Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 28 February 2019[1]

Case C-377/17

European Commission
v

Federal Republic of Germany

(Infringement — Services in the internal market — Directive 2006/123 — Article 15 — Architects' and engineers' tariffs — Mandatory tariffs)

1. The present infringement proceedings brought by the Commission against the Federal Republic of Germany relating to minimum and maximum tariffs for services provided by architects and engineers in Germany will provide the Court with the opportunity to clarify to what extent Article 15(2) of Directive 2006/123/EC[2] harmonises certain restrictions on freedom of establishment and to give a ruling on the proportionality test as set out in Article 15(3) of Directive 2006/123.

I. Legal framework

A. EU law

2. Article 2 of Directive 2006/123 is headed 'Scope'. According to its first paragraph, the directive 'shall apply to services supplied by providers established in a Member State'.

3. Chapter III (Articles 9 to 15) of the directive is devoted to freedom of establishment for service providers. Section 2 of that chapter (Articles 14 and 15) deals with requirements that are prohibited or subject to evaluation.

4. Article 15 of the directive, headed 'Requirements to be evaluated', reads inter alia 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:

…

1 Original language: English.

2 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

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

…

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

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

…'

B. German law

5. Architects' and engineers' fees are regulated in Germany by a federal government decree bearing the title 'Honorarordnung für Architekten und Ingenieure' (Official scale of fees for services by architects and engineers) of 10 July 2013[3] ('HOAI').

6. The first paragraph of that decree defines its scope of application and stipulates that it governs the calculation of fees for the basic services of architects and engineers established in Germany, insofar as the basic services are covered by that decree.

7. Paragraph 3 of the HOAI addresses services and performance as follows:

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

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

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

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

8. Pursuant to Paragraph 7 of the HOAI, headed 'Fee agreement':

'(1) the fees shall be based on the written agreement, adopted by the contracting parties when the mandate was granted and falling within the minimum and maximum amounts set by these regulations;

3 BGBl. I, p. 2276.

(2) if the eligible costs or areas determined are outside the scales set out in the fee tables in the HOAI, the fees may be freely agreed;

(3) the minimum amounts laid down in the HOAI may be reduced in exceptional cases, subject to written agreement;

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

9. Parts 2 to 4 of the HOAI, referred to in Paragraph 3(1) of the HOAI, contain detailed provisions relating to the minimum and maximum amounts for the land use planning, project planning and specialist planning. Some of these provisions allow for the lowering of minimum prices in exceptional cases, in accordance with Paragraph 7(3) of the HOAI.

10. It follows from Paragraph 44(7) of the HOAI that if the planning costs of civil engineering works with a large surface area and are built under equal construction conditions is disproportionate to the calculated fees, Paragraph 7(3) is to apply.

11. Paragraph 52(5) of the HOAI states that if the planning costs of load-bearing structures of civil engineering works with a large surface area and are built under equal construction conditions is disproportionate to the calculated fees, Paragraph 7(3) is to apply.

12. Paragraph 56 of the HOAI stipulates that if the planning costs of technical equipment for civil engineering works with a large surface area and are built under equal construction conditions is disproportionate to the calculated fees, Paragraph 7(3) is to apply.

II. Background to the dispute

A. Pre-litigation procedure

13. After collecting replies from some Member States to questions concerning national mandatory tariff systems, the Commission opened an EU Pilot procedure, in which the Federal Republic of Germany submitted its comments on 10 March 2015 to justify the provisions on architects' and engineers' fees.

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

15. By its reply of 22 September 2015, the Federal Republic of Germany contested this allegation. According to that Member State, the regulation in question would not restrict freedom of establishment and, in any event, any such restriction would be justified by overriding reasons relating to the public interest. In any event, it observed that situations of a purely internal nature were outside the scope of Directive 2006/123.

16. On 25 February 2016 the Commission issued a reasoned opinion in which it reiterated its arguments already contained in the letter of formal notice, and the Federal Republic of Germany replied on 13 May 2016, referring to the arguments already put forward in its reply to the letter of formal notice.

B. Procedure before the Court

17. Since the Commission did not consider the Federal Republic of Germany's response from 13 May 2016 to be sufficient, it decided to bring the present action. It was lodged with the Registry of the Court on 23 June 2017.

18. By application lodged at the Court Registry on 5 October 2017, the Hungarian government applied for leave to intervene in support of the Federal Republic of Germany. By decision of 7 November 2017, the President of the Court allowed that application.

19. Both the German Government and the Commission presented oral argument at the hearing held on 7 November 2018, as did the Hungarian government.

III. Assessment

A. Preliminary remarks

1. On the relationship between Article 15 of Directive 2006/123 and Article 49 TFEU

20. In its submissions, the Commission consistently refers to Article 15 of Directive 2006/123 and Article 49 TFEU together. This is not necessary and I shall separate those provisions, for the reasons that follow.

21. Directive 2006/123 constitutes a particular form of harmonisation [4] in that it does not positively harmonise standards but rather sets out to remove barriers [5] to the freedom of establishment of service providers and to the freedom to provide services. It therefore follows the same logic of 'negative integration' as the Treaty freedoms. Nevertheless, the general principles concerning harmonisation apply.

22. Ergo, within the scope of Directive 2006/123, as set out in its Article 2, the provisions of the directive constitute *leges speciales* with respect to those of the Treaties. [6] As a consequence, once a subject matter is within the scope of Directive 2006/123, there is no need to examine that subject matter through the prism of the Treaty provisions. [7]

23. It is therefore the rules laid down in Directive 2006/123 which constitute the legal framework for determining the compatibility of the HOAI with freedom of establishment under that directive.

4 I have argued before that the terms 'coordination', 'approximation' and 'harmonisation' are used interchangeably in the Treaty: see my Opinion in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, point 52).

5 See recital 5 et seq. of Directive 2006/123.

6 It should be stressed that the scope of harmonisation is set out in Article 2 of Directive 2006/123. The directive applies to services supplied by providers established in a Member State (see paragraph 1 of that provision) unless one of the activities in paragraph 2 of that provision is at stake. The scope of harmonisation is not defined by the prohibited requirements of Article 14 of the directive or the 'suspect requirements' (in the terminology of Barnard, C., 'Unravelling the services directive', 45 *Common Market Law Review*, 2008, pp. 323-396, at p. 357) of Article 15 of the directive. In other words, the fact that fixed minimum and maximum tariffs with which a provider must comply (see Article 15(2)(g)) are at issue says nothing about the scope of harmonisation of the directive. Rather, as will be seen below, this will be relevant for the question of the existence of a restriction.

7 See judgments of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 23 et seq.); of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 118); and of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 137).

24. The structure of Article 15 of Directive 2006/123 is similar to that of Article 49 TFEU, as interpreted by the Court of Justice over the decades. Article 15(1), (2), and (3)(a) contain a prohibition of restrictions on freedom of establishment, even of indistinctly applicable measures, that is to say measures which apply in law and in fact in the same way to all service providers and which do not discriminate, directly or indirectly, on the basis of nationality.[8] Article 15(3)(b) and (c) of Directive 2006/123 allow for proportionate justifications by an overriding reason relating to the public interest. Such overriding reasons are in turn defined in Article 4(8) of Directive 2006/123. Their list is non-exhaustive in the sense that with technological, economic, social or other developments, new overriding reasons may crop up over time.[9]

25. To complete the picture,[10] although Article 15 of the directive is directed at Member States in the form of an evaluation obligation, it is directly applicable and can be relied upon by individuals against Member States.[11]

2. On purely internal situations

26. A substantial part of the parties' submissions relate to the applicability of Article 15 of Directive 2006/123 to purely internal situations, that is to say situations in which the facts are confined to a single EU Member State.

27. That question has been answered by the Court in its judgment in *X and Visser* to the effect that 'the provisions of Chapter III of Directive 2006/123, on freedom of establishment for providers, must be interpreted as meaning that they also apply to a situation where all the relevant elements are confined to a single Member State'.[12]

28. There is therefore no need to address this question in the present Opinion.

B. Restriction pursuant to Article 15(2)(g)

1. Arguments of the parties

(a) Commission

29. The Commission considers that the HOAI's minimum and maximum price system hinders new service providers from other Member States from entering the market, in so far as it prevents them, as providers for whom it is more difficult to attract customers, from offering their services at prices lower than those fixed in the minimum tariff for suppliers established in Germany or offering higher value services at prices above the maximum tariff.

8 Within the scope of the directive, obviously.

9 It should be emphasised that this applies only to non-discriminatory measures on the basis of nationality. Discriminatory requirements based directly or indirectly on nationality are prohibited by Directive 2006/123 *ipso facto* by its Article 14(1). No justification whatsoever can be given for them: see judgment of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 28).

10 Obviously, the question of direct effect is not decisive in the present case which constitutes a direct action between the Commission and the Federal Republic of Germany.

11 Indeed, the Court began applying Article 15 of Directive 2006/123 in such a way, without even addressing the question of direct effect. See judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843). See also my Opinion in *Hiebler* (C-293/14, EU:C:2015:472, point 28). Subsequently, in judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 130), the Court explicitly stated that Article 15 of Directive 2006/123 had direct effect.

12 See judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110 and point 3 of the grounds of judgment). See also my Opinion in Joined Cases *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, points 106-118).

30. The Commission considers that, even if the German architectural services market density is very high, such a fact would not have any impact on the existence of restrictions on the freedom of establishment. In this respect, it submits that Article 15 of Directive 2006/123 makes no reference to the market situation and that the Court, in its judgment *Cipolla and Others*,[13] considered that the fixing of minimum fees for lawyers would constitute a restriction on the freedom to provide services, although the market was characterised by the presence of an extremely high number of registered and active lawyers.

31. While the HOAI does not regulate market access, the Commission notes that this does not change the fact that the HOAI has an impact on the incentive to offer the services provided for therein. In this respect, the Commission recalls that Directive 2006/123 guaranteed not only formal establishment but also the actual possibility of market access.

(b) Federal Republic of Germany

32. The Federal Republic of Germany takes the view the HOAI does not infringe Directive 2006/123 in so far as, on the one hand, it provides for minimum and maximum fees only for planning services, which is explained by the fact that, as far as they are concerned, there is a particular general interest in guaranteeing a high quality standard, while fees for consultancy services are freely negotiable between the parties. On the other hand, the HOAI provides for many exceptional situations and numerous possibilities to deviate from the scale, in order to ensure that a correct fee can be agreed in each particular case. Consequently, according to that Member State, there is a high degree of flexibility that allows operators from other EU Member States to enter the German market under conditions of effective competition.

33. The Federal Republic of Germany recalls that the concept of restriction covers measures taken by a Member State which, although indistinctly applicable, affect market access for undertakings from other Member States and thus hinder intra-Union trade. According to the Federal Republic of Germany, it follows from the judgment in *Commission* v *Italy*[14] that minimum and maximum fee rates do not constitute a restriction, where the exceptions that exist ensure that an appropriate fee must always be paid. That Member State adds that the Court's case-law shows that tariffs do not constitute an obstacle as long as a sufficient degree of flexibility is ensured in the legislation in question.

2. Analysis

(a) Requirement of fixed minimum and maximum tariffs constitutes a restriction

34. Pursuant to Article 15(2)(g) of Directive 2006/123,[15] which is a provision of particular importance for the liberal professions,[16] Member States are to examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with the non-discriminatory requirement of fixed minimum and/or maximum tariffs with which the provider must comply.

35. A requirement is defined in Article 4(7) of Directive 2006/123 as any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States.[17]

13 Judgment of 5 December 2006 (C-94/04 and C-202/04, EU:C:2006:758).

14 Judgment of 28 April 2009 (C-518/06, EU:C:2009:270).

15 This provision is inspired by the Court's judgment of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758).

16 See Schlachter, M./Ohler, Chr., *Europäische Dienstleistungsrichtlinie, Handkommentar*, Nomos, Baden-Baden, 2008, Artikel 15, point 23.

17 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 are not considered to be requirements within the meaning of Directive 2006/123.

36. My understanding of Article 15(2) of Directive 2006/123 as interpreted by the Court of Justice [18] is that once the conditions of that provision are fulfilled, there is, by virtue of the directive, a restriction, and it is not necessary to pursue the analysis on that point any further.

37. In the case at issue, the provisions under dispute of the HOAI imposing, on planning services, [19] minimum and maximum tariffs (a requirement) [20] constitute obligations [21] provided for in regulations of a Member State, [22] which make access to the activity of providing architectural services [23] subject to compliance with such a requirement. There is no indication that they are not non-discriminatory in nature. [24]

38. As a consequence, the requirement of fixed minimum and/or maximum tariffs with which the provider must comply constitutes a restriction on freedom of establishment.

39. But even on the classical test, resulting from the Court's case-law on freedom of establishment under Article 49 TFEU, we are in the presence of a restriction. A newcomer to the market wishing to establish itself is impeded from doing so.

40. In this connection, the Court consistently holds that national rules which prohibit undertakings from derogating from the minimum tariffs provided for by national law deprive undertakings established in another Member State of the possibility, by requesting fees lower than those set by the national legislature, of competing more effectively with undertakings established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning customers than undertakings established in another Member State. [25]

41. In addition, the Court has held that a system requiring the (state) prior approval of premium rates in the insurance sector 'is liable to dissuade undertakings having their head office in a Member State other than the one which introduced such a system from opening a branch in that Member State' [26] and found there to be a restriction on freedom of establishment. [27]

42. Moreover, competition is, by its very essence, determined by price. By depriving an economic operator of the possibility of undercutting a certain price, it is deprived of a factor allowing it to be competitive. [28]

43. To sum up, the measures in question constitute an interference with individual autonomy and affect the ability of undertakings to compete on price, and constitute a restriction on freedom of establishment.

18 See judgments of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843); of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44); and of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141).

19 Not on consulting services, as results from Article 3(1) of the HOAI.

20 Article 15(2)(g) of Directive 2006/123.

21 Article 4(7) of Directive 2006/123.

22 Ibid.

23 Article 15(2) of Directive 2006/123.

24 Article 15(2) of Directive 2006/123.

25 See judgment of 12 December 2013, *SOA Nazionale Costruttori* (C-327/12, EU:C:2013:827, paragraphs 56 and 57 and case-law cited).

26 See judgment of 7 March 2013, *DKV Belgium* (C-577/11, EU:C:2013:146, paragraph 34). The Court went on to state in paragraph 35 of the same judgment that '[t]hose undertakings will not only have to change their terms and rates to meet the requirements imposed by that system, they will also have to determine their premium positioning and, therefore, their commercial strategy when they first set their premiums, with the risk that future premium rate increases will be insufficient to cover the costs with which they will be faced.'

27 See judgment of 7 March 2013, *DKV Belgium* (C-577/11, EU:C:2013:146, paragraph 37).

28 See also my Opinion in *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:394, point 18) where I argued with respect to the free movement of goods that fixed prices are a thorn in the flesh of any economic operator not present on a market, given that competition is, by its very essence, determined by price and that depriving an economic operator of the possibility of undercutting a certain price deprives it of a factor allowing it to be competitive.

(b) HOAI exceptions and deviations irrelevant

44. For the sake of completeness, it should be clarified that the system instituted by the HOAI, which includes some possible exceptions and deviations from the provisions of the HOAI, in no way alters the finding that there is a restriction.

45. It is true that in a case on Italian provisions obliging lawyers to comply with maximum tariffs, the Court has found that the Commission had failed to demonstrate that the system at issue was established in a manner which adversely affects access to the Italian market for the services in question under conditions of normal and effective competition. [29]

46. The findings of that case cannot, however, be transposed to the present case.

47. First, the Italian system of fees was characterised by a flexibility which was far greater than that contained in the HOAI. Not only was it open to lawyers, in numerous situations, to conclude a special agreement with clients to fix the amount of fees, but also, in cases which were particularly important, complex or difficult, fees could be increased by up to twice the maximum tariffs applicable by default, and, for cases which were exceptionally important, by up to four times those limits, or even more where there was a clear lack of proportionality, in view of the circumstances of the individual case, between the services of a lawyer and the maximum tariffs. [30]

48. By contrast, the provisions of the HOAI providing for exceptions and deviations are narrow in scope, as is evidenced by the views both of the authors of the HOAI and of German courts. [31]

49. Secondly, and crucially, the Italian case being prior to the entry into force of Directive 2006/123, I have difficulties in assuming that it could be decided in the same way, had it been brought in 2017, when the present case was brought. Had Directive 2006/123 been applicable already, the Court would not have needed to examine the question of a restriction in more detail. For, as has been seen above, the directive, in its Article 15(2)(g), has the precise objective of doing away with fixed minimum and maximum tariffs [32] by legally defining such measures as restrictions.

50. Whether and to what extent such measures can be deviated from is therefore, under Article 15 of Directive 2006/123, irrelevant.

(c) Views of professional associations irrelevant for legal analysis

51. Nor is this finding called into question by the fact that professional associations such as the Architects' Council of Europe or the European Council of Engineers Chambers consider the measures in question not to prevent access to the German market and not to hinder freedom of establishment. That question has already been decided by Article 15(2) of the directive. No professional association can question this legal provision.

29 See judgment of 29 March 2011, *Commission* v *Italy* (C-565/08, EU:C:2011:188, paragraph 53).

30 See judgment of 29 March 2011, *Commission* v *Italy* (C-565/08, EU:C:2011:188, paragraph 53).

31 See, with respect to minimum tariffs, Bundesgerichtshof, 22 May 1997, VII ZR 290/95, point III.2., *Neue Juristische Wochenschrift*, 1997, p. 2330; Bundesgerichtshof, 15 April 1999, VII ZR 309/98, point II.2.a), *Neue Juristische Wochenschrift – Rechtsprechungsreport Zivilrecht*, 1999, p. 1109; Bundesgerichtshof, 27 October 2011, VII ZR 163/10, point 8, *Neue Zeitschrift für Baurecht und Vergaberecht*, 2012, p. 175. Concerning maximum tariffs, see judgment of the Oberlandesgericht Stuttgart, 29 May 2012, 10 U 142/11, point 46, *Neue Zeitschrift für Baurecht und Vergaberecht*, 2012, p. 584.

32 Subject, needless to say, to the justification test, including proportionality, contained in Article 15(3) of Directive 2006/123.

C. No justification by virtue of Article 15(3) of Directive 2006/123

52. There is no indication that the provisions of the HOAI in question constitute discrimination on the basis of nationality.[33] As a consequence, the restriction in question can potentially be justified.[34]

1. Arguments of the parties

(a) Federal Republic of Germany

53. The Federal Republic of Germany considers the provisions of the HOAI to be justified by overriding reasons relating to the public interest, namely, guaranteeing the quality of planning services, protecting consumers, ensuring the safety of buildings, preserving the 'Baukultur'[35](the integrity of the built environment) , and attaining the objective of ecological construction. According to that Member State, the main objective is to ensure a high level of quality. Such an objective also facilitates the achievement of the other stated objectives.

54. The Federal Republic of Germany thus argues that quality planning serves consumer protection in two respects. On the one hand, it guarantees the safety of buildings and thus protects the health and life of those who live there. On the other hand, high quality planning prevents many errors during the execution of work and ensures that it is faster and less costly. In this connection, that Member State points out that the setting of minimum tariffs is supported by interest groups relating to all sides of the process.[36]

55. In addition, the Federal Republic of Germany, relying on the judgment in *Cipolla and Others*,[37] considers that tariffs are suitable to ensure the objective of a high level of quality. Moreover, it is claimed that detailed studies both on the effect and on the precise setting of minimum and maximum mandatory tariffs were resorted to in the run-up to the adoption of the HOAI.

56. In this connection, according to the Federal Republic of Germany, studies and economic assessment of the situation demonstrated a well-founded relationship between the mandatory minimum tariffs and the quality of planning work as well as, more generally, a link between deregulation and quality in the liberal professions. In this regard, that Member State maintains that there is a link between price and quality insofar as the heavy workload of highly qualified personnel is reflected in a higher price. If the price is below a certain level, it is assumed that this price can only be achieved by a lower level of quality.

57. In addition, the Federal Republic of Germany considers that, on the market for planning services, there is a risk that the phenomenon of 'adverse selection' will occur: if consumers are not sufficiently informed, they will always choose the cheapest offer, as they are not able to recognise differences in quality. This would inevitably lead to a lowering of quality since high quality services will no longer be in demand. While relying on economic theory, that Member State argues that it is almost impossible to verify the quality of 'trusted goods', such as the work of the liberal professions and the

33 See Article 15(2) of Directive 2006/123, according to which a requirement must be non-discriminatory. Article 15(3) of the directive reiterates the non-discriminatory nature of the measure once more. I understand this second reference to be of a purely declaratory nature.

34 This would not be the case if the measures in question were discriminatory, see Article 14(1) of Directive 2006/123. See also judgment of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 28).

35 That is to say, the integrity of the built environment.

36 The Bauherrenschutzbund e.V. (association for the protection of contracting authorities), the Verbraucherzentrale Bundesverband (National Federation of Consumer Associations) and by the Verband Privater Bauherren e.V. (group of private contracting authorities).

37 Judgment of 5 December 2006 (C-94/04 and C-202/04, EU:C:2006:758).

services of architects and engineers. Under such conditions, it is practically only possible to make profits by offering a lower quality, so that a phenomenon of 'moral hazard' occurs: suppliers notice that superior quality is not rewarded accordingly and they may, due to asymmetric information, assume that their customers will not even notice (at least not in due time) a lower quality.

58. The Federal Republic of Germany notes that if, by setting minimum tariffs, the importance of price as a competitive factor is reduced, this should encourage suppliers to focus on quality as a competitive factor in order to distinguish themselves from their competitors.

59. Moreover, that Member State points to a statistical study showing that, in cases of tariffs agreed below the HOAI mandatory minimum tariffs, both the probability of damage and the amount of it were significantly higher. [38]

60. In addition to this, the preservation of a structure based on small and medium-sized enterprises is a desirable objective insofar as it has the effect of guaranteeing the existence of a high number of service providers, so that competitive pressure increases and, because of the minimum tariffs imposed for certain planning services, competition is based on quality.

61. As regards the necessity of the disputed provisions, the Federal Republic of Germany argues that there is no less restrictive measure that is capable of achieving the stated objectives. The provisions of the HOAI contain a gradation according to regulatory intensity, so that mandatory tariffs are set only in cases where the German Government considers that minimum and maximum mandatory tariffs are essential to the protection intended by the HOAI.

62. As for alternative measures, that Member State argues that rules on access to the profession cannot take the place of tariffs insofar as they guarantee that members of a profession have the required qualification, while tariffs guarantee the quality of a specific service. The introduction of any regulations governing access to the professions concerned would constitute a much more severe restriction on freedom of establishment than the current HOAI.

63. With regard to the rules on liability and compulsory professional liability insurance, the Federal Republic of Germany considers that the tariffs set in the HOAI and the provisions governing the liability of architects and engineers are at different levels: the former are supposed to ensure, in a preventive manner, that a high quality of services is provided, while the latter can only apply when damage has already occurred. Therefore, liability provisions are not, by their nature, appropriate to defend general interests such as building safety, architectural culture or ecology.

64. In addition, the Federal Republic of Germany considers that it cannot be argued that providers must be able to prove that they meet all quality requirements, since there is an asymmetry of information. Thus, according to that Member State, engineers and architects also indirectly carry out the tasks of the authorities responsible for supervising construction and granting building permits, by checking, in parallel with these authorities, that they comply with the standards of the legislation on the supervision of works, precisely because some of these services cannot be controlled by those authorities.

38 Again, this point of view appears to be shared by the Architects' Council of Europe, which sees advantages in the HOAI system.

65. Concerning the possibility of publishing price information, the Federal Republic of Germany argues that the reason for setting minimum rates is the asymmetry of information regarding the quality of planning services, so that price publications would even reinforce the 'downward spiral'. Indeed, such information would lead to service recipients being even more price-oriented than they can already be assumed to be. That Member State adds that even if it were possible to compensate for information asymmetry, this would not achieve all protection objectives such as safety, aspects related to 'Baukultur' and sustainability, and environmental protection.

66. As regards maximum tariffs, that Member State argues that they serve to protect consumers insofar as they prevent consumers from bearing an excessively heavy burden resulting from excessive fees.

(b) Commission

67. The Commission argues that the reliance on a series of objectives, the most important of which is that of ensuring a high level of quality, is vague, so that it does not allow the examination of either the suitability or the necessity of such tariffs. Moreover, according to the Commission, an assessment is only possible if two scenarios can be compared, in relation to a result sufficiently defined and desired by the legislature, namely the scenario with market prices and the scenario in which minimum prices must be respected. In this respect, the Commission submits that the Federal Republic of Germany has not demonstrated, with regard to the objectives of building safety, preservation of architectural culture and ecological construction, how the two scenarios are supposed to differ in practice.

68. In the Commission's view, that Member State has not demonstrated a causal link, i.e. that a service remunerated at the market price, but below the minimum tariff, has different, i.e. less good, characteristics than a service whose price complies with the minimum tariffs. The Commission thus observes that the Federal Republic of Germany does not explain how the alleged incentive effect of the minimum tariffs, as well as the possibility of adverse selection and moral hazard, lead to the deprecated consequences, which are, in turn, described in general terms. In addition, that institution observes that, in order to achieve the desired level of quality, the rules on professional qualifications, as well as those on liability, should be implemented, and that these rules cannot be replaced by minimum tariffs.

69. As regards the objective of consumer protection, the Commission maintains that there is no legitimate presumption that, if the price falls below a certain threshold, that price can only be maintained by lowering the quality level.

70. The Commission argues that minimum tariffs apply regardless of the specific time spent on a particular job so that, except in exceptional cases, the final amount cannot be less than the minimum rates and that hourly rates may vary from one provider to another, for a wide variety of reasons, but independently of the quality of its services. According to the Commission, the amendment of the HOAI in 2009, doing away with hourly rates, shows that reaching or remaining below generally applied hourly rates does not provide any information on the quality of the service. The Commission concludes that a price below the minimum tariff does not imply a lower level of quality and, conversely, that a price exceeding the minimum tariffs does not give rise to a presumption of higher quality, or even to a guarantee of quality.

71. As regards the consumer protection aspect based on the objective of avoiding 'adverse selection' and 'moral hazard', the Commission argues that, on the one hand, the Federal Republic of Germany has not demonstrated that the abolition of minimum tariffs leads to a reduction in quality and, on the other hand, that part of that Member State's own arguments contradict this conclusion. The Commission argues that artificially high prices do not remedy the asymmetry of information between professionals and customers. The link between quality of service and minimum prices was analysed

when preparing the 2009 version of the HOAI (the study called the 'Statusbericht 2000plus') and even this analysis, which assumes that customers are not in a position to assess the quality of services and that they make their choice according to price, concludes that minimum prices do not necessarily have a causal link with the desired quality level and that further evidence is needed. Thus, the said analysis concludes that the motivation of service providers to act in the interest of their clients cannot be ensured by the scale of fees itself, but only by an adequate culture of professional practice.

72. The Commission points out that there are a number of mechanisms to ensure the quality of services, such as advertising, the regulation of professional organisations, quality management systems and the possibility for customers to obtain information in a targeted manner via specialised websites.

73. The Commission notes that it does not oppose a system that would allow appropriate price guidelines to enable customers to detect unrealistic offers. In addition, the Commission notes that the Federal Republic of Germany's reference to quality-based competition also indicates that there are currently quality differences, despite the minimum tariffs, so that the latter cannot be considered as an effective quality condition.

74. The Commission is not convinced by the empirical evidence presented by that Member State. It considers that the examples shown, unlike the analysis made in 2009, are limited to showing the existence of a parallelism between the charging of prices below the minimum tariffs and the frequency of loss claims, without however demonstrating causality in a concrete way, and that the expert himself only speaks of 'indications' and not of evidence. Moreover, the Commission notes that the 2009 analysis found that it is not possible to examine whether there is a link between construction prices and loss claims caused by many factors that cannot be ignored.

75. In addition, the Commission argues that the protection of the market structure does not constitute an overriding reason relating to the public interest and that the Federal Republic of Germany, while basing its argument on the existence of information asymmetry, has not indicated that such asymmetry cannot occur in the case of consultancy services which are not subject to the mandatory tariffs. These also include environmental impact studies, studies on 'construction physics' and geotechnics, as well as engineering surveying services where there may well be information asymmetry. Moreover, with regard to comparisons with the field of public procurement, the Commission considers, on the one hand, that the prices of services covered by the HOAI may fall below the minimum tariffs of this scale but nevertheless correspond to market prices, so that they would not be 'abnormally low' by definition and would not even give rise to a specific audit. On the other hand, even if prices in a public procurement procedure are 'abnormally low', there may be a plausible explanation, so that the contracting authority cannot reject the tender solely because of the price level.

76. The Commission further argues that Eurostat's analysis shows that German architectural offices consist, on average, of 2.1 wage and salary earners, well above the EU average, but that the gross operating rate, which is 38.8%, is nevertheless the second highest in the EU, so that the allegations of the Federal Republic of Germany cannot prosper. In addition, the Commission considers that the Federal Republic of Germany has not answered the question why the quality level did not decline over a relatively long period from 1996 to 2009, during which construction price agreements were allowed. The Commission adds that the minimum rates were abolished between 20 October 1981 and 14 June 1985 without any reduction in construction quality.

77. According to the Commission, the minimum tariff is not necessary to achieve the desired objective. In this respect, the Commission does not agree with the Federal Republic of Germany's argument on the rules on access to the profession, insofar as the system of minimum fees is in no way suitable or necessary to guarantee quality, without regard to whether or not the activities concerned, by their nature, require a particular qualification. Moreover, with regard to liability rules and liability

insurance, the Commission maintains that, on the one hand, the liability for defects regime may have a preventive effect, which the defendant has not demonstrated with regard to minimum rates. On the other hand, the fact of agreeing on fees concerns as such the relationship between the parties, as well as liability for defective services.

78. While referring to its arguments on the rules on the exercise of the profession, the Commission maintains that the Federal Republic of Germany has not refuted its arguments on evidence of compliance with quality requirements, information obligations or freedom of choice for consumers either. Accordingly, the Commission adds that, while it is true that the measures imposed on suppliers to protect customers often entail costs that are then normally passed on to the customers, in this case the customer only incurs higher costs, with no identifiable consideration.

79. Finally, with regard to maximum tariffs, the Commission maintains that the Federal Republic of Germany has failed to explain how maximum tariffs are supposed to contribute to the elimination of asymmetries in information about quality. With regard to the protection of clients from excessive fee requirements, the Commission concludes that it is sufficient if appropriate guidance is made available to the client with which he can assess how the price compares to the usual prices.

2. Analysis

80. The restriction in question is justified if the cumulative[39] conditions listed in Article 15(3) of Directive 2006/123 are satisfied.[40]

81. Regarding Article 15(3)(a), it has already been established above that the provisions of the HOAI in question are non-discriminatory in nature.

(a) Overriding reasons invoked, Article 15(3)(b) of Directive 2006/123

82. As regards Article 15(3)(b) of the directive, the overriding reasons relating to the public interest invoked, i.e. the grounds of justification invoked by the Federal Republic of Germany, are the following: guaranteeing the quality of planning services, consumer protection, the safety of buildings, the preservation of 'Baukultur' and the objective of ecological construction. According to that Member State, the main objective is to ensure a high level of quality and such an objective also facilitates the achievement of the other stated objectives. Moreover, as referred to above, in places the Federal Republic of Germany also refers to the preservation of a structure based on small and medium-sized enterprises.

83. As the Federal Republic of Germany correctly points out, it can be inferred from the Court's case-law that all these five grounds can constitute overriding reasons relating to the public interest capable of justifying a restriction on freedom of establishment.[41] Yet, and here I concur with the Commission, I do not see how the submissions of the Federal Republic of Germany specifically relate to safety of buildings, the preservation of 'Baukultur' and the objective of ecological construction.

39 See judgment of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 56).

40 As I have pointed out before in my Opinion in Joined Cases *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 144), the wording of Article 15(3) of the directive is reminiscent of the Court's formulation, in judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 37). See also Davies, G., 'The Services Directive: extending the country of origin principle, and reforming public administration', *European Law Review*, vol. 32, 2007, pp. 232-245, at p. 234.

41 See judgments of 3 October 2000, *Corsten* (C-58/98, EU:C:2000:527, paragraph 38), and of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758, paragraph 64) for quality of service; of 8 September 2010, *Stoß and Others* (C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 74) for consumer protection; of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 74) for safety aspects); of 26 February 1991, *Commission* v *France* (C-154/89, EU:C:1991:76, paragraph 17) for cultural heritage; and of 13 March 2001, *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 76) for the environment.

Instead, the submissions are entirely geared towards guaranteeing the quality of planning services and consumer protection. In order for the other three grounds of justification to be effective in the present case, the Federal Republic of Germany would have had to specifically argue why and how the disputed measures in question serve to attain those objectives.

84. Concerning, moreover, the preservation of a market structure based on small and medium-sized enterprises, suffice it to point out that protecting existing enterprises constitutes an economic argument that is not capable of justifying a restriction on freedom of establishment. And insofar as it is the *market structure* which the HOAI is intended to preserve, I do not see how this aspect is further substantiated in the submissions of the German Government.[42]

85. The only overriding reasons relating to the public interest which can therefore be accepted are consumer protection and ensuring a high level of quality. Here, it is up to the Federal Republic of Germany to lay out to what extent the disputed provisions in question serve these aims.

(b) Proportionality, Article 15(3) of Directive 2006/123

86. This leads us to the proportionality test as set out in Article 15(3)(c) of Directive 2006/123. The provisions in question must be suitable for securing the attainment of an objective pursued and 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.

87. While it is up to Member States to fix the level of protection they wish to accord, according to settled case-law it is for the national authorities, where they adopt a measure derogating from a principle enshrined in European Union law, to show in each individual case that that condition is satisfied. The reasons which may be invoked by a Member State by way of justification must thus be accompanied by an analysis of the suitability and proportionality of the measure adopted by that Member State and by specific evidence substantiating its arguments.[43] This case-law, which has its origin in the fundamental freedom provisions of the FEU Treaty, is equally applicable in the context of Article 15(3) of Directive 2006/123.[44]

(1) Minimum tariffs

(i) Suitability

88. The question arises whether the fixing of minimum tariffs is suitable[45] to attaining the goal of ensuring quality of services.

42 I should also like to point to the Opinion of Advocate General Wahl in *Grupo Itevelesa and Others* (C 168/14, EU:C:2015:351, point 73), according to whom the Court is, rightly, wary of Member States interfering with freedom of establishment by regulating in detail a given market structure or competitive situation, inter alia under the pretext of ensuring a high quality of service for customers and consumers.

43 See judgments of 7 July 2005, *Commission* v *Austria* (C-147/03, EU:C:2005:427, paragraph 63); of 14 June 2012, *Commission* v *Netherlands* (C-542/09, EU:C:2012:346, paragraph 81); and of 23 January 2014, *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 33).

44 See judgments of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 69), and of 7 November 2018, *Commission* v *Hungary* (C-171/17, EU:C:2018:881, paragraph 86).

45 In its case-law, the Court sometimes resorts to the terms 'appropriate' or 'adequate' instead. See, by way of example, judgment of 23 January 2014, *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 33). I'll refer to 'suitable' throughout since this is the term employed by the directive.

89. In general, the Court accords Member States 'some discretion'[46] at this stage, in particular because the relevant public interest objectives vary between the Member States. This does not, however, exempt a Member State from clearly defining the objectives set and demonstrating in a comprehensible and consistent manner that the measure in question is suitable to achieve those objectives.

90. I consider that the Federal Republic of Germany has not proven the suitability of the contested provisions, for the reasons which I shall now set out.

91. It cannot be inferred from the judgment in *Cipolla and Others*,[47] as the Federal Republic of Germany suggests, that minimum tariffs are by their very nature suitable for attaining the desired quality of service. Rather, the Court stressed that 'it must be determined, in particular, whether there is a correlation between the level of fees and the quality of the services provided by lawyers and whether, in particular, the setting of such minimum fees constitutes an appropriate measure for attaining the objectives pursued, namely the protection of consumers and the proper administration of justice'.[48]

92. The suitability of minimum tariffs to promote the quality of the services concerned must therefore be demonstrated on a case-by-case basis, taking account of all the circumstances, as the Commission rightly contends.

93. And it is on this point that the Federal Republic of Germany fails to come up to the mark. Rather than demonstrating that the provisions of the HOAI, as they exist, are suitable to attaining a high quality in architectural and engineering services, that Member State contents itself with general considerations and suppositions.

94. Instead of proving that an abolition of minimum tariffs would lead to a reduction in the level of quality, the Federal Republic of Germany presupposes this and builds its argument upon it.

95. In support of its argument, that Member State points at length to the Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others*.[49] In those joined cases, which concerned the compatibility of a national system of compulsory affiliation to professional pension schemes with the competition rules of the EC Treaty, Advocate General Jacobs made general statements in the form of 'preliminary remarks'[50] on 'typical features of the markets for professional services'[51] 'from a competition law perspective'.[52] In this context he notes inter alia that 'some professions are involved

46 See judgment of 28 April 2009, *Commission* v *Italy* (C-518/06, EU:C:2009:270, paragraph 84).

47 Judgment of 5 December 2006 (C-94/04 and C-202/04, EU:C:2006:758).

48 See judgment of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758, paragraph 66). The Court went on to state in the following two paragraphs that 'although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, *in a context such as that of the Italian market* which, as indicated in the decision making the reference, is *characterised* by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided. Account must also be taken of the *specific features both of the market in question*, as noted in the preceding paragraph, *and the services in question* and, in particular, of the fact that, in the field of lawyers' services, there is usually an asymmetry of information between "client-consumers" and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them.' Emphasis added.

49 C-180/98 to C-184/98, EU:C:2000:151.

50 See Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:151, point 71).

51 Meaning services emanating from the liberal professions.

52 See Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:151, point 73).

in fixing compulsory charges and fees for their services'.[53] He then goes on to portray 'three recurrent difficulties',[54] one of which is that 'from an economic point of view, the markets for professional services are different in two important respects from normal markets for goods and services',[55] which is in part due to the 'important problem of so-called asymmetric information'.[56]

96. Relying on literature from the domain of economics,[57] Advocate General Jacobs goes on to explain as follows: 'Such an asymmetry between seller and buyer arises where the buyer cannot fully assess the quality of the product he receives. In the professions the problem is particularly acute because of the nature of their highly technical services. The consumer cannot assess the quality of those services prior to purchase by inspection (as he could for example when buying cheese), but only after consumption. Even worse, he might never fully understand whether or not the professional (e.g. doctor, architect, lawyer) provided a high quality service. That means that the incentives for professionals, who themselves determine how much attention they give to a client, either deliberately to lower quality to save time or money or to induce clients to have further recourse to their services in the absence of necessity, are high. The usual methods of overcoming or mitigating the negative effects of asymmetric information, or in other words of preventing a "race to the bottom", can all be found in the professions. Access examinations are intended to guarantee a high initial standard of skills. Liability rules, the consequences of a good or a bad reputation, and certification schemes are incentives to exploit those skills to the full. Advertising is seen by some as a means of overcoming or mitigating asymmetry, whilst others claim that advertising exacerbates the problems. One conclusion to be drawn is that in order to counter the effects of asymmetry a certain level of regulation of those markets is necessary.'

97. It is difficult for me not to concur these instructive remarks on asymmetry of information and not to subscribe to them. They are eloquent descriptions of a state of affairs. But, as the Advocate General points out himself and as has been referred to above, they constitute preliminary remarks. They are a description of the problem but do not provide a solution to the problem. Ergo, they are not – and cannot serve as – an analysis of correlations or causal relationships between quality and price.

98. I will therefore not examine those findings any further, but one thing is interesting to note: although Advocate General Jacobs sees a certain need for State intervention because of information asymmetries and provides a few examples of such interventions, regulating prices is not one of them.

99. I am aware of the fact that the Federal Republic of Germany, rather than aiming at reducing information asymmetry,[58] aims at mitigating the consequences of information asymmetry.

100. It is undeniable that there is information asymmetry between service provider and service recipient. That Member State concludes from this *abstract* and undisputed finding that minimum tariffs eliminate such an asymmetry in *concrete* cases.

53 See Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:151, point 77). In the same point he goes on to state: 'Possible regulatory arrangements range from the fixing of minimum fees by the profession itself to the fixing of maximum fees by the State after consulting the profession concerned.'

54 See Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:151, point 82).

55 See Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:151, point 84).

56 See Opinion of Advocate General Jacobs in Joined Cases *Pavlov and Others* (C-180/98 to C-184/98, EU:C:2000:151, point 86).

57 Cited as D.W. Carlton, J.M. Perloff, *Modern Industrial Organisation*, 2nd ed. New York, 1994, p. 115.

58 Which would in any event be close to impossible, since people tend to resort to the services offered by architects and engineers precisely because of asymmetry of information.

101. The Federal Republic of Germany has supplied the Court with technical expert evidence on the fixing of tariffs in the HOAI. But this evidence does not substantiate its arguments.[59] Nowhere is it proven that a system *without* minimum tariffs would lead to market failure[60] in which services of good quality would leave the market and be replaced by those of an inferior nature. Nowhere is it proven that good quality cannot be ensured by a regular system of supply and demand.

102. Summing up, the heart of the Federal Republic of Germany's argument that increased price competition leads to a lowering of standards has not been substantiated. Competition in service activities, in particular on price, is in general seen as a necessary, desired and efficient mechanism in a market economy. It is, however, very often in those sectors where the service providers are particularly well qualified and are subject to strict conditions regarding their qualifications that competition on price is seen as a threat. How price competition should turn these particularly well qualified people from 'saints into sinners'[61] remains a mystery.

(ii) Necessity

103. Even on the assumption that the HOAI provisions in question were suitable to attaining the objective of quality of service, they would not be necessary in the sense of Article 15(3)(c) of Directive 2006/123,[62] that is to say that they do not go beyond what it necessary to attain the objective envisaged and that it is not possible to replace the requirements in question with other, less restrictive measures which attain the same result.

104. At this stage, it is not for the Court to find alternative measures for the Member State. But it is for the Member State to explain why other measures which are less restrictive cannot be resorted to.

105. The argument that rules on access to the profession merely ensure that the members of the particular professional group possess adequate abstract qualifications whereas rules on tariffs ensure that concretely furnished services are of a sufficient quality presupposes what has to be proven. It is nothing more than an assumption.

106. There are a range of measures which would appear to ensure the quality of a service and the protection of consumers: rules on professional ethics, rules on liability and insurance, obligations to provide information, obligations to publish tariffs or on the State to provide indicative tariffs. The Federal Republic of Germany has not proven that the effect of the provisions in question on minimum tariffs better ensure the quality of a service and the protection of consumers. In particular, the statement that the introduction of any regulations governing access to the professions concerned would constitute a much more severe restriction on the freedom of establishment than the current HOAI is a mere assertion which is not backed up by evidence.

107. Only if it were proven that such other measures, as referred to in the preceding paragraph, do not attain the objectives of quality of service and consumer protection could one begin to envisage, as an *ultima ratio*, whether minimum tariffs better attain those objectives.[63]

59 As required by the Court in its consistent case-law. See judgments of 7 July 2005, *Commission* v *Austria* (C-147/03, EU:C:2005:427, paragraph 63); of 14 June 2012, *Commission* v *Netherlands* (C-542/09, EU:C:2012:346, paragraph 81); and of 23 January 2014, *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 33).

60 Labelled by the Federal Republic of Germany as 'adverse selection'.

61 See Opinion of Advocate General Poiares Maduro in Joined Cases *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2009:587, point 26) where a comparable argument is made in relation to pharmacists.

62 It is somewhat unfortunate that Article 15(3) of Directive 2006/123 refers to necessity in two different contexts: firstly in (b), simply stating that there must exist a ground of justification in the form of an overriding reason relating to the public interest and, secondly in (c), in the traditional sense of the second step of proportionality. It is, obviously, in this second sense that the term is employed here.

63 On the assumption of course that they pass the test of suitability, which in my view is not the case.

(2) Maximum tariffs

108. The German Government's argument consists in defending the *system* established by the HOAI with its *combination* of minimum and maximum tariffs. The German Government stresses that minimum and maximum tariffs should not be viewed in isolation, but refer to the performance profiles described in detail in the HOAI. Ergo, should the Court find the minimum tariffs not to be proportionate, it is difficult for me to imagine that the Federal Republic of Germany would maintain maximum tariffs, which is why it might appear sophistic to address this point separately.

109. Nevertheless, for the sake of completeness, I shall briefly address maximum tariffs.

(i) Suitability

110. The suitability of maximum tariffs does not appear to me to pose any problem. Indeed, as the German Government correctly claims, maximum tariffs are indeed suitable to serve the objective of consumer protection, as they provide for transparency and protect against excessive fee demands.

(ii) Necessity

111. However, the German Government has not demonstrated that it is not possible to replace maximum tariffs with other, less restrictive measures which attain the same result. In particular, it has not been proven why, for instance, price guidelines enabling consumers to have a concrete idea of what a service is normally remunerated for, would not protect their interests in an effective manner.

D. Article 49 TFEU

112. Since the Commission's complaint, which concerns Article 15 of Directive 2006/123, has been upheld, an analysis with respect to Article 49 TFEU is not necessary.[64]

IV. Conclusion

113. On the basis of the foregoing considerations, I am therefore of the opinion that the Court should:

– Declare that the Federal Republic of Germany has infringed Article 15(1), (2)(g) and (3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market by subjecting planning services provided by architects and engineers to mandatory minimum and maximum tariffs by virtue of the Honorarordnung für Architekten und Ingenieure;

– Order the Federal Republic of Germany to pay the costs.

64 See judgments of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 118), and of 7 November 2018, *Commission* v *Hungary* (C-171/17, EU:C:2018:881, paragraph 87).