



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

23 December 2015\*

(Reference for a preliminary ruling — Directive 2006/123/EC — Scope *ratione materiae* — Activities which are connected with the exercise of official authority — The trade of chimney sweep — Fire safety regulation tasks — Territorial restriction of the licence to trade — Service of general economic interest — Necessity — Proportionality)

In Case C-293/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 20 May 2014, received at the Court on 13 June 2014, in the proceedings

**Gebhart Hiebler**

v

**Walter Schlagbauer,**

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger and S. Rodin, Judges,

Avocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2015,

after considering the observations submitted on behalf of:

- Mr Hiebler, by G. Medweschek, Rechtsanwalt,
- Mr Schlagbauer, by A. Seebacher, Rechtsanwalt,
- the Austrian Government, by G. Eberhard, acting as Agent,
- the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,
- the European Commission, by F. Bulst, T. Scharf and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2015,

\* Langue of the case: German.

gives the following

### Order

- 1 This request for a preliminary ruling concerns the interpretation of Articles 2(2)(i), 10(4) and 15(1), (2)(a) 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 379, p. 36).
- 2 The request has been made in appeal proceedings on a point of law ('Revision') between Mr Hiebler and Mr Schlagbauer, two Austrian nationals who engage in trade as chimney sweeps, in connection with an action brought by Mr Schlagbauer seeking an injunction to prohibit Mr Hiebler engaging in an allegedly unfair commercial practice in the exercise of his trade.

### Legal context

#### *EU law*

- 3 Recitals 17, 70 and 72 of Directive 2006/123 are worded as follows:

'(17) This Directive covers only services which are performed for an economic consideration. Services of general interest are not covered by the definition in Article [57 TFEU] and therefore do not fall within the scope of this Directive. Services of general economic interest are services that are performed for an economic consideration and therefore do fall within the scope of this Directive. However, certain services of general economic interest, such as those that may exist in the field of transport, are excluded from the scope of this Directive and certain other services of general economic interest, for example, those that may exist in the area of postal services, are the subject of a derogation from the provision on the freedom to provide services set out in this Directive. This Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member States, in particular in the social field, in accordance with Community rules on competition. This Directive does not deal with the follow-up to the Commission White Paper on Services of General Interest.

...

(70) For the purposes of this Directive, and without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task.

...

(72) Services of a general economic interest are entrusted with important tasks relating to social and territorial cohesion. The performance of these tasks should not be obstructed as a result of the evaluation process provided for in this Directive. Requirements which are necessary for the fulfilment of such tasks should not be affected by this process while, at the same time, unjustified restrictions on the freedom of establishment should be addressed.'

- 4 Article 2 of Directive 2006/123 provides as follows:

'1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

...

(i) activities which are connected with the exercise of official authority as set out in Article [51 TFEU];

...'

5 Article 4 of Directive 2006/123 is worded as follows:

'For the purposes of this Directive, the following definitions shall apply:

...

(6) "authorisation scheme" means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

(7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

(8) "overriding reasons relating to the public interest" means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

...'

6 Article 10(4) of Directive 2006/123 is worded as follows:

'The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.'

7 Article 15 of Directive 2006/123 states as follows:

'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:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

...'

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.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.

...'

#### *Austrian law*

8 Paragraph 120(1) the Crafts, Trade and Industry Code (Gewerbeordnung) ('GewO') provides as follows:

'A licence to trade as a chimney sweep is required for ... the cleaning, sweeping and inspection of chimney and gas flues, smoke and gas exhaust pipes and the fireplaces attached to them. In so far as chimney sweeps are required by provisions of Austrian Land legislation to carry out administrative policing activities, in particular activities connected with fire safety regulation [Feuerpolizei], building control or the like, they perform public duties and must be established in Austria for that purpose.'

9 Paragraph 123 GewO is worded as follows:

'1. The Land governor (Landeshauptmann) shall, by way of regulation, define the territorial limits applicable to the pursuit of the trade of chimney sweep. That regulation shall lay down the limits of the sweeping area in such a way as to enable fire safety regulation activities to be carried out appropriately and to ensure, within each sweeping area, the economic viability of at least two chimney sweeping businesses each employing at least two workers on a full-time basis. ...

2. Business registration shall be permitted for the purposes of pursuing the trade of chimney sweep only if the exercise of the activities provided for in Paragraph 120(1) is restricted to the relevant sweeping area. On occasions when delay would be dangerous, in the case of work commissioned in accordance with Paragraph 122(2) or in the case of a change to another sweeping area as provided for in Paragraph 124, the activities provided for in Paragraph 120(1) may also be performed outside the sweeping area. ...

3. Chimney sweeps have an obligation to carry out the activities referred to in Paragraph 120(1), within their sweeping area, in accordance with the maximum tariff applicable.’

10 Paragraph 124 GewO states as follows:

‘In the event of a change of the chimney sweep commissioned to sweep a particular item, the chimney sweep previously commissioned to carry out the work must promptly send a written report on the last sweeping carried out and on the condition of the item for sweeping to the chimney sweep commissioned to carry out the work in future, to the municipality and to the owner of the item for sweeping. ... If there are no more than two chimney sweeps in the sweeping area concerned, a change to another sweeping area shall be permissible.’

11 Paragraph 125(1) GewO provides as follows:

‘The Land governor must, by way of regulation, lay down maximum tariffs. Account is to be taken in this regard of the capacity of the businesses concerned and the interests of the recipients of the service. ...’

12 The legislation of the Länder lays down rules relating the requirement for the owners of heating installations to have gas exhaust pipes cleaned regularly by a chimney sweep. Moreover, under those rules chimney sweeps are responsible for carrying out specific tasks connected with fire safety regulation.

13 In the Land of Carinthia, those tasks include carrying out periodic inspections for the purpose of fire prevention (‘fire safety inspections’).

14 In particular, Paragraph 26 of the Kärntner Gefahrenpolizei- und Feuerpolizeiordnung (Carinthian Hazard and Fire Safety Regulation Order) (‘the fire safety rules’) provides as follows:

‘1. Fire safety inspections shall, in the case of physical structures, serve to determine any conditions that may cause or encourage a fire hazard and make more difficult or prevent firefighting and the performance of rescue measures.

2. During the fire safety inspection, it must in particular be verified visually:

- (a) whether the provisions of this Law or the regulations and decisions adopted on the basis of this Law have been complied with by the owner of the property (owner of the installation) or person entitled to use the property, or whether there are deficiencies from the point of view of the fire safety rules;
- (b) whether there is any structural damage that represents a fire hazard;
- (c) whether there are any other circumstances relevant to fire safety or firefighting. ...

3. The fire safety inspection must be carried out with due regard for the risk that the physical structure represents from the point of view of fire safety. It must be carried out, in the case of physical structures representing

- (a) a low fire safety risk, every 15 years;
- (b) a medium fire safety risk, every 9 years;
- (c) a high fire safety risk, every 5 years.’

15 Paragraph 27 of the fire safety rules states as follows:

‘1. The fire safety inspection provided for in Paragraph 26 ... must be carried out independently by the chimney sweep commissioned for that purpose ...

...

9. For each fire safety inspection carried out in accordance with subparagraph (1), the owner (the person entitled to use the property or the property management company) must pay a contribution to the costs, which will be collected by the chimney sweep. If the contribution is not paid by the person liable for payment, the municipality shall adopt a decision demanding payment. The amount of the contribution shall be determined by reference to the tariff rates set for inspections in the order laying down maximum tariff rates for chimney sweeping.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

16 Mr Hiebler engages in trade as a chimney sweep in the Land of Carinthia under an authorisation that is valid in Area ‘A’ of that Land, in accordance with Paragraph 123 GewO.

17 Until 26 July 2011, there were no more than two chimney sweeps working in Area ‘B’. As a result, chimney sweeps authorised to engage in trade in other areas, such as Mr Hiebler, had the right, pursuant to Paragraph 124 GewO, to approach customers located in Area ‘B’.

18 An amendment to the legislative provisions relating to the sectorisation of the pursuit of trade as a chimney sweep in the Land of Carinthia, which came into effect on 27 July 2011, led to the creation of a new area, Area ‘C’, as a result of the merger of Area ‘B’ with another area.

19 In spite of the fact that, following that merger, four chimney sweeps were active in the new Area ‘C’, Mr Hiebler none the less continued to send out mailshots to win customers residing in that area and to pursue his trade as chimney sweep for a number of them who employed him to sweep their chimneys.

20 That resulted in a loss of earnings for Mr Schlagbauer, who holds a licence to pursue his trade in Area ‘C’. As a consequence, he brought proceedings before the Landesgericht Klagenfurt (Regional Court, Klagenfurt) seeking an injunction prohibiting Mr Hiebler from engaging in unfair commercial practice, an order requiring Mr Hiebler to pay EUR 2594.65 by way of damages, interest and legal costs, and publication of the court’s decision. Mr Hiebler contended that the action should be dismissed on the ground that Directive 2006/123 precludes the Austrian rules at issue in the proceedings before the referring court, in so far as those rules imposed a territorial restriction on licences to engage in trade on a private basis as a chimney sweep.

21 The Landesgericht Klagenfurt (Regional Court, Klagenfurt) granted Mr Schlagbauer’s application, taking the view that the territorial restriction imposed by Paragraph 123 GewO was compatible with Directive 2006/123 as it was on-discriminatory, necessary and proportional.

22 The Oberlandesgericht Graz (Higher Regional Court, Graz, Austria) confirmed that decision, adding that the special public interest tasks entrusted to chimney sweeps in connection with fire safety regulation justified the territorial restriction on licences to trade as a chimney sweep.

23 Mr Hiebler brought an appeal on a point of law (‘Revision’) before the Oberster Gerichtshof (Supreme Court). He argued before that court that, while the national provisions at issue may be considered compatible with EU law in so far as the territorial restriction in question concerns the tasks performed by chimney sweeps in connection with fire safety regulation, those provisions were not

compatible with EU law in so far as the restriction also impinged on the private economic activities of chimney sweeps as regards the cleaning and maintenance of chimney and gas flues, smoke and gas exhaust pipes and the fireplaces attached to them.

- 24 The Oberster Gerichtshof (Supreme Court) takes it as settled that, in accordance with Article 2(2)(i) of Directive 2006/123, that directive should not be applied to public interest tasks connected with fire safety regulation and should cover only the private economic activities of chimney sweeps. However, in view of the connection that exists between those tasks and those activities, that court is uncertain whether it is possible to take the view that the directive is not applicable to the pursuit of trade as a chimney sweep taken as a whole.
- 25 Moreover, if those private economic activities were to be regarded as falling within the scope of Directive 2006/123, the Oberster Gerichtshof (Supreme Court) also entertains doubts as to whether the Austrian provisions at issue in the main proceedings are compatible with EU rules governing freedom of establishment and freedom to provide services referred to in Articles 10 and 15 of the directive.
- 26 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In accordance with Article 2(2)(i) of Directive 2006/123, is the entire commercial activity of a chimney sweep excluded from the scope of that directive because chimney sweeps also perform tasks in the field of fire safety regulation (fire safety inspections, expert reports in the course of building approval procedures etc.)?’

(2) If Question 1 is answered in the negative:

Is a scheme, provided for in national law, under which the licence to trade as a chimney sweep is limited to a particular sweeping area compatible with Article 10(4) and Article 15(1), (2)(a) and (3) of Directive 2006/123?’

## **Consideration of the questions referred**

### *Question 1*

- 27 By its first question, the referring court seeks to ascertain, in essence, whether Directive 2006/123 is to be interpreted as meaning that the pursuit of a trade, such as the trade of chimney sweep as defined in the main proceedings, falls entirely outside the scope of the directive because that trade entails the performance not only of private economic activities but also of tasks connected with fire safety regulation.
- 28 The Oberster Gerichtshof (Supreme Court) puts that question on the basis of the implied premiss that the tasks connected with fire safety regulation entrusted to chimney sweeps in the Land of Corinthia must be classified as activities which are connected with the exercise of official authority and therefore fall outside the scope of the directive, by virtue of Article 2(2)(i) thereof. The question to be determined is therefore whether the connection between the performance of those tasks and the performance of private economic activities means that the directive is not applicable to the pursuit of trade as chimney sweep taken as a whole.
- 29 Furthermore, as the European Commission also noted in its written observations, the national court failed to specify in its order for reference the evidence it relied on in arriving at such a classification of those tasks.

- 30 Accordingly, in order to provide a useful answer to the first question, it will be necessary first of all to ascertain whether tasks connected with fire safety regulation, such as the tasks in question in the main proceedings, are connected with ‘the exercise of official authority’, within the meaning of Article 2(2)(i) of Directive 2006/123, or whether, as the case may be, they are covered by any other of the activities excluded from the scope of the directive. It is only in those cases that it will be necessary to go on to determine whether those circumstances have the effect of rendering the directive inapplicable to the pursuit of trade as a chimney sweep taken as a whole.
- 31 For the purpose of determining whether the tasks in question are connected with ‘the exercise of official authority’, it is appropriate to examine, as a preliminary matter, the scope of Article 2(2)(i) of Directive 2006/123.
- 32 As stated in point 2.1.2 of the Handbook on the implementation of the Services Directive (‘the Handbook’), that provision reflects the derogation from the principle of freedom of establishment provided for in Article 45 EC, which became Article 51 TFEU after the entry into force of the Treaty of Lisbon. In interpreting that provision, reference must therefore be made to the principles developed in the case-law of the Court of Justice in connection with those articles.
- 33 Having regard to that case-law, it should be noted at the outset that, as an exception to a fundamental freedom, the derogation in Article 2(2)(i) of Directive 2006/123 must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect (see, by analogy, judgment in *Commission v Belgium*, C-47/08, EU:C:2011:334, paragraph 84 and the case-law cited) and must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (see, by analogy, judgments in *Commission v Belgium*, C-47/08, EU:C:2011:334, paragraph 85, and *SOA Nazionale Costruttori*, C-327/12, EU:C:2013:827, paragraph 51).
- 34 It is also the Court’s settled case-law that activities that are auxiliary or preparatory to the exercise of official authority must be regarded as falling outside the scope of that derogation (see, by analogy, judgment in *Commission v Germany*, C-404/05, EU:C:2007:723, paragraph 44) as they do not entail the exercise of independent decision-making powers pursued in the context of direct State supervision (see, by analogy, judgments in *Commission v Portugal*, C-438/08, EU:C:2009:651, paragraphs 36 and 41, and *SOA Nazionale Costruttori*, C-327/12, EU:C:2013:827, paragraph 53), and do not entail the exercise of powers of constraint (see, by analogy, judgment in *Commission v Spain*, C-114/97, EU:C:1998:519, paragraph 37) or powers of coercion (see, by analogy, judgments in *Anker and Others*, C-47/02, EU:C:2003:516, paragraph 61, and *Commission v Portugal*, C-438/08, EU:C:2009:651, paragraph 44).
- 35 It is therefore necessary to ascertain in the light of that case-law whether the tasks connected with fire safety regulation entrusted to chimney sweeps in the Land of Corinthia are connected with ‘the exercise of official authority’ within the meaning of Article 2(2)(i) of Directive 2006/123.
- 36 In the present case, it should be noted that, as stated in Paragraph 26 of the fire safety rules, those tasks entail, inter alia, the regular inspection of physical structures for the purpose of determining whether fire safety legislative and regulatory provisions are being complied with by the owner of the structure or the person entitled to use it, whether there is any structural damage that represents a fire hazard and whether there are any conditions that may cause or encourage a fire hazard and make more difficult or prevent firefighting and the performance of rescue measures.
- 37 In performing those tasks, however, as the Austrian Government indicated in its written observations, chimney sweeps are fulfilling a duty entrusted to the municipalities by Paragraph 118(3)(9) of the Austrian Constitution, under which local fire safety regulation tasks fall within the sphere of action of municipalities.



- 38 Accordingly, fire safety regulation tasks are, as observed by the Advocate General at point 35 of his Opinion, activities auxiliary to the exercise of official authority because they are, in essence, delegated to chimney sweeps by the mayor of each municipality and are carried out under the mayor's direct supervision without the chimney sweeps having any personal power of enforcement, constraint or coercion vis-à-vis their customers. That finding is confirmed by the fact that chimney sweeps are under an obligation when carrying out those tasks to report to the municipality any defects which have not been remedied if there is an imminent risk of fire or if the conduct of the inspection is obstructed.
- 39 It follows that the fire safety regulation tasks performed by chimney sweeps in the Land of Corinthia are not, as such, connected with the exercise of official authority within the meaning of Article 2(2)(i) of Directive 2006/123 and are not therefore activities which, pursuant to that provision, fall outside the scope of the directive.
- 40 That conclusion would be no different if the national court were to classify those tasks as tasks connected with services of general economic interest, as claimed by the Austrian Government in response to a written question put by the Court.
- 41 In that regard, it should be noted that, as is apparent from the documents before the Court, fire safety regulation activities are performed by chimney sweeps in the Land of Corinthia, in accordance with recital 70 in the preamble to Directive 2006/123 and the Court's case-law, by way of special task in the public interest entrusted to them by means of an authorisation, namely a licence to trade, and pursuant to a regulatory provision, namely Paragraph 26 of the fire safety regulations, which define in a clear and transparent fashion the precise nature of the public service obligation imposed (see, by analogy, judgments in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 37, and *Femarbel*, C-57/12, EU:C:2013:517, paragraph 48).
- 42 Moreover, it would also appear from the documents before the Court that, in accordance with Article 14 TFEU, Article 1 of Protocol (No 26) on services of general interest annexed to the FEU Treaty, and the Court's established case-law, licensed chimney sweeps in the Land of Corinthia are required to perform, in accordance with that public service obligation, fire safety regulation tasks for the benefit of all users in the area allocated to them, in such a way as to ensure equality of access to services, charging uniform tariff rates, the maximum amount of which is set by order of the governor of that Land (see, by analogy, judgments in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 38, and *Femarbel*, C-57/12, EU:C:2013:517, paragraph 47), and ensuring similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation (see, to that effect, judgment in *Corbeau*, C-320/91, EU:C:1993:198, paragraph 15).
- 43 None the less, in spite of the fact that those tasks might be classified as tasks connected with a service of general economic interest, which it is for the national court to determine, they fall within the scope of Directive 2006/123.
- 44 Indeed, as the Advocate General observed at point 37 of his Opinion, it is made expressly clear in Article 2(2)(a) of Directive 2006/123, in conjunction with recitals 17, 70 and 72 in the preamble thereto, that the rules laid down by the directive are applicable, in principle, to all services of general economic interest, only non-economic services of general interest being excluded from the scope of those rules.
- 45 It must therefore be concluded that, however they may be classified by the national court, fire safety regulation tasks performed by chimney sweeps in the Land of Corinthia fall within the scope of Directive 2006/123.

46 That being the case, since it has proved to be devoid of purpose, there is no need to address the question whether the connection between those tasks and the private economic activities carried out by chimney sweeps in the Land of Corinthia has the effect of rendering Directive 2006/123 inapplicable to those activities also and, therefore, to the pursuit of trade as a chimney sweep taken as a whole.

47 In the light of all the foregoing considerations, the answer to Question 1 is that Directive 2006/123 must be interpreted as covering, in all respects, the pursuit of a trade, such as the trade of chimney sweep as described in the main proceedings, even though that trade entails the performance not only of private economic activities but also of fire safety regulation tasks.

### *Question 2*

48 By its second question, the national court seeks to ascertain, in essence, whether Articles 10 and 15 of Directive 2006/123 preclude national legislation, such as that at issue in the main proceedings, which limits, in all respects, a license to trade as a chimney sweep to a particular geographical area.

49 It should be noted at the outset that such a territorial restriction of a license to perform a service activity constitutes, pursuant to Articles 10 and 15 of Directive 2006/123, a restriction on the freedom of establishment and freedom to provide services.

50 First, it follows implicitly from Article 10(4) of Directive 2006/123, which provides that any authorisation to establish a business must enable the service provider to pursue his service activity ‘throughout the national territory’, that any territorial restriction on that authorisation constitutes an obstacle to the freedom to pursue the activity in question.

51 Second, Article 15(2)(a) of Directive 2006/123 expressly classifies ‘territorial restrictions’ on the pursuit of a service activity as ‘requirements’ within the meaning of Article 4(7) of the directive, which are conditions affecting the freedom of establishment of service providers.

52 In that context, in order to give a useful answer to the national court, it is necessary to determine the legal rules to which a territorial restriction such as that at issue in the main proceedings is subject by virtue of Articles 10 and 15 of Directive 2006/123, in order to ascertain whether that restriction is prohibited or whether, under certain conditions, it may be permitted.

53 First, with regard to Article 10 of Directive 2006/123, while it is true that the wording of paragraph 4 of that provision simply requires there to be an ‘overriding reason relating to the public interest’ to justify restricting an authorisation to a specific area of national territory, the fact none the less remains that, as observed by the Advocate General at point 45 of his Opinion and as is apparent from point 6.1.5 of the Handbook, that provision also requires such a restriction to adhere to the principles of non-discrimination and proportionality, as general principles of EU law.

54 Second, it should be noted that, as it includes territorial restrictions on the pursuit of a service activity on the list of requirements subject to evaluation set out in paragraph 2 thereof, Article 15 of Directive 2006/123 also authorises Member States, under paragraph 1, to maintain or, if necessary, introduce such restrictions in their legal systems, on condition that those restrictions satisfy the conditions of non-discrimination, necessity and proportionality laid down in Article 15(3) (see, to that effect, judgment in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraphs 32 and 33).

55 It follows from the foregoing considerations that, as stated by the Commission in its written observations, Articles 10(4) and 15(3) of Directive 2006/123 both provide for the possibility of justifying a restriction on freedom of establishment, such as the territorial restriction at issue in the main proceedings, and require, for that purpose, compliance with the same conditions, designed to

ensure that the restriction (i) does not discriminate on grounds of nationality, (ii) is justified by an overriding reason relating to the public interest and (iii) is suitable for securing the attainment of the objective pursued, does not go beyond what is necessary to attain that objective and may not be replaced by other, less restrictive measures which attain the same result.

- 56 In the present case, it should be noted, in the first place, that the territorial restriction at issue in the main proceedings applies without discrimination on grounds of nationality.
- 57 In the second place, as stated in the written observations of the Austrian Government, that restriction is designed to ensure the effective operation of fire safety measures and to improve measures for the prevention of fires, explosions and poisoning by gas.
- 58 As such objectives form part of public health protection, which, as is clear from Article 4(8) of Directive 2006/123 and the Court's established case-law, is one of the overriding reasons relating to the public interest that may justify restrictions on freedom of establishment (see, to that effect, judgment in *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 34 and the case-law cited), it must be concluded that the requirement that the territorial restriction at issue in the main proceedings should be necessary is also fulfilled.
- 59 It is therefore necessary, in the third place, to move on to examine the proportionality of the territorial restriction at issue in the main proceedings, ascertaining, as a preliminary step, whether that restriction is suitable for securing the attainment of the objective pursued.
- 60 According to the Court's case-law, health care establishments and infrastructure, pharmacies and opticians' shops may be subject to planning, so as to ensure the provision of public health care which is adapted to the needs of the population, covers the entire territory and takes account of geographically isolated or otherwise disadvantaged regions (see, to that effect, judgments in *Hartlauer*, C-169/07, EU:C:2009:141, paragraphs 51 and 52; *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 70, and *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraphs 36 and 37).
- 61 Those principles appear to be transposable to the pursuit of the trade as chimney sweep at issue in the main proceedings.
- 62 It is clear from the observations of the Austrian Government that there exist in the Länder, such as the Land of Corinthia, agglomerations which may be perceived by chimney sweeps to be more profitable and, therefore, more attractive, such as those located in urban areas. Conversely, other parts of national territory may be considered less attractive, such as geographically isolated or otherwise disadvantaged areas (see, by analogy, judgment in *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 72).
- 63 It is not inconceivable that, if no territorial restriction were imposed, chimney sweeps would decide to pursue their trade only in areas considered to be attractive, thus benefitting only a limited part of the population, so that the inhabitants of less attractive areas would not have sufficient providers willing to offer a chimney sweeping service which is reliable and of good quality (see, by analogy, judgment in *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 73).
- 64 It follows that the territorial restriction at issue in the main proceedings must be regarded as providing for a balanced distribution of chimney sweeps throughout national territory, ensuring that all the population has suitable access to chimney sweeping services and thus ensuring adequate public health protection.

- 65 While it is apparent from the above that such legislation is generally capable of attaining the objective of public health protection, it is also essential that that legislation pursues that objective consistently. According to the Court's case-law, national legislation is appropriate for ensuring attainment of the objective relied upon only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, judgments in *Blanco Pérez and Chao Gómez*, C-570/07 and C-571/07, EU:C:2010:300, paragraph 94; *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 47; and *Sokoll-Seebacher*, C-367/12, EU:C:2014:68, paragraph 39).
- 66 In that regard, although it is ultimately for the national court to determine whether, and to what extent, Paragraph 123 GewO fulfils that condition, the Court may provide guidance based on the documents relating to the main proceedings and on the written and oral observations submitted to it, in order to enable that court to give judgment (see judgment in *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 77 and the case-law cited).
- 67 Accordingly, it should be noted that the legislation at issue in the main proceedings does not directly establish or otherwise make provision for the delimitation of geographical areas by applying criteria that are consistent with the objective of ensuring a balanced allocation among chimney sweeps of both their private economic activities and their fire safety regulation tasks in those areas.
- 68 Although the territorial restriction at issue in the main proceedings is directed at the pursuit of trade as a chimney sweep taken as a whole, the only criterion for delimitation by geographical area imposed by national legislation is the criterion relating to the minimum number of chimney sweeps whose economic viability within each area must be guaranteed in order to ensure that fire safety regulation tasks may be performed satisfactorily, no account being taken of private economic activities which, moreover, form the most substantial part of a chimney sweep's work.
- 69 Accordingly, there is a risk that, when implemented, Article 123 GewO will not ensure a balanced allocation of private economic activities among chimney sweeps within the territory in question and, therefore, an equal level of protection of public health throughout that territory (see, by analogy, judgment in *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 54).
- 70 In those circumstances, and subject to verification by the referring court, the national legislation at issue in the main proceedings would appear not to seek to attain in a consistent and systematic manner the objective of public health protection.
- 71 That assessment, which is based on the interpretation of Articles 10(4) and 15(1), (2)(a) and (3) of Directive 2006/123, might not be accepted if the national legislation in question were to be considered in the light of Article 15(4) of the directive, in the event that the referring court were to classify fire safety regulation tasks as tasks connected with a service of general economic interest, in accordance with the principles set out in paragraphs 41 and 42 above.
- 72 It should be noted in that regard that Article 15 of Directive 2006/123 provides in paragraph 4 thereof that the rules laid down in paragraphs 1 to 3 apply to national legislation in the field of services of general economic interest only in so far as the application of those paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.
- 73 In that context and in the light of a reading of point 10.2.4 of the Handbook in conjunction with recital 72 in the preamble to Directive 2006/123, Article 15(4) of the directive must therefore be interpreted as not precluding national legislation which imposes a territorial restriction such as that at issue in the main proceedings, provided that restriction is, first, necessary to enable chimney sweeps carry out their fire safety regulation tasks under economically viable conditions and, second, proportionate to the performance of those tasks.

- 74 As the Court's case-law on Treaty competition rules makes clear, in order to carry out the assessment alluded to in the preceding paragraph, the starting point must undoubtedly be the premiss that the obligation, on the part of the persons entrusted with a task in the general economic interest to perform their services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence a restriction on freedom of establishment in economically profitable sectors may be justified (see, by analogy, judgments in *Corbeau*, C-320/91, EU:C:1993:198, paragraphs 16 and 17, and *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 57).
- 75 None the less, it must also be borne in mind that such a restriction may not be justified as regards specific services, severable from the service of general economic interest in question, if those services, by their nature and the conditions under which they are offered, do not compromise the economic equilibrium of the service of general economic interest (see, by analogy, judgments in *Corbeau*, C-320/91, EU:C:1993:198, paragraph 19, and *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 59).
- 76 In the light of the foregoing considerations, it is for the national court to examine, in its assessment of the proportionality of the territorial restriction at issue in the main proceedings, whether the private economic activities carried out by chimney sweeps in the Land of Corinthia are so closely connected with their fire safety regulation tasks that they must be regarded as unseverable from those tasks.
- 77 If that is not the case, the national court will be required to verify whether, in so far as it also extends to the pursuit of private economic activities that are severable from fire safety regulation tasks, the territorial restriction at issue in the main proceedings is, in any event, essential for the purpose of enabling the chimney sweeps concerned to perform those tasks in conditions of economic equilibrium, or whether it is possible to ensure that the performance of those tasks is economically viable by imposing a geographical limitation only in respect of those tasks.
- 78 In that regard, it is apparent from the documents submitted to the Court that the legislation of the Land of Salzburg has established delimited sweeping areas only for fire safety regulation tasks, which suggests that such a territorial restriction could be sufficient to ensure that those tasks are performed in conditions of economic equilibrium.
- 79 In the light of all the foregoing considerations, the answer to Question 2 is that:
- Articles 10(4) and 15(1), (2)(a) and (3) of Directive 2006/123 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits, in all respects, a license to trade as a chimney sweep to a particular geographical area, if that legislation does not seek to attain, in a consistent and systematic manner, the objective of public health protection, which is a matter to be determined by the national court.
  - Article 15(4) of Directive 2006/123 must be interpreted as not precluding such legislation where fire safety regulation tasks are classified as tasks connected with a service of general economic interest, provided that the territorial restriction imposed is necessary and proportionate to the performance of those tasks under economically viable conditions. It is for the national court to carry out that assessment.

### Costs

- 80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as covering, in all respects, the pursuit of a trade, such as the trade of chimney sweep as described in the main proceedings, even though that trade entails the performance not only of private economic activities but also of fire safety regulation tasks.**
2. **Articles 10(4) and 15(1), (2)(a) and (3) of Directive 2006/123 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits, in all respects, a license to trade as a chimney sweep to a particular geographical area, if that legislation does not seek to attain, in a consistent and systematic manner, the objective of public health protection, which is a matter to be determined by the national court.**

**Article 15(4) of Directive 2006/123 must be interpreted as not precluding such legislation where fire safety regulation tasks are classified as tasks connected with a service of general economic interest, provided that the territorial restriction imposed is necessary and proportionate to the performance of those tasks under economically viable conditions. It is for the national court to carry out that assessment.**

[Signatures]