Commission v Germany (c-377/17): Do exceptions in tariff regulation matter?

29 July 2019

The European Law Blog will be taking a summer recess. We'll be back end of August with new commentaries, including on key Summer developments. Please do send us on your contributions throughout this period and we will get back to you in due course. Happy Holidays to all our readers!

By Valentin Vandendaele

Lawyers, engineers, architects, and other liberal professions, i.e. 'occupations requiring special training in the liberal arts or sciences', tend to be subject to heavy regulation. Such regulation may preserve a high service quality or shield consumers against malpractice (see the European Commission's Report on Competition in Professional Services (COM(2004) 83 final, paras 1 and 28). In a similar vein, Member States have adopted legislation setting minimum and maximum prices in an attempt to ensure service quality by preventing excessive competition on price or to protect consumers from excessive prices.

One example of such legislation is the German *Honorarordnung für Architekten und Ingenieure*, which was the matter of contention in the *Commission* v *Germany* case (C-377/17). This decree fixed minimum and maximum tariffs architects and engineers could charge for their planning services. In its judgment, the Court of Justice of the European Union (Court) ruled that these tariffs constituted requirements falling within the scope of Article 15(2)(g) of the Services Directive (2006/123/EC). This was true even though the German measure provided for multiple exceptions allowing the legal minimum and maximum tariffs to be disregarded. Advocate General (AG) Szpunar had more openly suggested that these exceptions were inconsequential under Article 15(2)(g). Finally, the Court held that the German tariff regulation did not satisfy the conditions in Article 15(3) to be compatible with the directive.

Legal Background

Article 15 is part of Chapter III of the Services Directive on the freedom of establishment. Article 15(2) specifically lists a number of non-discriminatory requirements Member States may impose on service providers, like minimum and/or maximum tariffs (Article 15(2)(g)). To be compatible with the directive, these requirements must fulfil the conditions of Article 15(3) (Article 15(1)). More precisely, they must not directly or indirectly discriminate on the basis of nationality or, with respect to companies, the location of the registered office (Article 15(3)(a)), they must be justified by an overriding reason relating to the public interest (Article 15(3)(b)), and they must be proportionate to this objective, i.e. they must be suitable to attain the objective, they must not go beyond what is necessary to do so, and there must be no less restrictive alternative that would attain the same result (Article 15(3)(c)).

In the *Commission* v *Germany* case, the question arose whether Germany's tariff regulation could be compatible with the Services Directive if it contained a sufficient number of exceptions. This question echoes the "flexibility exemption" introduced in the *Commission* v *Italy* judgment (C-565/08). In this judgment, the Court held that Italian regulation setting a cap on lawyer tariffs was not proven to adversely affect market access 'under conditions of normal

and effective competition'. Rather, the maximum-tariff mechanism was 'characterised by a flexibility which appears to allow proper remuneration for all types of services provided by lawyers'. To support this assertion, the Court referred to the exceptions in the regulation permitting lawyers to charge tariffs exceeding the standard legal maximum. In conclusion, the Italian measure did not restrict the freedom of establishment or the freedom to provide services under the predecessors of Articles 49 and 56 TFEU (*Commission* v *Italy*, paras 53-54).

The AG's Opinion

AG Szpunar's assessment of the German tariff regulation's restrictive effect took the form of a simple *modus ponens*: (1) if a measure satisfies the conditions of Article 15(2) of the Services Directive, then it constitutes a restriction on the freedom of establishment, and (2) the German measure imposing minimum and maximum tariffs satisfied these conditions, so (3) the measure was restrictive (paras 36-38). The AG explicitly added that the German regulation was restrictive even in light of the Court's judgment in the *Commission* v *Italy* case, for two reasons. First, the Italian regulation under dispute in that case was far more flexible than the contentious German provisions. Second, Article 15(2)(g) defines fixed minimum and maximum tariffs as restrictions and removes the need to evaluate their restrictive effect any further (paras 44-50).

According to AG Szpunar, moreover, Germany had not proved its tariff regulation to be justified under Article 15(3) of the Services Directive (paras 80 and further). The AG thus advised the Court to declare that Germany had failed to fulfil its obligations under Article 15(1), (2)(g), and (3) of the directive (para 113).

The Court's Judgment

The Court concurred that the German requirements came within the purview of Article 15(2)(g) of the Services Directive because they fixed minimum and maximum tariffs for planning services provided by architects and engineers (para 66). This reason appeared to be sufficient for the directive provision to apply. The Court thus seemed to agree with AG Szpunar, albeit implicitly, that there was no room for a flexibility exemption under Article 15(2)(g).

The Court also thought Germany had not demonstrated that its requirements satisfied the conditions under Article 15(3) of the directive. Admittedly, the German regulation was not discriminatory (para 68, first condition). In addition, Germany had invoked multiple grounds of justification that could constitute overriding reasons relating to the public interest or be subsumed under such reasons (paras 69-72, second condition). Yet the Court found that Germany's requirements were not proven to be proportionate to these objectives (paras 75-95, third condition). The Court therefore reached the conclusion that Germany had infringed Article 15(1), (2)(g), and (3) of the Services Directive (para 96).

Comment

Flexibility and Article 15(2) of the Services Directive

Apparently, the analysis under Article 15(2)(g) of the Services Directive does not include a flexibility exemption. This result is consistent with the Court's pre-existing case law on Article 15(2). Indeed, it follows from this case law that Article 15(2) catches measures as soon as they correspond to requirements as listed in the same provision. The *Hiebler* (C-293/14), *X and Visser* (C-360/15 and C-31/16), and *CMVRO* (C-297/16) judgments to which AG Szpunar

referred (para 36) corroborate this statement. More recently, the Court even applied the same reasoning to maximum tariffs in the *Repsol Butano* case (C-473/17 and C-546/17).

Flexibility and Article 15(3) of the Services Directive

Be that as it may, the exceptions for which tariff regulation provides may yet be relevant to the proportionality test under Article 15(3)(c) of the Services Directive. This is because tariff regulation may in fact be less restrictive if it contains exceptions. They may, for instance, allow service providers to charge properly remunerative or more competitive tariffs. In the presence of many or important exceptions, it may therefore be easier to argue that tariff regulation is necessary, i.e. the regulation does not go beyond what is necessary to achieve its legitimate purpose and no less restrictive alternative that would attain the same result exists.

Neither the AG's opinion nor the Court's judgment in the *Commission* v *Germany* case supports this proposition, but the Court's judgment in the *DKV Belgium* case (C-577/11) might. This case concerned Belgian legislation limiting how often and how much insurance premium rates could increase. The measure was supposed to protect consumers, 'particularly with a view to preventing them from being faced with sharp, unexpected increases in insurance premium rates'. The Court found a measure such as the Belgian one to be restrictive within the meaning of Articles 49 and 56 TFEU yet suitable to attain the objective of consumer protection, which is an overriding requirement relating to the public interest (paras 34-42).

The next question was whether a measure like the one at issue went beyond what was necessary to attain this objective. The Court gave a threefold argument in favour of such a measure: (1) it protected older consumers who are more likely to rely on the insurance from sharp and unexpected premium rate increases that could make the insurance unaffordable for them, (2) it did not prevent insurers from freely setting the initial premium level, and (3) the responsible administrative body could allow an insurer 'to take measures in order to balance its premium rates where they risk giving rise to losses' (paras 44-46). Conditional upon the national judge finding that there was no less restrictive alternative that may achieve the same result, the Court concluded, a measure such as that under dispute did not go beyond what was necessary to achieve its purpose (para 47).

The Court's argumentation demonstrates the potential but also limited relevance of exceptions in price regulation to the necessity test. On the one hand, the Court seemed to think the exceptions the responsible administrative body could provide made a measure like the one at issue in the *DKV Belgium* case more acceptable. They arguably made such a measure less restrictive inasmuch as they could prevent premium rates from giving rise to losses. On the other hand, the observation that tariff regulation provides for exceptions and is therefore less restrictive may not be sufficient to prove the regulation to be necessary. Indeed, such regulation may yet go beyond what is necessary to pursue its legitimate purpose and an (even) less restrictive alternative that would attain the same result may still exist. The Court implied as much when it concluded that a measure such as the Belgian one in the *DKV Belgium* case did not go beyond what was necessary to achieve its purpose only if the national judge found that there was no less restrictive alternative that could achieve the same result. Member States must then provide additional arguments to demonstrate that their tariff regulation is necessary.

Conclusion

The exceptions tariff regulation may make, seem immaterial when determining whether this regulation falls within the scope of Article 15(2)(g) of the Services Directive. Only the conditions the directive explicitly mentions seem decisive. However, tariff regulation containing exceptions may in fact be less restrictive. In the presence of such exceptions, it may then be easier to argue that the regulation is necessary within the meaning of Article 15(3)(c) of the directive.