Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 21 September 2016[1]

Case C-342/15

Leopoldine Gertraud Piringer

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Directive 77/249/EEC — Legislation of a Member State requiring that the authenticity of the signature on a request for entry in the land register be certified by a notary — Article 56 TFEU — Justification — Proper functioning of the land register system)

1. In the present request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria), in the context of an appeal on a point of law brought by an Austrian national, Leopoldine Gertraud Piringer, an Austrian District Court refused to enter in the Austrian land register a planned sale of a property on the ground that the authenticity of the signature on that request had been certified not by a notary, but by a Czech lawyer.

2. I propose that the Court should state that the case must be assessed from the point of view of the freedom to provide services enshrined in Article 56 TFEU. In that context, the referring court should be provided with information which will be of use to it for the assessment of proportionality in the context of a possible justification for a non-discriminatory restriction.

I – Legal framework

A – *EU Law*

3. Under Article 1(1) of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services:[2]

‘This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services.

Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.’

1 — Original language: French
2 — OJ 1977 L 78, p. 17.

4. Article 4 of that directive provides:

‘1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State.

…

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State … The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer’s activities, the standing of the profession and respect for the rules concerning incompatibility.’

5. In accordance with recital 10 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained: [3]

‘… This Directive in no way affects the provisions under which, in every Member State, certain activities are reserved for professions other than the legal profession …’

6. Article 5(2) of that directive, entitled ‘Area of activity’, provides as follows:

‘Member States which authorise in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States.’

B – *Austrian law*

7. Article 31 of the Allgemeines Grundbuchsgesetz (Austrian federal law on the land register) as most recently amended (BGB1. I No 87/2015, ‘the GBG’) provides:

‘1. An entry in the land register may be made … only on the basis of public instruments or such private instruments on which the signatures of the parties have been authenticated by a court or a notary and where, in the case of natural persons, the certificate of authenticity also contains their date of birth.

…

3. The authentication of foreign instruments is governed by international treaties. Instruments authenticated by the Austrian representative authority under whose jurisdiction those instruments were prepared or authenticated, or by the national representative authority in the State in which they were prepared or authenticated, do not require additional authentication.

…’

3 — OJ 1998 L 77, p. 36.

8. Article 53 of the GBG provides as follows:

‘1. The owner is entitled to require that a planned sale or pledge be entered in the register in order to establish that the rights to be entered as a result of that sale or pledge have priority as of the date of the request for entry.

…

3. However, entries relating to such requests may be granted only if, as the land register stands, entry of the right to be entered or deletion of the existing right would be permissible, and if the signature on the request has been authenticated by a court or a notary. The provisions of Article 31(3) to (5) shall apply.

…’

II – The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

9. Leopoldine Piringer owns a half share in a property situated in Austria.

10. On 25 February 2009, in České Budějovice (Czech Republic), she signed a request for entry in the Austrian land register of the planned sale of her share of that property with a view to establishing the priority of that entry. The applicant’s signature on that request was authenticated by a Czech lawyer who, in accordance with national law, issued a declaration for that purpose containing the applicant’s date of birth and specifying the documents submitted by the applicant as proof of her identity. In the declaration, the lawyer confirms that Ms Piringer personally signed a copy of that request before him.

11. On 15 July 2014, Ms Piringer submitted the request for entry to the Bezirksgericht Freistadt (Freistadt District Court, Austria), the court which maintains the land register. That court refused the request by decision of 18 July 2014 on the grounds that the applicant’s signature had not been authenticated by a court or a notary, as required under Article 53(3) of the GBG. Moreover, according to that court, authentication of the signature by a Czech lawyer is not covered by the Treaty between the Republic of Austria and the Czechoslovak Socialist Republic of 10 November 1961 on judicial cooperation in civil matters, the recognition of public instruments and the provision of legal information (BGB1. No 309/1962), which is still applicable in bilateral relations with the Czech Republic (BGBl. No 123/1997 (‘the Austrian-Czech treaty’)), and, in any event does not bear the stamp of an official seal as required by Articles 21 and 22 of that treaty.

12. By order of 25 November 2015, the Landesgericht Linz (Linz Regional Court, Austria) confirmed that decision, finding, in particular, that although the declaration of the authenticity of the signature constituted a public instrument under Czech law, the recognition of such a declaration in Austria was covered by Article 21(2) of the Austrian-Czech treaty. Given that, under that provision, mutual recognition applies only to private instruments prepared by ‘a court, an administrative body or an Austrian notary’, extending the scope of its application to instruments prepared by Czech lawyers would not only contravene Article 21(2) but would also go against the wishes of the contracting parties themselves.

13. The Oberster Gerichtshof (Supreme Court), before which Ms Piringer brought an appeal on a point of law, finds in essence that the Austrian-Czech treaty is not applicable in the present case, and expresses doubts as to whether the requirement for notarial certification laid down in Article 53(3) of the GBG is compatible with EU law.

14. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 1(1), second sentence, of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services to be interpreted as enabling a Member State to exclude certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property from the freedom to provide services by lawyers and to reserve the provision of this service to public notaries?

(2) Is Article 56 of the Treaty on the Functioning of the European Union to be interpreted as not precluding a national provision of the State of registry (Austria) under which certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property is reserved to public notaries, with the effect that a declaration of the authenticity of a signature by a lawyer established in the Czech Republic made in his State of establishment is not recognised in the State of registry, despite this declaration being accorded the legal effect of an official certification under Czech law, in particular because

(a) the question of the recognition of a declaration of the authenticity of a signature on a request for entry in the land register of the State of registry made in the Czech Republic by a lawyer established there relates to the provision of a service by a lawyer the content of which is not possible for lawyers established in the State of registry, and the refusal to recognise it is therefore not subject to the prohibition of restrictions on recognition

or

(b) such a reservation is justified to ensure the legality and legal certainty of acts (instruments relating to legal transactions) and as a consequence is required for reasons of public interest and is also necessary to achieve this objective in the State of registry?’

15. Ms Piringer, the Austrian, Czech, German, Spanish, French, Latvian, Luxembourg, Polish and Slovene Governments and the European Commission submitted observations. Ms Piringer, the Austrian, Czech, German, Spanish, French, Luxembourg and Polish Governments and the European Commission presented oral argument at the hearing on 6 June 2016.

III – Analysis

A – *The first question*

16. By its first question referred for a preliminary ruling, the referring court seeks to establish, in essence, whether the provisions of Directive 77/249 prohibit a Member State from reserving to notaries certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property.

1. The first subparagraph of Article 1(1) of Directive 77/249/EC

17. In accordance with the first subparagraph of Article 1(1) of Directive 77/249, that directive applies, within the limits and under the conditions laid down therein, to the *activities of lawyers* pursued by way of provision of services.

(a) Non-movement of the service provider

18. The majority of the governments which submitted observations take the view that Directive 77/249 is not applicable in the present case because a lawyer established in one Member State did not physically move to another Member State.

19. I do not agree with such an interpretation of Directive 77/249.

20. The second recital of Directive 77/249 states that that directive 'deals only with measures to facilitate the effective pursuit of the activities of lawyers by way of provision of services'. Article 4 of that directive governs 'activities relating to the representation of a client in legal proceedings or before public authorities' and establishes a clear distinction between the Member State from which the lawyer comes and the host Member State.

21. I infer from that provision that, through Directive 77/249, the EU legislature intended to regulate the movement of lawyers from one Member State to another and wished, in particular, to facilitate the representation of clients before a public authority or a court, which requires the physical presence of a lawyer, in compliance with the conditions laid down in Directive 77/249.

22. As noted by the Commission in its observations, that does not rule out the possibility of other kinds of cross-border services provided by lawyers being included in Directive 77/249. Even if circumstances have rendered Directive 77/249, adopted in 1977, incapable of governing the relationships now existing between lawyers, clients, the authorities and the courts as a result of electronic communications, there is no reason why those ways of providing services should not fall within the scope of Directive 77/249, provided that the objective of protection pursued by its provisions is not undermined.

23. The provision of a service could involve movement not of the lawyer, but of the recipient of the service. Moreover, it is also possible to envisage situations in which it is the service that moves, for example, where legal advice is provided by telephone or email.

(b) The definition of 'activities of lawyers'

24. Directive 77/249 itself does not provide a definition of 'activities of lawyers'.[4]

25. However, Article 1(2) of that directive gives a detailed definition of what is meant by 'lawyer' in the respective EU Member States. That could support the claim that any activities pursued by a lawyer under his national law constitute activities of a lawyer and that, in other words, it is a decentralised concept and not an autonomous concept of EU law. That would mean that an activity such as the 'declaration of authenticity of a signature' under Article 25a of the Czech law on the profession of lawyer would constitute one of the activities of a lawyer.

26. Moreover, Directive 77/249 follows the rationale underlying the principle of mutual recognition, as is clear from Article 2 of that directive, according to which each Member State is to recognise as a lawyer for the purpose of pursuing the activities specified in Article 1(1) of that directive any person listed in paragraph 2 of that article. 'Mutual recognition' means, in principle, that the standards, rules or definitions are set out in national law.

4 — Moreover, that directive does not state whether the activities must constitute activities of lawyers in the State of origin, namely, in the Czech Republic, in the host State, namely, in Austria, or whether 'activities of lawyers' is an autonomous concept, unrelated to the activities pursued in each of those two Member States.

27. Nevertheless, in accordance with settled case-law, the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation. [5]

28. I do not consider that that case-law should be applied in the present case, given that the concept of 'lawyer' is defined by reference to national law.

29. Rather, I am of the opinion that the concept of 'activities of lawyers' is a hybrid concept in so far as it contains autonomous elements and elements to be defined by each Member State.

30. As regards the autonomous elements, Article 4(1) of Directive 77/249 refers to 'activities relating to the representation of a client in legal proceedings or before public authorities'. [6]

31. Moreover, the concept of 'activities of lawyers' can be assumed to include the provision of legal advice.

32. It seems unlikely that the authentication of a signature, as such, would fulfil such a requirement, since no legal expertise is required. Therefore, I have serious doubts about classifying, at least in the light of the national legislation at issue in the main proceedings, the mere authentication of a signature as one of the 'activities of lawyers' because that concept contains autonomous elements in that it covers activities requiring the possession of legal expertise.

2. The second subparagraph of Article 1(1) of Directive 77/249/EC

33. In accordance with the second subparagraph of Article 1(1) of Directive 77/249, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.

34. As stated by the German Government and the Commission, that provision was inserted for the benefit of the United Kingdom and Ireland, to take into account the particular legal situation in those two Member States, where certain categories of lawyers pursue their activities in the field of property law. The aim of that provision is thus to prevent lawyers from other Member States from pursuing the activities concerned in the United Kingdom or in Ireland.

35. In 1977, Member States other than the United Kingdom and Ireland had no need for such derogating rules, since they already allowed that type of activity only to notaries and it was not disputed that such activities did not fall within the scope of Directive 77/249.

36. Similarly, Article 5(2) of Directive 98/5 provides that 'Member States which authorise in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for *professions other than that of lawyer*,[7] may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States.'

5 — See judgment of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraph 45 and the case-law cited).

6 — The first paragraph of Article 5 of that directive also refers to 'the pursuit of activities relating to the representation of a client in legal proceedings'.

7 — Emphasis added.

37. Moreover, recital 10 of Directive 98/5, according to which 'provision should be made, as in Directive [77/249], for the option of excluding from the activities of lawyers practising under their home-country professional titles in the United Kingdom and Ireland the preparation of certain formal documents in the conveyancing and probate spheres', also confirms that interpretation.

38. I take the view that, should the logic and wording of the provisions of Directive 77/249 so permit, that directive should be interpreted consistently with the provisions of Directive 98/5. After all, Directives 77/249 and 98/5 have the same aim and follow the same rationale, namely the liberalisation of cross-border professional activities of lawyers, whether those activities are provided on a temporary basis, as is the case under Directive 77/249, or on a permanent basis, as is the case under Directive 98/5.[8]

39. Consequently, I propose that the answer to the first question referred for a preliminary ruling should be that the provisions of Directive 77/249 do not prohibit a Member State from reserving to notaries certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property.

B – *The second question*

40. By its second question, the referring court wishes to establish, in essence, whether the Article 56 TFEU prohibits a Member State from reserving to notaries certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property.

41. It should be noted at the outset that the formal conditions required for entries into the land register are determined by national law.[9] It follows that the applicable legislation is that of the Member State which maintains the register. In the case in the main proceedings, it is therefore Austrian law which lays down the formal conditions required for entries in the land register.

42. Although the formal conditions required for entries in the land register are determined by national law, they must obviously be compatible with EU law and, in this case, in particular with the fundamental freedom to provide services enshrined in Article 56 TFEU.

1. The restriction on the freedom to provide services

43. Under Article 56 TFEU, 'restrictions' on the freedom to provide services are prohibited.

44. It is settled case-law that the free movement of services under Article 56 TFEU requires not only the elimination of all discrimination against service providers established in other Member States on grounds of nationality, but also the abolition of any restriction – even if it applies without distinction to national service providers and service providers from other Member States – which is liable to prohibit, impede or render less attractive the activity of a service provider established in another Member State where he lawfully provides similar services.[10]

45. Moreover, in accordance with the Court's case-law, Article 56 TFEU requires the abolition of any restriction on that fundamental freedom imposed on the ground that the service provider is established in a Member State other than the one in which the service is provided.[11]

8 — See, also, Barnard, C., *The substantive law of the EU. The four freedoms*, Oxford University Press, 4th edition, 2013, p. 320, according to which those two directives are part of the same 'jigsaw'.

9 — Moreover, without prejudice to the scope of application of Article 81 TFEU, there is no EU legal instrument which addresses this issue.

10 — See, inter alia, judgment of 18 July 2013, *Citroën Belux* (C-265/12, EU:C:2013:498, paragraph 35 and the case-law cited).

11 — See judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor* (C-53/13 and C-80/13, EU:C:2014:2011, paragraph 34 and the case-law cited).

46. As the Commission rightly notes in its observations, the legislation at issue precludes anyone who is not an Austrian notary from legitimately authenticating a signature on a request for entry in the land register. Such a measure does not create discrimination between Austrian and Czech lawyers on the basis of the origin of the service. Nevertheless, it restricts the freedom to provide services for Czech lawyers.

47. There is also restriction on the freedom of services inasmuch as the outcome of a service provided in one Member State is not recognised in certain situations in another Member State. The authentication of a signature in the Czech Republic is not valid in Austria for the purposes of an entry in the land register.[12]

48. Finally, it should be noted that the Court has already made it clear, in its judgment of 24 May 2011, *Commission* v *Austria*,[13] that the activity of authentication pursued by Austrian notaries does not, as such, involve a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU. Therefore, the exception for the exercise of official authority, laid down in Article 62 TFEU and in the first paragraph of Article 51 TFEU, cannot be relied on.

2. The justification

49. In my view, the central legal issue in the present case is whether there is any justification.

50. Although their arguments differ in certain details, all the Member States which submitted observations, namely the Austrian, Czech, German, Spanish, French, Latvian, Luxembourg, Polish and Slovene Governments, consider that the legislation at issue is justified, while the Commission takes the opposite view.

(a) Overriding reason in the public interest: the proper functioning of the land register system

51. In its judgment of 24 May 2011, *Commission* v *Austria*,[14] the Court held that 'the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the legality and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article [49 TFEU] deriving from the particular features of the activities of public notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose'.

52. In that context, I agree with the German and Polish governments that the proper functioning of the land register system is connected with the guarantee of the legality and legal certainty of documents.

12 — The German Government's argument that, given the formal nature of the Austrian legislation, there is no restriction on the activities of lawyers, cannot therefore be accepted.

13 — C-53/08, EU:C:2011:338, paragraphs 91 to 95.

14 — C-53/08, EU:C:2011:338, paragraph 96.

53. As rightly noted by the German Government, the land register is of crucial importance in some Member States, including Austria and Germany, both in general terms and in particular in property transactions. Entry in the land register alters rights in so far as the right to property arises only after an entry has been made in the land register. The protection of the land register and of the accuracy of the entries therein helps to safeguard the proper functioning of the justice system. [15]

54. It is now necessary to consider whether reserving to notaries the authentication of a signature for the purposes of an entry in the land register in the circumstances of the main proceedings fulfils the requirement of proportionality.

(b) The proportionality of the Austrian legislation

55. In order to fulfil the requirement of proportionality, a measure must, first, be suitable (or appropriate or adequate) for securing the attainment of the objective pursued.

56. Suitability for securing attainment of the objective relied upon is accepted only if the measure at issue genuinely reflects a concern to attain that objective in a consistent and systematic manner. [16]

57. As rightly noted by the Polish Government, there does not seem to be any doubt as to the suitability of the Austrian legislation in this case. Reserving to notaries the competence to certify signatures ensures the proper functioning of the land register.

58. Secondly, the measure must not go beyond what is necessary to attain the objective. Where several measures are capable of achieving the same aim, the measure which least restricts the freedom to provide services should be the one chosen.

59. I would note at the outset that that issue was not addressed either by the referring court in its request for a preliminary ruling or by the Austrian Government in its observations, and yet it is that issue which seems to me to be the root of the problem. In particular, neither the referring court nor the Austrian Government stated that the requirements which Austrian notaries and Czech lawyers had to fulfil were, on the Czech side, such as to jeopardise the proper functioning of the land register in Austria.

60. Authentication such as that at issue in the main proceedings does not require any knowledge of Austrian law or even any legal knowledge, for that matter. As the Commission rightly observed, authentication does not require the drafting of instruments or provision of legal advice on complex matters, but is simply a case of establishing the identity of the person present and confirming that that person has signed a document.

61. Systematically reserving the provision of such a service to an Austrian notary may, at first, appear manifestly excessive.

62. Nevertheless, on the basis of the information available to the Court, I consider the legislation at issue, which reserves to notaries the authentication of signatures on instruments necessary for the creation or transfer of rights to property, to be proportionate.

15 — Which is, in accordance with the case-law of the Court, an overriding reason in the public interest. See judgment of 12 December 1996, *Reisebüro Broede* (C-3/95, EU:C:1996:487, paragraph 36).

16 — See judgment of 16 December 2010, *Josemans* (C-137/09, EU:C:2010:774, paragraph 70), and, as regards the free movement of goods, my Opinion in *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:394, point 48 et seq.).

63. The Republic of Austria confers competence only on notaries because it has a high level of trust in the courts and notaries with regard to the maintenance of the land register. In that context, as regards notaries in particular, I do not wish to call into question the decision of the Austrian legislature to reserve authentication to legal professionals who are subject to strict State control.

64. Moreover, it seems unlikely that the Republic of Austria would be able adequately to monitor the activities of foreign lawyers making declarations for land register purposes and to penalise any infringement by means of disciplinary measures. Where a Member State, such as the Republic of Austria, operates a system for the preventive administration of justice by establishing a land register and the guarantees contained therein for the purposes of protecting property ownership, it cannot reasonably dispense with state control functions and with an effective guarantee of control of entries in the land register.

65. As regards the case in the main proceedings, in any event, the system for monitoring Czech lawyers, as set out by the Czech Government, does not provide adequate guarantees. [17]

66. On the basis of the information before the Court, such a system is not, in my view, capable of ensuring that there is concrete, effective and efficient monitoring which would be comparable to the monitoring of notaries in countries operating a system of civil-law notaries and would ensure a high level of trust.

67. I therefore propose that the Court's answer to the second question should be that Article 56 TFEU does not preclude national legislation such as Article 31 of the GBG under which certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property is reserved to the courts and to notaries.

IV – Conclusions

68. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

Neither the provisions of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services nor Article 56 TFEU prohibit a Member State from reserving to notaries certification of the authenticity of signatures on instruments which are necessary for the creation or transfer of rights to property.

17 — The Czech Government explained at the hearing that the registers maintained by notaries and lawyers in the Czech Republic are checked regularly for the purposes of the authentication of signatures. The notaries' registers undergo two levels of checks, including one by the Ministry of Justice, while the lawyers' registers are checked only by the bar association.