

Case C-372/21

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:

17 June 2021

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

1 June 2021

Appellant on a point of law:

Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR

Subject matter of the main proceedings

Appeal on a point of law by a German free church against a decision confirming the non-granting of a subsidy under the Privatschulgesetz (Austrian Law on private schools); Application of EU law; Compatibility of national legislation with EU law

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

Interpretation of Article 17 and Article 56 TFEU, Article 267 TFEU

Questions referred for a preliminary ruling

1. In the light of Article 17 TFEU, does a situation in which a religious society that is recognised and established in one Member State of the European Union applies in another Member State for subsidisation of a private school which is recognised as denominational by that religious society and which is operated in that other Member State by an association registered under the law of that other Member State fall within the scope of EU law, in particular Article 56 TFEU?

If Question 1 is answered in the affirmative:

2. Is Article 56 TFEU to be interpreted as precluding a national rule which provides, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law?

Provisions of EU law relied on

Treaty on the Functioning of the European Union (TFEU), in particular Articles 17, 18, 54 and 56

Provisions of national law relied on

Austrian law

Gesetz vom 20. Mai 1874, betreffend die gesetzliche Anerkennung von Religionsgesellschaften (Law of 20 May 1874 on the legal recognition of religious societies; ‘the AnerkennungsG’), RGBl. No 68/1874, in particular Paragraphs 1, 2 and 5

Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften (Federal Law on the legal status of registered religious communities; ‘the BekGG’), BGBl. I No 19/1998, in the version published in BGBl. I No 78/2011, in particular Paragraph 11

Privatschulgesetz (Law on private schools; ‘the PrivSchG’), BGBl. No 244/1962, in the version published in BGBl. I No 35/2019, in particular Paragraphs 2, 2a, 14, 15, 17, 18 and 21

Subsidisation of denominational private schools.

Paragraph 17. Eligibility.

(1) Legally recognised churches and religious societies are to be granted subsidies for staff costs for denominational private schools having public-law status in accordance with the following provisions.

(2) Denominational private schools are to be understood as referring to schools maintained by legally recognised churches and religious societies and their institutions, as well as those schools maintained by associations, foundations and funds which are recognised as denominational schools by the competent higher authority of a church (religious society).

Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (Austrian Basic Law on the general rights of citizens; ‘the StGG’), RGBl. No 142/1867, in particular Article 15

German law

Article 140 of the Grundgesetz (German Basic Law), read in conjunction with Article 137(5) of the Weimarer Reichsverfassung (Weimar Constitution)

Provisions of international law relied on

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in particular Article 2 of Protocol No 1, read in conjunction with Article 14

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant on a point of law is a religious society recognised in Germany – but not in Austria – and having the status of a body governed by public law.
- 2 It applied for a subsidy for staff costs to be granted to the private primary and middle school ‘E’, which is operated by the association ‘K’ as the school provider at location D in Austria, is recognised as denominational by the appellant on a point of law, and had been granted public-law status as from the 2016/17 school year subject to ongoing compliance with the statutory conditions by decision of the Federal Minister for Education of 27 February 2017 pursuant to Paragraph 14(1) of the PrivSchG, read in conjunction with Paragraph 15 thereof. By decision of the Education Directorate for Vorarlberg of 3 September 2019, that application was refused pursuant to Paragraph 17(1) and (2) of the PrivSchG.
- 3 By the contested judgment of 26 February 2020, the appeal on the merits brought against that refusal by the appellant on a point of law was dismissed as unfounded by the Bundesverwaltungsgericht (Federal Administrative Court; ‘the Administrative Court’).
- 4 In its reasoning, the Administrative Court stated that, in Germany, the appellant on a point of law was granted the rights of a body governed by public law in accordance with Article 140 of the German Basic Law, read in conjunction with Article 137(5) of the Weimar Constitution. The appellant on a point of law is not recognised as a church or religious community in Austria, either by law or by a corresponding ordinance pursuant to Paragraph 2 of the AnerkennungsG. Since, according to Article 17(1) TFEU, the European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States, EU law does not require Austria to recognise a church or religious community where it is recognised in another EU Member State. As the appellant on a point of law is not a church or religious society legally recognised in Austria, it is irrelevant that it recognised the school as ‘denominational’ in its letter of 29 May 2019, as such recognition can be granted only by churches or religious societies that are legally recognised in Austria. The private school ‘E’ established in D in Austria is therefore not a denominational private school. Consequently, the school does not have the special legal status

referred to in Paragraph 18 of the PrivSchG. Since the requirements for Paragraph 17 et seq. of the PrivSchG are not met, the appeal must be dismissed.

- 5 The appellant on a point of law brought an appeal on a point of law against that judgment before the referring court, in which it calls into question, inter alia, the compatibility with EU law of the restriction of eligibility for subsidies to churches and religious societies that are legally recognised in Austria.
- 6 The assessment of the lawfulness of the refusal to grant subsidies depends on whether the provisions of the PrivSchG that govern subsidisation are in conformity with EU law, in so far as the latter is applicable at all in the circumstances of the present case.

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

- 7 Legally recognised churches and religious societies within the meaning of Article 15 of the StGG are to be understood as referring to bodies recognised as churches or religious societies by (special) law or by administrative act on the basis of the AnerkennungsG. If the conditions contained in the AnerkennungsG are met, there is a right to recognition as a religious society. Recognition as a church or religious society confers the status of a body governed by public law on a religious community. Churches and religious societies thereby not only have special rights, but must also perform special tasks, through which they participate in the shaping of public life at State level.
- 8 On the basis of the terminology used within the PrivSchG, the referring court proceeds on the assumption that Paragraph 17 of the PrivSchG covers only churches and religious societies recognised in Austria.

With the accession to the EEA, the PrivSchG was amended to the effect that Paragraph 2a was inserted into that law, according to which nationals and legal persons of a country to whose nationals and legal persons Austria is obliged to grant the same rights as it does to Austrian nationals and legal persons on the basis of a State treaty within the framework of European integration are to be equated with Austrian citizens and legal persons. The Administrative Court takes the view that it cannot be directly inferred from this that churches and religious societies which have been recognised in other Member States are also to be granted subsidies for denominational private schools that have public-law status, in application of Paragraph 17 of the PrivSchG. Rather, since Paragraph 17 of the PrivSchG is based not on nationality, but on legal recognition, it is necessary to examine in detail whether EU law requires the equality sought by the appellant on a point of law.

- 9 It is common ground in the present case that the appellant religious society is not a religious society that is legally recognised in Austria within the meaning of Article 15 of the StGG or the AnerkennungsG. In Germany, however, as a recognised religious society, it has the status of a body governed by public law.

- 10 Under Austrian law, private schools are schools established and maintained by persons other than the statutory school providers. Legally recognised churches and religious societies are to be granted subsidies for staff costs for denominational private schools having public-law status. Denominational private schools are schools maintained by legally recognised churches and religious societies and their institutions, as well as those schools maintained by associations, foundations and funds which are recognised as denominational schools by the competent higher authority of a church (religious society). Legally recognised churches and religious societies have a statutory entitlement to subsidies, which can be enforced through administrative channels.
- 11 If certain conditions are met, the Federal Government can grant subsidies for staff costs to all other private schools having public-law status within the limits of the funds available under the respective Federal law on finance. They therefore do not have an independent entitlement to subsidisation. Rather, it depends on whether or not there are actually any subsidy funds available for distribution.
- 12 The difference in treatment of denominational and non-denominational private schools cannot therefore be regarded as a violation of the principle of equality, because State schools – just like non-denominational private schools – are interdenominational, and denominational private schools therefore serve to supplement the State school system, making it easier for parents (within the meaning of Article 2 of Protocol No 1 to the ECHR) freely to choose an education for their children that is in conformity with their religious convictions. That conclusion was also reached by the Verfassungsgerichtshof (Constitutional Court), which considered the differentiation between denominational and non-denominational private schools to be justified because denominational private schools have traditionally enjoyed a special status in Austria. If, in Paragraph 21 of the PrivSchG, the legislature restricts State subsidisation to those private schools which correspond to a greater extent to the State school system, such an approach falls within the legislature's legal policy discretion.
- 13 The European Commission of Human Rights also recognised the importance of denominational private schools supplementing the State (non-denominational) school system, because the special support is justified in particular in the light of Article 2 of Protocol No 1 to the ECHR, read in conjunction with Article 14 ECHR (see European Commission of Human Rights, 6 September 1995, *Verein gemeinsam Lernen*, 23419/94).
- 14 With regard to subsidisation, the decisive factor is therefore whether the school is a denominational private school of a legally recognised church or religious society within the meaning of Paragraph 17 of the PrivSchG or another type of private school. For the purposes of assessing the question as to whether the appellant religious society has a statutory right to the subsidisation of the private school in question, as a denominational private school within the meaning of Paragraph 17 of the PrivSchG, the decisive factor, crucial to the decision to be given, is

therefore whether those provisions, or the restriction to churches and religious societies legally recognised in Austria, are in conformity with EU law.

1. The applicability of EU law (Question 1)

- 15 This case concerns an application filed by the appellant on a point of law, a religious society recognised in Germany, requesting subsidisation of a school which it recognises as denominational and which is operated in Austria by an association entered in the register of associations. According to the submissions made in the appeal on a point of law, pupils are admitted to that private school against payment of school fees charged to cover costs. The appellant on a point of law supports the association which operates as a school provider by providing it with grants, teaching material, further training for teachers, and so forth.
- 16 Under Austrian law, a legally recognised church or religious society is entitled to subsidies for schools that it operates itself or for schools which, although operated by other providers, are recognised by it as being denominational. Therefore, the appellant on a point of law, which is established in Germany, submitted a subsidy application for the private school operated in Austria by an association and recognised as denominational by the appellant on a point of law.
- 17 In such a situation, the question of the applicability of EU law arises. In that regard, the appellant on a point of law relies on the freedom to provide services within the meaning of Article 56 et seq. TFEU.
- 18 The Court of Justice has already ruled on several occasions that courses provided by educational establishments financed essentially by private funds that do not come from the provider itself constitute services, since the aim of such establishments is to offer a service for remuneration. It is not necessary for that private financing to be provided principally by the pupils or their parents, as the economic nature of an activity does not depend on the service concerned being paid for by those for whom it is performed (CJEU, 6 November 2018, *Scuola Elementare Maria Montessori Srl and Others*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 105; 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 48 and 49; 11 September 2007, *Commission v Germany*, C-318/05, EU:C:2007:495, paragraphs 69 and 70; 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraphs 40 and 41). The same cannot be said, however, of courses provided by certain establishments which are integrated into a system of public education and financed, entirely or mainly, by public funds. Indeed, in establishing and maintaining such a system of public education, which is, as a general rule, financed from public funds and not by pupils or their parents, the State is not seeking to engage in gainful activity, but is fulfilling its social, cultural and educational obligations towards its population (see, once again, CJEU, 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 50; 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 39).

- 19 In the present case, it can be assumed – albeit that the Administrative Court did not make any finding in this regard – on the basis of the information provided by the appellant on a point of law that the school in question is financed largely from private funds; in relation to this case, the question as to whether a service exists would have to be answered in the affirmative.
- 20 That service is provided in Austria by an Austrian association and thus does not have a cross-border element. The only discernible cross-border connection could reside solely in the fact that the appellant religious society established and recognised in Germany, which is not a service provider itself, submitted (in a permissible manner) a subsidy application under Austrian law for the private school recognised by that appellant as being denominational. It appears to the Administrative Court to be questionable whether a situation relevant to EU law has arisen at all in this specific case – from the aspect of a cross-border service. As far as can be seen, the Court of Justice has hitherto not taken a position on such a situation.
- 21 In that context, the question also arises as to whether the appellant religious society can rely on the freedom to provide services in order to obtain equality with denominational private schools of churches and religious societies recognised in Austria – which precisely do not carry out service activities within the meaning of the abovementioned case-law – because they are financed at least predominantly from public funds. In other words, can the appellant religious society rely on the freedom to provide services in order to obtain equal treatment with non-service providers?
- 22 Furthermore, it is necessary to assess whether Article 17 TFEU precludes the application of EU law to the situation in the present case. This is because the educational establishment in question is a private school that is recognised as ‘denominational’ by a religious society.

Article 17 TFEU provides that the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

- 23 It does not appear unreasonable to consider that the subsidisation of denominational private schools of legally recognised churches and religious societies regulates relations between the Member State and churches, religious associations or communities, towards which the Union is neutral (see, to that effect, the statements of Advocate General Michal Bobek in his Opinion of 25 July 2018 in *Cresco Investigation GmbH*, C-193/17, EU:C:2018:614, point 24).
- 24 In proceedings concerning the equal treatment of professional activities within churches and similar organisations, the Court of Justice has already ruled that, while Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and

religious associations and communities, that article is not such as to exempt compliance with the criteria set out in the applicable directive from effective judicial review (see CJEU, 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 48; 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 58). In connection also with the holiday regime for Good Friday, the Court of Justice ruled that Article 17 TFEU does not mean that a difference in treatment under national legislation concerning the grant to certain employees of a public holiday for the celebration of a religious festival is excluded from the scope of the applicable directive (see CJEU, 22 January 2019, *Cresco Investigation GmbH*, C-193/17, EU:C:2019:43, paragraph 30 et seq.).

- 25 However, on the basis of that case-law and the statements in the Opinion in *Cresco Investigation GmbH* (points 25 and 26), the referring court takes the view that even if Article 17 TFEU were applicable to the situation in the present case, this would not mean that the compatibility of the national rules on the subsidisation of denominational private schools with EU law, in particular the principle of equality, would not have to be reviewed.
- 26 It would therefore be necessary to clarify, in the context of the first question referred, whether Article 17 TFEU is in fact applicable to a situation such as that in the present case and, if that question is answered in the affirmative, what effects that has with regard to the application of EU law.

2. Obstacle to the freedom to provide services (Question 2)

- 27 Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State. This is because, according to the case-law of the Court of Justice, Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the service provider is established in a Member State other than that in which the service is provided. Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (see CJEU, 22 November 2018, *Vorarlberger Landes- und Hypothekenbank AG*, C-625/17, EU:C:2018:939, paragraphs 28 and 29).
- 28 In that context, the question arises as to whether the mere fact that the appellant religious society – unlike religious societies recognised in Austria – does not have a statutory entitlement to subsidies already leads to an obstacle to the freedom to provide services because the exercise of the freedom to provide services could be less attractive as a result. In principle, there are no legal obstacles to the establishment of a private school by the religious society or to the recognition as ‘denominational’ of a private school operated not by that religious society but by an association. The fundamental difference, however, resides in the lack of a statutory entitlement to subsidisation consisting in the financing of the teaching positions required to deliver the curriculum.

29 Where national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement in the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (CJEU, 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 58 et seq.).

30 Should the Court of Justice consider the Austrian provision of Paragraph 17(1) of the PrivSchG to be discriminatory, reference is made to the relevant legislative materials for the purposes of an examination of the justification and proportionality of that provision. They read as follows:

‘The provisions of Section IV give effect to the long-awaited subsidisation of denominational private schools. As has already been stated in the introduction to these Explanatory Notes, the provisions of Section IV are identical in content to those of the Concordat concerning Catholic schools, which is currently under negotiation between the Holy See and the Austrian Federal Government.

Section IV is divided into subsection A entitled “Subsidisation of denominational private schools” and subsection B entitled “Subsidisation of other private schools”. While legally recognised churches and religious societies are granted a statutory entitlement to subsidies for their denominational private schools to the extent specified in Paragraph 18, no such statutory entitlement is provided for non-denominational private schools (cf. Paragraph 21). That difference in treatment of denominational and non-denominational private schools cannot be regarded as a breach of the principle of equal treatment, because State schools are interdenominational and denominational private schools therefore serve to supplement the State school system, making it easier for parents freely to choose an education for their children that is in conformity with their religious convictions. In addition, by virtue of the provisions of the Concordat, Austria is also bound with regard to Catholic private schools by international law, under which provision must be made for such a statutory entitlement. In view of the requirement of equal treatment of legally recognised churches and religious societies, a statutory entitlement must also be provided in the same way for the other legally recognised churches and religious societies.’

31 The explanatory notes concerning the amendment of the BekGG by BGBl. I No 78/2011 state the following with regard to Paragraph 11, which relates to recognition under the AnerkennungsG:

‘... The indirect State support for churches and religious societies is provided because, through their work, they contribute to the welfare of people in a manner that transcends their own adherents. That support is on the one hand non-material,

but it is also very concrete in many areas, in particular charity, health care and education. However, the intangible effects can arise only if the group is of a certain size and its actions are not limited to its own immediate circle of adherents and do not benefit that circle alone. It is presumed that, on the intangible side, a positive effect extending beyond its own community exists in the case of the minimum number of members provided for in the law.

Paragraph 11 of the BekGG lays down conditions for recognition as a legally recognised church or religious society under the Anerkennungsgesetz 1874 (1874 Law on recognition; ‘the AnerkG’). Acquiring the status of a legally recognised church or religious society entails rights and obligations, the most extensive of which is the obligation to provide religious education. Paragraph 5 of the AnerkG already addresses the requirement of sufficient means to ensure regulated religious education and therefore proceeds on the presumption of an obligation to provide it. Nowadays, that obligation arises in particular from the precept directed at Austrian schools, which is contained in Article 14(5a) of the Bundes-Verfassungsgesetz (Federal Constitutional Law; ‘the B-VG’), to enable children and young people to assume responsibility for themselves, others, the environment and future generations in a manner based on religious values. The provision of religious education is an internal matter of churches and religious societies and can therefore be provided only by churches and religious societies, in accordance with Article 17 of the StGG 1867. In order to be able to provide such an educational offering at the highest possible level, as likewise prescribed in Article 14(5a) of the B-VG, a sufficient number of qualified teachers is required. In order to be able to run a teacher training and development programme required for that purpose, general experience shows that at least 10 to 20 students per academic year are required, as otherwise courses offering training and development cannot be run in the medium term. Assuming only 10 graduates per academic year and – taking into account other professional activities and periods of maternity or paternity leave – a professional working life in each case of 30 years, this results in 300 teachers. Under the law as it stands, full employment of those teachers requires 6 000 classes per week. If it is assumed that all those teachers wish to discharge only half the full teaching commitment, this would result in 3 000 teaching hours per week as a requirement. Even in the case of only three pupils per religious education group with one weekly lesson, this results in 9 000 required pupils across all 12 school levels, thus 750 pupils per school level. Assuming an average life expectancy and an age pyramid tending towards a lower average age than in the general population, this would result in approximately 30 000 to 40 000 adherents as a requirement for religious education guaranteed in the long term. The value of 2 per thousand is therefore considerably below what is actually necessary and is justifiable only because it can be assumed that there is a concentration of adherents of small denominations in conurbations, with the result that there is little dispersion and the educational establishments do not have to be run entirely by the denomination alone but can achieve synergies through interdenominational cooperation or cooperation with public institutions.

A similar situation arises in the private school system. According to the Rechnungshof (Court of Audit), 2.5 teachers are required to run a secondary school class. According to the teacher-pupil ratio (one teacher for every 10 pupils), which is a decisive factor for secondary schools on the basis of the financial equalisation scheme, 25 pupils per secondary school class are therefore required. 50 pupils per school level are therefore required in the case of two parallel classes. Since in most cases not all children of a denomination are gathered in the same location, [five times that figure] must be assumed as the requirement for Austria as a whole, that is to say, 250 per age group. Assuming a life expectancy of approximately 80 years, this would therefore result in approximately 20 000 persons across all age groups. In that respect, the 5-fold figure results from the normal distribution of pupil numbers. Vienna, for example, has approximately 20% of all pupils in Austria, that is to say, approximately 1/5 of Austrian pupils attend schools in Vienna; if it is assumed that the children of the religious community are distributed among the provinces in approximately the same way as the population, this results in the requirement of a 5-fold increase in order to achieve a guaranteed pupil population in the medium term, at least in the conurbations.

[...]

- 32 The referring court takes the view that the objective, expressed in the explanatory notes, of supplementing the State school system with denominational private schools, which are intended to enable parents freely to choose an education for their children that is in conformity with their religious convictions, constitutes an overriding reason in the public interest. The fact that only denominational private schools of churches and religious societies legally recognised in Austria have a statutory entitlement to subsidisation serves to achieve that objective, because such denominational private schools have a relatively large number of members on account of the recognition requirements (Paragraph 11 of the BekGG) and therefore address a correspondingly large section of the population that potentially chooses those schools, with the result that the effect of the supplemented educational offering can be achieved.
- 33 As part of the examination of proportionality, it is also necessary to consider whether it is proportionate to direct the religious society recognised in Germany to the process of applying for recognition as a religious society in Austria. The referring court takes the view that that question is to be answered in the affirmative because the required guarantee of the existence of a religious society is to be assessed within the framework of the recognition procedure.
- 34 The question therefore arises as to whether, in so far as there is an obstacle to the freedom to provide services, that obstacle could be justified on special grounds and be proportionate.