

**Case C-128/21**

**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:**

26 February 2021

**Referring court:**

Lietuvos vyriausiasis administracinis teismas (Lithuania)

**Date of the decision to refer:**

17 February 2021

**Applicants at first instance and other parties in the appeal:**

Lietuvos notarų rūmai

M. S.

S. Š.

D. V.

V. P.

J. P.

D. L.-B.

D. P.

R. O. I.

**Defendant at first instance and appellant:**

Lietuvos Respublikos konkurencijos taryba

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**Subject matter of the main proceedings**

Application for annulment of a decision of the Lietuvos Respublikos konkurencijos taryba (Competition Council of the Republic of Lithuania; ‘the

Competition Council’) of 26 April 2018 (‘the contested decision’) in so far as that decision found that the Notarų rūmai (Chamber of Notaries) and notaries who were members of the Presidium of the Chamber of Notaries (hereinafter also ‘the Presidium’) (together, ‘the applicants’) infringed requirements laid down in point 1 of Article 5(1) of the Lietuvos Respublikos konkurencijos įstatymas (Law of the Republic of Lithuania on competition) and in Article 101(1)(a) of the Treaty on the Functioning of the European Union, ordered them to cease the infringement and imposed fines on them.

### **Subject matter and legal basis of the request for a preliminary ruling**

Interpretation of Article 101 of the Treaty on the Functioning of the European Union (‘TFEU’).

Basis – third paragraph of Article 267 TFEU.

### **Questions referred for a preliminary ruling**

1. Is Article 101(1) TFEU to be interpreted as meaning that notaries in the Republic of Lithuania, when carrying out activity related to the clarifications adopted by the Chamber of Notaries that are described in the present case, are undertakings within the meaning of Article 101 TFEU?
2. Is Article 101(1) TFEU to be interpreted as meaning that the clarifications adopted by the Lithuanian Chamber of Notaries that are described in the present case constitute a decision of an association within the meaning of Article 101(1) TFEU?
3. If the answer to the second question is in the affirmative, do those clarifications have as their object or effect the prevention, restriction or distortion of competition in the internal market for the purposes of Article 101(1) TFEU?
4. When ruling on a possible infringement of Article 101(1) TFEU, are those clarifications, described in the present case, to be assessed in accordance with the criteria set out in paragraph 97 of the judgment in *Wouters*?
5. If the answer to the fourth question is in the affirmative, do the objectives referred to by the applicants, that is to say, making notarial practice uniform, filling a regulatory gap, protecting the interests of consumers, safeguarding the principles of equal treatment of consumers and proportionality, and protecting notaries against unjustified civil liability, constitute legitimate objectives when assessing those clarifications in accordance with the criteria set out in paragraph 97 of the judgment in *Wouters*?

6. If the answer to the fifth question is in the affirmative, are the restrictions imposed in those clarifications to be regarded as not going beyond what is necessary in order to ensure that legitimate objectives are attained?

7. Is Article 101 TFEU to be interpreted as meaning that notaries who were members of the presidium may be regarded as having infringed that article and may be fined on the ground that they participated in the adoption of the clarifications described in the present case while working as notaries?

### **Provisions of EU law and case-law of the Court of Justice of the European Union that are cited**

Article 4(3) of the Treaty on European Union ('TEU').

Article 101 TFEU.

Judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98 ('the judgment in *Wouters*'), paragraphs 46, 47, 57, 67 to 69 and 97.

Judgment of 18 July 2013, *Consiglio nazionale dei geologi*, C-136/12, EU:C:2013:489 ('the judgment in *Consiglio nazionale dei geologi*'), paragraphs 35, 36, 42, 53 and 54.

Judgment of 18 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492 ('the judgment in *Meca-Medina and Majcen v Commission*'), paragraph 47.

Judgment of 23 November 2017, *CHEZ Elektro Bulgaria and FrontEx International*, C-427/16 and C-428/16, EU:C:2017:890 ('the judgment in *CHEZ Elektro Bulgaria*'), paragraphs 42, 43 and 46.

Judgment of 4 September 2014, *API and Others*, C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, paragraphs 31 and 41.

Judgment of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, EU:C:2002:617 ('the judgment in *Aéroports de Paris v Commission*'), paragraph 74.

Judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376 ('the judgment in *MOTOE*'), paragraph 25.

Judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, C-1/12, EU:C:2013:127

Judgment of 15 March 2018, *Commission v Czech Republic*, C-575/16, not published, EU:C:2018:186.

Judgment of 24 May 2011, *Commission v Belgium*, C-47/08, EU:C:2011:334.

### **Provisions of national law cited**

Point 1 of Article 5(1) and Article 3(19) and (22) of the Lietuvos Respublikos konkurencijos įstatymas (Law of the Republic of Lithuania on competition; ‘the Law on competition’) (as amended by Law No XIII-193 of 12 January 2017).

Article 2, Article 6(1), Article 6<sup>2</sup>(1) and (6), Article 8, Article 9, points 4 and 7 of Article 10, Article 11(2) and (3), Article 12, Article 13, Article 16, Article 19(1) and (2), Article 19<sup>1</sup>, Article 20<sup>1</sup>(1), Article 21, Article 26, Article 28 and Article 45 of the Lietuvos Respublikos notariato įstatymas (Law of the Republic of Lithuania on the notarial profession; ‘the Law on the notarial profession’) (as amended by Law No XIII-570 of 29 June 2017).

Article 8(6) and (7), point 4 of Article 10, Article 18(1), Article 19(1), (2), (4) and (6), Article 20(1), Article 23, Article 25, Article 26(3) and Article 28(3) of the Lietuvos notarų rūmų statutas (Statute of the Lithuanian Chamber of Notaries; ‘the Statute’) approved by Order No 1R-3 of the Minister for Justice of the Republic of Lithuania of 3 January 2008.

Points 1.7 and 2.6 (as amended by Order No 1R-182 of 29 June 2012) and points 1.2, 1.6 and 2.2 (as amended by Order No 1R-386 of 31 December 2014) of the Notarų imamo atlyginimo už notarinių veikslių atlikimą, sandorių projektų parengimą, konsultacijas ir technines paslaugas laikinieji dydžiai (Provisional rates of fees charged by notaries for the performance of notarial acts, the drafting of transactions, consultation, and technical services; ‘the Provisional Rates’) approved by Order No 57 of the Minister for Justice of the Republic of Lithuania of 12 September 1996.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Pursuant to Article 19 of the Law on the notarial profession, a notary charges a fee for the performance of notarial acts, the drafting of transactions, consultation, and technical services, the rate of which is to be set by the Minister for Justice of the Republic of Lithuania, upon agreement with the Minister for Finance of the Republic of Lithuania and the Chamber of Notaries.
- 2 In the Provisional Rates approved by Order No 57 of the Minister for Justice of 12 September 1996, fees for the performance of notarial acts at the material time were mainly specified within a range by setting minimum and maximum rates. In this legal measure (in the versions relevant to the present case), fees are set at the following rates:
  - notarisatio of a mortgage on an item of immovable property is to be charged at a rate of 0.2 to 0.3 per cent of the value of the item, but not less than LTL 50 and not more than LTL 500 (correspondingly, from 1 January 2015, at a rate of 0.2 to 0.3 per cent of the value of the item,

but not less than EUR 14.48 and not more than EUR 144.80) (point 1.7);

- notarisatio n of a pledge is to be charged at a rate of 0.2 to 0.3 per cent of the value of the item, but not less than LTL 50 and not more than LTL 500 (correspondingly, from 1 January 2015, at a rate of 0.2 to 0.3 per cent of the value of the item, but not less than EUR 14.48 and not more than EUR 144.81) (point 2.6);
  - notarisatio n of a contract concerning the right of servitude, the right of usufruct or the right of superficies , or concerning arrangements for the use of an item of property, is to be charged at a rate of EUR 28.96 to EUR 86.89 (point 1.6);
  - notarisatio n of a contract for the exchange of an item of immovable property, including cases of exchange of an item of immovable property for a movable item or another object of civil-law rights, is to be charged at a rate of 0.4 to 0.5 per cent of the value of the exchanged item with a higher value, but not less than EUR 28.96 and not more than EUR 5 792.40) (point 1.2), and notarisatio n of a contract for the exchange of movable items is to be charged at a rate of 0.3 to 0.4 per cent of the value of the exchanged item or other object of civil-law rights with a higher value, but not less than EUR 14.48 (point 2.2).
- 3 By resolution of 30 August 2012, the Presidium of the Chamber of Notaries established that, where the value of the mortgaged or pledged item is not specified by the parties to the transaction, the maximum amount of the notarial fee specified in points 1.7 and 2.6 of the Provisional Rates is to be charged for the notarisatio n of a mortgage or pledge transaction.
  - 4 In its resolution of 23 April 2015, the Presidium of the Chamber of Notaries specified how the notarial fee is to be calculated where a servitude is created on several items of immovable property by a single contract. The Presidium decided that it would be recommended to multiply the fee rate set in point 1.6 of the Provisional Rates by the number of properties on which the servitude(s) is (are) created.
  - 5 By its resolution of 26 May 2016, the Presidium of the Chamber of Notaries confirmed that, where parts of several items are exchanged under a single contract, the notarial fee may be calculated by calculating the amount of the fee set in point 1.2 of the Provisional Rates on the basis of the price of each item transferred under the transaction, and then adding the sums together.
  - 6 By its resolution of 26 January 2017, the Presidium of the Chamber of Notaries established that, where several items of immovable property are mortgaged under a single mortgage transaction, the amount of the notarial fee set in the Provisional Rates ‘shall be calculated on the basis of the value of each mortgaged property, and then the sums calculated shall be added together’.

- 7 The abovementioned resolutions of the Presidium of the Chamber of Notaries (hereinafter also ‘the clarifications’) were adopted by consensus of the members of the Presidium who attended the meetings (unanimously) and published on the intranet of the Chamber of Notaries.
- 8 In the contested decision, the Competition Council stated that, by the clarifications, the applicants had laid down a mechanism for calculating notarial fees which in all cases set the maximum amounts under the Provisional Rates that it was possible to charge for the notarisation of mortgage, exchange and servitude transactions whereby several items are mortgaged, transferred or encumbered; as a result, the amounts of fees to be charged by notaries had been set indirectly, although prior to the adoption of those clarifications notaries were free in specific cases to set lower fees as well. The Competition Council also found that the applicants had directly set the amount of the fee – namely the maximum rate within the range of fees – to be charged by notaries for the notarisation of a mortgage or pledge where the value of the mortgaged or pledged item is not specified by the parties.
- 9 In the contested decision, it was concluded that, when adopting the clarifications, the Chamber of Notaries – acting through its management body, the presidium – and the notaries entered into an agreement restricting competition, thereby infringing the requirements of point 1 of Article 5(1) of the Law on competition and Article 101(1)(a) TFEU. Under Article 3(19) of the Law on competition, an agreement is defined as covering the concept of a decision of an association. The contested decision states that the Chamber of Notaries is an association of economic entities, namely notaries. Thus, for the purposes of Article 101(1) TFEU, the contested decision determined that the clarifications adopted by the Chamber of Notaries constitute a decision of an association adopted with the participation of eight notaries, who were members of the Presidium of the Chamber of Notaries.
- 10 In the contested decision, the Competition Council defined the relevant market as the notarial acts market in the Republic of Lithuania and treated the clarifications as a single infringement, which had lasted from 30 August 2012 to at least 16 November 2017; it also regarded those actions as being an agreement having as its object the restriction of competition between all notaries.
- 11 The applicants brought an action against the contested decision before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius). By judgment of 19 February 2019, that court upheld the action and annulled the parts of the contested decision under challenge.
- 12 By its appeal, the Competition Council requests the Lietuvos Vyriausiasis Administracinis Teismas (Supreme Administrative Court of Lithuania; ‘the referring court’) to set aside that judgment and to rule that the applicants’ action be dismissed.

**Principal arguments of the parties in the main proceedings**

- 13 In the present case, the applicants argue that notaries are in essence officials exercising public authority, and agents or representatives of official authority. According to the applicants, notaries compete with each other on the quality of services, not on price. As stated in their application to the court of first instance, there were 262 notaries who carried on activities in Lithuania at that time.
- 14 According to the applicants, in adopting the clarifications, they sought to perform the task of the Chamber of Notaries set out in point 5 of Article 9 of the Law on the notarial profession, namely making notarial practice uniform, and the functions of the Chamber of Notaries referred to in points 6 and 7 of Article 8 of the Statute, namely summarising notarial practice and submitting the conclusions to notaries (they thus had legislative powers in the present case). The applicants submit that the clarifications were also aimed at filling a regulatory gap, protecting the interests of consumers, safeguarding the principles of equal treatment of consumers and proportionality, and protecting notaries against unjustified civil liability. During the investigation conducted by the Competition Council, the Chamber of Notaries stated that the value of the subject matter of a mortgage is an important criterion for the weaker party – that is to say, the mortgagor – in order to assess to what extent his assets will be encumbered; therefore, the intention of setting the maximum amount of the notarial fee where the value of the subject matter of a mortgage or pledge is not specified was to encourage the parties to the transaction to indicate the value of the subject matter of the mortgage or pledge in all cases, and thereby to ensure balance between the interests of the parties.
- 15 The applicants also point out that Article 19<sup>1</sup> of the Law on the notarial profession lays down criteria to be taken into consideration in determining rates of fees for notarial acts. Furthermore, if the Minister for Justice disagreed with the adopted clarifications, he could have supplemented the Provisional Rates, as he was aware of those clarifications; however, he has not taken any actions provided for in Article 11 of the Law on the notarial profession, that is to say, he has not applied to the court requesting the annulment of measures which are not in conformity with legislative requirements, nor has he taken any initiative to amend the Provisional Rates. The applicants assert that the TFEU is not applicable in this case, as there is no common market of notarial services of EU Member States.
- 16 The defendant, the Competition Council, maintains that notaries are economic entities and are able to compete on price within the limits set in the Provisional Rates, and that notaries are also able to compete with each other on fees in cases where it is possible to calculate the amount of the fee set in the Provisional Rates by different methods. The defendant contends that both the Law on competition and the TFEU prohibit price-fixing agreements; therefore, the applicants do not have the right to make notarial practice uniform in such a way that that prohibition would be infringed. It does not agree that there were regulatory gaps. The defendant maintains that the TFEU is applicable in the present case, given that the

applicants' actions cover the entire territory of Lithuania, and points out that notarial fee rates are applicable not only to Lithuanian entities, but also to entities of other Member States using notarial services in Lithuania.

### **Succinct presentation of the reasons for the request for a preliminary ruling**

- 17 According to the referring court, the Court of Justice has already ruled in relation to the functions exercised by notaries in some other Member States in the context of the freedom of establishment, but it has not yet decided whether the functions of notaries such as those attributed to notaries in the Republic of Lithuania in the present case constitute an economic activity for the purposes of Article 101(1) TFEU and whether, in a situation such as that at issue in the present case, notaries are undertakings within the meaning of Article 101 TFEU.
- 18 It notes in particular that, according to settled case-law of the Court of Justice, although, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and any activity consisting of offering goods and services on a given market is an economic activity (judgment in *Wouters*, paragraphs 46 and 47 and the case-law cited), the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity or which is connected with the exercise of the powers of a public authority (judgment in *Wouters*, paragraph 57, and judgment in *Consiglio nazionale dei geologi*, paragraph 42).
- 19 It points out that the Court of Justice stated in paragraphs 67 to 69 of the judgment in *Wouters* that a distinction must be drawn between two approaches with regard to the principle of institutional autonomy. The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings. The second approach is that the rules adopted by the professional association are attributable to it alone. Moreover, the Court of Justice noted, in paragraph 97 of the judgment in *Wouters*, that 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. ... It has then to be

considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.’

- 20 The referring court recalls in particular the case-law of the Court of Justice in which it is stated that it is important to verify whether the restrictions imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives (judgment in *Meca-Medina and Majcen v Commission*, paragraph 47, and judgment in *Consiglio nazionale dei geologi*, paragraph 54), that the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities (judgment in *Aéroports de Paris v Commission*, paragraph 74), and that the classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity (judgment in *MOTOE*, paragraph 25).
- 21 The present court has doubts as to whether, in the light of Article 101 TFEU (read separately or in conjunction with Article 4(3) TEU), the right ‘to make notarial practice uniform’ conferred on the Chamber of Notaries may/should be interpreted as also including the right to standardise the fee rates applicable to notaries in so far as notarial fees (or their method of calculation) for the performance of notarial acts in specific cases are not specified in the Provisional Rates approved by the Minister for Justice. At the same time, it raises the question whether a situation, such as that at issue in the present case, where the Chamber of Notaries adopts the clarifications concerning the amount of notarial fees or the method of calculating them in those specific cases – which are not specifically addressed in the Provisional Rates approved by the Minister for Justice – may be regarded as meeting the criterion set out in paragraph 68 of the judgment in *Wouters* that ‘a Member State ... retains its power to adopt decisions in the last resort’ or the criterion set out in paragraph 46 of the judgment in *CHEZ Elektro Bulgaria* that ‘there must be actual review and the State must have the power to adopt decisions in the last resort’, where the Minister for Justice has the right, within one month after receipt of the relevant decision, to make an application to the court for annulment of a decision of the Chamber of Notaries that could be unlawful (Article 11(3) of the Law on the notarial profession) and also may supplement the Provisional Rates by determining how notarial fees should be calculated in those specific cases.
- 22 The referring court therefore has doubts as to whether the criteria set out in paragraph 68 of the judgment in *Wouters* are met in the present case, or whether the clarifications adopted by the Chamber of Notaries are nevertheless attributable to it alone (judgment in *Wouters*, paragraph 69), that is to say, whether the clarifications adopted by the Chamber of Notaries should be regarded as a decision by an association of undertakings within the meaning of Article 101(1) TFEU.

- 23 The clarifications set the specific amount of fees chargeable by notaries (in the first clarification) or the method of calculating them (in the other three clarifications). As already mentioned, the Competition Council considers that, in cases which are not specified in the Provisional Rates, notaries should themselves decide on the notarial fee to be charged or on the method of calculating it. The question therefore arises as to whether Article 101 TFEU is to be interpreted as meaning that these clarifications have as their object or effect the prevention, restriction or distortion of competition within the internal market.
- 24 The applicants point out a number of objectives of the adoption of the clarifications, which, in their view, justify their adoption. The referring court has doubts as to whether, in the light of Article 101(1) TFEU, the criteria set out in paragraph 97 of the judgment in *Wouters* should apply in the present case and whether these objectives indicated by the applicants may be regarded as legitimate objectives, as set out in paragraph 97 of the judgment in *Wouters*.
- 25 If that last question is answered in the affirmative, the referring court is also faced with the question as to whether, in the light of the criteria set out in paragraph 97 of the judgment in *Wouters*, the restrictions imposed in the clarifications do not go beyond what is necessary in order to ensure that legitimate objectives are attained.
- 26 In the contested decision, as already mentioned, eight notaries, who were members of the Presidium of the Chamber of Notaries, which adopted the clarifications, have also been found to have infringed Article 101(1)(a) TFEU and point 1 of Article 5(1) of the Law on competition. The question arises for the referring court as to whether Article 101 TFEU is to be interpreted as meaning that notaries who were members of the presidium (members of an association) may be regarded as having infringed Article 101 TFEU and may be fined on the ground that they participated in the adoption of the clarifications, that is to say, whether they may be held liable for also having worked as notaries while being members of the Presidium of the Chamber of Notaries.
- 27 As is apparent from the foregoing considerations, answers to those questions are crucial in examining the present case, that is to say, in deciding whether the applicants, by adopting the clarifications, have infringed Article 101(1) TFEU.