Anonymised Version

Case C-109/23

Request for a preliminary ruling

Date lodged:

23 February 2023

Referring court:

Landgericht Berlin (Berlin Regional Court, Germany)

Date of the order for reference:

16 January 2023

Complainants:

GM

ON

Respondent:

PR

Berlin Regional Court

[…]

Decision

In the notarial complaints procedure provided for under Paragraph 15 of the Bundesnotarordnung (Federal Code for Notaries, ‘the BNotO’)

concerning a refusal by the notary PR […]

to perform an official function

Parties to the proceedings:

1) **GM** […]

– First complainant –

2) **ON** […]

– Second complainant –

the Berlin Regional Court […] decided as follows on 16 January 2023:

I. The proceeds are stayed.

II The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 5n(2) of Council Regulation (EU) No 833/2014 (Russia Sanctions Regulation) in the version in force since 7 October 2022:

1. Does a German notary infringe the prohibition on providing, directly or indirectly, legal advisory services to a legal person established in Russia if he or she authenticates a contract for the sale of title to an apartment (*Wohnungseigentum*) entered into between that person as the seller and a national of a Member State of the European Union?

2. Does an interpreter act in contravention of the prohibition on providing, directly or indirectly, legal advisory services if, for the purposes of that authentication of the contract of sale, he or she accepts an assignment from that notary to translate the content of the authentication proceedings for the representative of the legal person established in Russia, who lacks sufficient proficiency in the German language?

3. Does the notary infringe the prohibition on providing, directly or indirectly, legal advisory services if he or she accepts and carries out instructions to perform notarial activities provided for by law for the purposes of execution of the contract of sale (for example, settlement of the purchase price payment via an escrow account held by the notary, requesting documents required for the cancellation of mortgages and other encumbrances burdening the object of sale, submission of the documents necessary to effect registration of the transfer of title to the body maintaining the *Grundbuch* (‘the Land Register’))?

Grounds:

I.

Parties 1 and 2 are German nationals residing in Berlin. They intend to acquire an apartment ownership right (*Wohnungseigentumsrecht*) in Berlin, which is registered in the Schöneberg Land Register, maintained by the Amtsgericht Schöneberg (Local Court, Schöneberg, Germany), under folio 31734 (*Wohnungsgrundbuch* (‘the Register of Apartment Ownership’)). Since 2013, the company Visit-Moscow Ltd. – which has its registered office in Moscow (Russia)

and was registered for the first time on 29 July 1993, and has, since 10 September 2002, been listed in the Russian Unified State Register of Legal Entities as a limited liability company, (OOO) WISIT-MOSKWA, under the main registration number 1027739169534 – has been registered in the Land Register as the owner of the title to the apartment.

Parties 1 and 2 and the seller requested the notary named in the heading of this decision, who has his official office location in Berlin, to authenticate a contract of sale with respect to the information it contained concerning the object of purchase, the purchase price and other contractual provisions, and then, subsequently, to carry out the execution of the authenticated contract by registering the transfer of title to the apartment in favour of the purchasers, obtaining cancellation of the existing encumbrances burdening the property and handling the notarial safe custody and disbursement of the purchase price. By letter of 15 December 2022, the notary informed both parties 1 and 2 and the seller that he was provisionally refusing to authenticate the contract of sale on the grounds that he could not definitively rule out the possibility that the authentication would infringe the legislative prohibition laid down in Article 5n(2) of Regulation (EU) [No] 833/2014.

By letter of 15 December 2022, the parties lodged a complaint with the notary based on that refusal. The notary did not remedy the complaint and, by letter of 19 December 2022, referred it to the Regional Court for a decision.

II.

According to Paragraph 15(2) of the BNotO, the complaint lodged by parties 1 and 2 is the admissible legal remedy against the notary's refusal. The success of the legal remedy depends on the answers to the questions referred for a preliminary ruling.

1. According to the first sentence of Paragraph 15(1) of the BNotO, a German notary may not refuse to perform notarial acts without sufficient reason. This means that a notary is not free to refuse a request for an authentication but is instead, at least as a general rule, legally required to accept it. A refusal to authenticate can be based only on a ground for refusal recognised by law. If there is no ground for refusal then, on the basis of the complaint lodged by the requesting parties, which is admissible under the first sentence of Paragraph 15(2) of the BNotO, the notary is to be instructed to perform the authentication by the court hearing the complaint.

2. Under Paragraph 4of the Beurkundungsgesetz (Law on the Authentication of Documents, 'the BeurkG'), there is a legally recognised ground for refusing to perform an authentication if doing so would be incompatible with the notary's official duties. According to Paragraph 14(2) of the BNotO, notaries are to refuse to carry out any notarial function when the same precondition is met. In the present case, it is conceivable that the notary would, in authenticating the contract

for sale of the apartment ownership right, infringe the legislative prohibition laid down in Article 5n(2) of Regulation (EU) [No] 833/2014 of 31 July 2014, in the version in force since 7 October 2022. Under that provision, it is prohibited to provide, directly or indirectly, legal advisory services to a person established in Russia.

a) The following considerations militate against the application of that provision to the notarial authentication of a contract for sale of title to an apartment:

(1) Under German law, notaries do not provide a service, but instead perform an official function. According to Paragraph 1 of the BNotO, notaries are appointed as independent holders of a public office to authenticate legal acts and to perform other tasks in the field of the preventive administration of justice. Under the second sentence of Paragraph 2 of the BNotO they hold an official seal, which bears the coat of arms of the *Bundesland* (Federal state) which appointed them. According to the second sentence of Paragraph 14(1) of the BNotO notaries are not to represent any particular party, but are to provide an independent and impartial service to all parties involved. Even if notaries are not civil servants, they perform public functions delegated to them by the State which, in the absence of such delegation, the State would be required to perform through its authorities (see Bundesverfassungsgericht (Federal Constitutional Court, Germany, 'BVerfG'), decision of 5 May 1964 – 1 BvL 8/62 –, NJW 1964, 1516 [1517]). Accordingly, notaries do not act on the basis of a civil-law contract for services entered into between the parties, but rather on the basis of a public-law request from the parties to perform an official notarial act. In this respect, the Court of Justice of the European Union has already ruled that a person's duties associated with authority in respect of notarial matters constitute their participation in the exercise of rights under powers conferred by public law for the purposes of safeguarding the general interests of the State (see judgment of the Court of Justice of the European Union of 30 September 2003 – C-405/01 (*Colegio de Oficiales de la Marina Mercante Española* v *Administración del Estado*)).

The proposition that a German notary does not exercise official authority cannot be upheld on the sole ground that he or she is authenticating only documents and agreements that have first been freely entered into by consensus of the parties and which he or she cannot subsequently alter (see , judgment of the Court of Justice of the European Union of 24 May 2011 – C-54/08 (*Commission* v *Germany*)). A notary's public-law function comes to bear precisely when – contrary to the will of the parties – he or she makes a binding decision on the invalidity of their contractual consent by refusing to authenticate it, pursuant to Paragraph 4 of the BeurkG, on the grounds of its unlawful or dishonest purpose, and thereby precludes its formal validity. Moreover, notaries have the official duty, which is enshrined in law under Paragraph 17(1) of the BeurkG and which is not subject to a contract for services, to brief the contracting parties impartially on the legal implications of the transaction. Provision of this information often serves to

effectively forestall a contractual agreement that would be prejudicial to one of the parties from being authenticated in the first place.

(2) Even if, under EU law, the activities of notaries are to be regarded as a service within the meaning of Article 5n(2) of Regulation (EU) No 833/2014, the application of that provision to those activities would have to be excluded by virtue of the exception under Article 5n(6) of Regulation (EU) No 833/2014. If a legislative prohibition prevents an interested party from obtaining the services of a notary for the purposes of a legal transaction concerning a plot of land or title to an apartment, then that prohibition also deprives the interested party of access to judicial proceedings in a Member State.

Under German law, registration in the Land Register is an essential condition for the establishment and acquisition of a right in an immovable property. Maintenance of the Land Register constitutes a judicial procedure in view of the fact that it is entrusted to special departments of the *Amtsgerichte* (local courts) – the *Grundbuchämter* (Land Registries) – and is regulated by judicial rules of procedure laid down in the Grundbuchordnung (Land Registration Code, 'the GBO'). Notaries play a central role in initiating the procedure for making an entry in the Land Register. Under Paragraph 29(1) of the GBO, the Land Registry may grant an application for an entry in the Land Register only if the legal transactions required for the entry are proven by means of public legal instruments or publicly authenticated legal instruments. With few exceptions, notaries have exclusive competence both to create public legal instruments concerning private legal transactions and to publicly certify private legal instruments. This therefore means that, as a general rule, access to the procedure for effecting entries in the Land Register is not possible for natural persons and private legal entities unless they first obtain the services of a notary. Furthermore, it would not be contrary to the purpose of Article 5n of Regulation (EU) No 833/2014 if access to the procedure for effecting entries in the Land Register were to remain available to those persons referred to in Article 5n(2) of Regulation (EU) No 833/2014, since such persons are not, for the time being, prohibited from disposing of land or economically exploiting it.

The situation would remain the same even if, notwithstanding the competence of the local courts, maintenance of the Land Register is to be regarded under Union law not as a judicial procedure but rather as an administrative procedure. According to Article 5n(6) of Regulation (EU) No 833/2014, the provision of services which are strictly necessary to ensure access to administrative proceedings in a Member State, and which do not conflict with the purpose of that regulation, is also exempt from the prohibition laid down in Article 5n(2) of Regulation (EU) No 833/2014.

3) Even if official notarial activities are to be regarded as legal advisory services under Union law, and could not be regarded as strictly necessary for ensuring access to judicial or administrative proceedings in a Member State in accordance with Article 5n(6) of Regulation (EU) No 833/2014, there would be

significant reasons militating in favour of an interpretation of Article 5n(2) of Regulation (EU) [No] 833/2014 according to which the prohibition would not, in any event, refer to the involvement of a notary in contracts for the sale of immovable property:

Except in special cases, the sale of title to a plot of land under German law necessarily requires the involvement of a notary at several stages; the same applies, *mutatis mutandis*, to the sale of title to an apartment, which is, according to Paragraph 6(1) of the Wohnungseigentumsgesetz (Law on the Ownership of Apartments and the Permanent Residential Right, 'the WEG'), merely a special form of co-ownership of a plot of land. For the purposes of transferring title to a plot of land, or title to an apartment, from the previous owner to the purchaser, Paragraph 873(1) of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') requires not only registration of the purchaser in the Land Register but also the agreement of both parties to the transfer of title […], which, pursuant to the first and second sentences of Paragraph 925(1) of the BGB, must normally be declared before a German notary; under the third sentence of Paragraph 925(1) of the BGB, an exception to that rule applies only in the case of a declaration of conveyance made in an in-court settlement, or in an insolvency or restructuring plan that has been confirmed by a court. According to Paragraph 925a of the BGB, notaries may only receive a declaration of conveyance if the legal instrument containing the contract of sale is presented to them. Pursuant to the first sentence of Paragraph 311b(1) of the BGB, a contract for the sale of a plot of land or title to an apartment must, in turn, have been authenticated by a German notary.

Since the involvement of a notary in the sale of immovable property cannot be dispensed with, the legal persons established in Russia would be legally and factually deprived of any possibility to dispose of their immovable property assets in Germany if notaries were prohibited, pursuant to Article 5n(2) of Regulation (EU) No 833/2014, from performing their official duties simply by virtue of the fact that those persons were involved. That would constitute a serious encroachment on the fundamental right to property, which, at least under German constitutional law, is also enjoyed by foreign legal persons. Even in the light of the purpose of the sanctions directed against Russia, it appears unlikely that such an encroachment could be justified by the mere fact that the owner is organised as a legal entity, while natural persons with Russian citizenship or holding permanent residence in Russia generally retain the capacity to act without restriction.

b) However, the court hearing the complaint cannot automatically refrain from applying the prohibition laid down in Article 5n(2) of Regulation (EU) No 833/2014 to the notarial authentication of the contract of sale. On the contrary, the question regarding the scope of the prohibition is to be referred to the Court of Justice of the European Union for a preliminary ruling in preliminary ruling proceedings under Article 267 TFEU. The provision has not yet been interpreted by the Court. Furthermore, the correct application of Union law is not so obvious as to leave no scope for any reasonable doubt ('*acte clair*', see Court of Justice of

the European Union judgment of 6 October 1982 – Case 283/81 (*Sri CILFIT and Lanificio de Gavardo SpA* v *Ministry of Health*)):

The European Commission has, through its Directorate-General for Financial Stability, Financial Services and Capital Markets Union, published a guide entitled 'Provision of Services – Frequently asked questions concerning sanctions adopted following Russia's military aggression against Ukraine and Belarus' involvement in it', which is accessible via the internet address: https://finance.ec.europa.eu/publications/provision-services_en (as of 21 December 2022). Under question 21, the Commission adopts the view that Article 5n(2) of Regulation (EU) [No] 833/2014 also prohibits notarial services provided to the Government of Russia and legal persons established in Russia. Based on the Commission's view, this applies irrespectively of whether notaries are – as in the Federal Republic of Germany – government-appointed officials and are, in performing their official duties, exercising public powers. In the opinion of the Commission it is, furthermore, equally irrelevant whether the involvement of a notary is mandated by law for a specific legal act – such as a notarial authentication of the formation of a contract for the sale of an apartment, as provided for under the first sentence of Paragraph 311b(1) of the BGB.

The opinion of the European Commission is not directly binding for the purposes of the referring court's decision in the complaint proceedings concerning the notary's refusal to perform his official duties. However, it at least establishes such a significant degree of uncertainty as to the correct interpretation to be applied to the provision of EU law that it precludes a court of a Member State from ruling on the basis of the contrary position.

3. The questions referred for a preliminary ruling under points II.2 and II.3 arise only if the question referred for a preliminary ruling under point II.1 is answered in the negative and the notary is generally permitted, under Article 5n of Regulation (EU) No 833/2014, to authenticate the contract for sale of title to an apartment:

a) The notary may be instructed to authenticate the contract only if compliance with the statutory provisions governing the authentication procedure is ensured. If, for example, the seller's representative is not proficient in the German language, the notary must either provide the representative with his or her own Russian translation of the transactions in the authentication proceedings, or engage an interpreter to assist at the authentication in accordance with the first sentence of Paragraph 16(3) of the BeurkG. If, however, the interpreter is prevented from assisting under Article 5(2) of Regulation (EU) No 833/2014, on the grounds that his or her services are to be regarded as providing, directly or indirectly, legal advisory services, then it would not be possible for the authentication to take place and the notary could not be instructed to perform the authentication.

b) If the authentication can be performed in accordance with the provisions governing the authentication procedure, the additional question arises as to

whether the contracting parties can, in the legal instrument, assign to the notary those activities that are necessary for execution of the legal transaction. This includes, in particular, submission of the authenticated declarations to the body responsible for maintaining the Land Register and the fiduciary receipt of the purchase price money, as well as of the Land Register documents from the mortgage creditors, whose claims are to be settled out of the purchase price. Notaries frequently undertake those tasks as an ancillary function to their authentication activities; in so doing, they act in their capacity as impartial adviser to the parties. If such tasks fall within the scope of the prohibition on providing, directly or indirectly, legal advisory services, as laid down in Article 5(2) of Regulation (EU) No 833/2014, the otherwise standard form of a notarial contract on immovable property would have to be modified considerably in the present case. That modification would then also have to be reflected in a decision by the referring court that instructed the notary to authenticate the contract of sale.

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