Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 7 July 2022 [1]

Case C-372/21

Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR
joined parties:
Bildungsdirektion für Vorarlberg

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling – Article 49 TFEU – Right of establishment – Article 17 TFEU – Churches and religious associations or communities – Subsidisation of a private school recognised as a denominational school by a religious society based in another Member State)

I. Introduction

1. According to Article 17(1) TFEU, the European Union 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'. For its part, Article 49(1) TFEU provides that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited'.

2. The present case concerns the interaction between those two provisions. In particular, it raises two main questions.

3. First, does Article 17(1) TFEU preclude the application of the EU rules on the free movement of services in a situation where a religious society, established in a Member State, recognises a school in another Member State as a denominational school and requests public funding in the latter? Second, if not, can those rules be successfully relied on in relation to an economic activity which, were the alleged restriction in the host Member State to be removed, would lose its economic character?

[1] Original language: English.

II. National legal framework

4. Paragraph 1 of the Gesetz vom 20. Mai 1874 betreffend die gesetzliche Anerkennung von Religionsgesellschaften (Austrian Law on the legal recognition of religious societies; 'the AnerkennungsG')[2] provides that:

'Members of a religious denomination previously not recognised by law shall be recognised as a religious society provided:

1. that nothing in their religious doctrine, in their religious office, in their statutes, as well as in the name they choose for themselves is illegal or contrary to morality;

2. that the establishment and existence of at least one religious community founded in accordance with the requirements of this law is assured.'

5. Paragraph 2 of the AnerkennungsG is worded as follows:

'If the conditions set out in Paragraph 1 are met, the Cultusminister [(Minister of Education and Cultural Affairs, Austria)] shall recognise the religious society.

As a result, the religious society shall enjoy all the legal rights conferred on churches and religious societies recognised by law.'

6. Paragraph 11 of the Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften (Federal Law on the legal status of registered religious communities; 'the BekGG'),[3] lays down additional requirements for a religious community to be recognised under the AnerkennungsG. It reads:

'In addition to the requirements set out in the [AnerkennungsG], in order to be recognised, the religious community must fulfil the following conditions.

1. The religious community must:

(a) have existed for at least 20 years in Austria, of which 10 years in an organised form, and at least 5 years as a religious community with legal personality under this Act; or

(b) be organisationally and doctrinally integrated into an internationally active religious society which has existed for at least 100 years and has already been active in Austria in an organised form for at least 10 years; or

(c) be organisationally and doctrinally integrated into an internationally active religious society which has existed for at least 200 years; and

(d) has a membership equal to at least two per thousand of the population of Austria as determined at the last census. If the religious community cannot provide this proof from the census data, it must provide it in any other appropriate form.

[2] RGBl. 68/1874.

[3] BGBl. I, 19/1998, in the version published in BGBl. I, 78/2011.

2. The income and assets of the religious community may only be used for religious purposes, including charitable purposes and for purposes of public interest based on religious principles.

3. The faith community must be well disposed towards society and the state.

4. It must not create unlawful disturbance in relations with churches and religious societies recognised by law and with other existing religious communities.'

7. Under the title 'Subsidisation of denominational private schools', Paragraph 17 of the Privatschulgesetz (Austrian Law on private schools; 'the PrivSchG'),[4] which covers eligibility, provides:

'(1) Legally recognised churches and religious societies are to be granted subsidies for staff costs for denominational private schools having public law status in accordance with the following provisions.

(2) Denominational private schools are to be understood as referring to schools maintained by legally recognised churches and religious societies and their institutions, as well as those schools maintained by associations, foundations and funds which are recognised as denominational schools by the competent higher authority of a church (religious society).'

8. Paragraph 18(1) of the PrivSchG, concerning the scope of the subsidy, states:

'As a subsidy, the churches and religious societies recognised by law shall be provided with the teaching staff required for the implementation of the curriculum of the school concerned … provided that the ratio between the number of pupils and the number of teachers in the denominational school concerned corresponds essentially to that prevailing in public school establishments of the same or comparable type and location.'

9. Pursuant to Paragraph 19 of the PrivSchG, entitled 'Nature of the subsidy', grants for staff remuneration are, in principle, made by the assignment of teachers employed by or under contract with the Federal state or the *Land* as 'living grants'.

10. Paragraph 21 of the PrivSchG, concerning the conditions for the subsidies for other private schools, provides:

'(1) For private schools with public law status that do not fall under Paragraph 17, the Federal State may, in accordance with the funds available under the respective Federal Finance Act, grant subsidies towards staff costs if

…

(b) the purpose of running the school is not to make a profit,

…'

[4] BGBl. No 244/1962, in the version published in BGBl. I, 35/2019.

III. Facts, national proceedings and the questions referred

11. Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR (Free Church of the Seventh-day Adventists in Germany; 'the appellant') is a religious society recognised in Germany, where it has the status of a body governed by public law. It does not have the same status in Austria.

12. In 2019, the appellant recognised as a denominational school a private institute in Austria which was being run by a private association – combining primary and middle school – and introduced a request for public funding of its staff pursuant to the provisions of the PrivSchG.

13. By decision of 3 September 2019, the Bildungsdirektion für Vorarlberg (Directorate of Education of Vorarlberg, Austria) rejected that request.

14. The appellant brought an appeal against that decision. However, that appeal was dismissed as unfounded by judgment of 26 February 2020 of the Bundesverwaltungsgericht (Federal Administrative Court, Austria). That court found that the school in question did not possess the special legal status granted to 'denominational' schools within the meaning of Paragraph 18 of the PrivSchG, since the appellant was not legally recognised in Austria as a church or religious society. It thus concluded that the requirements of Paragraph 17 et seq. of the PrivSchG were not met.

15. The appellant brought an appeal on a point of law against the judgment of the Bundesverwaltungsgericht (Federal Administrative Court) before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). That court, harbouring doubts as to the compatibility of the relevant national legislation ('the national legislation at issue') with EU law, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of Article 17 TFEU, does a situation in which a religious society that is recognised and established in one Member State of the European Union applies in another Member State for subsidisation of a private school which is recognised as denominational by that religious society and which is operated in that other Member State by an association registered under the law of that other Member State fall within the scope of EU law, in particular Article 56 TFEU?

If Question 1 is answered in the affirmative:

(2) Is Article 56 TFEU to be interpreted as precluding a national rule which provides, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law?'

16. Written observations have been submitted by the appellant, the Czech and Austrian Governments, as well as the European Commission.

IV. Analysis

17. In the following points, I will deal with the two main issues arising from the questions referred which concern, in a nutshell, the effects of Article 17(1) TFEU (A), and the scope of Article 49 TFEU (B).

A. First question: the effects of Article 17 TFEU

18. By its first question, the referring court wishes to know, in essence, whether Article 17(1) TFEU precludes the application of the EU rules on the free movement of services in a situation where a religious society, established in one Member State, recognises a school in another Member State as a denominational school and requests public funding in the second Member State.

19. In my view, the answer to that question should be in the negative.

20. Article 17(1) states that the European Union 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'. In that regard, the Court has held that that provision 'expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities',[5] and incorporates the principle of organisational autonomy of religious communities.[6]

21. To my mind, the Court's findings imply that the European Union has no specific power to regulate matters concerning the internal functioning of religious communities and their relationship with the Member States. Accordingly, it is in principle for each Member State to determine the kind of relationship it wishes to establish with religious communities and, to that end, lay down rules which govern matters such as, for example, the legal status and scope of the autonomy of religious communities, their financing, and any special status accorded to their ministers or staff.[7]

22. However, this does not mean that those organisations need not comply with the EU rules that may be applicable to their activities, nor that the Member States are free to adopt ecclesiastical laws which are incompatible with EU law. Indeed, even when acting in fields falling within their competence, the Member States must exercise that competence with due regard for EU law,[8] and thus comply with their obligations deriving from EU law.[9]

23. In fact, the Court has, on numerous occasions, ruled on the compatibility with EU law of national rules that concern the relationship between a Member State and religious communities. In particular, some of those cases concern situations which have certain similarities to the present case. For instance, the Court has previously considered whether national measures that provide funding to denominational schools[10] or provide tax exemptions in favour of activities carried out

5 See, inter alia, judgment of 13 January 2022, *MIUR and Ufficio Scolastico Regionale per la Campania* (C-282/19, EU:C:2022:3, paragraph 50 and the case-law cited).

6 See, to that effect, judgment of 10 July 2018, *Jehovan todistajat* (C-25/17, EU:C:2018:551, paragraph 74).

7 Similarly, Morini, A. 'Comment to Article 17 TFEU', in Curti Gialdino, C., (ed.) *Codice dell'Unione europea – Operativo*, Simone, Naples, 2012, p. 543.

8 See, to that effect, judgment of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)* (C-398/19, EU:C:2020:1032, paragraph 65 and the case-law cited).

9 See, to that effect, judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 38 and the case-law cited).

10 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496).

by religious communities [11] comply with the EU rules on State aid. In similar vein, the Court has also confirmed that the fact that an activity is carried out by a religious community, or a member thereof, does not preclude the application of the EU rules on the internal market. [12]

24. That is not called into question by Article 17(1) TFEU. As emphasised by Advocate General Tanchev, it does not follow from Article 17(1) TFEU that relations between religious communities and a Member State are completely shielded from any review of compliance with EU law 'whatever the circumstances'. [13] In other words, Article 17(1) TFEU cannot be considered – as Advocate General Bobek put it – akin to a 'block exemption' for any matter touching upon a religious community and its relationship with the national authorities. [14] In fact, the Court has found that Article 17(1) TFEU cannot be invoked to exempt compliance with, inter alia, the EU rules on equal treatment in employment and occupation, [15] or on the protection of personal data. [16]

25. In the light of the above, it must be concluded that Article 17(1) TFEU does not preclude the application of the EU rules on the free movement of services in circumstances where a religious society, established in a Member State, recognises a school in another Member State as a denominational school, and requests public funding in the latter.

B. Second question: the scope of Article 49 TFEU

26. By its second question, the referring court asks, in essence, whether the EU rules on the free movement of services preclude national legislation which provides, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law.

27. In the sections below, after providing some preliminary remarks that clarify the applicable provision of EU law (1), I shall deal with the substance of that question. I shall explain why I take the view that the right of establishment cannot be invoked by service providers in order to be permitted to exercise a non-economic activity in another Member State (2). In the alternative, I will explain why I am of the view that national legislation such as that at issue may constitute a restriction on the right of establishment, but may be justified as necessary and proportionate for the attainment of certain public objectives which merit protection (3).

1. Preliminary remarks

28. At the outset, it may be useful to clarify the specific provision of EU law that is applicable in the case at hand. I have two remarks in that regard.

[11] Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

[12] See, inter alia, judgments of 5 October 1988, *Steymann* (196/87, EU:C:1988:475); of 7 September 2004, *Trojani* (C-456/02, EU:C:2004:488); and of 7 May 2019, *Monachos Eirinaios* (C-431/17, EU:C:2019:368).

[13] Opinion in *Egenberger* (C-414/16, EU:C:2017:851, points 88 and 93). See also Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:135, point 32).

[14] Opinion in *Cresco Investigation* (C-193/17, EU:C:2018:614, point 26).

[15] See, for example, judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43).

[16] Judgment of 10 July 2018, *Jehovan todistajat* (C-25/17, EU:C:2018:551, paragraph 74).

29. First, the referring court inquires about the compatibility of national legislation such as that at issue with Article 56 TFEU, which enshrines the freedom to provide services. However, in a situation such as that at issue in the main proceedings, it is not Article 56 TFEU that is applicable, but rather Article 49 TFEU, which concerns the right of establishment.

30. Indeed, as the Court has consistently held, the concept of establishment means that the operator offers its services on a stable and continuous basis from an establishment in the host Member State. On the other hand, the provision of services that are not offered on a stable and continuous basis from an establishment in the host Member State constitutes a 'provision of services' for the purposes of Article 56 TFEU. [17]

31. Since the activity at issue in the main proceedings is the running of a school which offers, on a stable and continuous basis, educational services to primary and secondary school students in Austria, I consider that the present case falls within the scope of the EU rules on establishment. [18]

32. Second, it is well-established that the EU rules on free movement, including those relating to the freedom to provide services and the freedom of establishment, do not apply to a situation which is confined in all respects within a single Member State. [19] Those rules can, therefore, be validly invoked only in situations involving a cross-border element. That requirement stems from the very purpose of the internal market provisions, which is to liberalise intra-Union trade. [20]

33. In the present case, contrary to view taken by the Austrian Government, that requirement appears to be fulfilled. The appellant, a religious community, is a legal person based in Germany, which introduced a request for funding in another Member State, namely Austria. As the referring court points out, that request was submitted in accordance with Austrian national law. Indeed, under Paragraph 17 of the PrivSchG, it is the religious communities which are (formally) the beneficiaries of such funding. A cross-border element in the present case can thus be found.

34. Having made those clarifications, I will now turn to the substantive issues raised by the second question referred.

2. Article 49 TFEU cannot be invoked by service providers in order to be permitted to exercise a non-economic activity in another Member State

35. According to settled case-law, Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the FEU Treaty. [21]

[17] See, to that effect, judgments of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraphs 25 and 26), and of 19 July 2012, *Garkalns* (C-470/11, EU:C:2012:505, paragraph 27 and the case-law cited).

[18] See, *mutatis mutandis*, my Opinion in *Boriss Cilevičs and Others* (C-391/20, EU:C:2022:166).

[19] See, in particular, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874).

[20] See, with further references, Opinion of Advocate General Wahl in Joined Cases *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:529, point 27).

[21] See, among many, judgment of 3 September 2020, *Vivendi* (C-719/18, EU:C:2020:627, paragraph 51 and the case-law cited).

36. However, it must be borne in mind that the EU rules relating to establishment – just like those relating to other internal market freedoms – are applicable only where the activity in question can be classified as 'economic'. In that regard, the Court has consistently held that any activity consisting in offering goods or services on a given market is an economic activity. [22]

37. More specifically, Article 57 TFEU provides that 'services' within the meaning of the Treaties are those 'normally provided for remuneration'. The essential characteristic of remuneration lies – as the Court has held – in the fact that it constitutes *consideration* for the service in question, [23] and is normally agreed upon between the provider and the recipient of the service. [24]

38. The Court has adopted a rather broad interpretation of the concept of 'remuneration'. [25] In particular, the application of the rules on the freedom to provide services is not excluded by the fact that the remuneration for the service is: (i) of a limited amount, [26] (ii) provided in the form of a benefit in kind, [27] (iii) not paid by the recipient of the service, [28] or (iv) subsequently reimbursed by a third party. [29] Similarly, a service may fall within the scope of Article 49 TFEU also if the provider is not seeking to make a profit. [30]

39. Nevertheless, in one way or another, there must be a payment (or transfer of some benefit of an economic value) which constitutes a form of 'consideration' for the service provided. [31] The Court has consistently stated that 'the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its *economic character*'. [32] That is not so, for example, when the activity is carried out free of charge, [33] or takes place in the context of a system not founded on a commercial logic. [34] What is crucial for an activity to be considered 'economic' is, to my mind, that the transaction between the provider and a recipient is based on a quid pro quo, [35] in which a *reasonable relationship* between the value of the service provided and the payment made in exchange can be identified.

40. In the light of those principles, as regards *educational activities*, the Court has held that courses provided by educational establishments which are essentially financed by private funds constitute 'services' for the purposes of EU law. Consequently, national laws that govern those activities must, as a matter of principle, comply with the rules on the internal market, and, more

22 See, inter alia, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 45 and the case-law cited).

23 Ibid., paragraph 47.

24 See, inter alia, judgment of 17 March 2011, *Peñarroja Fa* (C-372/09 and C-373/09, EU:C:2011:156, paragraph 37 and the case-law cited).

25 Similarly, Opinion of Advocate General Cosmas in Joined Cases *Deliège* (C-51/96 and C-191/97, EU:C:1999:147, point 30).

26 See, for example, judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraph 34).

27 Judgments of 5 October 1988, *Steymann* (196/87, EU:C:1988:475), and of 7 September 2004, *Trojani* (C-456/02, EU:C:2004:488).

28 Judgment of 26 April 1988, *Bond van Adverteerders and Others* (352/85, EU:C:1988:196, paragraph 16).

29 Judgment of 12 July 2001, *Smits and Peerbooms* (C-157/99, EU:C:2001:404, paragraph 58).

30 Ibid., paragraphs 50 and 52.

31 See the case-law cited in footnote 22 above. Emphasising this point, and with further references, see also Koutrakos, P., 'Healthcare as an economic service under EC law', in Dougan, M., Spaventa, E. (eds), *Social Welfare and EU Law*, Hart Publishing, Oxford, 2005, pp. 112 to 115.

32 See judgments of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraph 32), and of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 154). Emphasis added.

33 See, inter alia, judgment of 4 October 1991, *Society for the Protection of Unborn Children Ireland* (C-159/90, EU:C:1991:378, paragraphs 24 to 26).

34 See, to that effect, Opinion of Advocate General Slynn in *Gravier* (293/83, EU:C:1985:15, p. 603), and Opinion of Advocate General Fennelly in *Sodemare and Others* (C-70/95, EU:C:1997:55, point 29).

35 See, to that effect, judgment of 12 July 2001, *Ordine degli Architetti and Others* (C-399/98, EU:C:2001:401, paragraph 77). See, generally, Spaventa, E., 'Public Services and European Law: Looking for Boundaries', *Cambridge Yearbook of European Legal Studies*, Vol. 5, 2003, pp. 272 to 275.

specifically, with the rules on the free movement of services. By contrast, the offering of educational courses provided by establishments which are integrated into a system of public education and financed, entirely or mainly, by public funds does not constitute an economic activity for the purposes of the EU rules on the internal market. Indeed, in establishing and maintaining such a system of public education, which is, as a general rule, financed from public funds and not by pupils or their parents, the State is not seeking to engage in gainful activity, but is fulfilling its social, cultural and educational obligations towards its population. [36]

41. In the present case, I understand that the educational activity carried out by the (private) school in question is currently financed by private funds, including those provided by its pupils and their parents. Therefore, that activity may be classified as 'economic' for the purposes of EU law.

42. That said, there are two issues that arise in the present case. First, can the activity which that school intends to carry out in Austria, if and when the public funding requested were to be granted, still be classified as 'economic' for the purposes of the internal market rules? Second, if it cannot be classified as such, would that have any bearing on the answer to be given to the second question raised by the referring court?

43. With regard to the first issue, the Austrian Government and the Commission submit that the activity that that school would be carrying out in Austria, were the public funding requested to be granted, could no longer be regarded as 'economic'.

44. If my understanding of the national legislation at issue is correct – which it is for the referring court to verify – I would tend to agree with that view. Indeed, if the school in question were admitted to the system established under the national legislation at issue, that school would appear to satisfy the two conditions under which, in accordance with the case-law of the Court recalled in point 40 above, the offer of educational courses cannot be regarded as constituting a 'service' for the purposes of the internal market rules: (i) the school is integrated into a system of public education, and (ii) that system is financed entirely or mainly by public funds.

45. Indeed, the national legislation at issue does not simply establish a mechanism for the funding of denominational schools, but appears to go further than that by providing, in essence, for the *full integration* of those schools within the public education system.

46. Private schools may only be recognised as 'denominational' by religious communities recognised as such in Austria. Those communities are constituted in the form of legal persons under public law, whose income and assets may be used solely for religious purposes, including non-profit and charitable purposes based on religious objectives. [37] Religious communities are granted some special rights, but are also entrusted with the fulfilment of specific tasks, through which – according to the expression used by the Verfassungsgerichtshof (Constitutional Court,

[36] See judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 50 and the case-law cited).

[37] Paragraph 11(2) of the BekGG.

Austria) – 'they influence, at their level, national public life'.[38] One of those tasks concerns precisely education, since they are responsible for religious instruction in schools,[39] and required to provide 'quality' education in that regard.[40]

47. In order to carry out their tasks, religious communities have the right to receive subsidies for staff costs, which are, in principle, provided through the assignment of teachers employed by or under contract with the Federal State or a *Land* as 'living grants'. The staff assigned includes the staff required to implement the programme of the school concerned (including the post of director and any ancillary services that the teaching staff at comparable public schools have to provide).[41] As I understand it, schools subsidised by public funds in Austria not only cannot be run for profit[42] but, more importantly, become mainly financed by public funds.

48. Therefore, subject to verification by the referring court, I take the view that the nature of the activity of the school in question, once admitted to the system of public funding set up by the PrivSchG, would necessarily change and cease to be 'economic'. That activity would then be exercised in a State-driven system which does not follow a commercial logic.

49. That interim conclusion begs the following question: can Article 49 TFEU be invoked successfully vis-à-vis an economic activity in the host Member State in the circumstance where, were the alleged restriction removed, it would lose its economic character?

50. In that respect, I again agree with the Austrian Government and the Commission that the answer to such a question should be in the negative.

51. In that regard, it should not be overlooked that the objective pursued by the EU rules on the internal market is the elimination of all obstacles to intra-Union trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.[43] The overarching aim of the internal market is to ensure, within the European Union, a free flow of the inputs required for the carrying out of economic activities, in order to ensure an optimal allocation of resources and maximise economic welfare.[44]

52. Conversely, the rules on the internal market are not meant to pursue non-economic forms of integration between the EU Member States, which may be the object of other provisions of the EU Treaties. Accordingly, those rules cannot, in principle, be invoked where there is no activity exercised within a commercial logic.[45]

[38] Judgment of 16 December 2009, VfSlg 18.965/2009 (AT:VFGH:2009:B516.2009).

[39] Paragraph 17(4) of the Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder (Austrian Basic Law on the general rights of citizens; RGBl. 142/1867).

[40] As explained by the Austrian Government, with reference to the explanations concerning the Government Bill relating to the law amending the BekGG (see footnote 2 above).

[41] Paragraphs 18 and 19 of the PrivSchG.

[42] Paragraph 21(1)(b) of the PrivSchG.

[43] See judgments of 5 May 1982, *Schul Douane Expediteur* (15/81, EU:C:1982:135, paragraph 33), and of 17 May 1994, *France* v *Commission* (C-41/93, EU:C:1994:196, paragraph 19).

[44] See, for example, Opinion of Advocate General Szpunar in Joined Cases *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 1), and Barnard, C., *The Substantive Law of the EU: The Four Freedoms*, 5th edition, Oxford University Press, Oxford, 2016, pp. 3 to 8.

[45] In legal scholarship, see, for example, Odudu, O., 'Economic Activity as a Limit to Community Law', in Barnard, C., Odudu, O. (eds), *The Outer Limits of European Union Law*, Hart Publishing, Oxford, 2009, pp. 242 and 243.

53. In fact, the Court has consistently held that the concept of 'establishment' within the meaning of the EU Treaties involves the *actual* pursuit of an economic activity in the host Member State. [46] That principle is also reflected in a number of cases in which the Court excluded, *in toto* or in part, certain activities from the scope of the EU provisions on the free movement of services.

54. To begin with, in a consistent body of case-law, the Court has found that the activities involved in the management of the public social security systems, fulfilling an exclusively social function, are not 'economic' when based on the principle of national solidarity and run entirely on a non-profit basis. [47]

55. Moreover, in *Sodemare and Others*, in which a company had invoked the EU rules on the free movement of services in order to be allowed to provide social welfare services of a healthcare nature, despite the fact that the national legislation reserved the possibility of participating in the running of the social welfare system to non-profit-making private operators only, the Court rejected the application of Article 49 TFEU. It noted that, according to a well-established principle, EU law does not detract from the powers of the Member States to organise their social security systems as they see fit. In the exercise of the powers retained in that respect, Member States could thus lawfully decide that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making. [48]

56. A similar logic was followed by the Court in *Analisi G. Caracciolo*, in which a company sought to rely on, inter alia, the rules on the free movement of services in order to contest its failure to obtain accreditation in conformity with Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93. [49] In its judgment, the Court confirmed the validity of the EU provisions according to which accreditation was performed exclusively by a single national body. The Court found that the rules on the free movement of services were not applicable in that case in so far as the accreditation body carried out a public authority activity, outside any commercial context and operating on a not-for-profit basis. [50]

57. On the basis of the above considerations, I consider that the EU rules on the free movement of services cannot be relied upon in relation to an economic activity, if that activity would necessarily lose its economic character as a result of the removal of the alleged restriction.

58. A different conclusion would, in my view, not only be hardly reconcilable with the definition of 'services' set out in Article 57 TFEU, as consistently interpreted by the Court, but would also – and more fundamentally – over-stretch the scope of the rules on free movement, thus going against their very rationale.

59. In the light of the above, I would conclude that Article 49 TFEU does not preclude national legislation providing, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law, where the result of that subsidisation is that the school becomes fully integrated within the public system.

46 See, for example, judgment of 12 July 2012, *VALE Építési* (C-378/10, EU:C:2012:440, paragraph 34 and the case-law cited).

47 See, inter alia, judgments of 17 February 1993, *Poucet and Pistre* (C-159/91 and C-160/91, EU:C:1993:63, paragraphs 17 and 18), and of 22 October 2015, *EasyPay and Finance Engineering* (C-185/14, EU:C:2015:716, paragraph 38).

48 Judgment of 17 June 1997 (C-70/95, EU:C:1997:301).

49 Regulation of the European Parliament and of the Council of 9 July 2008 (OJ 2008 L 218, p. 30).

50 Judgment of 6 May 2021 (C-142/20, EU:C:2021:368).

60. Nonetheless, if the Court were not to share that view, or if that analysis were found by the referring court to be based on an erroneous understanding of national law, I will, in the alternative, assess the compatibility of national legislation such as that at issue with Article 49 TFEU.

3. Article 49 TFEU does not preclude national legislation such as that at issue

61. Article 49 TFEU precludes not only overt discrimination based on nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[51] In particular, as mentioned in point 35 above, Article 49 TFEU precludes any national measure which is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the FEU Treaty.

62. In the present case, I consider national legislation such as that at issue to be indirectly discriminatory, and that the difference in treatment among schools resulting from that legislation is capable of hindering or rendering less attractive the exercise by individuals, associations and companies based in a different Member State of their right of establishment in Austria.

63. First, according to the national legislation at issue, only denominational schools have the *right* to receive public funding.[52] Other private schools *may* receive funding, under certain conditions, if the Federal State has allocated some funds for that purpose in the federal budget.[53]

64. Denominational private schools within the meaning of the national legislation at issue are only those affiliated to religious communities legally recognised.[54] Among the conditions for State recognition are the requirements that the religious community has (i) been active in Austria for a given number of years, and (ii) a membership at least equal to a specific percentage of the population of Austria.[55]

65. It is self-evident that those conditions are more easily fulfilled by communities which have some form of establishment in Austria.

66. Second, it also seems clear to me that legislation of a Member State granting public funding only to certain types of privately run schools (that is to say, denominational schools) and not to others (that is to say, non-denominational schools, including those affiliated to religious communities not legally recognised) may discourage certain physical or legal persons – in particular, as explained above, those not established in Austria – from setting up new schools in that Member State.

67. Private schools that do not receive any public funding are placed at a clear disadvantage vis-à-vis those that receive such funding. The latter should normally be able to offer comparable services for lower fees given that a large part of their costs are covered by public monies. Funds

[51] See, to that effect, judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 62 and the case-law cited).

[52] Paragraph 17 of the PrivSchG.

[53] Paragraph 21 of the PrivSchG.

[54] Paragraph 17(2) of the PrivSchG.

[55] Paragraph 11(1) of the BekGG.

paid by the pupils and their parents come 'on top of' the public funds. By contrast, non-denominational schools need to finance their activities mostly through private funds, with student fees normally constituting a significant part thereof.

68. Against that background, I am of the view that national legislation which provides, as a condition for the subsidisation of (denominational) private schools, that the applicant must be recognised as a church or religious society under national law constitutes a 'restriction' on the right of establishment within the meaning of Article 49 TFEU.

69. That being said, it is settled case-law that a restriction on the freedom of establishment is permissible if, first, it is justified on grounds of public policy, public security or public health, or by an overriding reason in the public interest and, second, it respects the principle of proportionality. As regards proportionality, the national measure must be suitable for securing the attainment of the objective pursued, and not go beyond what is necessary in order to attain it. In addition, the national measure must be proportionate *stricto sensu* in as much as it must strike a fair balance between the interests at stake, that is, the interest pursued by the State with the measure in question and the interest of the persons adversely affected. [56]

70. In that regard, the Austrian Government emphasises that, in Austria, private denominational schools complete the public system of schools, since public schools are only interdenominational. Private denominational schools thus enable parents to choose an education for their children that is in conformity with their religious convictions. In this context, the Austrian Government refers to Article 2 of Protocol No 1 to the European Convention on Human Rights (ECHR) which, as regards the right to education, provides that 'the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

71. That government argues, in essence, that the limitation of public subsidies to those schools pursues a dual objective: to ensure a reasonable use of public resources, which in turn guarantees quality of education, and to protect public safety. That government points out that the procedure for the recognition of religious communities allows the public authorities to check, inter alia, that the community in question has a stable organisation with a sufficient number of followers, and that it is well disposed towards society and the State, and does not endanger religious peace.

72. In my view, those are *legitimate objectives* that, in principle, may justify restrictions on the right of establishment. Indeed, Article 52 TFEU allows Member States to introduce or maintain derogations to the right of establishment on grounds of, among others, public security. Moreover, the Court has accepted that both the risk of seriously undermining the financial balance of social policies [57] and the aim of ensuring high standards of education [58] can constitute overriding reasons in the public interest capable of justifying obstacles to freedom of movement.

73. Next, it must be considered whether national legislation such as that at issue is *suitable* to achieve those objectives, meaning that it makes a meaningful contribution towards their achievement.

[56] See, to that effect, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraphs 178 and 179 and the case-law cited).

[57] See, inter alia, judgment of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 31 and the case-law cited).

[58] See, to that effect, judgments of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614, paragraph 46), and of 14 September 2006, *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568, paragraph 45).

74. In my opinion, it does.

75. In the first place, I agree with the Austrian Government that limiting subsidies to schools that are likely to be attended by a significant number of students and that are related to a stable organisation is a reasonable measure to ensure cost efficiency and prevent, as far as possible, the waste of financial, technical and human resources.[59] A reasonable use of the resources available, those being necessarily limited, is also likely to promote the provision of better education services.

76. In the second place, both distant and recent history shows that religious teaching, preaching and proselytism may, in some rare circumstances, be used to convey ideas that may pose a threat to public security. When that is the case, such activities may not be considered as protected under the right to freedom of expression or of religion,[60] and a Member State must thus be able, as the ECtHR has stated, to maintain 'public order, religious harmony and tolerance in a democratic society' particularly between opposing groups.[61] An *ex ante* review of the compatibility of the ideology and beliefs of a religious community with the fundamental values of the society appears appropriate, at least to some extent, to limit that risk.

77. With that said, does the national legislation at issue go beyond what is necessary to achieve its objectives, or does it fail to strike a fair balance between the interests at stake?

78. Those are, in my view, matters upon which referring courts are generally best placed to rule. That is especially true in the present case since the party that invoked the right of establishment, the appellant in the main proceedings, has not put forward any argument in that regard.

79. In any event, I must state that, on the basis of the information provided in the case file, I am unable to identify any possible measure that could be less restrictive than the national legislation at issue vis-à-vis service providers, while being equally capable of attaining the objectives pursued by that legislation. Nor is there any element in the file to suggest that, in limiting public funding to schools affiliated to religious communities legally recognised, the Austrian authorities may have incorrectly balanced the public interests pursued by the legislation in question with the interests of the persons affected by it (*in casu*, non-recognised religious communities).

80. In that respect, I also note that the criteria to be fulfilled for a religious community to be legally recognised do not appear to be unreasonable or excessive for a community that has a meaningful presence and activity in the country. I also understand that, if the criteria are fulfilled, the public authorities have no discretion in the matter as the recognition is granted automatically, which should ensure a fair and equal treatment of the different religious communities.[62]

81. The fact that the appellant has the status of a recognised religious society in Germany is immaterial in this context. Indeed, no provision of EU law may be interpreted as providing for a 'mutual recognition' mechanism between the Member States with regard to religious communities. As rightly pointed out by the Czech Government, any such principle would largely deprive Article 17(1) TFEU of its effectiveness since it would severely limit the freedom of the Member States to deal with religious communities as they see fit.

[59] See, *mutatis mutandis*, judgment of 20 December 2017, *Simma Federspiel* (C-419/16, EU:C:2017:997, paragraph 42 and the case-law cited).

[60] See, for example, ECtHR, 13 February 2003, *Refah Partisi (the Welfare Party) and Others v. Turkey* (CE:ECHR:2003:0213JUD004134098).

[61] ECtHR, 10 November 2005, *Leyla Şahin v. Turkey* (CE:ECHR:2005:1110JUD004477498, § 107).

[62] See, especially, the wording of Paragraphs 1 and 2 of the AnerkennungsG.

82. More fundamentally, I am of the view that Article 17(1) TFEU necessarily implies, in this context, that the Member States must enjoy significant leeway in respect of the rules regarding the recognition of religious communities and the relationship they intend to establish with them. Some leeway should also exist vis-à-vis the *financial relationship* established by the Member States with the religious communities. [63]

83. Interestingly, I observe that, on this matter, the ECtHR – before which some cases were brought on the grounds, in particular, of alleged breaches of the freedom of religion [64] – came to similar conclusions. That court has recognised that the Member States have a wide margin of discretion as regards the manner in which they wish to organise their relationships with religious communities, the possibility of entrusting those communities with the responsibility of carrying out certain (even non-religious) tasks in the public interest, and the financing of those communities or of certain activities thereof, such as the offering of educational courses. The discretion enjoyed by the Member States was not excluded by the mere fact that the national legislation at issue had the effect of treating various communities differently, thereby granting more support to some communities than to others. [65] In this context, the ECtHR has also found that Article 2 of Protocol No. 1 [66] cannot be interpreted as meaning that parents can require the State to provide a particular form of (religious) teaching. [67]

84. It follows, in my view, from the foregoing considerations that national legislation such as that at issue in the present case constitutes a restriction on the right of establishment, but may be justified as necessary and proportionate for the attainment of certain public objectives that merit protection. Whether that is so in the case at hand is for the referring court to verify.

85. In the light of the foregoing, I must conclude that Article 49 TFEU, in principle, does not preclude national legislation which provides, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law.

V. Conclusions

86. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

– Article 17(1) TFEU does not preclude the application of the EU rules on the free movement of services in a situation where a religious society, established in one Member State, recognises a school in another Member State as a denominational school and requests public funding in the latter;

63 However, it is important to add a word of caution in that respect: that leeway with regard to financial matters exists in so far as the rules on public monies paid to the religious communities comply with the EU provisions that, depending on the circumstances, may be applicable in the specific situation. In particular, if a Member State subsidises economic activities carried out by religious communities, the measures in question must be compatible with the EU rules on State aid (see, for example, the case-law cited in footnotes 9 and 10 above). That is, nevertheless, not an issue raised in the present proceedings.

64 That right is protected under Article 9 ECHR, entitled 'Freedom of thought, conscience and religion'.

65 See, inter alia, ECtHR, 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (CE:ECHR:1976:1207JUD000509571); 28 August 2001, *Lundberg v. Sweden* (CE:ECHR:2001:0828DEC003684697); 29 June 2007, *Folgerø and Others v. Norway* (CE:ECHR:2007:0629JUD001547202); and 18 March 2011, *Lautsi and Others v. Italy* (CE:ECHR:2011:0318JUD003081406). More broadly on this matter, with further references, see Evans, C., Thomas, C.A., 'Church-State Relations in the European Court of Human Rights', *BYU Law Review*, 2006, p. 699.

66 See above, point 70 of this Opinion.

67 ECtHR, 18 March 2011, *Lautsi and Others v. Italy* (CE:ECHR:2011:0318JUD003081406, §61 and the case-law cited).

– Article 49 TFEU, in principle, does not preclude national legislation which provides, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law.