Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 15 July 2021 [1]

Case C-261/20

Thelen Technopark Berlin GmbH
v
MN

(Request for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Directive 2006/123/EC – Article 15 – Fees of architects and engineers for planning services – Minimum and maximum tariffs – Judgment of the Court establishing a failure of a Member State to fulfil obligations – Contrary to a directive – Whether it may be relied upon in a dispute between individuals – Freedom of establishment – Article 49 TFEU – Charter of Fundamental Rights of the European Union – Article 16 – Freedom of contract)

I. Introduction

1. In a civil action, the applicant claims payment from the defendant for a service rendered and demands an amount exceeding the amount agreed by the parties in the contract. The applicant bases his claim on a provision of national law which provides that for the service in question, the service provider is entitled to a fee at least equal to the minimum rate laid down by national law. However, that provision of national law is contrary to a directive. Does the claim have merit?

2. That was the question faced by the referring court in the present case. Its decision depends on the Court's answer to the question whether, when assessing the merits of an action brought by an individual against another individual, the national court may disapply a provision of national law on which that action is based and which is contrary to a directive, in this case Directive 2006/123/EC. [2]

[1] Original language: Polish.

[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).

II. Legal framework

A. EU law

3. Recitals 5, 6 and 64 of Directive 2006/123 provide as follows:

'(5) It is … necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. …

(6) Those barriers cannot be removed solely by relying on direct application of Articles 43 and 49 of the Treaty [now Articles 49 and 56 TFEU], since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.

…

(64) In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 43 and 49 of the Treaty [now Articles 49 and 56 TFEU] respectively. The restrictions to be prohibited particularly affect the internal market for services and should be systematically dismantled as soon as possible.'

4. Article 2(1) of the directive provides:

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

5. Article 15 of the directive provides:

'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:

…

(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 [citizenship] 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.

…

5. In the mutual evaluation report provided for in Article 39(1), Member States shall specify the following:

(a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;

(b) the requirements which have been abolished or made less stringent.

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

…'

B. German law

6. During the period relevant to the dispute in the main proceedings, the fees of architects and engineers were regulated by the Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Decree on fees for services provided by architects and engineers) in its wording of 10 July 2013 [3] ('the HOAI').

7. Paragraph 1 of the HOAI is worded as follows:

'This regulation governs the calculation of fees for the basic services of architects and engineers (acting as agents) established in Germany, provided that those basic services are covered by this regulation and are provided from Germany.'

8. Paragraph 7 of the HOAI states:

'1. The fee 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 this regulation.

[3] BGBl. I, p. 2276.

2. …

3. The minimum rates laid down in this regulation may be reduced in exceptional cases, subject to written agreement.

4. …

5. In the absence of a written agreement to the contrary executed at the time when the mandate is granted, it shall be presumed that minimum rates have been adopted in accordance with the provisions of subparagraph 1.'

9. Paragraph 7 of the HOAI was amended by the Erste Verordnung zur Änderung der Honorarordnung für Architekten und Ingenieure (First regulation amending the rules governing the fees of architects and engineers) of 2 December 2020.[4] The amendment took effect on 1 January 2021. As of that date, Paragraph 7(1) of the HOAI provides:

'The fee shall be determined by a written agreement between the contracting parties. In the absence of a written agreement on the fee amount, the basic rates for the basic services shall be as determined in accordance with Paragraph 6.'

III. Facts, national proceedings and the questions referred for a preliminary ruling

10. On 2 June 2016, MN (the applicant), who operates an engineering firm, and Thelen Technopark Berlin GmbH (the defendant) entered into an engineering services contract whereby the applicant undertook vis-à-vis the defendant to provide services for a construction project in Berlin. The parties agreed that the applicant would receive a flat-rate fee of EUR 55 025 for the services performed. On the basis of the intermediate invoices issued by the applicant, the defendant paid the applicant a total of EUR 55 395.92 gross.

11. In July 2017, after terminating the engineering services contract by letter dated 2 June 2017, the applicant issued a final invoice for his services based on the minimum rates under the HOAI. Taking into account the transfers that had already been made and the amount retained under the warranty, he subsequently brought an action against the defendant for payment of the balance of the fees due, which amounted to EUR 102 934.59 gross, plus interest and pre-litigation costs.

12. The action was largely successful at first and second instance. By its appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany), the defendant seeks to have the action dismissed in its entirety.

13. According to the referring court, the ruling on the appeal on a point of law depends on the answer to the question whether the provisions of Article 15(1), (2)(g) and (3) of Directive 2006/123 apply in a dispute between individuals in such a manner that the provision of the HOAI forming the basis of the action must be disapplied. If the answer is in the affirmative, the appeal on a point of law will have merit. The case-law of the Court lies at the root of the doubt.

[4] Erste Verordnung zur Änderung der Honorarordnung für Architekten und Ingenieure (First regulation amending the rules governing the fees of architects and engineers), BGBl. I, p. 2636.

14. This is because in its judgment of 4 July 2019, *Commission* v *Germany*,[5] the Court held that by maintaining the fixed tariffs for planning services provided by architects and engineers laid down in the HOAI, the Federal Republic of Germany had failed to fulfil its obligations under Article 15(1), (2)(g) and (3) of Directive 2006/123.

15. Subsequently, by its order of 6 February 2020, *hapeg dresden*,[6] the Court held that Article 15(1), (2)(g) and (3) of Directive 2006/123 must be interpreted as precluding national legislation which prohibits the agreement in contracts with architects or engineers of fees which are lower than the minimum rates laid down in the HOAI.

16. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does it follow from EU law, in particular from Article 4(3) TEU, the third paragraph of Article 288 TFEU and Article 260(1) TFEU, that, in the context of ongoing court proceedings between private persons, Article 15(1), (2)(g) and (3) of Directive 2006/123 … has direct effect in such a way that the national provisions contrary to that directive that are contained in Paragraph 7 of the HOAI, pursuant to which the minimum rates for planning and supervision services provided by architects and engineers laid down in that official scale of fees are mandatory – save in certain exceptional cases – and any fee agreement in contracts with architects or engineers which falls short of the minimum rates is invalid, are no longer to be applied?

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

(a) Does the Federal Republic of Germany's scheme of mandatory minimum rates for planning and supervision services provided by architects and engineers in Paragraph 7 of the HOAI constitute an infringement of the freedom of establishment under Article 49 TFEU or of other general principles of EU law?

(b) If Question 2(a) is to be answered in the affirmative: Does it follow from such an infringement that the national rules on mandatory minimum rates (in this case: Paragraph 7 of the HOAI) are no longer to be applied in ongoing court proceedings between private persons?'

17. In the proceedings before the Court, written observations were submitted by the parties to the main proceedings, the Kingdom of the Netherlands and the European Commission. With the exception of the defendant in the main proceedings, those parties participated via their representatives in the hearing which took place on 3 May 2021.

IV. Analysis

18. In essence, the referring court is asking the Court of Justice whether European Union law imposes an obligation on a national court hearing a dispute between individuals to disapply a provision of national law from which the applicant derives its claim, in this case, Paragraph 7 of the HOAI ('the provision at issue'), where that provision is contrary to Directive 2006/123. At the

5 C-377/17, EU:C:2019:562.

6 C-137/18, not published, EU:C:2020:84.

root of the referring court's doubts lies a classic problem of EU law, namely, the application by national courts, in horizontal relations, of provisions of a directive that has not been transposed, or has been incorrectly transposed, after the period prescribed for its transposition has expired.

19. In my analysis, I shall briefly recall the position of the Court on the effectiveness of directives in relations between individuals (Section A). Subsequently, I shall indicate those elements of the main proceedings which I consider to be relevant to the case (Section B). Next, I shall consider the Commission's proposal concerning the possibility of a conforming interpretation (Section C). Finally, I shall turn to an analysis of the grounds for the possible disapplication of a provision of national law which is contrary to a directive (Section D).

A. Effectiveness of a directive in horizontal relations

20. It follows from the third paragraph of Article 288 TFEU that, unlike a regulation, a directive is binding upon each Member State to which it is addressed. Hence, it cannot of itself create obligations on the part of individuals and therefore, in principle, cannot be relied upon against them.[7]

21. This is referred to as the lack of direct horizontal effect of directives. The latter term is used both to describe the absence of an effect consisting in rights and obligations being created for individuals and to describe the exclusion of the very applicability of a directive in a dispute between individuals.

22. In this context, I wish to recall that the issue of the horizontal effect of directives must be distinguished from the issue of the direct horizontal effect of primary legislation and regulations. In the latter case, we say that provisions have horizontal effect where the scope of their application covers the behaviour of individuals (private persons). In other words, the issue is whether individuals are the direct addressees of the obligations or prohibitions arising from those provisions. It is worth noting in this context that even if individuals are not the addressees of those provisions, they may rely on them in disputes with other individuals. This concerns, in particular, reliance on those provisions in order to establish whether the national provisions applicable to a given dispute are compatible with EU law (review of legality).

23. If the direct horizontal effect of directives is excluded, we face a different problem, namely, that in proceedings against an individual, the provision of a directive cannot be relied upon irrespective of whether such reliance is intended directly to establish rights or obligations under the directive in question or whether it is intended to assess the compatibility of national provisions with EU law (review of legality). To that effect, the issue of determining whether individuals are the addressees of specific provisions of a directive is of secondary importance.

24. However, the exclusion of the direct horizontal effect of a directive does not mean that, in a dispute between individuals, the directive cannot be taken into account in such a manner as to affect the legal position of another individual. In its case-law, the Court has identified several situations in which a directive may be taken into account in this manner. In view of the subject of the present proceedings and the positions taken by the parties, I shall confine myself to recalling four such situations.

[7] See, in particular, judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 108); and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 42).

25. First, the Court has pointed out that national courts are required to interpret national law in accordance with directives (consistent interpretation). In doing so, they are required to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.[8] Therefore, reliance on a directive before a court in order to obtain a conforming interpretation may result in it being taken into account in the process of applying the law.

26. Secondly, relying on a directive laying down a procedure for the provision of information in the field of technical standards and regulations,[9] where national technical regulations have been adopted in breach of the Member States' obligations under that directive, may have the effect of disapplying those national technical regulations, as a Member State's failure has the effect of rendering national technical regulations adopted in breach of those obligations inapplicable in a dispute between individuals, since it constitutes a 'substantial procedural defect'.[10]

27. Thirdly, where a conforming interpretation is not possible, the national court hearing a dispute between individuals must disapply the national provision contrary to a directive when compliance with a general principle of EU law, including that given specific expression in the Charter of Fundamental Rights of the European Union,[11] so requires. In such cases, however, the justification for the disapplication of national provisions is not a provision of the directive but a general principle of EU law given specific expression by that provision of the directive.[12]

28. Fourthly, it is not impossible to rely on a directive in a triangular situation, that is to say, where the consequences of a dispute concerning a directive and conducted vertically between an individual and the State affect the legal situation of a third party.[13]

B. Specific features of the case in the main proceedings

29. Relevant to the present proceedings are the following facts in the main proceedings:

– the dispute in the main proceedings is one between individuals (private persons) and the legal relationship giving rise to the dispute has its source in a service contract. Therefore, the relationship between the parties is a horizontal one;

– all the elements of the dispute in the main proceedings are confined to a single state;

8 See, in particular, judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26); of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395, paragraph 8); and of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113 and 114).

9 Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8); subsequently Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37); and, finally, Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (codification) (OJ 2015 L 241, p. 1). That case-law also applies to the obligation laid down in Article 3(4) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1). See, in that regard, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 100).

10 See judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 48), and of 26 September 2000, *Unilever* (C-443/98, EU:C:2000:496, paragraphs 44, 50 and 51).

11 'The Charter'.

12 See the case-law cited in point 67 of this Opinion.

13 See, in particular, judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404), and of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12).

– the action is based on a provision of national law which has the effect that the minimum rate applies instead of a contractual provision under which the service provider is to be paid less than the minimum rate;

– that provision of national law is contrary to Article 15(1), (2)(g) and (3) of Directive 2006/123; [14]

– that non-compliance was established by the judgment of the Court of Justice in proceedings governed by Article 258 TFEU;

– in the view of the referring court, it is not possible to interpret the provision at issue in such a manner as to ensure its compliance with Article 15(1), (2)(g) and (3) of Directive 2006/123;

– the contract between the parties was concluded after the expiry of the time limit for the transposition of the directive into national law but prior to the commencement of the litigation in the *Commission* v *Germany* case. [15]

C. Possibility of making a conforming interpretation

30. It follows from the settled case-law of the Court that the question whether a provision of national law may be disapplied in horizontal relations on the ground that it is contrary to a directive arises only where a conforming interpretation is impossible. [16]

31. According to the referring court, it is not possible to interpret the provisions of national law in such a manner as to ensure that they are compatible with Directive 2006/123, as that would amount to a *contra legem* interpretation. In its written observations and at the hearing, the Commission disputed the view of the referring court.

32. Although in the past the Court has repeatedly stressed the obligation by national courts to interpret legislation such as a directive or framework decision in conformity with European Union law, it has also consistently held that the principle of conforming interpretation cannot serve as a basis for interpreting national law *contra legem*. [17] Since, as the Court itself has pointed out, the Court does not have jurisdiction to interpret the internal law of a Member State, [18] it is ultimately for the national court to decide whether an interpretation which complies with the directive would be *contra legem*. [19]

33. In this context, I can, on the one hand, agree with the Commission that the limits of interpretation under German law as set out by the referring court in the reference for a preliminary ruling appear to be excessively narrow. This is true particularly in the light of the case-law of the German courts presented in the reference for a preliminary ruling, which shows that reliance on the principle of good faith as expressed in the German Civil Code made it possible to disregard the provision of German law at issue in a number of similar cases in the

14 See points 14 and 15 of this Opinion.

15 Judgment of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562).

16 See, in particular, judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraphs 71 to 75, operative part 3), and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 25, operative part 2).

17 See, in particular, judgments of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 100), and of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 33 and the case-law cited).

18 See, in particular, judgment of 16 February 2017, *Agro Foreign Trade & Agency* (C-507/15, EU:C:2017:129, paragraph 23).

19 See, in particular, judgments of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 39), and of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraphs 73 to 75).

past. On the other hand, in view of the firm position of the referring court that the case-law in question cannot be applied in the present case, I see no basis for the Court to substitute itself for the referring court in assessing the permissible limits of conforming interpretation in German law.

D. Possible grounds for the national court to disapply the provision at issue

1. Directive 2006/123 as an instrument giving specific expression to a fundamental freedom of the internal market

34. In my view, the analysis of the present case should begin with a closer look at Directive 2006/123 as an instrument giving specific expression, inter alia, to freedom of establishment under Article 49 TFEU. Although this issue was not expressly raised by the parties in their submissions, it nevertheless appears desirable in the present case for the Court to take a closer look at the relationship between Article 49 TFEU and Directive 2006/123.

35. As regards the first part of the second question referred for a preliminary ruling, the Commission has ruled out the possibility of deriving solely from Article 49 TFEU an obligation on the national court to disapply the provision of national law which is incompatible with that article. In the view of the Commission, Article 49 TFEU cannot be applied in the present case due to the fact that the application of the provision of German law at issue is limited to domestic relations. This argument is based on the assumption that, if there were any cross-border element in the case and the provision of German law at issue were applicable, Article 49 TFEU could be relied upon. This would also mean that the facts which fall within the scope of Directive 2006/123 could be assessed in terms of their compatibility with Article 49 TFEU as well. I have considerable doubts in this regard, which I would like to share with the Court at this point. In my view, those doubts may justify direct application of Directive 2006/123 in the present proceedings.

36. Let us therefore take a closer look at Chapter III of Directive 2006/123, which gives specific expression to the freedom of establishment laid down in Article 49 TFEU with regard to almost all types of service activities. In this respect, Directive 2006/123 differs from other secondary legislation that harmonises selected, and typically narrow, aspects of freedom of establishment in a given sector.[20] This means that the rules developed in the case-law to date governing the relationship between the Treaty freedoms and the measures harmonising certain aspects of those freedoms cannot be automatically applied to Directive 2006/123.

37. To begin with, I would like to recall two extremely important judgments of the Court. First, in *Rina Services*, the Court held that where an issue falls within the scope of Directive 2006/123, there is no need for it to be analysed further in the light of Treaty provisions.[21] Secondly, in *X and Visser*, the Court held that the provisions of Chapter III of Directive 2006/123 on freedom of establishment of service providers also apply in cases where all the relevant elements are confined to a single Member State.[22]

[20] For instance, Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC) (OJ 1977 L 78, p. 17).

[21] Judgment of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 23 et seq.).

[22] See judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraphs 99 to 110, operative part 3).

38. Subsequently, attention should be drawn to those elements which clearly show that, in adopting Directive 2006/123, the EU legislature sought to give effect, or specific expression, to two fundamental freedoms of the internal market, including freedom of establishment. [23] Directive 2006/123 does not serve to harmonise selected aspects of service activities, but rather makes the provisions of the Treaty more specific. To that end, the directive takes the existing case-law of the Court into account within an extremely broad scope by, inter alia, detailing prohibitions on certain restrictions or specifying exceptions thereto. Further, Article 15 of the directive clearly aims to reconcile the Member States' regulatory powers over the requirements related to economic activity with the effective exercise of freedom of establishment as guaranteed by the Treaty.

39. Two conclusions emerge from the above analysis. First, if the national provision at issue falls within the scope of Directive 2006/123 and is incompatible with it, there is no need to examine the compatibility of that provision with the Treaty. This appears to be an obvious conclusion and the Court has no doubts about it. [24] Secondly, and this is in my view a natural consequence of the *Rina Services* [25] judgment, if the national provision at issue falls within the scope of Directive 2006/123 and is *compatible* with it, it cannot be challenged under Treaty provisions on freedom to provide services and freedom of establishment. [26]

40. In my view, this logic casts doubt on the validity of the Commission's argument that if there were any cross-border element in the case and if the provision of German law at issue were applicable, Article 49 TFEU could be relied upon, since this would mean that the same facts could be assessed in terms of compliance both with Directive 2006/123 and with Article 49 TFEU. In my opinion, this would be contrary to the intention of the EU legislature, which, in adopting that directive, sought to regulate freedom of establishment in relation to service activities comprehensively. In other words, all those types and aspects of freedom of establishment which fall within the scope of the directive can no longer be assessed in the light of Article 49 TFEU.

41. At the same time, as follows from the judgment in *X and Visser*, [27] the provisions of Chapter III of Directive 2006/123 also apply to a situation where all the relevant elements are confined to a single Member State. In my view, that judgment confirms the intention of the EU legislature that Directive 2006/123 – within its scope – should extend freedom of establishment also to purely domestic relations. [28]

42. In my view, the assumption that Chapter III of Directive 2006/123 gives specific expression to the freedom of establishment laid down in Article 49 TFEU means that a special approach should be taken to the issue of horizontal application of that directive.

23 Cf. recitals 5, 6 and 64 of Directive 2006/123. See also judgment of 16 June 2015, *Rina Services and Others* (C-593/13, EU:C:2015:399, paragraph 40), where the Court explicitly stated that Directive 2006/123 is secondary legislation giving effect to a fundamental freedom enshrined in the FEU Treaty.

24 See judgments 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).

25 Judgment of 16 June 2015(C-593/13, EU:C:2015:399).

26 It would only be possible to challenge such a national provision if specific provisions of the Services Directive were found to be incompatible with the Treaty.

27 Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, operative part 3).

28 It is obvious that this solution has many advantages, as it is no longer necessary in every factual situation to look for a cross-border element (whose existence is often difficult to identify) in order to directly apply a freedom enshrined in the Treaty.

43. I am convinced that if a specific set of facts falls within the scope of Chapter III of Directive 2006/123, the possibility of relying on freedom of establishment under Article 49 TFEU in order to challenge a provision of a Member State in a dispute against another individual must be ruled out, since this would not only run counter to the idea of giving specific expression to the freedom of establishment by adopting Directive 2006/123, but would also lead to complex analyses with regard to the substantive scope of freedom of establishment. Then, it would be necessary to analyse whether the national provision in question, which is contrary to the directive, would also have been contrary to Article 49 TFEU, on the hypothetical assumption that the directive had not been adopted. I have no doubt that such a solution would undermine the effectiveness (*effet utile*) of Directive 2006/123.

44. It is hypothetically possible to rely on the traditional exclusion of direct horizontal effect and hold that, irrespective of whether there is a cross-border element in the case or not, reliance on the provisions of Chapter III of that directive in a dispute against an individual is excluded. Such a solution would, in my view, be manifestly unacceptable for the simple reason that secondary legislation such as Directive 2006/123 cannot in any way limit the scope of application of a Treaty freedom, including reliance thereon in a dispute against an individual.

45. This leaves us with only one solution which, in my view, is also the right one, and is a consequence of the recognition that Chapter III of Directive 2006/123 not only gives specific expression to the freedom of establishment enshrined in the Treaty, but also extends its application to purely domestic relations. Reliance on that chapter in a dispute against another individual should be permissible just as direct reliance on the Treaty freedom of establishment is permissible in similar situations.

46. Therefore, the incompatibility of the provision of national law at issue with Article 15(2)(g) of Directive 2006/123 should be determined by the national court in a specific manner, without taking account of the case-law which excludes the direct horizontal effect of directives.

47. Consequently, I take the view that where an interpretation that conforms with EU law is not possible, a national court that hears a dispute between individuals concerning a claim based on a national provision which fixes minimum tariffs for service providers in a manner contrary to Article 15(1), (2)(g) and (3) of Directive 2006/123 must disapply such a national provision. That obligation is incumbent on the national court under Article 15(2)(g) and (3) of Directive 2006/123 – provisions which give specific expression to the freedom of establishment arising from Article 49 TFEU.

2. Application by analogy of case-law on technical regulations

48. The Dutch Government suggested, inter alia, that the Court should apply to the present case by analogy its case-law on non-notified technical regulations.

49. As the Court itself has pointed out, its case-law on technical regulations is unique and there are no grounds for extending it to other situations. The peculiar character of the cases in which the Court adopted that case-law[29] consists in the fact that the directive in question creates neither rights nor obligations for individuals and does not define the substantive content of the

[29] See, in particular, judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 48); of 26 September 2000, *Unilever* (C-443/98, EU:C:2000:496, paragraphs 44, 50 and 51); and of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 100).

legal rule on the basis of which the national court was to decide the dispute before it. Hence, the case-law to the effect that a directive which has not been transposed may not be relied on by one individual against another was not relevant in such a situation. [30]

50. This case is not similar to cases concerning non-notified technical regulations. Article 15(2)(g) and (3) of the directive does not provide for notification obligations. There are therefore no grounds for applying by analogy the case-law on non-notified technical regulations.

3. Using the directive as a 'shield' rather than a 'sword'

51. According to the Dutch Government, it follows from the case-law of the Court [31] to date that an individual cannot rely on a provision of a directive in order to have an obligation arising therefrom imposed on another individual in a situation where no such obligation arises under national law (thus, he cannot use the directive as a 'sword'). On the other hand, it does not follow from that case-law that an individual cannot rely on a provision of a directive where the other party seeks to have an obligation imposed on him that is laid down by national law which is contrary to the directive. The Dutch Government takes the view that in the latter situation (where the directive is used as a 'shield'), it is incumbent on the national court to disapply the provision of national law.

52. The Commission sees the need for this distinction. It points out that the case-law of the Court to date points to the fact that a directive cannot *of itself* impose obligations on an individual and cannot therefore be relied upon *as such* against such an individual. Meanwhile, in the present case, the applicant's obligation to *adhere* to the agreed fee arises from the contract. Thus, the defendant's defence against the applicant's claim for a higher fee relies not on the directive alone, but rather on the directive in conjunction with the contract. It is not, therefore, a situation in which a directive *of itself* or *as such* would confer specific rights on an individual.

53. However, the Commission has doubts as to whether this is of decisive importance in the case. First, because the Court has firmly held in its case-law that a directive cannot be relied upon, in a dispute between individuals, to exclude the application of a provision of a Member State which is contrary to that directive. [32] And secondly, because of the specific nature of private contracts, in which the parties balance their interests themselves when defining their rights and obligations. Where the directive is taken into account, this must necessarily imply a deterioration in the position of one of the parties. Therefore, whether a right or an obligation arises from it is not of decisive importance, since these are essentially two sides of the same coin.

54. I share that last conclusion of the Commission.

55. First of all, the idea that a directive as such would have different effects in horizontal relations depending on whether it was used as a 'sword' or as a 'shield' is not, in my view, supported by the wording of the third paragraph of Article 288 TFEU. That provision does not entail any power to annul or render ineffective national provisions which are contrary to the directive in horizontal relations.

30 See, to that effect, judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 53).

31 The Dutch Government cites the following judgments: of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631), and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33).

32 Judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 44).

56. As the Commission rightly observes, it follows from the case-law of the Court that essentially no legal consequences may be drawn from directives, whether in the form of rights or in the form of obligations, for individuals in horizontal relations. Determining whether a directive sets out an obligation which a party wishes to impose on the other party or merely a prohibition on imposing an obligation arising from national law depends on the procedural setting and the perspective adopted, and therefore this distinction is not based on an objective criterion.

57. If the directive prohibits the adoption of provisions that fix a minimum fee for a particular service which is binding on the parties, it may of course be argued that this is a situation where a provision of national law imposes an obligation to pay more than the amount agreed by the parties, against which obligation the directive acts as a 'shield'. On the other hand, it may also be argued that the directive indirectly creates a right and a specific obligation for individuals: a right of the customer to be released from his obligation as a result of payment of the contractually agreed price and an obligation for the service provider to regard payment of the contractually agreed price as having the effect of releasing the customer from his contractual obligation. Thus, in defending against an action, the customer raises his 'shield' with one hand, but at the same time thrusts his 'sword' with the other, in order to impose on the service provider the obligation to recognise that the customer's liability towards him can be met by the payment of an amount lower than the minimum rate.

58. Let us imagine that the customer wrongfully paid a higher fee than that agreed upon in the contract and then demanded a refund from the service provider. He would thus seek to impose on the latter an obligation to repay a benefit unduly received. To that end, the customer would invoke the directive as a 'sword'. The same would be true if the parties had agreed a fee above the applicable maximum rate and the service provider, having only obtained the payment of the maximum rate, claimed the difference between that rate and the amount stipulated in the contract. In fact, in that case the service provider would seek to impose on the customer an obligation to pay the contractual price resulting from the directive. Although we are not dealing with such situations in the present case, it is logical that the solution should always be the same: if a provision of national law should not apply, then it should not apply in any of those circumstances. An argument that refers to the imposition of an obligation on an individual does not guarantee that that effect will be achieved in every procedural setting and is based on a vague and fluid criterion.

59. Considering the Dutch Government's proposal from a slightly different perspective, one might focus on the very possibility of relying on the directive against an individual. Then, the effect of the directive as a 'shield' would be to remove from the rationale for the ruling the provision of national law which is contrary to the directive. In that sense, the effect of the directive as a 'shield' corresponds to invoking the directive to exclude a provision of national law (*invocabilité d'exclusion*) and is in contrast to invoking the directive to substitute a provision of the directive for the rationale for the ruling (*invocabilité de substitution*).[33]

60. That criterion for distinguishing between the use of the directive as a 'shield' and a 'sword' (if one assumes that it corresponds to the distinction between 'exclusion' and 'substitution') is perhaps more precise, but one can imagine situations in which such a distinction would be difficult to make.

[33] See the Opinion of Advocate General Léger in *Linster* (C-287/98, EU:C:2000:3, point 57 et seq.) and the article cited there: Galmot, Y., Bonichot, J-C., 'La Cour de justice des Communautés européennes et la transposition des directives en droit national', *Revue française de droit administratif*, 4(1), janvier-février 1988, p. 16.

61. However, despite encouragement from Advocates General A. Saggio,[34] S. Alber,[35] and D. Ruiz-Jarabo Colomer,[36] the Court appears to have rejected that concept definitively in the *Pfeiffer* judgment.[37]

62. Indeed, in the latter case, the obligation contrary to the Working Time Directive arose from the collective agreement to which the employee's contract referred, rather than from statute. The difference between those two cases is that in one of them, the obligation contrary to the directive is at the same time in direct conflict with the provision in the parties' contract as to price (the present case), and in the other, there was no such obvious conflict because the contract itself did not contain the disputed provision on working time but referred to the collective agreement from which that obligation arose (the case giving rise to the judgment in *Pfeiffer*[38]). It may be argued, however, that the lack of a relevant provision in the contract meant that the obligation in this respect was determined by a statutory provision setting out the maximum working hours for employees. The fact that in the present case the contradiction arises directly from the wording of the contract cannot, in my view, be regarded as necessitating a different conclusion to be drawn in the present case as regards the direct horizontal effect of the directive.

63. Summing up this part of the discussion, I consider that the provision of the third paragraph of Article 288 TFEU and the case-law of the Court of Justice do not provide any grounds for assuming that the rights and obligations of individuals may at all be determined in a binding manner by taking account of the provision of a directive 'as such' when determining the legal grounds for a ruling that resolves a dispute between individuals. In this context, it should be recognised that when determining the legal grounds for that ruling, it is irrelevant whether a provision of national law is excluded or substituted by the provision of a directive or whether the provision of a directive is used to supplement the rationale for the ruling. Ultimately, the concepts of 'substitution' or 'exclusion' of a provision of national law in horizontal relations can only be used to determine the effect of the possible inclusion of a directive in the process of applying the law. However, there are no grounds for assuming that a directive has direct effect in horizontal relations if the result of its inclusion is merely to exclude the application of a provision of national law.

4. Reference to general principles of EU law, including freedom of contract

64. In its written observations, the Commission proposed, as an alternative, to disapply the provision in question on the grounds that it is contrary to the freedom of contract guaranteed by Article 16 of the Charter. This freedom includes the parties' freedom to set the price of a service and is restricted by the provision of national law providing for mandatory minimum rates for certain services. In view of the disproportionate nature of the restriction placed on that freedom, the Commission takes the view that the provision of German law at issue should be disregarded by the national court as contrary to Article 16 of the Charter.

34 See the Opinion of Advocate General Saggio in Joined Cases *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:1999:620, point 38).

35 See the Opinion of Advocate General Alber in *Collino and Chiappero* (C-343/98, EU:C:2000:23, point 30).

36 See the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2003:245, point 58).

37 Judgment of 5 October 2004 (C-397/01 to C-403/01, EU:C:2004:584).

38 Judgment of 5 October 2004 (C-397/01 to C-403/01, EU:C:2004:584).

65. I shall discuss first the conditions that emerge from the case-law to date as regards the possibility of relying on the Charter in order to disapply a provision of national law which is contrary to a directive (section (a)). I shall then consider whether these are met in relation to freedom of contract and the right to set the price (section (b)). Finally, I shall assess the applicability of the provision guaranteeing this freedom in the present case (section (c)).

(a) Conditions for relying on general principles of EU law, including those given specific expression in the Charter

66. In the case-law developed following the *Mangold*[39] judgment, the Court allowed the disapplication, in horizontal relations, of provisions of national law which are contrary to a directive when general principles of EU law, including those given specific expression in the Charter, so require.[40]

67. Thus, the Court held that there are grounds for refusing to apply national legislation contrary to the provisions of Council Directive 2000/78/EC[41] in so far as that is necessary to comply with general principles of EU law such as the principle of non-discrimination on grounds of age,[42] the principle of non-discrimination on grounds of religion or belief,[43] and the right to effective judicial protection.[44] In cases concerning Directive 2003/88/EC,[45] the Court held that there are grounds for refusing to apply national legislation which infringe a worker's right to paid annual leave as guaranteed by Article 31(2) of the Charter.[46]

68. By contrast, the Court objected to the application of such an approach to the obligations arising from Article 1 of the Third Council Directive 90/232/EEC[47] on the ground that that provision could not be regarded as giving specific expression to a general principle of EU law.[48] It did the same with respect to the provisions of Directive 2002/14/EC,[49] taking the view that the prohibition laid down in Article 3(1) thereof could not be inferred as a directly applicable principle of law either from the wording of Article 27 of the Charter or from the explanatory notes to that article.[50]

39 Judgment of 22 November 2005 (C-144/04, EU:C:2005:709, paragraph 76).

40 The relationship between general principles of EU law and the fundamental rights guaranteed by the Charter has not been made explicit in the case-law of the Court. In his Opinion in *Prigge and Others* (C-447/09, EU:C:2011:321), Advocate General Cruz Villalón assessed that since the entry into force of the Treaty of Lisbon, the general principle of EU law that is non-discrimination has been enshrined in the 'Lisbon Charter' (point 26 of the Opinion). In the present Opinion, for the sake of simplicity, I shall use the term 'general principles of EU law, including those given specific expression in the Charter'.

41 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

42 See, in particular, judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraph 76); of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 46); and of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraphs 35 to 37).

43 See, in particular, judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraphs 76 to 77 and 79); of 11 September 2018, *IR* (C-68/17, EU:C:2018:696, paragraphs 69 to 71); and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraphs 76 and 80).

44 See judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 78).

45 Directive of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

46 See, in particular, judgments of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraphs 74, 80, 81 and operative part 2), and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraphs 80, 84 and 91).

47 Third Council Directive of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33).

48 See judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 48).

49 Directive of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29).

50 See judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 46).

69. The Court's case-law has sometimes been criticised in the doctrine as resulting in an excessively narrow application of the Charter to relations between individuals [51] and making it dependent on vague criteria. [52] Wider application of the Charter to horizontal relations has also been advocated in the past by Advocates General. [53] Despite this, the Court has remained essentially faithful to its cautious and case-by-case approach. [54]

70. The paradox of the whole situation is that, given that directives cannot be applied in horizontal relations, the effectiveness of the Charter, which is an act of primary legislation with equal force to the Treaties, in horizontal relations has only been discovered in piecemeal fashion over the years, in connection with successive references for a preliminary ruling concerning the possibility of disapplying a provision of national law that is contrary to a non-transposed or incorrectly transposed directive. In fact, in this area, the Charter has proved to be of exceptional practical importance, becoming – to use the jargon of alchemists – the philosophers' stone of EU law enabling base norms (directive provisions that do not have a horizontal effect) to be transmuted into precious ones (those that do). It was on such occasions that the rules governing reliance on the Charter in relations between individuals were worked out.

71. In the light of the current state of the Court's case-law, the basic condition for a provision of the Charter to constitute an autonomous rationale for a ruling in proceedings before a national court is that it must be 'self-executing', [55] namely, the provision in question must be sufficient in itself to confer upon individuals a right on which they can rely in disputes with other individuals. For this to be possible, a right must arise from that provision that is both mandatory and unconditional in nature. The latter condition is not satisfied where further provisions of EU or national law must be adopted in order to determine the content of that right. [56]

72. Moreover, a provision of the Charter can only be applied in order to give horizontal effect to the provision of a directive on the condition that a link exists between that provision of the Charter and the provision of the directive in question. This link, with regard to certain rights, should consist in the provision of the directive giving specific expression to the provision of the Charter. [57]

51 See, for instance, Leczykiewicz, D., 'Horizontal application of the Charter of Fundamental Rights', *European Law Review*, 2013, 38(4), pp. 479 to 497.

52 See, for instance, Frantziou, E., *The horizontal effect of fundamental rights in the European Union: a constitutional analysis*, Oxford University Press, Oxford, 2019, whose view is that 'the judgments remain rooted in largely unpredictable, case-by-case assessments, which predominantly concern direct effect, but marginalise the overall significance of horizontality in the field of fundamental rights (as well as the risk of its over-extension)' (p. 114).

53 See, in particular, the Opinion of Advocate General Cruz Villalón in *Association de médiation sociale* (C-176/12, EU:C:2013:491, points 34 to 38).

54 In the light of recent case-law, however, the question may be asked whether Advocate General Bot would today uphold his assessment expressed in his Opinion in Joined Cases *Bauer and Broßonn* (C-569/16 and C-570/16, EU:C:2018:337, point 95), in which he described the Court's approach at the time as 'excessively restrictive'.

55 See, in that regard, the Opinion of Advocate General Bot in Joined cases *Bauer and Broßonn* (C-569/16 and C-570/16, EU:C:2018:337, points 80, 82 and the literature cited).

56 Lenaerts, K., 'The Role of the EU Charter in the Member States', *The EU Charter of Fundamental Rights in the Member States*, Hart Publishing, Oxford, 2020, pp. 32 to 33; Prechal, S., 'Horizontal direct effect of the Charter of Fundamental Rights of the EU', *Revista de Derecho Comunitario Europeo*, vol. 66 (2020), p. 420.

57 This is not an absolute condition. It appeared to have played a key role in earlier case-law (see, for instance, judgments: of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 21; of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 22, 27, 35, 38; and of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 48). On the other hand, in its judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraphs 78 to 79), the Court held that there is no requirement for the right to paid annual leave to be given specific expression in secondary legislation. The Court ruled similarly on 17 April 2018 in *Egenberger* (C-414/16, EU:C:2018:257, paragraph 78) with respect to the right to effective judicial protection.

73. Are these conditions satisfied in relation to Article 16 of the Charter in so far as it guarantees freedom of contract?

74. Before answering that question, I must stress that the present case is not essentially about the direct horizontal effect of a provision of the Charter in the classic sense. Indeed, the issue to consider is not whether a provision of the Charter directly imposes obligations on one of the parties to the contract, but instead whether, in a dispute between individuals, the application of a provision of national law may be excluded on the ground that it is incompatible with a provision of the Charter, in this case Article 16. Here too, however, the above conditions should be satisfied, as they determine the direct effect of the provision of the Charter, that is to say, its direct applicability to the dispute at hand.

(b) Freedom of contract

(1) Preliminary observations

75. Freedom of contract [58] is one of the key principles of private law alongside such principles as *pacta sunt servanda* and the principle of good faith. Although its origins are sometimes dated back to antiquity, it is traditionally accepted that it found full expression for the first time in the Napoleonic Code. [59]

76. One can sometimes get the impression that freedom of contract is the elephant in the room. In my opinion, it has not yet found its rightful place in the system of EU law. However, it underpins its framework, above all in the context of the operation of fundamental freedoms. [60] The internal market and a highly competitive social market economy, as referred to in Article 3(3) TEU, as well as the adoption of an economic policy which is conducted in accordance with the principle of an open market economy with free competition, as referred to in Article 119 TFEU, would be inconceivable without it. Yet, it remains hidden behind the entire system of other EU principles and laws.

77. Perhaps this case should provide an opportunity for the Court to take a closer look at freedom of contract and clarify its place in the system of EU law.

(2) Recognition of freedom of contract in law and in case-law

78. In the current legal environment, freedom of contract is guaranteed by Article 16 of the Charter. Although it is not explicitly mentioned there, it is clear from the explanations relating to the Charter of Fundamental Rights [61] that it is a constituent part of the freedom to conduct business, which that article concerns.

58 In the Polish literature, the term zasada swobody umów ('principle of freedom of contract') is often used. To avoid the impression that I am classifying this freedom from the outset as a 'principle' rather than a 'right' within the meaning of Article 52 of the Charter, I shall use the term 'freedom of contract' in this Opinion.

59 Trzaskowski, R., *Granice swobody kształtowania treści i celu umów obligacyjnych. Art. 353(1) k.c., Zakamycze, Kraków, 2005, p. 41, who, however, follows Ghestin, J., Traité de droit civil. La formation du contrat, Paris, 1993, p. 41, in pointing out that the provision of Article 1134 of the Code, traditionally treated as an emanation of that principle, in fact does not express it at all.*

60 As J. Basedow recently noted, 'while the freedom of contract was a necessary element in the overall scheme of the internal market from the very beginning, it has only much more recently been acknowledged as a principle of EU law' (J. Basedow, *EU Private Law. Anatomy of a Growing Legal Order*, Intersentia, Cambridge – Antwerp – Chicago, 2021, s. 426, Nb 68.).

61 Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17, 'the Charter explanations').

79. A given provision of the Charter may guarantee various rights and freedoms and lay down various principles,[62] some of which can provide rationales for rulings in national proceedings, and some not.[63] The fact that Article 16 of the Charter deals, inter alia, with freedom of contract does not mean that the conditions for relying on it before national courts will also apply to the other rights or freedoms guaranteed in that article. In view of the subject matter of the present case, I shall confine my examination to freedom of contract and, further, to one specific right arising therefrom.

80. It is clear from the Charter explanations that Article 16 merely codifies the case-law of the Court in which it has already been recognised that freedom of contract is part of EU law.[64] The status of freedom of contract as a principle of EU law was later confirmed by the case-law of the Court subsequent to the adoption of the Charter.[65] It may therefore be understood as a well-established freedom guaranteed by EU law. It is understood to be a right rather than a principle within the meaning of Article 52(5) of the Charter.[66]

(3) Content of freedom of contract

81. Freedom of contract is a subtype of freedom in general: freedom in the sphere of private law obligations. This freedom is often equated with the autonomy of the individual's will, but it is narrower in scope as it does not pertain to all legal transactions, but only to contracts.[67]

82. It is traditionally assumed that freedom of contract consists of at least the following freedoms: to conclude a contract, to choose the counterparty, and to determine the content of the contract, and thus the contractual relationship, as well as the form of the contract.[68] The right of the parties to determine freely the content of their legal relationship includes the right to determine the amount of mutual benefits, including in particular the price or remuneration for the other party's services.

83. This image of freedom is reflected in the case-law of the Court. The Court has expressly pointed out that the imposition on an individual by a Member State of an obligation to conclude a contract constitutes a significant interference with freedom of contract,[69] that freedom of

62 Cf. the Charter explanations regarding Article 52(5) of the Charter.

63 Lenaerts, K., op. cit., p. 33, which indicates that Article 31(2) of the Charter only has direct horizontal effect in its essence.

64 Here, the Charter explanations refer to the following judgments: of 16 January 1979, *Sukkerfabriken Nykøbing* (151/78, EU:C:1979:4, paragraph 19), and of 5 October 1999, *Spain* v *Commission* (C-240/97, EU:C:1999:479, paragraph 99).

65 See, in particular, judgments of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraphs 42 and 43); of 18 July 2013, *Alemo-Herron and Others* (C-426/11, EU:C:2013:521, paragraphs 32 to 35); and of 24 September 2020, *NK (Occupational pensions for managerial staff)* (C-223/19, EU:C:2020:753, paragraph 86).

66 Judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraphs 43 to 48). See also Oliver, P., 'What purpose does Article 16 of the Charter serve?', *General Principles of EU law and European Private Law*, Wolters Kluwer, The Netherlands, 2013, paragraph 12.06, pp. 295 to 296; Jarass, H.D., 'Art.16 Unternehmerische Freiheit', *Charta der Grundrechte des Europäischen Union. Kommentar*, 4. Auflage, 2021, C.H. Beck, München, 2021, Rn. 2.

67 Machnikowski, P., *Swoboda umów według art. 353(1) k.c. Konstrukcja prawna*, C.H. Beck, Warszawa, 2005, pp. 2 to 3.

68 *Ibid*., pp. 3 to 4. Consistent with this definition is the wording of Article 1102 of the French Civil Code, according to which 'Chacun est libre de contracter ou de ne pas contracter, de choisir son cocontractant et de déterminer le contenu et la forme du contrat dans les limites fixées par la loi.' See also von Bar, C., Clive, E. and Schulte-Nölke, H. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Outline Edition, Sellier, München, 2009, Book II – I:102: Party Autonomy (1): 'Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules'; and also UNIDROIT Principles 2016, Article 1.1, entitled 'Freedom of contract', which reads: 'The parties are free to enter into a contract and to determine its content'.

69 See, in particular, judgment of 28 April 2009, *Commission* v *Italy* (C-518/06, EU:C:2009:270, paragraphs 66 to 71).

contract encompasses, inter alia, the freedom to choose with whom to do business,[70] the parties' freedom to determine freely their mutual obligations,[71] including setting the price of a service,[72] and finally the right to amend the concluded contract.[73]

84. In view of the above, I am of the opinion that freedom of contract is a recognised right both in the legal orders of the Member States and in EU law. It confers certain rights on individuals, with which are correlated obligations to refrain from interfering with the autonomy of the parties' will, including in particular by prescribing the conclusion or termination of contracts or by imposing specific terms.

(4) Importance of the reference in Article 16 of the Charter

85. The categorical nature of this conclusion may be questioned in the light of the wording of Article 16 of the Charter, which provides that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. Meanwhile, in its judgment in *Association de médiation sociale*,[74] the Court held that, as regards the wording of Article 27 of the Charter,[75] which makes a similar reference, 'it is … clear … that, for this article to be fully effective, it must be given more specific expression in European Union or national law'.[76] Consequently, the prohibition that was a decisive factor in that case could not be inferred as a directly applicable rule of law either from the wording of Article 27 of the Charter or from the explanatory notes to that article.[77]

86. However, unlike the rights covered by Article 27 of the Charter, freedom of contract, although not expressly mentioned in the wording of Article 16, is mentioned in the Charter explanations as protected by that provision. This has also been confirmed by the case-law of the Court. There are therefore no grounds for simply applying the case-law to it concerning Article 27 of the Charter.

87. I also believe that the reference to Union law and to national law in Article 16 of the Charter is of a different nature from that in Article 27. Whereas the latter is a reference to the provisions by virtue of which the right in question is being created, the former refers to the provisions laying down the rules for exercising a right which already exists and is guaranteed by the Charter.

88. The Charter explanations provide as follows: 'of course, [the right guaranteed in Article 16] is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.' As the Court has stressed, the freedom to conduct business does not constitute an absolute prerogative, but must be viewed in relation

70 See, in particular, judgments: of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 43), and of 20 December 2017, *Polkomtel* (C-277/16, EU:C:2017:989, paragraph 50).

71 See, in particular, judgment of 20 May 2010, *Harms* (C-434/08, EU:C:2010:285, paragraph 36).

72 See, in particular, judgments of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 43); of 20 December 2017, *Polkomtel* (C-277/16, EU:C:2017:989, paragraph 50); and of 24 September 2020, *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 86).

73 See, in particular, judgment of 5 October 1999, *Spain* v *Commission* (C-240/97, EU:C:1999:479, paragraph 99).

74 Judgment of 15 January 2014 (C-176/12, EU:C:2014:2).

75 Article 27 of the Charter provides as follows: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.'

76 Judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 45).

77 Judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 46).

to its function in society.[78] That freedom may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.[79] The same applies to freedom of contract.

89. In this context, I share the views expressed in the doctrine that the reference in Article 16 of the Charter only serves to emphasise that a greater degree of State interference is permissible in relation to the right guaranteed in that article than in relation to other rights. The reference does not imply either a reduction in the level of protection guaranteed by that right or that it has the status of a principle or of a 'second-class' right.[80]

90. The above does not change the fact that in practice it will be rare for decisions to be based solely on Article 16 of the Charter.[81] In comparison with other fundamental rights, freedom to conduct business, and therefore also freedom of contract, will often have to give way to other values protected by EU law.[82] The need for far-reaching interference in freedom of contract is particularly evident with regard to regulated markets and transactions conducted with consumers.

(5) Self-executing nature of Article 16 of the Charter in so far as it gives parties the right to set the price of a service

91. Of the above rights, which together constitute freedom of contract and which have been confirmed by the case-law of the Court, the one relevant to the present case is the right of parties to a contract to determine the content of their legal relationship by setting the price of a service. In the next part of my considerations, I shall confine myself to considering this right.

92. I consider that the parties' right to set the price of a service that is the subject of a contract is so obvious, clear and unambiguous that it does not need to be given specific expression in EU law or national law in order for its content to be determined.

93. To the extent that it guarantees the parties the freedom to set the price of a service, Article 16 of the Charter is therefore a 'self-executing' provision. It thus meets the essential condition for having a direct effect.

(6) Permissible restrictions on freedom of contract regarding the right to set a price

94. It follows from the observations made in point 88 of this Opinion that the existence of restrictions on the freedom of contract is inherent in that freedom itself. Its content is in fact determined negatively by its restrictions laid down by EU law and the laws of the Member States. The admissibility of those restrictions can be assessed in the light of Article 52(1) of the Charter.

78 See, in particular, judgments: of 9 September 2004, *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraphs 51 to 52); of 6 September 2012, *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54); of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 45); and of 24 September 2020, *NK (Occupational pensions for managerial staff)* (C-223/19, EU:C:2020:753, paragraph 88).

79 Judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 46).

80 See, for example, Leonard, T., Salteur, J., 'Article 16. Liberté d'entreprise', in Picod, F., Rizcallah, C., Van Drooghenbroeck, S., (eds.), *Charte des droits fondamentaux de l'Union européenne: commentaire article par article*, 2e éd., Bruylant, Bruxelles, 2020, p. 407, paragraph 15, p. 415, paragraph 24; Jarass, H.D., op. cit., Rn. 20.

81 Oliver, P., op. cit., p. 299, paragraph 12.08. The author posits that that provision is reserved for extreme cases.

82 For instance, to intellectual property rights – see judgment of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 50), or the public's right to information – see judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 66).

95. A restriction on freedom may have its source in national law or in EU law, or possibly both. [83]

(7) Model for relying on Article 16 of the Charter in horizontal relations

96. The question arises as to how the parties' right to set the price of a service could be relied on in a dispute between individuals. Doubts emerge from the fact that reliance on the right in question is not entirely in line with the model familiar from the existing case-law.

97. The case-law of the Court that allows direct reliance on general principles of EU law, including those given specific expression in the Charter, has concerned the subjective rights of individuals that give rise to specific rights with which the obligations of the other party to the dispute are correlated. The right to annual leave or the right not to be discriminated against were correlated with the obligation of the other party to the dispute: to grant leave (or possibly compensation for unused leave) or to grant the rights enjoyed by other persons in a similar situation. [84]

98. In the case of the right to set the price of a service, this reasoning cannot apply. First, freedom of contract entails the individual's right to be free from interference in the autonomy of the will of the parties to a legal relationship, whether potential or already existing. That right is not as quantifiable as the right to leave or to employment. Secondly, it is not a right that can be relied on in a dispute with another individual. Indeed, freedom of contract is infringed by restrictions on the exercise of that freedom established by an entity external to the existing or potential legal relationship. The source of such restrictions is undoubtedly the State, or possibly any entity capable of adopting binding provisions which stipulate the rules for concluding contracts in a given area. By contrast, freedom of contract does not impose obligations on another individual, and especially not the other party to a contract. [85]

99. This is because the right to demand payment of the agreed price cannot be equated with the right to determine the content of the legal relationship, which includes the price. The source of this right is not freedom of contract, but rather a specific contract that has already been concluded. Non-performance or improper performance of a contract by one of the parties is not an infringement of freedom of contract, but an infringement of the principle of *pacta sunt servanda*. [86]

100. Indeed, as the Commission rightly pointed out at the hearing, freedom of contract protects both parties to a contract from outside interference; it does not protect one of them against the other. The key right to set the price is a joint right of those two parties and not of one of them against the other.

101. Hence, it must be concluded that infringement of the rights arising from freedom of contract occurs primarily in vertical relations. This is not uncommon, for in practically all cases where the Court recognised a direct horizontal effect of the Charter, the fundamental right in question was

[83] Owing to the principle of primacy, restrictions under national law may not be in conflict with restrictions under EU law.

[84] Even if the Court does not admit it explicitly, a natural consequence of recognising the right to, for instance, compensation for unused leave is the obligation to pay that compensation by an employer.

[85] Jarass, H.D., op. cit., Rn. 2.

[86] See, in that regard, the clear distinction between the principles arising from UNIDROIT Principles 2016, commentary to Article 1.3 entitled 'Binding character of contract': '1. The principle *pacta sunt servanda*. This Article lays down another basic principle of contract law …'

infringed primarily in vertical relations as the State had failed to protect an individual's fundamental rights adequately. Only subsequently did the question arise as to whether, in the absence of a provision providing that protection, another individual was obliged to act positively. [87]

102. The peculiar feature of infringement of freedom of contract is that, technically, it is perpetrated against both parties to the contract. However, this may affect their individual legal interests in different ways. For one party, it may mean an additional right, and for the other, an obligation.

103. As the principal way of interfering in freedom of contract is for the State to impose restrictions on that freedom, the only defence against such interference in a dispute with a party to a contract which derives its rights from such a restriction is to raise the objection that the restriction in question is unlawful. Its lawfulness depends, in turn, on whether it meets the conditions for limitations on rights and freedoms set out in Article 52(1) of the Charter. A finding that a limitation is unlawful implies an infringement of the fundamental right guaranteed by Article 16 of the Charter.

104. In the light of the above, it is apparent that a case such as the present one does not involve direct horizontal effect in the classical sense where a provision is addressed to an individual and thus imposes on him an obligation to act in a certain way. In the dispute at hand, the Charter is invoked as a standard of review to demonstrate the unlawfulness of the provision which forms the basis of the action. [88]

105. I see no reason why the provision of Article 16 of the Charter could not constitute such a standard for reviewing lawfulness. It is sufficiently precise and unconditional within the scope relevant to resolving the present case, namely, in so far as it implies the individuals' freedom to set the price. Where it is infringed by a provision of national law, the same rules must be applied with respect to the application of the Charter as those applicable where provisions of national law conflict with Treaty provisions that provide for a derogation from applying a provision of national law. [89]

106. This conclusion is in no way undermined by Article 51(1) of the Charter, since the Court has already held that the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals. [90]

(c) Relying on freedom of contract in the main proceedings

107. The present case falls within the scope of Article 16 of the Charter, since the provision of national law at issue constitutes a restriction on the freedom of contract guaranteed by that article and falls within the scope of application of EU law, namely, Article 15(1), (2)(g) and (3) of Directive 2006/123.

87 See, in that regard, Frantziou, E., op. cit., p. 39, who states: 'Indeed, it is not necessary to view vertical and horizontal obligations to protect fundamental rights as emphatically separate issues. Responsibility for violations of fundamental rights operates on a spectrum, which ranges from state obligations to the duties we owe to one another.'

88 In the doctrine, this situation is described as similar to the triangular situations I mention in point 28 of this Opinion. Leczykiewicz, D., 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law', *General Principles of EU law and European Private Law*, Wolters Kluwer, The Netherlands, 2013, p. 185, paragraph 6.06.

89 See, in particular, judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 25).

90 See judgment of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 88).

108. The disputed provision of national law is contrary to the cited provisions of Directive 2006/123, as is clear from the judgment in *Commission* v *Germany*[91] and the order in *hapeg dresden*.[92] A judgment given under Article 258 TFEU is binding on national courts.

109. Article 15(2)(g) and (3) of Directive 2006/123/EC lays down specific requirements for Member States with respect to adopting provisions in national law that provide for price regulation in respect of services covered by Chapter III of that directive.[93]

110. In adopting those provisions, the EU legislature has already balanced the various competing fundamental rights and assessed the proportionality of the solution.

111. Within the scope of Article 15(2)(g) and (3) of Directive 2006/123, restrictions on freedom of contract arising from national law must remain within the limits set by EU law.

112. Consequently, the finding of the Court of Justice in the *Commission* v *Germany*[94] judgment that the provision of national law at issue establishing a restriction on the right to freely set the price is incompatible with the provision of EU law which sets the limits on the adoption of such provisions means that the provision of national law must be disapplied. Where such conflict occurs, there is no doubt that the restriction, laid down by national law, on the right to set the price freely does not satisfy the conditions laid down in Article 52(1) of the Charter. Thus, it infringes Article 16 of the Charter.

113. Consequently, the national court in the main proceedings should disapply the national provision at issue, which is contrary to Directive 2006/123, on the ground that the fundamental right to freedom of contract must be respected as regards the parties' right to set the price.

114. Therefore, notwithstanding the proposition set out in Part 1 Section D of my analysis, I take the view that where an interpretation that conforms with EU law is not possible, a national court that hears a dispute between individuals concerning a claim based on a national provision which sets minimum tariffs for service providers in a manner contrary to Article 15(1), (2)(g) and (3) of Directive 2006/123 must disapply such a national provision. That obligation is incumbent on the national court under Article 16 of the Charter.

5. Obligation to implement the judgment establishing the failure of a Member State to fulfil its obligations

115. In the present case, the question must be asked whether the national court is obliged to disapply the national provision at issue on the basis of a judgment given pursuant to Article 258 TFEU which declares that provision to be contrary to the directive.

116. In accordance with the settled case-law of the Court, a statement in a judgment given pursuant to Article 258 TFEU that a Member State has failed to fulfil its obligations under the Treaty is declaratory in nature.[95] However, such a judgment creates obligations on the part of the

91 Judgment of 4 July 2019 (C-377/17, EU:C:2019:562).

92 Order of 6 February 2020 (C-137/18, not published, EU:C:2020:84).

93 It should be noted that Article 15(2)(g) and (3) of Directive 2006/123 does not impose an absolute prohibition on price regulation, but merely an obligation to ensure that the provisions laying down minimum and maximum tariffs for services meet the conditions laid down in Article 15(3), that is to say, they must be non-discriminatory, necessary and proportional.

94 Judgment of 4 July 2019 (C-377/17, EU:C:2019:562).

95 Judgment of 16 December 1960, *Humblet* v *Belgium* (6/60-IMM, EU:C:1960:48).

State authorities, which are obliged to implement it. That obligation is also incumbent on the courts, which have a duty to ensure that the judgment is complied with in the exercise of their functions,[96] including the duty to disapply provisions which are contrary to EU law.[97]

117. Does the latter obligation in itself constitute a ground for disapplying a provision of national law which is contrary to a directive in horizontal relations?

118. I do not think so.

119. First, it follows from the case-law of the Court that in proceedings governed by Article 258 TFEU, the Court has no power to annul laws of the Member States.[98] On the other hand, the assumption that a provision of national law that has been found to be in conflict with a directive in a judgment delivered pursuant to Article 258 TFEU cannot, by reason of that judgment, be applied by the courts, would have an effect equivalent to its annulment.

120. Secondly, as the Court itself stressed in *Waterkeyn and Others*,[99] where a judgment is delivered declaring that a Member State has breached its Treaty obligations, the courts of that State are bound by virtue of now Article 260(1) TFEU to draw the necessary inferences from that judgment. However, it should be understood that the rights accruing to individuals derive not from that judgment but from the actual provisions of EU law having direct effect in the internal legal order.

121. The case-law of the Court on Member States' liability for damages in the event of failure to transpose or incorrect transposition of a directive, as established in the *Francovich*[100] judgment, is also consistent with this reasoning; from that case-law it follows that the basis for a claim for damages in such a case is the provisions of EU law, and not the judgment finding that the Member State has failed to fulfil its obligations as such.[101]

122. Thus, in my view, a judgment given pursuant to Article 258 TFEU, while imposing specific obligations on the courts of a Member State, does not provide them with new powers beyond those already conferred upon them. Hence, where a national court is obliged under EU law to disapply a provision of national law where that provision conflicts with a provision of EU law having direct effect, a judgment given pursuant to Article 258 TFEU only activates that obligation.

123. Article 260(1) TFEU cannot be interpreted as meaning that a judgment given pursuant to Article 258 TFEU imposes new obligations on individuals which, pursuant to the third paragraph of Article 288 TFEU, cannot be imposed on individuals by a directive itself. On that assumption, a judgment given pursuant to Article 258 TFEU would have the effect of altering the binding effect of the provisions of a directive as a source of EU law.

96 See, in particular, judgment of 14 December 1982, *Waterkeyn and Others* (314/81 to 316/81 and 83/82, EU:C:1982:430, paragraph 14).

97 See, in particular, judgments of 13 July 1972, *Commission* v *Italy* (48/71, EU:C:1972:65, paragraph 7), and of 19 January 1993, *Commission* v *Italy* (C-101/91, EU:C:1993:16, paragraph 24).

98 Judgment of 16 December 1960, *Humblet* v *Belgium* (6/60-IMM, EU:C:1960:48, p. 1145).

99 Judgment of 14 December 1982 (314/81 to 316/81 and 83/82, EU:C:1982:430, paragraph 16).

100 Judgment of 19 November 1991 (C-6/90 and C-9/90, EU:C:1991:428).

101 See paragraphs 40, 41 and 44 of that judgment.

124. Just as a binding interpretation of a provision of a directive in a preliminary ruling binds the court making the reference, but does not result in a change in the rules governing the application of that directive in horizontal relations, there are likewise no grounds, in my view, for such an effect being produced by a judgment given pursuant to Article 258 TFEU.

125. From such a judgment, a certain interpretation of EU law undoubtedly follows, which is binding on national courts in the process of applying the law. That interpretation must be taken into account by the national court and it is irrelevant that that obligation coincides with the obligation to comply with the judgment given in the proceedings referred to in Article 258 TFEU.

126. For the reasons set out above, I consider that a judgment given pursuant to Article 258 TFEU does not of itself provide a basis for disapplying in horizontal relations the provision of national law contrary to the directive to which that judgment relates.

V. Conclusions

127. In view of the above, I propose that the Court should answer the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

A national court, hearing a dispute between individuals concerning a claim based on a national provision which fixes minimum tariffs for service providers in a manner that is contrary to 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 must disapply such a national provision. That obligation is incumbent upon the national court under:

– Article 15(2)(g) and (3) of Directive 2006/123 as provisions which give specific expression to the freedom of establishment arising from Article 49 TFEU; and

– Article 16 of the Charter of Fundamental Rights of the European Union.