

Case C-674/23

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:

13 November 2023

Referring court:

Ustavno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

26 October 2023

Applicants and intervener:

AEON NEPREMIČNINE, d.o.o.

AGENCIA d.o.o.

AGENCIJA KATJA d.o.o.

and others

STAN nepremičnine d.o.o.

Državni svet Republike Slovenije

Other party to the proceedings:

Državni zbor Republike Slovenije

Subject matter of the main proceedings

Application from private parties and request from the Državni svet (Council of State, Slovenia) to initiate proceedings for a constitutional review of the Zakon o nepremičninskem posredovanju (Real Estate Agencies Act; ‘the ZNPosr’), which limits the maximum fee permitted for brokerage activities in the context of the purchase or sale or rental of property; Charter of Fundamental Rights of the European Union; respect for private life and family life, freedom of economic initiative, consumer protection; Directive 2006/123, minimum and/or maximum rates that the service provider may charge.

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Are Articles 7, 16 and 38 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 15 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, to be interpreted as precluding legislation of a Member State of the European Union under which the maximum fee permitted for property brokerage in the context of the purchase or sale of the same property may not exceed 4% of the contractual price, in the case of brokerage in the context of the purchase or sale of a single-family residence, an apartment or a dwelling purchased by an individual?

2. Are Articles 7, 16 and 38 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 15 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, to be interpreted as precluding legislation of a Member State of the European Union under which the maximum permitted brokerage fee in the context of a lease for the same property may not be more than 4% of the amount resulting from the multiplication of the amount of monthly rent by the number of months for which the property is let, and in any event may not exceed the amount of one month's rent, in the case of brokerage in the context of the rental of a single-family residence, apartment or dwelling rented by an individual?

Provisions of European Union law relied on

Articles 7, 16 and 38 of the Charter of Fundamental Rights of the European Union ('the Charter')

Article 15 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('the Services Directive')

Provisions of national law relied on

Constitution of the Slovenian Republic ('the Constitution')

Article 74 states, inter alia, that free economic initiative shall be guaranteed. Article 78 of the Constitution provides that the State shall create opportunities for citizens to obtain proper housing.

Zakon o nepremičninskem posredovanju (Real Estate Agencies Act) (ZNPposr)

Article 5 of the ZNPosr, entitled ‘maximum permitted brokerage fee’, provides as follows:

‘1. In the case of a purchase or sale, the maximum permitted brokerage fee may not amount, for the same property, to more than 4% of the contractual price. That limitation does not apply when the contractual value of the property is less than EUR 10 000.

2. In the case of a lease, the maximum permitted brokerage fee may not amount, for the same property, to more than 4% of the contractual value. The fee may not exceed the amount of one month’s rent, nor be less than EUR 150. The contractual value referred to in the previous sentence shall correspond to the amount resulting from the multiplication of the amount of monthly rent by the number of months for which the property is let.

3. The property company may only invoice the client for the brokerage fee on the basis of a property brokerage contract.

4. Any brokerage contract that is contrary to paragraphs 1, 2 and 3 of this article shall be null and void.

5. Any provision of a contract of sale, purchase or rental or of any other contract [...] in relation to a specific property which is contrary to paragraphs 1, 2 and 3 of this article shall be null and void.

[...]’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Two applications from private parties and a request from the Council of State were lodged with the Ustavno sodišče (Constitutional Court, Slovenia) to initiate proceedings for a constitutional review of the ZNPosr, which, so far as relevant to this reference for a preliminary ruling, sets a limit on the maximum permitted brokerage fee in the context of the purchase or sale or rental of a property. In the proceedings initiated at the request of the parties, the Constitutional Court performed an abstract assessment of that law.

The essential arguments of the parties in the main proceedings

- 2 Several real estate companies or sole traders, whose business consists of providing property brokerage services (‘the applicants’), have applied for a constitutional review. The applicants submit that the ZNPosr is contrary to the Slovenian Constitution, to Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, to Article 16 of the Charter and to the Services Directive. They contend that the legislature has not demonstrated the existence of a public interest that has a genuine substantive link

with the infringement of their constitutional rights. The applicants submit and adduce evidence that the property brokerage market is highly developed, there being more than 990 real estate companies registered to carry on that activity. Furthermore, there are more than 2 100 registered property brokers and there are no laws restricting access to the market. At the same time, the parties point out that property brokerage services and property transactions are not obligatory for consumers. In their view, the legislature did not mention any reason for the decision to set a maximum permitted brokerage amount which has an actual substantive link with the property brokerage activity. In the applicants' opinion, the argument of consumer protection put forward by the legislature is a general objective. It is not evident that there is a particularly close link between that objective and the activity carried out by the parties.

- 3 Likewise, the reference made by the legislature to Article 78 of the Slovenian Constitution (decent housing), as well as the shortage of public housing combined with high market rents, also lead to the same conclusion. The applicants argue that the contested Article 5 of the ZNPosr will not have the effect of increasing the quantity of public housing available or reducing rents in the housing market. Indeed, it is unclear from the preparatory work for the law how those effects were expected to materialise or how the law would address the housing problem for vulnerable categories (young and older people), by improving access to housing and increasing the term of property lettings, both of which are objectives pursued by the law in question. According to the applicants, the mere fact that the fee for property brokerage services is a possible one-off expense linked to property transactions does not demonstrate a particular link with the activity they carry out.
- 4 In the applicants' opinion, the contested Article 5 of the ZNPosr does not pass the proportionality test. They claim that other measures have already been introduced into the legal system that give effect to the obligations incumbent on the State under Article 78 of the Constitution, which are effective for the entire term of the lease and are specifically aimed at vulnerable groups. In that respect, they refer to the possibility of accessing subsidised housing and housing benefit. They point out that the brokerage fee is a one-off expense when renting a property and only applies if the provision of (non-compulsory) property brokerage services is actually requested. At the same time, the contested legislation is contrary to Article 16 of the Charter, and specifically the right to pursue an economic activity and the right to conclude contracts. The maximum brokerage commission set for property lettings is basically less than the brokerage expenses incurred for renting and letting properties. The applicants also specifically allege incompatibility with the Services Directive. The body requesting the constitutional review also makes substantially identical allegations.
- 5 The applicants submit that the contested legislation, in so far as it pertains to lettings, is contrary to the objectives pursued by the housing policy aimed at encouraging long-term apartment lettings. In view of the calculation of the maximum permitted commission, they contend that principals benefit from a shorter duration of the leasing of the property, since the maximum permitted

brokerage fee is lower in that case. At the same time, the fact that the maximum brokerage expense is low encourages landlords to change tenants more frequently. Moreover, the contested legislative measure is not even necessary under Article 15(3) of the Services Directive: as an example of less restrictive measures, the applicants refer to the increase in the quantity of public housing available to let, the payment of housing benefit and taxation, planning and other regulatory measures which act as an incentive for the construction of (public) housing.

- 6 One of the applicants submits that, due to the limit on the amount of commission it can earn when signing leases, it makes a loss because of the expenses it has to incur. This is forcing it out of business. The same applicant points out that in practice, commission is the only remuneration it receives for its work.
- 7 The Državni zbor (Slovenian National Assembly) has not responded to the application or to the request for a constitutional review. The Constitutional Court has the right to continue assessing the application, even in the absence of a response from the other party.

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

- 8 The present case concerns proceedings for the constitutional review of a law, initiated pursuant to two applications, and proceedings initiated on the basis of a request from the Council of State. It is not a question of proceedings arising from individual proceedings brought by the applicants before the ordinary courts.
- 9 The parties applying for the review and the body requesting the review also allege the non-compliance of the contested legislation with EU law. In the opinion of the referring court, the parties' reference to EU law cannot be regarded as generic, nor can its significance and relevance for the purposes of the constitutional review be denied. In the opinion of the Constitutional Court, the interpretation of EU law is necessary for the referring court to adopt its decision. The referring court holds that, for the purpose of assessing the contested legislative framework, the interpretation of Articles 7, 16 and 38 of the Charter of Fundamental Rights, read in conjunction with Article 15 of the Services Directive, is decisive.
- 10 In the event that doubts should arise in the present case regarding the existence of a cross-border element, the Constitutional Court observes that the case concerns proceedings for a constitutional review of the ZNPosr, and not an individual assessment. In those proceedings, the Constitutional Court assesses the compatibility of a law with the Slovenian Constitution, taking into account all the persons to whom those provisions apply. In proceedings for a constitutional review of a law, it is possible that the contested provisions also apply to nationals of other Member States and to legal persons having their registered office in other Member States. For that reason, in the opinion of the Constitutional Court, it is not possible to support the argument that all the elements of the dispute are located within a single Member State. On that basis, the Services Directive must also be taken into account in the present case. The Services Directive implements the

fundamental freedoms enshrined in Articles 49 and 56 TFEU and summarises in codified form the consolidated case-law of the Court of Justice, which has declared individual national requirements to be incompatible with the fundamental freedoms that may be relied on by economic operators. As to the assessment of that law, property brokerage services are undoubtedly requested (at least potentially) by persons in other Member States of the European Union.

- 11 According to the Constitutional Court, the present case involves a complex intertwining of various aspects of the Charter and restrictions under the Services Directive (in connection with the freedom of establishment). From the applicants' point of view, however, the freedom of economic initiative must still be taken into consideration. This includes the right to pursue an economic activity, the right to conclude contracts and the freedom of competition. It is clear from the case-law of the Court of Justice that the freedom of economic initiative (in the context of the freedom to conclude contracts) also includes the right to determine the price of a service. Nevertheless, consumer protection may be a legitimate reason to restrict the freedom of economic initiative.
- 12 The Constitutional Court holds that legislation in the sector in question should seek to harmonise and strike a fair balance between the fundamental rights and principles enshrined in the Charter. As the Constitutional Court understands it, at its core, freedom of economic initiative does not guarantee the right to unlimited profit in every aspect of the right holder's business. On the other hand, the contribution to general transparency and consumer protection in connection with the affordability of housing as a fundamental human right has, for the protected individuals, an inestimable value which, in essence, cannot be dealt with in an economic analysis. In its case-law, the Constitutional Court assesses in principle the limitations of rights (including economic and social rights), taking into account the importance of individual human rights within the framework of other constitutional values (public interests), bearing in mind that the economic perspective may actually be one of the starting points for the assessment, which in itself is not decisive. In addition, social justice is also a value which is in the public interest.
- 13 First, in the absence of a response from the legislature, the Constitutional Court asks whether the assessment of the appropriateness – in so far as it must be taken into account in the light of the general value assumptions of the rights enshrined in the Charter – can have a decisive influence on the fact that the legislature prescribes limitations on commission in a vertical market (the property brokerage market) and does not intervene directly in the property market through price regulation. In that regard, under Article 5(3) of the ZNPosr, a real estate company may only invoice the client for the brokerage fee on the basis of a property brokerage contract. Therefore, from a legal point of view, the direct transfer of the economic burden corresponding to the amount of commission to the buyer or tenant is not permitted unless they are also the client of the property brokerage firm at the same time. Indeed, any other solution is null and void under paragraph 4 of that article. In the opinion of the Constitutional Court, taking into

account the deterioration in the conditions of access to housing and the aggravation of tensions in property markets, where the market is weighted in favour of supply, it is to be expected that commission (which in the absence of regulatory intervention could be higher still) will largely be transferred to those looking for accommodation. That applies to any contract concluded with the help of a property broker. For other contracts, it may apply indirectly owing to the effect on property prices. Accordingly, the amount of commission that the property broker earns does not depend on the behaviour of the person looking to buy or rent accommodation, unless they are a client of the property brokerage firm. In that case, the expenditure on property brokerage is not in the person's interest and cannot influence the amount of the fee. In the absence of clarification from the legislature, the Constitutional Court may decide that it contributes to the achievement of the objectives pursued, but cannot (without an analysis by the legislature) conclude that that contribution is significant. In the light of the foregoing, the Constitutional Court asks whether the relevant effect in this sense should be understood mainly in terms of the importance of the right protected under the Charter, rather than simply in terms of the requirement for the legislature to quantify and demonstrate the impact of the measure through an (economic) analysis. Given the importance of the objectives pursued by the legislature, which are intertwined with the Charter itself – which, in the opinion of the Constitutional Court, forms the crux of the assessment in the present case – the Constitutional Court asks whether the condition relating to appropriateness is satisfied in the present case despite the concerns highlighted above. At the same time, the Constitutional Court considers that the legislation adopted may contribute to a better overview of prices, since, from the consumer's perspective, it gives an idea of the amount of commission and the extent of any possible impact on the price or the amount of rent.

- 14 Any Member State that, in order to justify the requirement under Article 15 of the Services Directive, adduces an important public interest, must demonstrate that its legislation is appropriate and necessary to achieve a legitimate aim. Yet that burden of proof cannot lead to the Member State being required to provide proof positive that the same objective could not, in identical circumstances, be achieved by any other conceivable means. In the absence of clarification from the legislature, the Constitutional Court cannot support the finding that the limitation of the amount of commission is a major factor in the affordability of housing. Given the importance of the objectives pursued by the legislature, which are also enshrined in the Charter – which the Constitutional Court considers to be the linchpin of the assessment in the present case – the Constitutional Court asks whether the condition of necessity must be deemed satisfied in the present case despite the concerns expressed above, in so far as it affects the assessment under the Charter. Indeed, the question of the various measures and their impact on housing policy is highly complex. Therefore, in the opinion of the Constitutional Court, it is also necessary to take into account certain practical limitations that prevent the State from interfering ad libitum with the housing supply. There is certainly no basis for concluding that the legislature has the option of adopting a different measure (including timewise) of identical value, which has less effect on

protected situations under the Charter. In the opinion of the Constitutional Court, those circumstances may also explain why the competence of the national legislature in the present case must be understood in a broad sense, hence the need for the contested legislation.

- 15 Regarding the limit on the amount of commission on leases, the applicants submit that the legislation makes it impossible for them to remain in business, at least as regards short-term lettings, on which they only earn small amounts of commission. In the absence of a response from the legislature, the Constitutional Court cannot rule out that (some of) the applicants have ceased or will cease (in part) to provide property brokerage services in connection with leases. It cannot express a view on the market rate of commission in the absence of regulation and/or on the economic efficiency or otherwise of the individual applicants in terms of costs. In such circumstances, the Constitutional Court, taking into account the value assumptions in the Charter, asks whether the fear that real estate companies (or some of them) will cease (in part) to provide brokerage activities for properties rented by individuals is sufficient evidence that the measure at issue is not strictly proportionate. The Constitutional Court asks whether, in accordance with the value assumptions in the Charter, it is necessary in this case to consider that contractual autonomy is diminished to the point that the limitation in question affects the very essence of the right to freedom of economic initiative.
- 16 Since the Court of Justice has not yet ruled on the assessment of the legislation, based on the assumption that a fair balance must be achieved between the different viewpoints of the Charter and, in that context, the relationship – with respect to the Services Directive – of the protected freedom of establishment (or freedom to provide services) in the particular circumstances of protecting the affordability of housing as a fundamental human right, the Constitutional Court has decided to refer two questions to the Court of Justice for a preliminary ruling. In that respect, the Constitutional Court is aware that, as the referring court, it must ultimately determine whether those requirements are met. It considers that the questions raised require a uniform interpretation of EU law, for which the Court of Justice has jurisdiction.