that each individual tariff rule and its effect must be examined and justified in each individual case.

Assessment criteria – Questions 6 to 9

25 Next, the referring court requires guidance as to whether, in assessing proportionality in the application of the NMRAV, it should be guided primarily by the criteria laid down when that regulation was adopted, in so far as there was a better means of providing for them at the time, or whether it should itself seek criteria regarding the proportionality of the level of remuneration in the light of the requirement of fair remuneration for high-quality legal assistance. Account must be taken of the fact that, although the applicant in the present case – relying to a certain extent on the case-law of the VKS – challenges the interpretation in the judgment of the Court of Justice, according to which the minimum amounts must be the lowest at which the objective can be achieved, this is not generally in dispute. The national statutory criteria for the permissibility of restrictions on the freedom contractually to agree lower prices are also not in dispute in practice: under the ZAdv, the amount of remuneration must be ‘fair and justified’ and, under the GPK, must correspond to the ‘actual legal and factual complexity’ of the case.

26 In practice, however, it is difficult to give substance to those elastic standards. As stated above, since the cited judgment of the Court of Justice, the national case-law has not contained a uniform view on how the application of EU law is to be ensured in concrete terms.

27 Account must be taken of the fact that the gradation of minimum amounts provided for in the NMRAV according to material interest (and two other criteria: the nature of the dispute in some cases and the number of hearings held) is not always indicative of the efforts made. Sometimes even the lowest threshold does not give an indication of the efforts made, while the degressive scale is not steep enough and the remuneration for simple cases can be quite high, as the interest increases. In rare cases, the opposite may also be true: in a case with no or low

material interest, the lawyer might be forced (due to the lack of competition, everyone works at minimum rates) to work for remuneration which is not commensurate with the complexities of the case.

28 If, on the other hand, the proportionality review is to be carried out by the court on a case-by-case basis, there are even greater difficulties. The referring Chamber has doubts as to which criteria it should apply for the assessment of proportionality between a non-material objective (provision of high-quality legal services) and a material restriction (amount of remuneration). At first glance, the only common yardstick is the amount of work performed by the lawyer, which is regarded as an objective measure of workload in terms of time, but such an approach is not shared in the practice of other compositions of the court. It is also made significantly more difficult by the fact that, in the respective cases, there are neither records of the amount of work performed nor generally accepted market standards regarding the value of the services and their relationship to the objective pursued, such that the court would be in a position to determine those parameters at its discretion also, applying Article 162 of the GPK *mutatis mutandis*.

29 If the regulation, as the only legal act which approximates the actual market situation of prices, cannot be applied either directly or indirectly, the question arises as to whether national courts may make use of the tariffs for the payment of legal assistance to court-appointed lawyers. It should be noted that those tariffs were intended to ensure a minimum level of remuneration for high-quality legal work, but, in practice, the State, which pays that remuneration, set it at a rate significantly lower than that provided for in the Regulation of the Supreme Bar Council. At the same time, however, since the delivery of the previous judgment of the Court of Justice, the legislature has acknowledged that that regulation also applies as a starting point and as a limitation for successful parties represented by in-house legal adviser.

30 Lastly, if no normative criterion can be taken as the basis, and the court must rely on its own assessment, it must also be clarified – in connection with the obligations under Article 47 of the Charter of Fundamental Rights, which would have to be applicable since national courts, in implementation of the competition rules under Article 101 TFEU, disapply national law – which requirements are to be imposed on the reasoning for such a court decision. Those requirements should be twofold: first, whether the court is required to state all the main criteria which it used, and second, whether it is also required to assess their weighting, that is to say, to justify, after determining the final amount of the remuneration awarded, which criteria had which mathematical weight and how they contributed to the result. The latter is virtually impracticable, as it would require serious preparation and research into the legal services market, which is not available to most judges outside the cases pending before them.

Consequences – Question 10

31 Following the judgment in Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria*, the national case-law does not contain a uniform view on how to guarantee the application of EU law in concrete terms. The case-law of the VKS contains, to the extent that the referring court was able to ascertain by consulting legal information systems, the following solutions: (1) There is no case in which the VKS has found that the regulation goes beyond what is necessary or in which an assessment was carried out on the basis of objective criteria. (2) In one case, it was held that a case should not be permitted to proceed to cassation where the appellate court had previously found that the minimum rates of the regulation were not complied with in part. (3) In one case, the VKS did not grant leave for cassation because it considered that the judgment of the Court of Justice did not apply to cases under Article 78(5) of the GPK – lawyers' remuneration – as it concerned Article 78(8) of the GPK – remuneration of in-house legal advisers – which had previously referred to lawyers' remuneration. (4) In several cases, the VKS did not grant leave for cassation, stating laconically that the findings of the appellate court according to which the remuneration could not be reduced below the minimum amount laid down in the regulation did not run counter to the judgment of the Court of Justice, according to which the limitations had to be restricted to the minimum amount. (5) Only in two cases did the VKS grant leave for appeals in cassation on that issue, stating that the minimum amounts of the regulation in fact always meet the criteria set by the Court of Justice.

32 In most cases, the courts attempt to assume, with blanket reasoning, that the amount, once provided for in the Regulation on minimum amounts for lawyers' remuneration, is always justified, or to set amounts at their discretion which are not based on objective indicators (probably in order to save time). Ultimately, that has the effect of negating the very understanding set out by the Court of Justice, since, in the vast majority of cases, the absence of an effective criterion leads to a denial of genuine review of the permissibility of the decision of the association of undertakings. Therefore, the problem also arises with regard to the question as to whether the abovementioned findings of the Court of Justice regarding the effectiveness of the application of EU law allow for a similar approach, namely to apply a decision of an association of undertakings in breach of Article 101(1) TFEU as a substitute for itself.

33 In particular, with regard to the cassation case-law of the VKS, it should be noted, in addition to the above considerations, that the appropriateness of the comparison with the State fees (which is incorrect: the rate of the minimum lawyers' fee is lower than the State fee only in respect of an interest with an amount exceeding BGN 10 000) can be called into question in so far as the judicial system, unlike lawyers, does not have to support itself. The referring Chamber also does not understand the term 'excessive competition' to refer to an undesirable concept. In fact, guaranteeing higher remuneration may theoretically reduce the need to take on more cases and ensure more time to study cases, participate in them and further the lawyer's training, but it cannot guarantee those objectives, since, in both

cases – lower and higher remuneration – the effort depends on the lawyer's conscience. Ultimately, the practice prescribed by the VKS, of accepting the applicability of the NMRAV irrespective of its wording, the specifics of the case, and the economic situation, provides the association with a 'blank cheque' when it comes to setting rates.