

Case C-366/24

Request for a preliminary ruling

Date lodged:

21 May 2024

Referring court:

Conseil d'État (France)

Date of the decision to refer:

17 May 2024

Applicant:

Amazon EU Sàrl

Defendants:

Ministre de la Culture

Ministre de l'Économie, des Finances et de la Souveraineté
industrielle et numérique

...

The Conseil d'État, acting in its judicial capacity

(Judicial Section, Combined 9th and 10th Chambers)

...

Having regard to the following procedural stages:

By an application and two sets of written submissions, registered on 22 May, 15 November and 20 December 2023 with the secretariat of the judicial section of the Conseil d'État (Council of State, France), the company Amazon EU requests that the Council of State:

(1) annul on grounds of ultra vires the order of 4 April 2023 on the minimum charge for book delivery services;

(2) ... [head of claim relating to costs]

It submits that:

- the order was adopted following an unlawful procedure, in that it was not submitted to the Autorité de la concurrence (Competition Authority) for prior consultation;
- Article 1 of loi n° 2021-1901 du 30 décembre 2021 visant à conforter l'économie du livre et à renforcer l'équité et la confiance entre ses acteurs (Law No 2021-1901 of 30 December 2021 aimed at strengthening the book market and enhancing fairness and confidence among the parties in that market) – the legal basis for the contested order – fails to have regard to the objectives of Directive 2000/31/EC of 8 June 2000 and, in the alternative, those of Directive 2006/123/EC of 12 December 2006;
- Article 1 of the loi du 31 décembre 2021 (Law of 31 December 2021) fails to have regard to the free movement of goods guaranteed by the Treaty on the Functioning of the European Union.

By two statements of defence, registered on 19 October 2023 and 7 March 2024, the ministre de la culture (Minister for Culture) contends that the action should be dismissed. The Minister submits that the pleas raised by the applicant company are unfounded.

The application was served on the ministre de l'économie, des finances et de la souveraineté industrielle et numérique (Minister for the Economy, Finance and Industrial and Digital Sovereignty, France), who did not lodge written submissions.

Having regard to:

- the Treaty on European Union;
- the Treaty on the Functioning of the European Union;
- the Charter of Fundamental Rights of the European Union;
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000;
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006;
- loi n° 81-766 du 10 août 1981 (Law No 81-766 of 10 August 1981);

- Law No 2021-1901 of 30 December 2021;
- the code de commerce (Commercial Code);
- the code de justice administrative (Code of Administrative Justice);
- ...

[procedural details]

Whereas:

- 1 According to the first paragraph of Article 1 of the Law of 10 August 1981 on book prices, as amended by Article 1 of the Law of 30 December 2021 aimed at strengthening the book market and enhancing fairness and confidence among the parties in that market: ‘Any natural or legal person who publishes or imports books is required to set the price for sale to the public of the books published or imported by that person’. According to the fourth paragraph of that article: ‘The actual selling price charged by retailers to the public shall be between 95% and 100% of the price set by the publisher or importer. Where a book is sent to the purchaser and is not collected from a book retailer, the selling price shall be the price set by the publisher or importer. Under no circumstances may the book delivery service, either directly or indirectly, be offered by the retailer free of charge, unless the book is collected from a book retailer. It must be invoiced in compliance with a minimum charge set by order of the ministers responsible for culture and the economy, based on a recommendation from the Autorité de régulation des communications électroniques, des postes et de la distribution de la presse (Regulatory Authority for Telecommunications, Postal Services and Print Media Distribution). This order shall take into account the prices offered by postal service providers in the book retail market and the need to maintain a dense network of retailers across the country’.
- 2 By order of 4 April 2023 implementing the fourth paragraph of Article 1 of the Law of 10 August 1981, the Minister for the Economy, Finance and Industrial and Digital Sovereignty and the Minister for Culture set the minimum charge for the home delivery service of books at EUR 3 (inclusive of all taxes) for any order comprising one or more books for which the new purchase value is less than EUR 35 (inclusive of all taxes), and more than EUR 0 (inclusive of all taxes) for any order comprising one or more new books for which the new purchase value is greater than or equal to EUR 35 (inclusive of all taxes). Amazon EU is seeking the annulment of that order on the basis that it is ultra vires.

Consultation of the Competition Authority:

- 3 ...

4 ... [plea concerning a point of national law that is irrelevant to the questions referred for a preliminary ruling]

Compliance with EU law:

5 First, under Article 22 of the Charter of Fundamental Rights of the European Union: ‘The Union shall respect cultural, religious and linguistic diversity’. Under the final subparagraph of Article 3(3) of the Treaty on European Union: ‘[The European Union] shall respect its rich cultural and linguistic diversity’. Under Article 167 of the Treaty on the Functioning of the European Union: ‘1. The Union shall contribute to the flowering of the cultures of the Member States ... 2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas ... – artistic and literary creation ... 4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures’.

6 Second, under Article 34 of the Treaty on the Functioning of the European Union: ‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States’. Article 56 of that treaty provides as follows: ‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended’.

7 In the first place, ...

8 ...

9 ...

10 ... [plea alleging that the provisions of national law at issue are incompatible with Directive 2000/31, rejected by the referring court in accordance with the Court’s established case-law and irrelevant to the questions referred for a preliminary ruling]

11 In the second place, Article 1 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market provides as follows: ‘1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services. ... 4. This Directive does not affect measures taken at Community level or at national level, in conformity with Community law, to protect or promote cultural or linguistic diversity or media pluralism’. Article 16(1) of that directive provides: ‘Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory. Member States shall not make access to or

exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles: (a) non-discrimination ... (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment; (c) proportionality ...'.

- 12 In support of its argument that the order it is challenging is unlawful, the applicant company submits that the fourth paragraph of Article 1 of the Law of 10 August 1981, which that order implements, fails to have regard to the objectives of Directive 2006/123/EC in that it makes the freedom to provide a service subject to a requirement that is incompatible with the conditions laid down in Article 16(1) of that directive. For her part, the Minister for Culture argues in defence, primarily, that, as the contested provisions were introduced with a view to preserving editorial diversity and, consequently, cultural diversity, they do not come within the scope of Directive 2006/123/EC by virtue of Article 1(4) of that directive. In the alternative, the Minister maintains that the ground of preservation of cultural diversity justifies the contested measure.
- 13 The answer to that plea in law depends on whether Article 1(4) of Directive 2006/123/EC must be interpreted as excluding from the scope of that directive a national measure governing the exercise, in the territory of the Member State, of a service activity with a view to protecting or promoting cultural diversity or whether, in conjunction with Article 16(1)(b) of that directive, it must be interpreted as meaning that the preservation or promotion of cultural diversity is capable of justifying an exemption from the prohibition on subjecting service providers established in another Member State to a requirement introduced by such national legislation.
- 14 If the Court were to adopt such a combined reading of Articles 1 and 16 of the directive, the question also arises whether the assessment of the compatibility of the national legislation at issue with the objectives pursued by Directive 2006/123/EC excludes the same examination in the light of the primary law of the European Union.
- 15 In the third place, if it is necessary to assess the compatibility of a national measure adopted with a view to protecting or promoting cultural diversity with the freedoms guaranteed by Articles 34 and 56 of the Treaty on the Functioning of the European Union, the question arises as to whether a national measure that sets a minimum charge for the home delivery of a product must be regarded as relating to a selling arrangement for that product and, consequently, must be assessed in the light of the free movement of goods or whether the contested legislation must be assessed in the light of the freedom to provide services, in particular, having regard to the harm caused to the activity of selling that product online or to the distinct nature of the delivery service as compared with the sale of the product.
- 16 Those questions are decisive for the outcome of the dispute before the Council of State. They present serious difficulties. It is therefore necessary to refer the

questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU and, until that Court has given a ruling in that regard, to stay the proceedings in respect of the claims submitted by the applicant.

DECIDES AS FOLLOWS:

Article 1: The proceedings are stayed until the Court of Justice of the European Union has given a ruling on the following questions:

1. Must Article 1(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market be interpreted as excluding from the scope of that directive a national measure governing the exercise, in the territory of the Member State, of a service activity with a view to protecting or promoting cultural diversity or must it be interpreted, in conjunction with Article 16(1)(b) of that directive, as meaning that the preservation or promotion of cultural diversity is capable of justifying an exemption from the prohibition on subjecting service providers established in another Member State to a requirement introduced by such national legislation?
2. Does the assessment of the compatibility of such national legislation with the objectives pursued by Directive 2006/123/EC exclude the same examination in the light of the primary law of the European Union?
3. If it is necessary to assess the compatibility of a national measure adopted with a view to protecting or promoting cultural diversity with the freedoms guaranteed by Articles 34 and 56 of the Treaty on the Functioning of the European Union, must a national measure that sets a minimum charge for the home delivery of a product be regarded as relating to a selling arrangement for that product and, consequently, must it be assessed solely in the light of the free movement of goods, or should that legislation be assessed solely in the light of the freedom to provide services, in particular, having regard to the harm caused to the activity of selling that product online or to the distinct nature of the delivery service as compared with the sale of the product?

[...] [operative part concerning notification of the decision]

[...] [information relating to the delivery of the decision, the composition of the court and the enforcement of the decision]