

JUDGMENT OF THE COURT (Fourth Chamber)

4 July 2019 ([\\*](#))

(Failure of a Member State to fulfil obligations — Services in the internal market — Directive 2006/123/EC — Article 15 — Article 49 TFEU — Freedom of establishment — Fees of architects and engineers for planning services — Minimum and maximum tariffs)

In Case C-377/17,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 23 June 2017,

**European Commission**, represented by W. Mölls, L. Malferrari and H. Tserepa-Lacombe, acting as Agents,

applicant,

v

**Federal Republic of Germany**, represented initially by T. Henze and D. Klebs, and subsequently by D. Klebs, acting as Agents,

defendant,

supported by:

**Hungary**, represented by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,

intervener,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fourth Chamber, L. Bay Larsen, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Szpunar,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2018,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2019,

gives the following

### **Judgment**

- 1 By its application, the European Commission asks the Court to declare that, by maintaining fixed tariffs for architects and engineers, the Federal Republic of Germany failed to fulfil its obligations under Article 49 TFEU and under Article 15(1), (2)(g) and (3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

### **Legal context**

#### ***EU law***

- 2 Recital 40 of Directive 2006/123 is worded as follows:

‘The concept of “overriding reasons relating to the public interest” to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: ... the protection of the recipients of services; ... the protection of the environment and the urban environment, including town and country planning; ... the protection of intellectual property; cultural policy objectives, ....’

- 3 Article 2(1) of that directive provides:

‘This Directive shall apply to services supplied by providers established in a Member State.’

- 4 Article 15 of that directive states:

‘1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

...

- (g) fixed minimum and/or maximum tariffs with which the provider must comply;

...

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

- (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;
- (b) necessity: requirements must be justified by an overriding reason relating to the public interest;
- (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

...

5. In the mutual evaluation report provided for in Article 39(1), Member States shall specify the following:

- (a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;
- (b) the requirements which have been abolished or made less stringent.

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

...’

### ***German law***

5 The fees of architects and engineers are governed by the Honorarordnung für Architekten und Ingenieure (Official scale of fees for services by architects and engineers) of 10 July 2013 (BGBl. I, p. 2276) (‘the HOAI’).

6 Paragraph 1 of the HOAI is worded as follows:

‘This decree governs the calculation of the fees for the basic services of architects and engineers (acting as agents) established in Germany, provided that those basic services are covered by this decree and are provided from Germany.’

7 Paragraph 3 of the HOAI states:

‘1. The fees for basic services in the field of land use planning, project planning and specialist planning are regulated with binding effect in Parts 2 to 4 of this decree. The fees for consultancy services referred to in Annex 1 are not regulated with binding effect.

2. The basic services that are generally necessary for the proper execution of an agency contract are included in the performance profiles. The performance profiles are subdivided into service phases, in accordance with the provisions of Parts 2 to 4.

3. The list of special services covered by this decree and the service profiles and their annexes are not exhaustive. Special services may also be agreed for service profile plans and service phases which do not cover them, provided that they do not constitute basic services. The fees for special services can be freely agreed.

4. The cost effectiveness of the service must always be respected.’

8 Paragraph 7 of the HOAI provides:

‘1. The fees shall be based on the written agreement adopted by the contracting parties when the agency contract was awarded and falling within the minimum and maximum amounts set by these regulations.

2. If the eligible costs or areas determined are outside the scales set out in the fee tables in the [HOAI], the fees may be freely agreed.

3. The minimum amounts laid down in the [HOAI] may be reduced in exceptional cases, subject to written agreement.

4. The maximum amounts set out in the [HOAI] may only be exceeded in the event of extraordinary basic services or services of an unusually long duration, subject to written agreement. In this case, no account shall be taken of circumstances which have already been decisive for classification in the fee brackets or for classification within the framework of the minimum and maximum amounts.’

9 Parts 2 to 4 of the HOAI, referred to in Paragraph 3(1) of the HOAI, contain detailed provisions relating to the minimum and maximum amounts for land use planning, project planning and specialist planning. Some of these

provisions allow for the lowering of minimum tariffs in exceptional cases, in accordance with Paragraph 7(3) of the HOAI.

10 Paragraph 44(7) of the HOAI provides:

‘If the planning costs of civil engineering works with a large surface area and built under equal construction conditions are disproportionate to the calculated fees, Paragraph 7(3) is to apply.’

11 Paragraph 52(5) of the HOAI provides:

‘If the planning costs of load-bearing structures of civil engineering works with a large surface area and built under equal construction conditions are disproportionate to the calculated fees, Paragraph 7(3) is to apply.’

12 Paragraph 56(6) of the HOAI is worded as follows:

‘If the planning costs of technical equipment for civil engineering works with a large surface area and built under equal construction conditions are disproportionate to the calculated fees, Paragraph 7(3) is to apply.’

### **Pre-litigation procedure**

13 After undertaking an evaluation of compliance with obligations imposed by Directive 2006/123, the Commission engaged in bilateral discussions with some Member States, in relation to, in particular, the fixed tariffs laid down by national legislation. In that context, the Commission opened an EU Pilot procedure, in which the Federal Republic of Germany stated its position on 10 March 2015, seeking to justify the provisions of the HOAI on the tariffs of architects and engineers.

14 By letter of formal notice dated 18 June 2015, the Commission drew the German authorities’ attention to a possible infringement, by the provisions of the HOAI relating to tariffs, of Article 15(1), (2)(g) and (3) of Directive 2006/123 and of Article 49 TFEU.

15 By letter of 22 September 2015, the Federal Republic of Germany disputed the ground of complaints submitted to it. The Federal Republic of Germany argued that the HOAI did not restrict freedom of establishment and, even if it did, any such restriction would be justified by overriding reasons relating to the public interest. The Federal Republic of Germany also stated that the national provisions at issue governed only situations that were purely internal, which could not be assessed under Directive 2006/123 and Article 49 TFEU.

- 16 On 25 February 2016 the Commission issued a reasoned opinion in which it reiterated the arguments which it had set out in the letter of formal notice. The Commission asked the Federal Republic of Germany to take the measures necessary to comply with that reasoned opinion within 2 months of its receipt. The Federal Republic of Germany replied to that opinion on 13 May 2016, and maintained its position.
- 17 The Commission took the view that the Federal Republic of Germany had not remedied the infringement complained of and decided to bring the present action.
- 18 By decision of the President of the Court of 7 November 2017, Hungary was granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany.

## **The action**

### ***Arguments of the parties***

- 19 The Commission claims, first, that the HOAI comprises a restriction on the freedom of establishment guaranteed by Article 49 TFEU and by Directive 2006/123. The Commission considers that that legislation, which introduces a system of minimum and maximum tariffs for the services of architects and engineers, hinders the entry into the German market of new suppliers from other Member States. In that regard, the Commission claims that the HOAI limits the opportunities of the latter, since they can less easily attract clients in the German market, to offer services that are equivalent to those offered by suppliers already established in Germany at prices lower than those laid down by the fixed tariff, or to offer higher quality services at prices exceeding the prescribed maximum tariffs.
- 20 The Commission considers that however dense the supply of services by architects and engineers in Germany, that is of no relevance to the existence of the restrictions at issue on freedom of establishment. In that regard, the Commission argues that Article 15 of Directive 2006/123 makes no reference to the market situation and that the Court, in the judgment of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758), held that the setting of minimum fees for lawyers constituted a restriction on the freedom to provide services, although the market was characterised by the presence of an extremely high number of lawyers.
- 21 Moreover, the Commission submits that, while the HOAI concerns the manner in which services are to be supplied by architects and engineers, the effects of the HOAI are to restrict access to the market as such.

- 22 Further, the Commission infers from the wording of Article 2(1) of Directive 2006/123 that that directive is also applicable to purely internal situations.
- 23 Second, the Commission considers that the restrictions on freedom of establishment contained in the HOAI cannot be justified by the overriding reasons relating to the public interest relied on by the Federal Republic of Germany.
- 24 In the first place, the Commission believes that the preservation of a high level of services cannot, in this case, justify the restriction at issue. It cannot be inferred from the judgment of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758) that the Court held to be lawful any legislation setting minimum tariffs where the market is characterised by a high number of suppliers of the services at issue. According to the Commission, evidence that the tariffs are such as to ensure the quality of those services ought to have been produced by the Federal Republic of Germany.
- 25 In particular, the Commission believes that that Member State ought to have demonstrated that the removal of minimum tariffs would lead to a level of prices for those services being set which could create uncertainty as to their quality. Eurostat data indicates that the gross operating rate in the case of architects' services in Germany is markedly higher than in other Member States, though there is no evidence that the quality of services supplied in the other Member States is inferior due to the operation of lower margins. Further, the Commission argues that the HOAI goes beyond what is necessary to achieve the objective pursued, in that the service providers who wish to supply their services at prices lower than the minimum tariffs do not have the opportunity to prove that they satisfy all the requirements laid down by the national legislation.
- 26 The Commission comments that the frequent recourse to the option, provided for by the HOAI, of entering into an agreement on construction costs and setting fees lower than the minimum tariffs, with no complaints of a reduction in the quality of the services, undermines the arguments of the Federal Republic of Germany.
- 27 In the second place, the Commission rejects the argument that the objective of consumer protection by means of the elimination of the information asymmetry between consumers and service providers is achieved through the high level of quality of the services, which is itself ensured by the imposition of minimum tariffs. According to the Commission, that argument is based on a misconception that such tariffs guarantee the quality of the services supplied.
- 28 Further, the Commission comments that Article 22 of Directive 2006/123 obliges service providers to inform the service recipients of the price of a

service or of the method for the calculation of that price. The national authorities could make provision for the publication of information on the prices currently applied as indications of market practice. Moreover, the Commission states that the Federal Republic of Germany has not explained why information asymmetry did not exist in the case of consultancy services, which are not subject to the fixed tariffs laid down by the HOAI.

- 29 The Commission considers that the studies relied on by the Federal Republic of Germany fail to demonstrate the existence of any correlation between the prices of services and their quality. The Commission also states that the reasons why the alleged incentive effect of the minimum tariffs would lead to the consequences described in general terms by the Federal Republic of Germany are not apparent from the explanations put forward by that Member State. The Commission considers that the letter of the European Council of Engineers Chambers of 5 November 2015 refers to the declaration of that Council of 26 September 2015, which describes, positively, systems that ensure remuneration that is uniform, predictable and transparent, for certain types of services, but does not, however, impose as binding the tariffs set for those services. The Commission is of the opinion that it is clear from that declaration that measures which are less restrictive than those laid down by the HOAI make it possible to achieve the objectives pursued. The Commission considers that, in order to attain the expected level of quality, measures other than those provided for by the HOAI should be adopted, such as rules on professional qualifications and professional liability.
- 30 In the third place, the Commission submits that the objectives of ensuring the preservation and continuity of undertakings providing services and the income of the service providers are purely economic and do not constitute overriding reasons relating to the public interest.
- 31 Third, the Commission considers that, contrary to what is claimed by the Federal Republic of Germany, the rules on tariffs laid down by the HOAI are not suitable for achieving the objective of consumer protection, since they do not inform consumers whether the proposed prices are appropriate, nor do they enable consumers to check, notwithstanding the scale of tariffs laid down by the HOAI, the sums charged. According to the Commission, while that scale of tariffs allows consumers more readily to distinguish the various services proposed to them and may possibly be useful for placing the services in order of importance, it does not however justify the obligation to use the minimum and maximum tariffs set according to that subdivision.
- 32 Fourth, the Commission states that Paragraph 7(3) and (4) of the HOAI, which allow a degree of flexibility in the application of the fixed tariffs, has been designed as an exception, which is interpreted strictly by the German courts. It is accordingly possible to derogate, by written agreement, from the maximum



tariffs only in the case of basic services that are extraordinary or of an unusually long duration.

- 33 The Commission also claims that, under Paragraph 7(3) of the HOAI, derogations from the minimum tariffs are permitted in specific cases, relating to the services provided by engineers and not by architects.
- 34 The derogations from the minimum tariffs, according to the Commission, are also interpreted strictly by the German courts. Citing the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany), the Commission submits that a supplier may not pass on to its clients cost savings achieved in its business, by means of rationalisation, if that leads to the setting of a price that would be lower than the minimum tariffs. As regards, more specifically, the judgment of the Bundesgerichtshof (Federal Court of Justice) of 22 May 1997, the Commission argues that it is clear from that judgment that even a situation of long-term cooperation based on a tender of an architect or an engineer providing for tariffs lower than the minimum tariffs constitutes a breach of the HOAI, since each contract has to be considered separately. The Commission concludes that the German system is not sufficiently flexible to be regarded as compatible with EU law.
- 35 Further, the Commission claims that the Federal Republic of Germany has not explained how the maximum tariffs are supposed to contribute to the elimination of the information asymmetry between consumers and service providers in relation to the quality of the services provided. The Commission concludes that the objective of protecting clients from the setting of excessive fees can be achieved by making available to the client appropriate information, with the assistance of which the client can assess how the price sought from him relates to the prices usually charged in the market. Such a measure would be less restrictive than that resulting from the system of tariffs laid down by the HOAI.
- 36 The Federal Republic of Germany contends, first, that the HOAI does not infringe either Article 49 TFEU or Directive 2006/123, since the HOAI lays down minimum and maximum tariffs in relation to fees only for basic services within the fields of land use planning, buildings planning and other specialised planning, with respect to which the guarantee of a high standard of quality represents a public interest objective, and not for consultancy services, the fees for which are freely negotiable by the parties.
- 37 Further, the HOAI makes provision for many exceptions, in order to ensure that appropriate fees can be agreed in each particular case, which reflects a high degree of flexibility of that legislation that enables operators from other Member States of the European Union to enter the German market in conditions of effective competition.

- 38 In that regard, the Federal Republic of Germany relies on the Court's case-law, and in particular on the judgment of 28 April 2009, *Commission v Italy* (C-518/06, EU:C:2009:270), to the effect that minimum and maximum tariffs do not constitute a restriction on freedom of establishment and on the freedom to provide services where the body of rules laying down those tariffs is characterised by a flexibility that allows a degree of adjustment of the tariffs according to the nature of the services carried out. In this case, the HOAI does indeed provide for such flexibility, with respect to both the minimum tariffs and the maximum tariffs.
- 39 Further, the Federal Republic of Germany contends that it is clear from the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874), that purely internal situations are not to be assessed under freedom of establishment and Directive 2006/123, since neither is applicable to such situations.
- 40 Moreover, that Member State considers that the Commission has not explained why access to the market is restricted by the minimum and maximum tariffs laid down by the HOAI, nor has the Commission demonstrated the existence of specific restrictions on freedom of establishment. The Commission has only referred to 'possible restrictions' and has done no more than claim that the market situation is 'of no importance'. The Federal Republic of Germany relies in that regard on the Court's case-law that no restriction exists where the possible effects of a measure on freedom of establishment are too uncertain and indirect, and on recital 69 of Directive 2006/123, the wording of which essentially reflects that case-law. Accordingly, the Federal Republic of Germany considers that, in this case, the measure to be evaluated, which does not even relate to market access, has no specific effect on freedom of establishment and that the Commission, on whom falls the burden of proof, has produced no evidence of there being such an effect.
- 41 The Federal Republic of Germany refers also to documents produced by professional organisations of architects and engineers, which are said to indicate that the HOAI does not prevent access to the German market and does not restrict freedom of establishment in the territory of that Member State.
- 42 Second, and in the alternative, the Federal Republic of Germany contends that the system of tariffs laid down by the HOAI is justified by overriding reasons relating to the public interest, namely ensuring the quality of planning services, the protection of consumers, the safety of buildings, the preservation of the 'Baukultur' and ecological construction. According to that Member State, the main objective of the HOAI is to ensure that the services of architects and engineers are of a high standard of quality.

- 43 The Federal Republic of Germany states that a quality planning service serves the objective of consumer protection in two respects, in that it ensures that buildings are safe and in that it is designed to ensure that there are no mistakes when the work is carried out, so that the work is carried out both more quickly and at lower cost. That Member State adds that the setting of minimum tariffs is supported both by professional organisations of property developers and by consumer associations.
- 44 The Federal Republic of Germany does not accept the Commission's arguments in support of its view that the restriction at issue on freedom of establishment is not justified. The Federal Republic of Germany contends in particular that the preservation of a market structure based on small and medium-sized enterprises is a desirable goal, since the effect is to guarantee the existence of a high number of service providers and to contribute to competition based on 'better quality'. That Member State states that the Commission's finding on the gross operating costs in Germany may be significantly distorted by the structure of undertakings active within Germany. The Federal Republic of Germany adds that the possibility of entering into an agreement on construction costs, which existed between 2009 and 2014, was declared to be unlawful by the Bundesgerichtshof (Federal Court of Justice) in 2014.
- 45 Third, the Federal Republic of Germany considers that the setting of minimum tariffs is suitable for achieving the objective of ensuring that the services are of a high level of quality. In that regard, the Federal Republic of Germany states that the Court, in the judgment of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758), recognised in principle the existence of a link, in a market where the information available to service providers and service recipients is highly asymmetric and where the number of service providers is high, between the introduction of a minimum tariff for the supplies of services and the preservation of the quality of those services, even though the Court left to the national court the task of determining the existence and relevance of that link in the dispute in the main proceedings. Further, the Court recognised that Member States have a discretion in comparable situations, so that the Member States cannot be required to demonstrate a causal link in the sense of a condition *sine qua non* between the quality and the price of a service supplied in the national market. The Federal Republic of Germany states that, while there is no such requirement, it relied, when the HOAI was adopted, on detailed studies on the setting of minimum and maximum tariffs and their effect.
- 46 According to the Federal Republic of Germany, the minimum and maximum tariffs are appropriate to achieve the objective of quality pursued, in that there is a link between price and quality, since a significant volume of work carried out by highly qualified staff has an effect on the price, which becomes higher.

If the price is lower than a certain level, it can be assumed that that price can only be achieved through an inferior quality of services.

- 47 The Federal Republic of Germany states that there is a risk of ‘adverse selection’ in the planning services market in Germany. Accordingly, to the extent that consumers are not sufficiently informed and are unable to detect differences in quality, they will systematically choose the less expensive offer, with the result that competition is based only on price. Taking into consideration that there is an information asymmetry between service providers and consumers, as well as a significant presence of service providers in the market, it would in practice no longer be possible to remain competitive and be profitable other than by offering services of inferior quality, which would lead to a situation of ‘moral hazard’ or ‘adverse selection’.
- 48 The Federal Republic of Germany considers that, as a result of the statutory setting of minimum tariffs, the importance of price as a competitive factor is reduced, which makes it possible to prevent such deterioration in the quality of the services.
- 49 The Federal Republic of Germany further maintains that the setting of minimum tariffs laid down by the HOAI does not go beyond what is necessary to achieve the stated objectives and that there are no less restrictive measures, in that the HOAI takes account of the nature of the services concerned, imposes such tariffs only on planning services and provides for many exceptions to its application.
- 50 The alternative measures proposed by the Commission would not, according to the Federal Republic of Germany, be an appropriate replacement for the fixed tariffs. Rules governing access to a profession only ensure that the members of a profession possess the required qualifications, whereas a system of fixed tariffs makes it possible to ensure that services of quality are supplied. First, access to the professional activities subject to the HOAI is not restricted in Germany, and any person may, as a general rule, pursue such activities provided that he or she complies with that legislation. Second, the introduction of any legislation governing access to the professions concerned would constitute a restriction on freedom of establishment much more significant than that arising from the HOAI.
- 51 Further, the Federal Republic of Germany considers that the alternative measure of laying down rules governing liability and requiring obligatory professional liability insurance is equally unconvincing. The rules concerning fees within the HOAI are supposed to ensure, as a preventive measure, a high quality of services, whereas the rules on liability and insurance, which apply only when harm has occurred, are inherently inappropriate for the protection of public interests such as the safety of buildings, the Baukultur, or ecology.

- 52 As regards the alternative proposed by the Commission of laying down rules on how a profession is to be pursued, that would make it possible only to ensure that the services carried out were of a minimal quality and not of the high quality standard pursued by the legislation at issue. In order to achieve the quality objective pursued, it would be necessary either to compel all the service providers concerned to become members of professional organisations responsible for monitoring the quality of the services supplied, or to exclude from the market those who are not members of such organisations.
- 53 Last, the Federal Republic of Germany does not accept the alternative of publishing information on the prices currently charged as an indication of market practice. That Member State considers that such publication would not resolve the problem of asymmetric information and could even reinforce a downward ‘spiral’ of prices.
- 54 Fourth, the Federal Republic of Germany contends that the maximum tariffs do not hinder freedom of establishment and that they are, in any event, justified by the protection of consumers, ensuring that they do not bear an overly heavy financial burden, as a result of excessive fees. Further, those tariffs are appropriate to achieve the stated objectives.
- 55 Hungary, intervening in support of the forms of order sought by the Federal Republic of Germany, concurs, in essence, with the latter’s arguments.

### *Findings of the Court*

- 56 It is appropriate, first, to examine the national legislation at issue with respect to Article 15 of Directive 2006/123 before undertaking, if necessary, an examination of that legislation with respect to the provisions of Article 49 TFEU.
- 57 As a preliminary matter, the argument of the German Government that Article 15 of Directive 2006/123 is not applicable to purely internal situations, that is, situations in which the facts are confined to a single Member State, must be rejected.
- 58 The Court has previously held that the provisions of Chapter III of Directive 2006/123, on freedom of establishment of service providers, must be interpreted as meaning that they also apply to a situation where all the relevant elements are confined to a single Member State (judgment of 30 January 2018, *X and Visser*, C-360/15 and C-31/16, EU:C:2018:44, paragraph 110).
- 59 It should also be recalled that, in accordance with Article 15(1) of Directive 2006/123, Member States must examine whether, under their legal system, any requirements such as those listed in Article 15(2) are imposed and ensure that

any such requirements are compatible with the conditions laid down in Article 15(3).

- 60 Article 15(2)(g) of that directive concerns requirements the effect of which is that the pursuit of an activity is subject to the service provider complying with minimum and/or maximum tariffs.
- 61 It follows from Article 15(5) and (6) of that directive that it is open to Member States to maintain or, as the case may be, introduce requirements of the type mentioned in Article 15(2), provided that those requirements comply with the conditions laid down in Article 15(3) (see, to that effect, judgment of 16 June 2015, *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 33).
- 62 Those conditions concern (i) the non-discriminatory nature of the requirements concerned, which cannot be directly or indirectly discriminatory according to nationality or, with regard to companies, according to the location of the registered office; (ii) the fact that the requirements should be necessary, that is to say, they must be justified by an overriding reason relating to the public interest; and (iii) their proportionality, which means that those requirements must be suitable for securing the attainment of the objective pursued and not go beyond what is necessary to attain it, and that it must not be possible to replace them with other, less restrictive measures which attain the same result.
- 63 Article 15 of Directive 2006/123 seeks, to that end, to reconcile the regulatory competence of the Member States with respect to the requirements to be evaluated pursuant to that article, on the one hand, and the genuine exercise of freedom of establishment, on the other.
- 64 It follows, in particular, that, while it is true that it is for a Member State which relies on an overriding reason in the public interest as justification for a requirement within the meaning of Article 15 to demonstrate that its legislation is appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see, to that effect, judgments of 28 April 2009, *Commission v Italy*, C-518/06, EU:C:2009:270, paragraph 84 and the case-law cited; of 24 March 2011, *Commission v Spain*, C-400/08, EU:C:2011:172, paragraph 123; and of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 55). Such a requirement would amount, in practice, to depriving the Member State concerned of its regulatory competence in the field concerned.
- 65 That applies a fortiori when, as stated by the Federal Republic of Germany, a Member State has to be able to justify a ‘requirement to be evaluated’ by an

overriding reason in the public interest as soon as that requirement is introduced and therefore, logically, when it does not necessarily have in its possession any empirical evidence of the results of that requirement, as compared with the results of other measures.

- 66 In this case, the requirements stemming from the HOAI, since they set the minimum and maximum tariffs in relation to planning services supplied by architects and engineers, fall within the scope of Article 15(2)(g) of Directive 2006/123.
- 67 Consequently, as requirements covered by that provision, the tariffs at issue must, in order to be compatible with the objectives of that directive, satisfy the three conditions laid down in Article 15(3) of that directive, namely they must be non-discriminatory, necessary and proportionate to the achievement of an overriding reason relating to the public interest (see, to that effect, judgment of 1 March 2018, *CMVRO*, C-297/16, EU:C:2018:141, paragraph 54).
- 68 As regards the first condition laid down in Article 15(3) of Directive 2006/123, it is clear that the requirements described in paragraph 66 of the present judgment are neither directly nor indirectly discriminatory according to nationality or, with regard to companies, the location of their registered office, within the meaning of point (a) of that provision, and, consequently, that condition is satisfied.
- 69 As regards the second condition, the Federal Republic of Germany states that the aim of the minimum tariffs is to achieve an objective of quality planning services, consumer protection, building safety, preservation of the Baukultur and ecological construction. As regards the maximum tariffs, their aim is to ensure consumer protection by guaranteeing that fees are transparent in relation to the corresponding services and by preventing excessive tariffs.
- 70 In that regard, it is clear that the objectives relating to the quality of work and the protection of consumers have been recognised by the Court as overriding reasons relating to the public interest (see, to that effect, judgments of 3 October 2000, *Corsten*, C-58/98, EU:C:2000:527, paragraph 38; of 8 September 2010, *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 74; and of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 74).
- 71 As regards the objectives of preservation of the Baukultur and ecological construction, they can be subsumed under more general objectives: preservation of the cultural and historical heritage and environmental protection, which also constitute overriding reasons relating to the public interest (see, to that effect, judgments of 26 February 1991, *Commission v France*, C-154/89, EU:C:1991:76, paragraph 17, and of

14 December 2004, *Commission v Germany*, C-463/01, EU:C:2004:797, paragraph 75).

- 72 It must moreover be stated that recital 40 of Directive 2006/123 confirms that the protection of recipients of services, the protection of the environment and cultural policy objectives constitute overriding reasons relating to the public interest.
- 73 As regards the third condition referred to in Article 15(3) of Directive 2006/123, that presupposes a combination of three factors, namely that the requirement must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective, and that that objective cannot be achieved by means of other, less restrictive measures.
- 74 In that regard, a Member State which, like the Federal Republic of Germany in this case, relies on an overriding reason relating to the public interest in order to justify a measure that it has adopted must submit specific evidence substantiating its arguments (see, to that effect, judgment of 23 January 2014, *Commission v Belgium*, C-296/12, EU:C:2014:24, paragraph 33 and the case-law cited).
- 75 Against that background, it must, initially, be stated that, in so far as meeting the objectives of building safety, preservation of the Baukultur and ecological construction is directly linked to the quality of planning work, both the suitability of the HOAI for securing the three abovementioned objectives and its necessity for that purpose will have to be accepted if it is established that the HOAI is suitable and necessary for achieving such quality.
- 76 As regards, first, the suitability of the HOAI to achieve the objectives concerned, the Federal Republic of Germany contends that, because of the link between the price of a service and its quality, the setting of minimum tariffs is suitable for achieving the objective of guaranteeing that the services supplied are of a high level of quality.
- 77 Further, the setting of such tariffs is also suitable for achieving the objective of consumer protection, by mitigating the consequences of the fact that the information available to architects and engineers, on the one hand, and consumers, on the other, is asymmetric, which may lead to competition being based solely on price and to consumers choosing their service providers only according to the price of their services.
- 78 In that regard, the Court has previously held that it cannot be a priori ruled out that the setting of a minimum tariff may make it possible to ensure that service providers are not encouraged, in a context such as that of a market characterised



by the presence of an extremely high number of service providers, to engage in competition that results in offering services at a discount, with the risk of deterioration in the quality of services provided (see, to that effect, judgment of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 67).

- 79 In this case, it is not disputed that, as submitted by the Federal Republic of Germany, there are a very high number of operators active in the planning services market in the field of construction within that Member State.
- 80 Likewise, the assertion by the Federal Republic of Germany that a feature of that market is that information is highly asymmetric, due to the fact that the service providers possess technical competences that most of their clients lack, so that the clients find it difficult to assess the quality of the planning services tendered, is not effectively disputed by the Commission.
- 81 It follows that the Federal Republic of Germany has established to the requisite legal standard that, having regard to the particular characteristics of the market and services at issue, there may be a risk that the planning service providers in the field of construction active in that Member State engage in competition that may result in the offer of services at a discount, or the elimination of operators offering quality services as a consequence of adverse selection.
- 82 In such a context, the imposition of minimum tariffs may be such as to help to limit that risk, by ensuring that services are not offered at prices that are inadequate to ensure, in the long term, the quality of those services.
- 83 In addition, the Federal Republic of Germany has submitted various studies in support of its position, namely that, in a market such as the German market, characterised by a high number of small and medium-sized enterprises, the setting of minimum tariffs in relation to planning services may constitute an appropriate measure to guarantee that those services are of a high level of quality.
- 84 That being the case, the Commission's argument that the price does not, as such, constitute an indication of the quality of the service cannot suffice to exclude the risk raised by the Federal Republic of Germany that the convergence of the two factors mentioned in paragraphs 79 and 80 of the present judgment may lead to a deterioration in the quality of services supplied with respect to planning, or to establish that that risk could not be limited by a measure preventing the offer of services at prices that are too low.
- 85 Further, while the Commission claims that the Federal Republic of Germany has failed to establish that removal of the minimum tariffs would entail a decrease in quality, it must be stated that, as follows from paragraphs 64 and 65

of the present judgment, it is the task of that Member State not to produce such evidence but solely to demonstrate that the HOAI is capable of making a significant contribution to the objectives pursued by limiting the risk of deterioration in the quality of planning services.

- 86 That conclusion is not called into question by the Commission's argument that the gross operating rate with respect to the services of architects in Germany is markedly higher than in the other Member States, though there is no evidence that the quality of the services supplied in the other Member States is inferior due to the charging of lower margins.
- 87 The table produced by the Commission indicates the gross operating rate with respect to the services of architects in the Member States for the year 2014, but does not, however, as regards the Federal Republic of Germany, make any distinction between planning services, which are subject to the minimum tariffs, and consultancy services, which are not. Further, that table reflects the market situation for a single year, and consequently no conclusion can be drawn as to changes in the market after the introduction of the minimum tariffs. Last, it is clear that, as submitted by the Federal Republic of Germany, the gross operating rate depends on a certain number of factors, such as the structure of undertakings, labour costs or the use of upstream services, and not solely the pressure of competition in the market concerned.
- 88 It follows from the findings made in paragraphs 75 to 87 of the present judgment that the existence of minimum tariffs for planning services is, in principle, capable, having regard to the characteristics of the German market, of helping to ensure a high level of quality of planning services and, consequently, of achieving the objectives pursued by the Federal Republic of Germany.
- 89 However, it must be recalled that, in accordance with the Court's settled case-law, national legislation is appropriate for securing attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 76, and order of 30 June 2016, *Sokoll-Seebacher and Naderhirn*, C-634/15, EU:C:2016:510, paragraph 27).
- 90 In this case, the Commission claims, in essence, that the German legislation does not pursue the objective of ensuring a high level of quality of planning services in a consistent and systematic manner, since the actual provision of planning services is not reserved, in Germany, to persons practising a regulated activity, so that there is no guarantee, in any event, that the planning services

are carried out by service providers who have demonstrated their professional capacity to do so.

- 91 In that regard, the Federal Republic of Germany stated in its written pleadings that planning services were not reserved to certain professions that are subject to obligatory surveillance under legislation relating to the professions or through professional bodies, and service providers other than architects and engineers, who are not subject to rules relating to the professions, are entitled to supply such services.
- 92 The fact that planning services may be provided in Germany by service providers who have not demonstrated their professional capacity to do so indicates a lack of consistency in the German legislation in relation to the objective, of preserving a high level of quality of planning services, pursued by the minimum tariffs. Notwithstanding the finding made in paragraph 88 of the present judgment, it is clear that such minimum tariffs cannot be suitable for attaining such an objective if, as is clear from the material submitted to the Court, the provision of the services subject to those tariffs is not itself circumscribed by minimal safeguards that ensure the quality of those services.
- 93 Accordingly, it is clear that the Federal Republic of Germany has failed to establish that the minimum tariffs laid down by the HOAI are suitable for securing the attainment of the objective of guaranteeing a high level of quality of planning services and ensuring the protection of consumers.
- 94 On the other hand, as regards maximum tariffs, those, as submitted by the Federal Republic of Germany, are such as to contribute to the protection of consumers by increasing the transparency of the tariffs applied by the service providers and preventing them from charging excessive fees.
- 95 However, as stated by the Advocate General in point 111 of his Opinion, the Federal Republic of Germany has failed to demonstrate why the possibility of making available to clients guidance as to prices for the various categories of services covered by the HOAI, suggested by the Commission as a less restrictive measure, would not suffice to achieve that objective adequately. It follows that the requirement consisting of setting maximum tariffs cannot be regarded as being proportionate to that objective.
- 96 It follows from all the foregoing that, by maintaining fixed tariffs for the planning services of architects and engineers, the Federal Republic of Germany failed to fulfil its obligations under Article 15(1), (2)(g) and (3) of Directive 2006/123.
- 97 In the light of the foregoing, there is no need to examine the legislation at issue with respect to Article 49 TFEU.

## Costs

- 98 Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the Federal Republic of Germany must be ordered to bear its own costs and to pay those of the Commission.
- 99 Under Article 140(1) of those Rules, the Member States which intervened in the proceedings are to bear their own costs. Hungary must, consequently, bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Declares that, by maintaining fixed tariffs for the planning services of architects and engineers, the Federal Republic of Germany failed to fulfil its obligations under Article 15(1), (2)(g) and (3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market;**
- 2. Orders the Federal Republic of Germany to bear its own costs and to pay those incurred by the European Commission;**
- 3. Orders Hungary to bear its own costs.**

[Signatures]

\* Language of the case: German.