Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

10 September 2015*

(Failure of a Member State to fulfil obligations — Article 49 TFEU — Freedom of establishment — Notaries — Nationality requirement — Article 51 TFEU — Connection with the exercise of official authority)

In Case C-151/14,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 31 March 2014,

European Commission, represented by I. Rubene and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Latvia, represented by D. Pelše, I. Kalniņš and K. Freimanis, acting as Agents,

defendant,

supported by:

Czech Republic, represented by M. Smolek and J. Vláčil, acting as Agents,

Hungary, represented by M. Tátrai and M. Fehér, acting as Agents,

interveners,

THE COURT (Seventh Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Latvian.

Judgment

1 By its application the European Commission asks the Court to declare that, by imposing a nationality requirement for access to the profession of notary, the Republic of Latvia has failed to fulfil its obligations under Articles 49 TFEU and 51 TFEU.

Legal context

The general organisation of the profession of notary in Latvia

2 The organisation of the notarial profession is governed by the Law on the notarial profession (Notariāta likums) of 9 July 1993 (*Latvijas Vēstnesis*, 1993, No 48; 'the Law on the notarial profession').

3 Article 1(2) of that law states that it governs the professional and business activity of notaries who, under Article 238 of that law, have a professional occupation.

4 Under Article 3 of that law, notaries are regarded as public officers. By virtue of Article 5 thereof, they are subject only to the law and perform their functions on a fully independent basis.

5 In accordance with Article 8(1) of that law, notaries are nominated, transferred and dismissed by the Minister for Justice.

6 As regards the conditions of access to the notarial profession, Article 9(1) of that law provides that 'only nationals of the Republic of Latvia may be notaries'.

7 By virtue of Article 38(1) of the Law on the notarial profession, members of that profession are to perform their duties within the area of the judicial district in which they are established. In accordance with Article 39(1) of that law, notaries may assist persons who request their help, even if their place of residence or their property, to which the notarised document refers, is located outside that judicial district.

8 Under Article 39(2) of that law, notaries cannot refuse to practise their profession, except in situations provided for by the law. None the less, they are obliged, in accordance with Article 40 of that law, to refuse their services when their assistance is sought to participate in activities which manifestly have an illegal or immoral purpose.

The activities of a notary in Latvia

9 As regards the various activities of a notary in the Latvian legal system, a notary's principal task is to draw up authentic instruments.

10 Article 82(1) of the Law on the notarial profession provides that 'when certifying an expression of will, notaries must draw up an authentic instrument' and Article 87(1) of that law states, inter alia, that notaries are required to note the will of the parties in that document and the terms of the agreement and to inform the parties of any possible legal consequences of that agreement.

11 As regards the enforcement of notarial acts, Article 107(4) of that law states that a creditor may submit to a notary a notarised instrument with a view to enforcing performance of an obligation within one year from the date on which the obligation becomes enforceable. If the debtor believes that the

creditor's claim is unfounded, he may, under Article 107(9) of that law, bring an action in accordance with the provisions laid down in Article 406 of the Code of Civil Procedure (*Latvijas Vēstnesis*, 1998, No 326/330).

12 By virtue of Articles 108 to 139 of that law, notaries authenticate, inter alia, signatures, copies and translations and attest to the reality of certain facts, such as the fact that a person is alive.

13 In accordance with Articles 140 to 145 of the Law on the notarial profession, notaries carry out activities of preservation of funds, securities and documents.

14 In matters of succession, Article 264 of that law provides that notaries must establish a notarised instrument where the surviving spouse and heirs who have accepted the estate have reached an agreement. Article 315 of that law states that any disagreement in matters of succession must be settled by a court in accordance with the applicable procedures.

15 Article 320 of the Law on the notarial profession states that a notary may proceed to divide the estate provided that there is no disagreement between the heirs in that regard. Any disagreement must, in accordance with Article 250(1) of the Code of Civil Procedure, be brought before a court which may, under Article 250(3) of that code, entrust the notary with the supervision of the division of the estate. In that situation, Article 250(3) of that code provides that the notary must, when drafting the instrument dividing the estate, take measures to reconcile the parties concerned which are likely to bring about agreement between them. Article 250(5) of that code states that the notary must place the inventory, valuation and draft instrument dividing the estate before the court.

16 As regard a notary's powers in divorce matters, Articles 325 and 327 of the Law on the notarial profession provide that a notary may dissolve a marriage where there is a joint request by the spouses, if they have no children in common and do not jointly own a property. If that is not the case, the notary may pronounce the dissolution of the marriage if the parties concerned have concluded a prior contract concerning the custody of the child, the arrangements for visiting rights and the means necessary for its maintenance or the division of the property.

17 Article 338 of that law states that a notary is to provide the information concerning a transnational divorce to the Ministry of Foreign Affairs.

The pre-litigation procedure

18 The Commission sent a letter of formal notice to the Republic of Latvia dated 12 October 2006 requesting that it submit, within two months, its observations on the compatibility of the nationality requirement for access to the profession of notary with Articles 49 TFEU and 51 TFEU.

19 The Republic of Latvia responded to that letter of formal notice by letter of 21 December 2006, in which it set out the reasons for which, from its point of view, the first paragraph of Article 51 TFEU applies to notaries.

20 Not being persuaded by the arguments put forward by the Republic of Latvia, the Commission, by letter of 17 October 2007, sent a reasoned opinion to that Member State, to which the Republic of Latvia replied by letter of 3 January 2008.

21 On 24 May 2011, in the judgments in *Commission* v *Belgium* (C-47/08, EU:C:2011:334), *Commission* v *France* (C-50/08, EU:C:2011:335), *Commission* v *Luxembourg* (C-51/08, EU:C:2011:336), *Commission* v *Austria* (C-53/08, EU:C:2011:338), *Commission* v *Germany* (C-54/08, EU:C:2011:339) and *Commission* v *Greece* (C-61/08, EU:C:2011:340), the Court held that the nationality requirement, applied in Belgium, France, Luxembourg, Austria, Germany and Greece respectively, for access to the profession

of notary constitutes discrimination on the ground of nationality prohibited under Article 43 EC (now Article 49 TFEU). The Republic of Latvia intervened, before the Court, in support of those Member States.

22 By letter of 9 November 2011, the Commission drew the attention of the Republic of Latvia to the judgments referred to in the previous paragraph of the present judgment.

23 The Republic of Latvia replied to that letter by a letter of 5 January 2012.

24 On 22 November 2012, the Commission sent an additional reasoned opinion to the Republic of Latvia, which dealt only with the questions that the Court had not covered in the judgments referred to in paragraph 21 of this judgment.

25 By a letter of 21 January 2013, the Republic of Latvia responded to that opinion, setting out the reasons for its view that the position adopted by the Commission was unfounded.

26 In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

27 The Commission is of the opinion that the activities carried out by a notary in the Latvian legal order have no connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU, as interpreted by the Court.

28 Firstly, with regard to the task of authenticating documents and agreements, the Commission argues that, on the one hand, the notary's intervention thus presupposes the prior existence of consent of the parties and, on the other, a notary cannot unilaterally alter a document without obtaining the prior consent of the parties concerned. In that regard, it refers to the case-law of the Court, in accordance with which that activity of authentication cannot be likened to a direct and specific connection to the exercise of official authority.

29 Furthermore, the authentication of signatures of citizens as part of the procedure for lodging citizens' legislative proposals should be assessed in the same way.

30 Secondly, with regard to notaries' activities of the preservation of funds, securities and documents, the Commission is also of the opinion that those do not have a connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU either.

31 Thirdly, notaries' activities in matters of succession are, like the divorce matters which they handle, non-contentious, Article 315 of the Law on the notarial profession providing that any dispute in that area must be settled in legal proceedings.

32 In the view of the Commission, those activities are preparatory to the exercise of official authority, since they lead to the establishment of an inventory, an evaluation thereof and a draft division of the estate which the notary must then pass to the court. Accordingly, the view cannot be taken that the notary has binding decision-making powers in that regard.

33 Fourthly, as regards notaries' activities in divorce matters, the Commission points out that the Law on the notarial profession confers on notaries only the right to pronounce divorces by mutual consent. Where there is conflict between the spouses, only the court has jurisdiction. In the case of transnational divorces, notaries may make only the purely formal finding that one of the spouses is actually resident in Latvian territory.

34 Furthermore, the specific nature of the status of notary in Latvian law, the oath of allegiance to the Latvian State, his access to information for which the State is responsible and the use of State symbols are not directly relevant to the assessment of the nature of the activities carried out by notaries.

35 In particular, the Commission recalls that, in accordance with the case-law of the Court as regards the specific status of notaries, it is by reference to the nature of the relevant activities themselves, not by reference to that status as such, that it must be ascertained whether those activities fall within the exception in the first paragraph of Article 51 TFEU.

36 The Commission also points out that the Court has stated that while notaries' fees are indeed partly fixed by law, the quality of the services they provide may vary from one notary to another, depending in particular on their professional capabilities. The Court therefore concluded that, within the geographical boundaries of their office, notaries practise their profession in conditions of competition, which is not characteristic of the exercise of official authority.

37 The Republic of Latvia, supported by the Czech Republic and Hungary, submits, firstly, that the notarial profession cannot be regarded as a business activity for the purposes of Article 49 TFEU, as shown by Article 239 of the Law on the notarial profession, which states that the professional activity of notaries is intellectual work which does not have the purpose of making a profit.

38 In addition, notaries do not practise their profession in conditions of free competition, since they choose neither the services which they provide nor the place in which they provide them, nor the remuneration they receive for providing those services.

39 In any event, notaries in Latvia carry out activities connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU even if that is not the case of notaries practising in the Member States which, by the judgments referred to in paragraph 21 of the present judgment, were found to have failed to fulfil their obligations.

40 On the one hand, notaries have a discretion in so far as they can legally refuse to draw up notarised instruments connected with unlawful activities.

41 On the other, the instruments drawn up by notaries in the practice of their profession are public acts.

42 Secondly, the Republic of Latvia argues that Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), as amended by Directive 2013/55/EU (OJ 2013 L 354, p. 132; 'Directive 2005/36'), does not apply to notaries, which excludes them from the scope of the freedom to provide services and the freedom of establishment.

43 Thirdly, as regards the activities carried out by notaries, the Republic of Latvia points out that the establishment of authentic acts is a manifestation of the exercise of official authority, since authentication of a document renders it enforceable against third parties.

44 Authentic instruments established by a notary thus enjoy complete probative force and are enforceable and the fact that a notarised act can be the object of legal proceedings does not suggest that it constitutes merely an auxiliary or preparatory act.

45 As regards the powers of notaries in matters of succession, they carry out their activities independently and are entrusted with establishing acts concerning the confirmation of the rights of the heirs.

46 With regard to the activities carried out by notaries in divorce matters, the Republic of Latvia asserts that it is irrelevant that those activities are limited to divorces by mutual consent, since the decision which the notary is called upon to make in the matter is a final decision binding on the parties and on third parties. Notaries are not subject to any judicial supervision in respect of those particular tasks, including where the divorces are transnational.

47 Furthermore, the fact that the divorces are registered in the registers of births, marriages and deaths confirms that the notarial activity in those matters is connected with the exercise of official authority (judgment in *Colegio de Oficiales de la Marina Mercante Española*, C-405/01, EU:C:2003:515, paragraph 42).

Findings of the Court

48 It must be noted first of all that, in the judgments referred to in paragraph 21 of the present judgment, the Court considered that the freedom of establishment, as set out in Article 49 TFEU, is applicable to the notarial profession.

49 The argument of the Republic of Latvia, as summarised in paragraphs 37 and 38 of the present judgment, that the notarial profession cannot be regarded as a business activity does not cast doubt on the above assessment.

50 Firstly, in accordance with Article 238 of the Law on the notarial profession, notaries have a professional occupation. Secondly, it is not disputed that, apart from the cases in which a notary is appointed by law, every party can choose a notary freely. While notaries' fees are indeed fixed by law, the quality of the services they provide may vary from one notary to another, depending in particular on their professional capabilities.

51 It follows that, within the geographical limits of their office, notaries exercise their profession in conditions of competition.

52 Next, it must be borne in mind that Article 49 TFEU is intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State, and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from national legislation (see, inter alia, the judgments in *Commission* v *France*, 270/83, EU:C:1986:37, paragraph 14, and *Commission* v *Netherlands*, C-157/09, EU:C:2011:794, paragraph 53).

53 In the present case, the national legislation at issue reserves access to the profession of notary to Latvian nationals, thus enshrining a difference in treatment on the ground of nationality which is prohibited in principle by Article 49 EC.

54 The Republic of Latvia submits, however, that the activities of notaries are outside the scope of Article 49 TFEU because they are connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

55 It must be noted, in that regard, that in the cases which gave rise to the judgments referred to in paragraph 21 of the present judgment, the view was taken that the activities entrusted to the notaries concerned did not involve, within the meaning of the case-law of the Court, a direct and specific connection with the exercise of official authority.

56 It must therefore be ascertained in the light of the above considerations whether the activities entrusted to notaries in the Latvian legal system involve a direct and specific connection with the exercise of official authority.

57 Firstly, as regards the authentication activity, it is not in dispute that its main characteristic is that the notary must ascertain, inter alia, that all the conditions required by law for drawing up the instrument are satisfied.

58 Furthermore, under Latvian legislation, the documents or agreements freely signed or entered into by the parties are subject to authentication. They decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties.

59 In that regard, the Court has held that the activity of authentication entrusted to notaries therefore does not, in itself, involve a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU (see, by analogy, inter alia, judgment in *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 92).

60 It is true that, as submitted by the Republic of Latvia, the notary's ascertainment, before carrying out the authentication of a document or agreement, that all the conditions required by law for drawing up that document or agreement have been satisfied, pursues an objective in the public interest, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals. However, the mere pursuit of that objective cannot justify the powers necessary for that purpose being reserved exclusively to notaries who are nationals of the Member State concerned (judgment in *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraphs 94 and 95).

61 It is also true that a notary must refuse to authenticate a document or agreement which does not satisfy the conditions laid down by law, regardless of the wishes of the parties. However, following such a refusal, the parties remain free to remedy the unlawfulness, amend the conditions in the document or agreement, or abandon the document or agreement (see judgment in *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 98).

62 Thus, with the exception of the argument concerning the enforceability of the document against third parties, which cannot validly succeed in that the enforceability is linked to the probative force of the document, it must be held that the Republic of Latvia does not put forward anything to distinguish the activities of a notary in that Member State from those carried out in the Member States which, by the judgments referred to in paragraph 21 of this judgment, were found to have failed to fulfil their obligations.

63 Furthermore, nor can the authentication of signatures of citizens as part of the procedure for lodging citizens' legislative proposals, having regard to the considerations in paragraphs 60 and 61 of the present judgment, be regarded as having a connection with the exercise of official authority.

64 Secondly, it must also be ascertained whether the other activities entrusted to notaries in the Latvian legal system, referred to by the Republic of Latvia, involve a direct and specific connection with the exercise of official authority.

65 Firstly, as regards the activities of preservation of funds, securities and documents, it must be found that the Republic of Latvia has disputed only that such activities do not have any connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

66 Secondly, with regard to the activities carried out in matters of succession, on the one hand, a notary may proceed to divide the estate only if there is no disagreement between the heirs in that regard and, on the other, that, in the event of disagreement between the heirs, the notary must, under Article 250(5) of the Code of Civil Procedure, place the inventory, valuation and draft instrument dividing the estate before the court.

67 Since the tasks entrusted to notaries in matters of succession are carried out in that matter, either on a consensual basis or as preparatory tasks under the supervision of the court, they cannot, consequently, be regarded as having, in themselves, a direct and specific connection with the exercise of official authority.

68 With regard, thirdly, to the activities carried out by notaries in divorce matters, it must be noted that, in accordance with Articles 325 and 327 of the Law on the notarial profession, a notary has powers to dissolve a marriage where the spouses have expressed their agreement on the principle of the divorce and where, if they have a child in common or jointly own a property, they have concluded a prior contract concerning the custody of the child, the arrangements for visiting rights and the means necessary for its maintenance or the division of the property.

69 Furthermore, with regard to other divorce cases, it is clear from Article 233 of the Code of Civil Procedure, which forms part of Chapter 29 entitled 'Aspects concerning the annulment and dissolution of marriage', that handling such cases falls within the powers of the courts.

70 Clearly, therefore, a notary's powers in divorce matters, which are based entirely on the wishes of the parties and leave the prerogatives of the courts intact in the absence of agreement between the parties, do not have any connection with the exercise of official authority.

71 As regards the argument which the Republic of Latvia derives from the judgment in *Colegio de Oficiales de la Marina Mercante Española* (C-405/01, EU:C:2003:515), relating to the fact that, in Latvia, divorce by mutual consent pronounced by a notary is registered by the Registrar of births, marriages and deaths, it is apparent from paragraph 42 of that judgment that, when the Court ruled that the duties conferred on masters and chief mates of merchant ships flying the Spanish flag constitute participation in the exercise of rights under powers conferred by public law, it was referring to all the duties performed by them, including rights connected to the maintenance of safety and to the exercise of police powers, together with, in appropriate cases, powers of investigation, coercion and punishment, and not merely the authority held by those masters and chief mates in respect of the registration of births, marriages and deaths.

72 Nor is the conclusion set out in paragraph 70 of the present judgment called into question by the power conferred on notaries in cases of transnational divorce, since, on the one hand, those divorces are based on the common will of the spouses to dissolve their marriage and, on the other, the notary's task in that regard is to ascertain that all the conditions required by law for the pronouncement of such a divorce are satisfied. As stated in paragraphs 60 and 61 of the present judgment, that task cannot be regarded as directly and specifically connected with the exercise of official authority.

73 Thirdly, as regards the particular status of notaries in the Latvian legal system, it need only be recalled that it is by reference to the nature of the relevant activities themselves, not by reference to that status as such, that it must be ascertained whether those activities fall within the exception in the first paragraph of Article 51 TFEU (see, inter alia, judgment in *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 85).

74 Furthermore, it is not in dispute, as has been stated in paragraph 51 of the present judgment, that notaries practise their profession in conditions of competition, which is not characteristic of the exercise of official authority (see, by analogy, judgment in *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 117).

75 Finally, the argument which the Republic of Latvia bases on Directive 2005/36 not being applicable to notaries also fails to convince. The fact that the legislature has chosen to exclude notarial activities from the scope of a given measure, in this case that directive, does not mean that those activities necessarily fall under the exception provided for in the first paragraph of Article 51 TFEU (see, to that effect, inter alia, judgment in *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 119).

76 In those circumstances, it must be concluded that the activities of notaries as defined in the current state of the Latvian legal system are not connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

77 Consequently, the nationality condition required by Latvian legislation for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by Article 49 TFEU.

78 Having regard to all the foregoing considerations, it must be held that the Commission's action is well founded.

Costs

79 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Republic of Latvia has been unsuccessful, the latter must be ordered to pay the costs.

80 Under Article 140(1) of those rules the Member States and the institutions which have intervened in the case must bear their own costs. The Czech Republic and Hungary must therefore bear their own costs.

On those grounds, the Court (Seventh Chamber) hereby:

1. **Declares that, by imposing a nationality requirement for access to the profession of notary, the Republic of Latvia failed to fulfil its obligations under Article 49 TFEU;**

2. **Orders the Republic of Latvia to pay the costs;**

3. **Orders the Czech Republic to bear its own costs;**

4. **Orders Hungary to bear its own costs.**

[Signatures]