Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

15 July 2021 *

(Reference for a preliminary ruling – Directive 2006/123/EC – Article 14(6) – Freedom of establishment – Commercial operating permit issued by a collegiate body – Body made up of, inter alia, recognised experts representative of the economic fabric – Persons potentially constituting or representing competing operators of the applicant for authorisation – Prohibition)

In Case C-325/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 15 July 2020, received at the Court on 22 July 2020, in the proceedings

BEMH,

Conseil national des centres commerciaux (CNCC)

v

Premier ministre,

Ministère de l'Économie, des Finances et de la Relance,

Ministre de la cohésion des territoires et des relations avec les collectivités territoriales,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, and C. Toader, Judge,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Conseil national des centres commerciaux (CNCC), by E. Piwnica, avocat,

* Language of the case: French.

– the French Government, by E. de Moustier and N. Vincent, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and T. Machovičová, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and P. Huurnink, acting as Agents,

– the European Commission, by L. Armati, C. Vrignon and L. Malferrari, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns Article 14(6) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in the context of three sets of proceedings brought by BEMH and by the Conseil national des centres commerciaux (National Council of Shopping Centres, 'CNCC') concerning, inter alia, the lawfulness of Decree No 2019-331 of 17 April 2019 on the composition and functioning of departmental commercial planning committees and applications for commercial operating permits (JORF, 18 April 2019, text No 11).

Legal context

EU law

3 Article 14(6) of Directive 2006/123 provides:

'Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

…

(6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large'.

4 Under Article 15(3) of that directive:

‘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 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 According to the third paragraph of Article 16(1) of the directive:

‘Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.’

French law

6 Under Article L. 710-1 of the Commercial Code:

‘The establishments of the network of Chambers of Commerce and Industry each exercise, as intermediate State authorities, a representative role for the interests of industry, businesses and services before public authorities or foreign authorities …’

7 Article L. 751-1 of that code is worded as follows:

‘A departmental commercial planning committee shall issue decisions on applications filed with them pursuant to the provisions of Articles L. 752-1, L. 752-3 and L. 752-15.’

8 The decree of 17 April 2019 was adopted, inter alia, for the application of Article L. 751-2 of that code, in the version resulting from the amendments made by loi No 2018-1021 du 23 novembre 2018 portant évolution du logement, de l’aménagement et du numérique (Law No 2018-1021 of 23 November 2018 on housing development, planning and the digital economy) (JORF, 24 November 2018, text No 1) (‘the ELAN law’).

9 That Article L. 751-2 provides that departmental commercial planning committees ('CDACs') are composed, inter alia, as follows:

'II. In departments other than Paris …:

3. Of three recognised experts representative of the economic fabric: one appointed by the chambre de commerce et d'industrie [(Chamber of Commerce and Industry)], one appointed by the chambre de métiers et de l'artisanat [(Chamber of Skilled Trades and Crafts)], and one appointed by the chambre d'agriculture [(Chamber of Agriculture)].

…

The committee shall hear any person who could provide clarification for its decisions or opinions. Although they do not vote, the persons appointed by the Chamber of Commerce and Industry and the Chamber of Skilled Trades and Crafts shall present the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric. …

III.- In Paris, …

3. Of two recognised experts representative of the economic fabric: one appointed by the Chamber of Commerce and Industry and one appointed by the Chamber of Skilled Trades and Crafts.

In order to provide clarification for its decisions or opinions, the committee shall hear any person whose opinion is of interest. Although they do not vote, the experts appointed by the Chamber of Commerce and Industry and the Chamber of Skilled Trades and Crafts shall present the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric.'

10 Article L. 752-1 of that code lists the projects for which a commercial operating permit is required. Those projects include, as set out in paragraph 1 of that article, 'the creation of a retail trade outlet with a sales area exceeding 1 000 square metres, resulting either from a new construction or from the re-purposing of an existing building'.

11 According to the second paragraph of Article L. 5-1 of the Craft Trades Code:

'The network of the Chambers of Skilled and Crafts Trades shall contribute to the economic development of companies registered in the trade registry and to regional development, by carrying out any task in the public interest in favour of economic actors and in partnership with existing structures for the benefit of the craft sector. …'

The dispute in the main proceedings and the question referred for a preliminary ruling

12 The CDACs are collegiate bodies that issue decisions on, inter alia, applications for commercial operating permits relating to projects for the creation or extension of retail trade outlets or shopping centres the sales area of which exceeds 1 000 m^2.

13 In the context of their applications in the main proceedings, BEMH, a consultancy firm specialised in commercial town planning, and the CNCC submit that the provisions of French law on the composition of CDACs are incompatible with Article 49 TFEU and Article 14(6) of Directive 2006/123.

14 In that regard, the referring court observes that, pursuant to Article L. 751-2 of the Commercial Code, CDACs are composed, inter alia, of recognised experts representative of the economic fabric appointed by the Chamber of Commerce and Industry, the Chamber of Skilled Trades and Crafts, and the Chamber of Agriculture. Such a composition is incompatible with the requirements laid down in Article 14(6) of Directive 2006/123 in so far as the latter provision lays down that Member States cannot make access to, or the exercise of, a service activity subject to compliance with the direct or indirect involvement of competing operators in the granting of authorisations.

15 The referring court specifies that, pursuant to Article L. 751-2 of the Commercial Code, those experts merely 'present' the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric, without taking part in the voting on the application for authorisation.

16 In those circumstances, the Conseil d'État (Council of State, France) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 14(6) of Directive [2006/123] be interpreted as meaning that it permits the presence, on a collegiate body responsible for issuing an opinion on the granting of a commercial operating permit, of a recognised expert representative of the local economic fabric, whose role is limited to merely presenting the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric, without taking part in the vote on the permit application?'

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 14(6) of Directive 2006/123 must be interpreted as precluding national legislation that permits the presence, within the collegiate body responsible for issuing opinions on the granting of commercial operating permits, of recognised experts representative of the local economic fabric in the relevant catchment area who do not vote on the application for authorisation and merely present the situation of that economic fabric and the impact of the project on that economic fabric.

18 In order to answer the question referred, it is necessary to interpret Article 14(6) of Directive 2006/123 taking into consideration not only the wording of that provision, but also the context in which that provision occurs and the objectives pursued by the rules of which it is part (see, to that effect, judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 61 and the case-law cited).

19 It is apparent from the wording of Article 14(6) of Directive 2006/123 that Member States must not make access to, or the exercise of, a service activity in their territory subject to compliance with the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities. That provision lays down two exceptions, that is to say, first, the involvement of

professional bodies and associations or other organisations acting as the competent authority and, secondly, the consultation of organisations, such as chambers of commerce. The latter exception does not, however, apply where those organisations are involved in matters concerning individual applications for authorisation.

20 It is thus apparent from the wording of Article 14(6) of Directive 2006/123 that the prohibition laid down therein is worded broadly and may include any involvement other than that of professional bodies and associations or other organisations acting as the competent authority, whether direct or indirect, including within consultative bodies, of operators competing with the applicant for a commercial operating permit when the matter in question concerns the grant of such a permit.

21 Regarding the context in which Article 14(6) of Directive 2006/123 occurs, it should be borne in mind that the Court ruled, before the entry into force of Directive 2006/123, on the compatibility with the provisions of the EC Treaty relating to the freedom of establishment of national legislation providing for the presence of competitors of the applicant for a commercial operating permit within collegiate bodies competent to issue such a permit.

22 Thus, in paragraph 39 of the judgment of 15 January 2002, *Commission* v *Italy* (C-439/99, EU:C:2002:14), the Court held that provisions of Italian law making the organisation of trade fairs subject to the involvement, even if only on an advisory basis, of bodies comprised of operators exercising that activity already in the territory concerned or representatives of such operators for the purposes of recognition and approval of the organiser constituted a restriction on the freedom to provide services or on the freedom of establishment.

23 In addition, in the judgment of 24 March 2011, *Commission* v *Spain* (C-400/08, EU:C:2011:172, paragraphs 110 and 111), the Court held, in the context of the assessment of a potential justification of an infringement of the freedom of establishment by the national legislation at issue, that the establishment of a committee comprising, inter alia, representatives of the trade sector, responsible for drawing up a report before any decision on the issuing or refusal of a permit was taken, was not such as to achieve the objectives relating to town and country planning, environmental protection or consumer protection. The only sectoral interest represented in that committee was that of the existing local trade and, therefore, potential competitors of the applicant for a commercial operating permit.

24 As regards the interpretation of Article 14(6) of Directive 2006/123 in the light of the objectives thereof, it must be noted that, according to recital 12, that directive seeks to create a legal framework to ensure the freedom of establishment and the free movement of services between the Member States. However, the influence on the decision-making process exercised by the competitors of an applicant for a commercial operating permit, even if they do not take part in the voting on the permit application, is such as to impede or render less attractive the exercise of those fundamental freedoms. Those competitors might seek to delay the adoption of necessary decisions, propose excessive restrictions or obtain important competitive information.

25 It is therefore apparent from the literal, contextual and teleological interpretation of Article 14(6) of Directive 2006/123 that the prohibition laid down in that provision covers both the potential competitors of an applicant for a commercial operating permit and the operators competing with the applicant or the representatives of such competitors which, even though they do not take part directly in the voting on the permit application, are part of the competent collegiate body in that regard and, in that respect, take part in the process of the adoption of that authorisation.

26 Moreover, it should be noted that, contrary to other provisions of Directive 2006/123, no justification can be given for the requirements listed in Article 14 of that directive (see, to that effect, judgment of 16 June 2015, *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 28).

27 If it were acknowledged that the 'prohibited requirements' under Article 14 of Directive 2006/123 may be justified on the basis of primary law, it would deprive that provision of any practical effect by ultimately calling into question the ad hoc harmonisation intended by that directive (see, to that effect, judgment of 16 June 2015, *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 37).

28 It follows that the prohibition laid down in Article 14(6) of Directive 2006/123 precludes, inter alia, the taking of a decision on the granting of a commercial operating permit following the presentation, by recognised experts representative of the economic fabric in the relevant catchment area, of the situation of that economic fabric and the impact of the project concerned on the latter.

29 More specifically, in so far as those persons could be involved, at least indirectly, in the procedure relating to the granting of a commercial operating permit, their activity could be defined as involvement 'in the granting of authorisations' within the meaning of Article 14(6) of Directive 2006/123.

30 Moreover, it should be considered that recognised experts representative of the economic fabric of the relevant catchment area could embody, inter alia, the expression of the interests of actual or potential competitors of the applicant for a commercial operating permit, in so far as they participate in the appointment of those persons, which it is for the referring court to verify.

31 In those circumstances, it seems that those persons could be, at the very least, representatives of the actual or potential competitors of the applicant for a commercial operating permit, and, consequently, that the role attributed to them in the procedure relating to the granting of authorisation can come within the definition of 'direct or indirect involvement of competing operators' within the meaning of Article 14(6) of Directive 2006/123.

32 Having regard to all the foregoing considerations, the answer to the question referred is that Article 14(6) of Directive 2006/123 must be interpreted as precluding national legislation that permits the presence, within a collegiate body responsible for issuing opinions on the granting of commercial operating permits, of recognised experts representative of the local economic fabric in the relevant catchment area, even if those experts do not take part in the vote on the application for authorisation and merely present the situation of that economic fabric and the impact of the project on that economic fabric, in so far as the actual or potential competitors of the applicant participate in the appointment of those persons.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 14(6) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding national legislation that permits the presence, within a collegiate body responsible for issuing opinions on the granting of commercial operating permits, of recognised experts representative of the local economic fabric in the relevant catchment area, even if those experts do not take part in the vote on the application for authorisation and merely present the situation of that economic fabric and the impact of the project on that economic fabric, in so far as the actual or potential competitors of the applicant participate in the appointment of those persons.

[Signatures]