Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 1 October 2015 [1]

Case C-342/14

X-Steuerberatungsgesellschaft
v
Finanzamt Hannover-Nord(Request for a preliminary ruling

from the Federal Finance Court (Bundesfinanzhof, Germany))

(Freedom to provide services — Article 56 TFEU — Directive 2006/123/EC — Recognition of professional qualifications — Directive 2005/36/EC — Tax consultancy company established in one Member State and providing services in another Member State — National legislation making exercise of the activities of tax consultancy companies subject to a recognition requirement and to professional qualification requirements for their managers)

1. The dispute in the main proceedings in the present case concerns the refusal of the German tax authorities to allow a tax consultancy company legally established in another Member State, in this case the Kingdom of the Netherlands, to carry out its activities for its clients established in Germany. The activity in question, which is not regulated in the Netherlands, can in this case be carried out in Germany by a tax consultancy company only on condition that that company has been recognised, which means that its managers must have been appointed as tax advisers and have therefore passed the tax adviser examination.

2. The consultancy company at issue in the main proceedings is challenging that refusal, relying on Article 5 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications,[2] Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market[3] and Article 56 TFEU, prompting the referring court to seek a preliminary ruling from the Court on three questions concerning the interpretation of those provisions.

1 — Original language: French.
2 — OJ 2005 L 255, p. 22.
3 — OJ 2006 L 376, p. 36.

I – **Legal background**

A – *EU law*

1. Directive 2005/36

3. Article 1 of Directive 2005/36 defines the purpose of that directive in the following terms:

‘This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.’

4. Article 2 of Directive 2005/36, which defines the scope of the directive, provides in paragraph 1:

‘This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.’

5. Article 5 of Directive 2005/36 provides:

‘1. Without prejudice to specific provisions of Community law, as well as to Articles 6 and 7 of this Directive, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State:

(a) if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (hereinafter referred to as the Member State of establishment), and

(b) where the service provider moves, if he has pursued that profession in the Member State of establishment for at least two years during the 10 years preceding the provision of services when the profession is not regulated in that Member State. The condition requiring two years’ pursuit shall not apply when either the profession or the education and training leading to the profession is regulated.

2. The provisions of this title shall only apply where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, the profession referred to in paragraph 1.

The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity.

3. Where a service provider moves, he shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.’

2. Directive 2006/123

6. Article 16(1) and (3) of Directive 2006/123 provides:

‘1. 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: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

(g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

…’

7. Article 17 of Directive 2006/123, which establishes additional derogations from the freedom to provide services, provides:

‘Article 16 shall not apply to:

…

(6) matters covered by Title II of Directive 2005/36 …, as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession;

…’

B – *German law*

8. Under Paragraph 80(5) of the Tax Code (Abgabenordnung), in the version in force at the time of the facts in the main proceedings, representatives and advisers are not to be allowed to provide professional assistance in tax matters without being authorised to do so.

9. The first sentence of Paragraph 2 of the Law on Tax Consultancy (Steuerberatungsgesetz [4]), in the version in force at the time of the facts in the main proceedings, provides that professional assistance in tax matters may be provided only by persons or associations which are authorised for that purpose.

10. Under Paragraph 3 of the Law on Tax Consultancy, the following persons are authorised to provide professional assistance in tax matters:

‘(1) tax advisers, tax representatives, lawyers, established European lawyers, accountants and certified auditors,

(2) professional partnerships in which the partners are exclusively persons referred to in subparagraph 1 above,

(3) tax consultancy companies, firms of lawyers, firms of accountants and firms of auditors.’

11. Temporary and occasional professional assistance in tax matters is governed by Paragraph 3a of the Law on Tax Consultancy, which is intended to implement, in the relevant field, Directive 2005/36. It provides:

‘1. Persons who are professionally established in another Member State of the European Union or in another State Party to the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3)] or in Switzerland and who are authorised there to provide professional assistance in tax matters in accordance with the law of the State of establishment shall be authorised to provide, on a temporary and occasional basis, professional assistance in tax matters in the territory of the Federal Republic of Germany. The scope of the authorisation to provide assistance in tax matters in Germany shall be determined by the scope of that authorisation in the State of establishment. In their activities in Germany those persons shall be subject to the same professional rules as the persons specified in Paragraph 3. If neither the profession nor the training for the profession is regulated in the State of establishment, the authorisation to provide professional assistance in tax matters in Germany shall be valid only if the person has practised the profession in the State of establishment for at least two years during the preceding ten years. The question whether professional assistance in tax matters is provided on a temporary and occasional basis shall be assessed in particular in relation to its duration, its frequency, its regularity and its continuity.

4 — BGBl. 1975 I, p. 2735.

2. Professional assistance in tax matters under subparagraph (1) shall be permitted only if the person gives written notification to the competent authority before the first provision of a service in Germany. The competent authority for persons from:

…

(4) the Netherlands and Bulgaria is the Steuerberaterkammer (Chamber of Tax Advisers) Düsseldorf,

…The notification must contain the following:

1. the surname and first names, the commercial name or business name, including the legal representatives,

2. the year of birth or establishment,

3. the professional address, including the addresses of all branches,

4. the professional qualification under which activities in Germany are to be carried out,

5. a certificate attesting that the person is legally established for the purposes of providing professional assistance in tax matters in a Member State of the European Union or in a State Party to the Agreement on the European Economic Area or in Switzerland and that, at the time of submission of the certificate, he is not prohibited, even temporarily, from carrying out that activity,

6. evidence of professional qualifications,

7. evidence showing that the person has pursued the profession in the State of establishment for at least two years during the previous ten years, where neither the profession nor the training required for that profession are regulated in the State of establishment,

8. detailed information concerning insurance against occupational risks or any other individual or collective professional liability protection.

The notification must be submitted each year if, at the end of the calendar year, the person again wishes to provide professional assistance in tax matters in Germany in accordance with subparagraph 1. In those circumstances, the certificate referred to in Paragraph 3(5) and the information to be provided in accordance with Paragraph 3(8) must be submitted once again.

…'

12. Paragraph 4 of the Law on Tax Consultancy provides:

'The following persons shall also be authorised to provide professional assistance in tax matters:

1. notaries, in the context of the activities which they are authorised to carry out …;

2. patent lawyers and patent law firms, in the context of the activities which they are authorised to carry out …;

3. authorities and bodies governed by public law, as well as interregional audit organisations for agencies and institutions governed by public law, within the context of their powers;

4. receivers and administrators of third-party assets or of assets which have been transferred to them in their capacity as trustee or transferred as security, in so far as they provide assistance in tax matters concerning those assets;

5. undertakings having a commercial activity, in so far as they provide to their customers assistance in tax matters which relates directly to a matter forming part of their commercial activity;

6. cooperative umbrella associations, cooperative audit associations and cooperative trustees, in so far as they provide to the members of the umbrella and review associations assistance in tax matters in the context of their duties;

7. professional bodies or associations created on a similar basis, in so far as they provide to their members assistance in tax matters in the context of their duties; …

8. professional associations or groups established on an equivalent basis for farmers and foresters, the statutes of which provide for assistance to be given to agricultural and forestry holdings …, in so far as that assistance is provided through persons authorised to hold the title of 'agricultural accounting officer' and where the assistance does not concern the calculation of revenue derived from self-employment or industrial or commercial activities, save where it is secondary revenue such as is usually obtained by farmers;

9. (a) freight forwarding undertakings, in so far as they provide assistance concerning levies on the entry or treatment, as regards excise duties, of goods traded with other Member States of the European Union;

   (b) other industrial or commercial undertakings, in so far as they provide assistance concerning customs treatment in cases relating to levies on entry;

   (c) the undertakings referred to in (a) and (b), in so far as they provide to businesses … assistance in tax matters … and are established within the geographical scope of the present Law, do not constitute a small business … and have not been excluded from the activity of tax representation …;

10. employers, in so far as they provide assistance to their employees on issues relating to the taxation of income from employment activities or issues relating to family tax credits …;

11. associations providing assistance to taxpayers, in so far as they provide assistance in tax matters to their members …;

12. national investment companies as well as persons, companies and other jointly owned entities, in so far as they make, on behalf of recipients of capital income, combined applications for the refund of tax on capital income …;

12 a. foreign credit institutions, in so far as they make, on behalf of recipients of capital income, combined applications for the refund of tax on capital income …;

13. approved experts in actuarial science, in so far as they provide to their clients assistance in tax matters which is directly related to the calculation of provisions for pensions, technical insurance provisions and transfers to pension and provident funds;

…

15. authorities recognised by the law of the Länder as being suitable … in the context of their duties;

…’

13. Paragraph 32 of the Law on Tax Consultancy provides:

‘1. Tax advisers, tax representatives and tax consultancy companies shall provide professional advice in tax matters in accordance with the provisions of this Law.

2. Tax advisers and tax representatives must be appointed; they practise a liberal profession. Their activity is not a commercial activity.

3. Tax consultancy companies shall require recognition. A precondition for recognition is that the company be managed by tax advisers acting autonomously.’

II – **The facts giving rise to the dispute in the main proceedings**

14. X-Steuerberatungsgesellschaft is a capital company incorporated and having its seat in the United Kingdom and with branches in the Netherlands and Belgium; the objects of the company are business consultancy, tax consultancy and accountancy, and its shareholders and directors are S, who is resident in Germany, and Y, who is resident in Belgium.

15. It provides advice to several principals resident in Germany on tax matters and acts as their representative in administrative procedures concerning tax, although it is not recognised as a consultancy company in Germany, within the meaning of Paragraphs 32(3) and 49 of the Law on Tax Consultancy, and the appointment of Y as a tax adviser in Germany was revoked in 2000.

16. The applicant in the main proceedings uses the services of A Ltd, an office services undertaking established in Germany, which was appointed as the applicant’s representative for accepting service of documents and in whose offices Y pursued his activities.

17. In particular, it assisted in the preparation of the turnover tax return for 2010 of C Ltd. However, by notice of 12 March 2012, the Finanzamt Hannover-Nord (the Hannover-Nord tax authority) refused to accept it as the authorised representative of C Ltd, in accordance with Paragraph 80(5) of Tax Code, on the ground that it was not authorised to provide professional assistance in tax matters.

18. The action brought by the applicant in the main proceedings against that decision was dismissed by the Finanzgericht (Finance Court). The Finanzgericht, first, confirmed that the applicant had no authorisation to provide professional assistance in tax matters and, secondly, ruled that the conditions allowing for the provision, on a temporary and occasional basis, of professional assistance in tax matters under Paragraph 3a of the Law on Tax Consultancy were not met, since the applicant in the main proceedings had not sent a written notification complying with the requirements of Paragraph 3a(2) thereof to the Tax Advisers’ Professional Association, Düsseldorf, which had competence in the Netherlands.

19. In the context of the applicant’s appeal on a point of law before the referring court, the applicant in the main proceedings submitted that a service provider established in a Member State, in this case the Kingdom of the Netherlands, where it lawfully pursues its activities as a tax adviser, cannot be prohibited from providing its services from that Member State to economic operators established in another Member State, in this case the Federal Republic of Germany, that is to say, without crossing the border, regardless of the fact that, in the latter Member State, tax consultancy is an activity reserved to certain professionals. It pleads an infringement of Article 5 of Directive 2005/36, Article 16 of Directive 2006/123, Article 56 TFEU and Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic

commerce'). [5]

III – **The questions referred and the procedure before the Court**

20. In those circumstances the Bundesfinanzhof (German Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 5 of Directive 2005/36 preclude a restriction of the freedom to provide services in a case where a tax consultancy company formed in accordance with the law of a Member State prepares in the Member State of its establishment, where tax consultancy work is not regulated, a tax return for a recipient of services in another Member State and sends it to the tax authority, and national provisions in that other Member State require that a tax consultancy company be recognised as authorised to provide professional assistance in tax matters and that the company be managed by tax advisers who act autonomously?

(2) Can a tax consultancy company, in the circumstances referred to in question 1, rely successfully on Article 16(1) and (2) of Directive 2006/123, irrespective of which of the two Member States is the one in which it provides the service?

(3) Is Article 56 TFEU to be interpreted as precluding a restriction, by measures applicable in the Member State of the recipient of services, of the freedom to provide services in the circumstances referred to in question 1, if the tax consultancy company is not established in the Member State of the recipient of the services?'

21. In its order for reference the referring court explained that the Court must rule on whether it is compatible with EU law to restrict the freedom to provide services by national measures which provide that professional assistance in tax matters may be provided only by persons and associations authorised for that purpose and that, in order to be so authorised, a tax consultancy company must have been recognised and be managed by tax advisers acting autonomously.

22. It also stated that, in the light of the case-law of the Court, the reference for a preliminary ruling was not precluded by the fact that the lower court has not yet ascertained whether the applicant in the main proceedings did in fact provide the service at issue in the main proceedings in the Member State in which it is established or whether the applicant should be regarded as established in the Member State of the recipient of the services.

23. The applicant and the defendant in the main proceedings, the German and Netherlands Governments and the European Commission submitted written observations and made oral submissions at the hearing which was held in open court on 13 May 2015, focussing, at the request of the Court, on the third question referred.

IV – **The observations submitted to the Court**

A – *The first question*

24. The referring court has, in its order for reference, expressed its doubts on the applicability of Directive 2005/36 to the facts in the main proceedings. First, that directive seems to apply only to nationals and not to companies, provided that the persons acting on behalf of companies are taken into account. Secondly, Articles 5 to 9 of Directive 2005/36 apply, in accordance with Article 5(2) thereof,

5 — OJ 2000 L 178, p. 1.

only where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, the profession referred to in paragraph 1 thereof. Thirdly and finally, it asks whether Article 5 of Directive 2005/36 covers services which are provided by a company from the Member State of its establishment, where the profession pursued is not regulated, and which are intended for a Member State where the pursuit of that profession is subject to the possession of professional qualifications, for the purposes of Article 3(1)(a) of Directive 2005/36.

25. The parties to the main proceedings, the interested parties who have submitted observations and the Commission all maintain that Directive 2005/36 does not apply to the dispute in the main proceedings. [6]

26. The defendant in the main proceedings, the Commission and the German Government, which makes this argument in the alternative, accordingly submit that Article 5 of Directive 2005/36 requires that the service provider move to the host Member State. However, there was no physical crossing of the border in the case in the main proceedings, since the applicant in the main proceedings provided its services to its German clients from its establishment in the Netherlands.

27. The German and Netherlands Governments consider that Directive 2005/36 is not applicable *ratione personae*. They argue that that directive applies only in cases where it is necessary to have acquired training or professional experience, which, by their nature, can be obtained only by natural persons. However, the first question covers only the activity of the tax consultancy company and not that of any persons acting on its behalf.

28. The German Government adds that, in any event, the decision of the defendant in the main proceedings is not contrary to Directive 2005/36, since the requirements laid down in Paragraph 3a of the Law on Tax Consultancy are covered by Article 7(2)(b) to (d) of that directive, which provides that Member States may require, for the first provision of services, an attestation certifying that the service provider is legally established in a Member State for the purpose of pursuing the activities concerned and evidence of professional qualifications.

B – *The second question*

29. In its order for reference, the referring court expresses doubts as to whether a tax consultancy company such as the applicant in the main proceedings can rely Article 16 of Directive 2006/123, which guarantees the right of service providers to provide services in a Member State other than that in which they are established, where tax consultancy work is not regulated in the Member State of establishment but is regulated in the host Member State. It notes, in that regard, that, if the services of such a company are provided in its Member State of establishment, they are not covered by Article 16 of Directive 2006/123, and if they are supplied in the Member State of the recipient of the services, they then fall within the derogation from the freedom to provide services laid down in Article 17(6) of Directive 2006/123.

30. The defendant in the main proceedings, the German Government and the Commission also consider that Directive 2006/123 does not apply to the main proceedings, for the reasons given by the referring court. [7]

6 — The applicant in the main proceedings, which regrets that the questions it had proposed to the referring court were not referred to the Court, did not submit observations on the first question referred.

7 — The applicant in the main proceedings has not submitted observations on the second question referred.

31. The Netherlands Government, however, takes the opposite view. It observes, first of all, that the application of Directive 2006/123 is not excluded by Directive 2005/36, since the latter is not applicable to the requirements imposed on a tax consultancy company. It next points out, referring in that regard to recital 33 in the preamble to Directive 2006/123, that services provided at a distance fall within its scope. Article 16 of Directive 2006/123 covers the provision of services by providers established in a Member State other than that where the services are received, regardless of the Member State in which the activity itself is carried out. It considers, finally, that the recognition requirement to which the German legislation makes the activities of a tax consultancy company subject applies to the composition of the company's board of directors and therefore does not constitute a requirement reserving an activity to a particular profession within the meaning of Article 17(6) of Directive 2006/123, a provision which, as a derogation, must be interpreted restrictively.

32. It therefore considers that the German legislation is compatible with Directive 2006/123 only on condition that it is non-discriminatory, necessary and proportionate in the light of one of the four reasons referred to in Article 16 thereof, a matter which it is for the referring court to determine. It also concludes from this that there is no need to answer the third question referred.

C – *The third question*

33. The referring court notes, in its order for reference, that, although the German legislation is applicable without distinction to all tax consultancy companies, it none the less constitutes a restriction of the freedom to provide services, inasmuch as a company which is incorporated in accordance with the legislation of another Member State and which has its seat in that Member State, but which is not managed by tax advisers acting autonomously, is prevented by that legislation from being recognised in Germany and from providing there professional assistance in tax matters. The referring court considers, however, that that legislation could be justified by overriding reasons in the public interest, in this case by the public interest in complying with tax legislation and preventing tax evasion as well as the protection of consumers. That legislation aims to ensure that taxpayers receive qualified assistance in fulfilling their tax obligations and protection against the damage that they could suffer by obtaining advice in complex German tax matters from persons who do not possess the required professional or personal qualifications.

34. The German Government takes the view that, assuming that Directive 2005/36 is not applicable to the case in the main proceedings and that Article 56 TFEU is therefore applicable, the third question must be answered in the negative. It considers, like the referring court, that the German legislation constitutes a restriction of the freedom to provide services guaranteed by Article 56 TFEU, but that it is justified by the overriding reasons in the public interest to which the referring court alludes and that it does not go beyond what is necessary to attain the objectives pursued.

35. It emphasises that the overriding reasons in the public interest invoked must be taken into account as a whole, in that they contribute both to the protection of the recipients of the service and, more generally, to the protection of consumers and ultimately the entire community. It adds that a taxpayer who receives tax assistance himself suffers the consequences of any mistakes made, including any criminal consequences.

36. The Commission essentially argues that the German legislation constitutes a restriction of the freedom to provide services, within the meaning of Article 56 TFEU, since it makes exercise of the activity of tax consultancy subject to the issuing of administrative authorisation which is contingent upon the possession of certain professional qualifications.

37. Although the Commission considers that that legislation may be justified by the overriding reason in the public interest alluded to by the referring court, relating to consumer protection and, more specifically, to the legitimate interest of protecting taxpayers against injury arising from advice provided by persons who are inadequately qualified in view of the complexity of German tax law, it nevertheless takes the view that it is not appropriate for ensuring attainment, in a systematic and consistent manner, of the objective pursued and that, in any event, it goes beyond what is necessary to secure that protection.

V – **Analysis**

A – *The first question*

38. The defendant in the main proceedings and the interested parties who have submitted observations all take the view, and in doing so reflect the doubts expressed by the referring court itself, that the dispute in the main proceedings does not fall within the scope of Directive 2005/36, arguing either that it is inapplicable *ratione personae*, since legal persons cannot by their nature obtain vocational training or acquire professional experience, or that it is inapplicable *ratione materiae*, since the service provider at issue in the main proceedings did not cross the border.

39. In that regard, it must be borne in mind that Directive 2005/36 guarantees the recognition of professional qualifications acquired by nationals of Member States in one or more Member States, that is to say, of natural persons, for the purposes of access to the regulated professions which it covers and their pursuit in another Member State.

40. However, the first question from the referring court expressly refers only to the activity of the applicant in the main proceedings, namely a tax consultancy company preparing in its Member State of establishment a tax return for a recipient of the service established in another Member State, and not to the activity of the natural persons who manage, direct or work for that company.

41. Accordingly, it is possible to consider that the first question, seen from that strict perspective, must be answered in the negative, since Directive 2005/36 cannot preclude a restriction of the freedom to provide the services of a tax consultancy company, that is to say a legal person.

42. That said, it nevertheless cannot be concluded that, for that reason alone, the situation at issue in the main proceedings does not fall within the scope of Directive 2005/36.

43. Quite apart from the restrictive formulation of the first question and the doubts expressed by the referring court itself, it should be noted that the German legislation at issue in the main proceedings makes the exercise, by a tax consultancy company, of the activity of professional assistance in tax matters in Germany subject to a recognition requirement (Paragraph 32(3) of the Law on Tax Consultancy), such recognition being itself subject to the requirement that that company is managed autonomously by tax advisers, that is to say, natural persons who must be appointed (Paragraph 32(2) of the Law on Tax Consultancy), such appointment being itself subject to the requirement of having passed the tax adviser examination or having been exempt from sitting it (Paragraph 35(1) of the Law on Tax Consultancy).

44. The activity of professional assistance in tax matters falls, however, within the concept of 'regulated profession in Germany', for the purposes of Article 3(1)(a) of Directive 2005/36,[8] and the requirements for appointment as a tax adviser are capable of falling within the concept of 'professional qualifications', within the meaning of Articles 3(1)(b) and 11(a)(i) of that directive.[9]

45. It therefore cannot be ruled out that the requirements of the German legislation fall within the general system of recognition of professional qualifications established by Directive 2005/36.

46. However, the referring court has provided the Court with no information concerning the professional qualifications of the shareholders, directors or employees of the applicant in the main proceedings. It merely indicated that the appointment of Y as a tax adviser in Germany was revoked in 2000.

47. Moreover, and in any event, as the referring court, the defendant in the main proceedings and the Commission have all pointed out, the system of recognition of professional qualifications established by Directive 2005/36 applies to the provision of services only in so far as it involves the movement of the service provider to the host Member State.[10]

48. The Court does not have sufficient factual information to determine whether the circumstances of the case in the main proceedings fit that description.

49. Indeed, as the referring court itself pointed out, the lower court has not yet established whether the directors of the applicant in the main proceedings had exercised the activity of professional assistance in tax matters at issue in the main proceedings in its Member State of establishment or in the host Member State, that is to say, in Germany at the premises of A Ltd.[11]

50. In those circumstances, I consider that the Court is not in a position to give a useful answer to the first question on the interpretation of Directive 2005/36 raised by the referring court and that the question must therefore be declared inadmissible.

B – *The second question*

51. The parties to the main proceedings and the majority of the interested parties who have submitted observations also argue that Directive 2006/123 does not apply to the dispute in the main proceedings, so that the national legislation at issue in the main proceedings falls solely within the scope of the provisions of Article 56 TFEU.

52. It is important to point out in that regard that Article 17(6) of Directive 2006/123 states that Article 16 thereof, which lays down in the first subparagraph of paragraph 1, 'the right of providers to provide services in a Member State other than that in which they are established', is not to apply inter alia to 'requirements in the Member State where the service is provided which reserve an activity to a particular profession'.

8 — See judgments in *Rubino* (C-586/08, EU:C:2009:801, paragraphs 23 to 25) and *Peñarroja Fa* (C-372/09 and C-373/09, EU:C:2011:156, paragraphs 27 to 32).

9 — It may also be noted that Paragraph 32(2) of the Law on Tax Consultancy states that tax advisers practise a liberal profession, Article 2(1) of Directive 2005/36 stating for its part that it is to apply to those belonging to the liberal professions.

10 — See also to that effect, in particular, Berthoud, F., 'La libre prestation de services en application de la directive 2005/36/CE', *Revue suisse de droit international et européen*, 2010, No 2, p. 137 and 143; Pertek, J., 'Reconnaissance des diplômes organisée par des directives — Directive 2005/36/CE du 7 septembre 2005 — Équivalence des autorisations nationales d'exercice', *Juris-Classeur Europe*, March 2013, Fascicule No 720, paragraph 227. See also, 'User Guide — Directive 2005/36/EC', paragraph 14, at the following Internet address: http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf.

11 — See points 16 and 22 of this Opinion.

53. Inasmuch as Paragraph 32 of the Law on Tax Consultancy makes exercise of the activity of professional assistance in tax matters by a company such as the applicant in the main proceedings subject to a recognition requirement, which involves it being managed by tax advisers acting autonomously, the German legislation must be regarded as falling within the scope of the derogation provided for in Article 17(6) of Directive 2006/123. [12]

54. Accordingly, since Article 16 of Directive 2006/123 is inapplicable, it cannot preclude legislation of a Member State which prevents a company such as the applicant in the main proceedings from providing its services to its clients established in Germany, whether from its establishment in the Netherlands or from any secondary establishment in Germany. [13]

55. Consequently, it is by reference to the provisions of the TFEU, and in particular to the principle of freedom to provide services in Article 56 TFEU, that the German legislation must therefore be examined, [14] which specifically forms the subject-matter of the third question referred.

C – *The third question*

1. The applicability of Article 56 TFEU

56. It must be stated, first of all, that the facts at issue in the main proceedings do indeed fall within the scope of Article 56 TFEU, since the services provided by the applicant in the main proceedings unquestionably constitute services within the meaning of that provision.

57. It is true that the referring court stated that the Finance Court had not made sufficient findings to determine whether the applicant in the main proceedings could be regarded as established in Germany, on account of its continuous presence at the commercial premises of A Ltd, with the result that the provisions relating to freedom of establishment could apply.

58. The fact remains, however, that the referring court's third question, which deals expressly with the interpretation of Article 56 TFEU, explicitly refers to the situation of a tax consultancy company which prepares, in its Member State of establishment, a tax return for a recipient of services in another Member State and sends it to the tax authority of that other Member State. It covers, therefore, the situation in which a service provider is established in a Member State other than that of the recipient for whom those services are intended. [15]

59. In any event, the fact that the activity of the applicant in the main proceedings has been carried out by means of a certain presence in the Member State of the recipient of the services and might be of a repeated and lasting nature, and not of just an occasional and temporary one, cannot alter that conclusion.

12 — See also, to that effect, 'Handbook on implementation of the Services Directive' OOPEC 2007, p. 42, at the following Internet address: http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

13 — See, by analogy with Article 17(11) of Directive No 2006/123, judgment in *OSA* (C-351/12, EU:C:2014:110, paragraphs 65 and 66).

14 — See judgment in *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 43).

15 — See judgments in *Bond van Adverteerders and Others* (352/85, EU:C:1988:196, paragraph 15); *Distribuidores Cinematográficos* (C-17/92, EU:C:1993:172, paragraph 11) and *OSA* (C-351/12, EU:C:2014:110, paragraph 68).

60. The third paragraph of Article 57 TFEU states that the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. The Court inferred from this that, in so far as pursuit of that activity in that Member State remains temporary, such a person continues to come under the provisions of the chapter relating to services, it being noted that that temporary nature has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity. [16]

61. However, the fact that the activity is temporary does not mean that the provider of services may not equip himself with some form of infrastructure in the host Member State, including an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of performing the services in question. [17]

62. The Court has also held that the concept of 'services' may cover services varying widely in nature, including services which are provided over an extended period, even over several years, and services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, such as the giving of advice or information for remuneration. [18]

2. The existence of an obstacle

63. It is settled case-law of the Court that Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national service providers and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services. [19]

64. In this case, the applicant in the main proceedings is a tax consultancy company formed in accordance with the legislation of the United Kingdom, which lawfully carries out its tax consultancy activities in the Netherlands, a Member State in which those activities are not regulated.

65. The German legislation provides that a tax consultancy company, which may be authorised to provide professional assistance in tax matters in Germany, [20] can carry out its activities only on condition that it has previously been recognised there, [21] which presupposes that it is managed autonomously by tax advisers, that is to say, persons who have either passed the tax adviser examination or been exempt from sitting it. [22]

66. The German legislation thus makes the exercise by a tax consultancy company of the activity of providing professional assistance in tax matters subject to a prior authorisation scheme, an authorisation which is itself subject to its managers having appropriate professional qualification.

16 — See judgment in *Schnitzer* (C-215/01, EU:C:2003:662, paragraphs 27 and 28).

17 — See judgments in *Gebhard* (C-55/94, EU:C:1995:411, paragraph 27); *Commission* v *Italy* (C-131/01, EU:C:2003:96, paragraph 22) and *Schnitzer* (C-215/01, EU:C:2003:662, paragraph 28).

18 — Judgment in *Schnitzer* (C-215/01, EU:C:2003:662, paragraph 30).

19 — See judgments in *Commission* v *Belgium* (C-577/10, EU:C:2012:814, paragraph 38) and *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 44).

20 — See Paragraph 3 of the Law on Tax Consultancy.

21 — See Paragraph 32(3) of the Law on Tax Consultancy.

22 — See the first sentence of Paragraph 35(1) of the Law on Tax Consultancy.

67. In so doing, it excludes any possibility of a tax consultancy company, established in another Member State in which that activity is lawfully carried out without being regulated, from providing its services in Germany and therefore constitutes a restriction of the freedom to provide services within the meaning of Article 56 TFEU. The German legislation is all the less permissible because its restrictive effect is strengthened where, as in the main proceedings, the service is provided in the Member State of the service provider and without that service provider moving. [23]

68. On the other hand, it is true that the German legislation also provides that persons professionally established in another Member State, in which they are authorised to provide professional assistance in tax matters, may be authorised to carry out that activity in Germany, on a temporary and occasional basis, that authorisation being dependent on the extent of the authorisation in the Member State of establishment. That activity can be exercised by persons established in a Member State in which it is not regulated only on condition that they have carried it out for at least two years during the preceding ten years [24] and that they have given the competent authority prior written notification containing the required details. [25]

69. However, it is important to recall, in that regard, that the referring court stated that the conditions set out in Paragraph 3a of the Law on Tax Consultancy for occasional tax assistance in German territory were not satisfied, since that provision does not cover services which a company provides in another Member State, when the persons acting on behalf of the company do not move to German territory.

3. Justification of the obstacle

70. It is settled case-law that national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued. [26]

71. The German Government relies in the present case on the protection of consumers and in particular the protection of recipients of tax assistance services, as well as the effectiveness of tax controls and its corollary, the need to prevent tax evasion. More specifically, it argues that the authorisation, qualification and professional experience requirements laid down by the German legislation are justified, given the complexity of German tax law, by the need to protect the recipients of tax assistance services against incorrect advice and its consequences, in particular criminal consequences, but also, more broadly, to ensure that taxpayers properly fulfil their tax obligations and thus to limit the loss of tax revenues.

72. In that regard, it must be observed at the outset that, as the referring court has pointed out, the German legislation applies to any person providing tax assistance services, in particular tax consultancy companies, regardless of his Member State of establishment. It is therefore applicable without distinction and capable of being justified by overriding reasons in the public interest, [27] provided, however, that the interest in question is not already protected by the rules to which the person providing the services is subject in the Member State in which he is established. [28] This is the case in the main proceedings, since the activity of tax assistance is not regulated in the Netherlands.

23 — See judgment in *Säger* (C-76/90, EU:C:1991:331, paragraph 13).

24 — See Paragraph 3a(1) of the Law on Tax Consultancy.

25 — See Paragraph 3a(2) of the Law on Tax Consultancy.

26 — See judgment in *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 50).

27 — See, inter alia, *Schindler* (C-275/92, EU:C:1994:119, paragraph 47) and *Läärä and Others* (C-124/97, EU:C:1999:435, paragraph 31).

28 — See, inter alia, judgments in *Säger* (C-76/90, EU:C:1991:331, paragraph 15); *Commission* v *Italy* (C-131/01, EU:C:2003:96, paragraph 28) and *Peñarroja Fa* (C-372/09 and C-373/09, EU:C:2011:156, paragraph 54).

73. It will next be recalled that the Court has accepted that the protection of consumers and of the recipients of services was among the overriding reasons in the public interest capable of justifying a restriction of the freedom to provide services. [29]

74. Although the need to limit the loss of tax revenues cannot in itself justify a restriction of the freedom to provide services, [30] it must be accepted that the objective primarily put forward by the German Government, namely to protect the recipients of tax assistance services against incorrect advice and its consequences, in particular criminal consequences, by mitigating the complexity of German law by qualification and professional experience requirements, is a public interest objective capable of justifying a restriction of the freedom to provide services.

75. However, and in accordance with a settled line of authority, the overriding reason in the public interest connected with the protection of recipients of tax assistance services relied upon is capable of justifying an obstacle to the freedom to provide services only if it is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary to attain it.

76. It is important, in that regard, to recall that national legislation is appropriate for ensuring attainment of the objective pursued only if it meets the concern to attain it in a consistent and systematic manner, which it is for the referring court to ascertain. [31]

77. However, it may be observed, in that regard, that Paragraph 4 of the Law on Tax Consultancy lists a large number of persons who are authorised to provide professional assistance in tax matters, without being subject either to the scheme of prior administrative authorisation or to the professional qualification requirements imposed on the managers of tax consultancy companies. [32]

78. Those persons include, inter alia, notaries and patent lawyers, receivers and administrators of third-parties, undertakings having a commercial activity, professional bodies or associations, associations providing assistance to taxpayers, employers, or national investment companies, foreign credit institutions and approved experts in actuarial science: the characteristic common to those persons clearly being that they may incidentally be required to provide tax assistance in the context of their principal activity.

79. In those circumstances, it is difficult for the German Government to maintain that, by means of the professional qualification requirements which it imposes on managers responsible for tax consultancy companies, the German legislation protects in a systematic and consistent manner recipients of the service of professional assistance in tax matters.

80. In any event, although, as is clear from the settled case-law, Member States remain free, in a situation not governed by a directive relating to the mutual recognition of qualifications, to regulate the practice on their territory of certain activities in the interests of consumer protection and accordingly to define the professional diplomas, knowledge, qualifications or experience required for

29 — See, inter alia, judgments in *Commission* v *France* (220/83, EU:C:1986:461, paragraph 20); *Säger* (C-76/90, EU:C:1991:331, paragraphs 16 and 17); *Schindler* (C-275/92, EU:C:1994:119, paragraph 58); *Ambry* (C-410/96, EU:C:1998:578, paragraph 31); *Läärä and Others* (C-124/97, EU:C:1999:435, paragraph 33); *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758, paragraph 64); *DKV Belgium* (C-577/11, EU:C:2013:146, paragraph 41); *Citroën Belux* (C-265/12, EU:C:2013:498, paragraph 38) and *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 58).

30 — See inter alia, by analogy, judgments in *Dickinger and Ömer* (C-347/09, EU:C:2011:582, paragraph 55) and *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 54).

31 — See, inter alia, judgments in *Hartlauer* (C-169/07, EU:C:2009:141); *Dickinger and Ömer* (C-347/09, EU:C:2011:582, paragraph 56); *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 56) and *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 64).

32 — That provision currently comprises sixteen subparagraphs, providing for the same number of possibilities.

that purpose, they must, none the less, where a national of another Member State intends to carry out that activity, take account of the evidence of qualifications and experience he has acquired in that other Member State and compare them to the knowledge and qualifications required by the national legislation. [33]

81. However, the German legislation does not provide for the possibility of taking into account, for the purposes of authorising a tax consultancy company to provide the service of professional assistance in tax matters, the professional knowledge and experience of the persons who direct or manage it, or even its staff, and therefore, as the Commission has pointed out, goes beyond what is necessary to ensure the protection of the recipients of those services.

82. Accordingly, I consider that the answer to the third question raised by the referring court should be that Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the activity of professional assistance in tax matters, carried out by a tax consultancy company legally established in another Member State in which that activity is not regulated, subject to the requirement that that company be recognised and that its managers be appointed as tax advisers.

VI – **Conclusion**

83. In the light of the foregoing, I propose that the Court answer the questions referred by the Federal Finance Court as follows:

Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the activity of professional assistance in tax matters, carried out by a tax consultancy company legally established in another Member State in which that activity is not regulated, subject to the requirement that that company be recognised and that its managers be appointed as tax advisers.

33 — See, inter alia, judgments in *Vlassopoulou* (C-340/89, EU:C:1991:193, paragraphs 20 to 23); *Aguirre Borrell and Others* (C-104/91, EU:C:1992:202, paragraphs 7 to 16); *Commission* v *Spain* (C-375/92, EU:C:1994:109); *Fernández de Bobadilla* (C-234/97, EU:C:1999:367); *Hocsman* (C-238/98, EU:C:2000:440) and *Peśla* (C-345/08, EU:C:2009:771).