Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 13 June 2024[1]

Case C-242/23

Tecno*37
v
Ministero dello Sviluppo Economico,
Camera di Commercio Industria Artigianato e Agricoltura di Bologna,
intervener:
FIMAA – Federazione Italiana Mediatori Agenti D'Affari

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Freedom to provide services – Directive 2005/36/EC – Article 59(3) – Directive 2006/123/EC – Article 25 – Multidisciplinary activities – National legislation imposing a general prohibition barring property agents from engaging in the activity of property manager as a business – Relationship between Directive 2005/36 and Directive 2006/123 – Article 3 of Directive 2006/123 – Conflict with other provisions of EU law – None – Applicability of Directive 2006/123 – Overriding reasons in the public interest – Proportionality)

1. The Consiglio di Stato (Council of State, Italy) has raised with the Court of Justice its doubts as to the compatibility with EU law of the prohibition on the simultaneous pursuit on a professional basis of the activities of 'mediazione immobiliare' (property brokerage) and 'amministrazione di condominio' (property management).

2. The referring court seeks, in particular, an interpretation of Article 59(3) of Directive 2005/36/EC,[2] Article 25 of Directive 2006/123/EC[3] and Article 49 TFEU.

[1] Original language: Spanish.

[2] Directive 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 of the European Parliament and of the Council of 20 November 2013 (OJ 2013 L 354, p. 132).

[3] 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).

I. Legal framework

A. European Union law

1. Directive 2005/36

3. Article 1 ('Purpose') provides:

'This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

…'

4. Article 2 ('Scope') stipulates:

'1. This Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.

…'

5. Article 4 ('Effects of recognition') states:

'1. The recognition of professional qualifications by the host Member State shall allow beneficiaries to gain access in that Member State to the same profession as that for which they are qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

…'

6. In accordance with Article 59 ('Transparency'):

'…

3. Member States shall examine whether requirements under their legal system restricting the access to a profession or its pursuit to the holders of a specific professional qualification, including the use of professional titles and the professional activities allowed under such title, referred to in this Article as "requirements" are compatible with the following principles:

(a) requirements must be neither directly nor indirectly discriminatory on the basis of nationality or residence;

(b) requirements must be justified by overriding reasons of general interest;

(c) requirements must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective.

…’

2. Directive 2006/123

7. In accordance with Article 3 (‘Relationship with other provisions of Community law’):

‘1. If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions.

…’

8. Article 4 (‘Definitions’) reads:

‘…

(8) “overriding reasons relating to the public interest” means reasons recognised as such in the case-law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

(9) “competent authority” means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof;

…’

9. Article 25 (‘Multidisciplinary activities’) stipulates:

‘1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.

However, the following providers may be made subject to such requirements:

(a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality;

(b) providers of certification, accreditation, technical monitoring, test or trial services, in so far as is justified in order to ensure their independence and impartiality.

…'

B. Italian law

1. Codice civile (Civil Code)

10. Within the chapter devoted to the co-ownership of buildings:

– Article 1117 defines those parts of the property which are co-owned;

– Articles 1129 to 1133 set out the legal framework governing property managers, who are responsible for representing co-owners.

2. Law No 39/1989[4]

11. Article 5(3) reads:

'3. Pursuit of the activity of property brokerage is incompatible with the pursuit of business activities involving the production, sale, representation, or promotion of goods in the same commercial sector in which the brokerage activity is carried on, or with the status of employee of an entrepreneur, and with activity carried on as an employee of a public body or as an employee or collaborator in undertakings providing the financial services as laid down in Article 4 of Legislative Decree No 59 of 26 March 2010, or with the pursuit of intellectual professions in the same commercial sector in the context of which the activity of brokerage is carried on and, in any case, in the event of a conflict of interest.'

II. Facts, dispute and questions referred for a preliminary ruling

12. Since 1988, Tecno*37, the name under which a sole trader (natural person) operates, has been simultaneously pursuing the activities of property management and property brokerage.

13. On 17 March 2020, the Ministry of Economic Development, acting on an alert which it had received, invited the Camera di Commercio, Industria, Artigianato e Agricoltura di Bologna (Chamber of Commerce, Industry, Crafts and Agriculture of Bologna, Italy; 'the CCIAA') to take action in relation to the existence of a possible incompatibility or conflict of interest involving Tecno*37.[5]

[4] Legge 3 febbraio 1989, n. 39 – Modifiche ed integrazioni alla legge 21 marzo 1958, n. 253, concernente la disciplina della professione di mediatore (Law No 39 of 3 February 1989, amending and implementing Law No 253 of 21 March 1958 on the rules governing the profession of property broker) (GURI No 33 of 9 February 1989) ('Law No 39/1989'). The wording of that law was amended by Legge 3 maggio 2019, n. 37 – Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea – Legge europea 2018 (Law No 37 of 3 May 2019 laying down provisions for the fulfilment of obligations arising from Italy's membership of the European Union – European Law 2018) (GURI No 109 of 11 May 2019). That text has been the subject of later amendments which are set out in the order for reference. Its current wording, introduced on foot of a new reform in 2021, is reproduced here.

[5] It is common ground that the CCIAA is a body competent to regulate in a collective manner access to service activities or the exercise thereof for the purposes of Article 4(9) of Directive 2006/123.

14. After investigating the case,[6] the CCIAA found that the activity of property management carried on by Tecno*37 was not of a sporadic and occasional nature, but of a professional and typically business nature. Given that Tecno*37 was also a property broker, the CCIAA held that there was an incompatibility within the meaning of Article 5(3) of Law No 39/1989.

15. On 11 November 2020, the CCIAA decided to: (i) register the sole trader Tecno*37 in the Repertorio economico amministrativo (Economic and Administrative Business Directory) ('the REA') as being engaged in the activity of property management; (ii) prohibit it from continuing to pursue the activity of property broker; and (iii) register the cessation of Tecno*37's trading as a property broker in the REA.

16. Tecno*37 brought an action against that decision before the Tribunale Amministrativo Regionale per l'Emilia-Romagna (Regional Administrative Court, Emilia Romagna, Italy), which dismissed that action by judgment No 7/2022.[7]

17. Tecno*37 brought an appeal against the judgment at first instance before the Consiglio di Stato (Council of State). It claims in particular that the abstract prohibition on simultaneously pursuing the professional activities of property broker and property manager infringes EU law.

18. It is in that context that the Consiglio di Stato (Council of State) has referred three questions to the Court of Justice for a preliminary ruling, the last two of which are reproduced below:

'(2) Do the principles and objectives of Article 59(3) of Directive [2005/36] (as amended by Directive [2013/55]) and Article 25(1) of Directive [2006/123] and, more generally, of Article 49 TFEU preclude rules such as the Italian rule contained in Article 5(3) of Law No 39/1989, which establishes, as a preventive and general provision, incompatibility between [the activity of property brokerage and that of property management] due to the mere fact that the two activities are carried [on] jointly and, therefore, without there being any need for chambers of commerce [subsequently to] ascertain on a case-by-case basis the nature of the brokerage carried out, without this being based on a specifically identified and [proven] "overriding reason in the public interest" or, in any event, on a demonstration of the proportionality of the general incompatibility provided for with regard to the objective pursued?

(3) Can a property agent in any case also act as a property manager, provided he or she does not seek to sell or purchase the property he or she manages since a conflict of interest would arise in this case?'

[6] In the course of that investigation, the CCIAA asked Tecno*37 to clarify whether or not its activity as a property manager was of a business nature. Having received no reply, it set in motion a number of steps aimed at answering that question. The tax authority reported that, in 2018, Tecno*37's turnover as a property manager was well in excess of that corresponding to its property brokerage. According to the CCIAA, Tecno*37 operated out of 2 offices in which it had 3 employees and managed 39 apartment buildings.

[7] According to the court of first instance, the incompatibility stems first and foremost from the amount of revenue generated by the activity of property management, which was carried on predominantly as a business. There is a risk that the properties so managed may be unduly favoured by comparison with other available properties, which constitutes a breach of the requirements of objectivity and impartiality incumbent on a broker. The large number of buildings under Tecno*37's management, each consisting of a number of apartments, is liable to hinder the objective and impartial selection of suitable proposals for its customers when the owner of Tecno*37 carries on the activity of property brokerage simultaneously.

III. Procedure before the Court of Justice

19. The request for a preliminary ruling was received at the Registry of the Court of Justice on 18 April 2023.

20. Written observations have been lodged by Tecno*37, the CCIAA, the Czech Government, Ireland, the Italian Government and the European Commission. All of those parties (except the Czech Government) plus the Federazione Italiana Mediatori Agenti D'Affari (Italian Federation of Property Brokers) (FIMAA) and the French Government attended the hearing held on 9 April 2024.

21. At the Court's request, this Opinion will be confined to the last two questions referred for a preliminary ruling.

IV. Assessment

A. Preliminary observations

1. Content of the national legislation

22. The Italian legislation states, in very broad terms, that the activity of brokerage 'is incompatible with the pursuit of business activities involving the production, sale, representation, or promotion of goods in the same commercial sector in which the brokerage activity is carried on'.

23. The concept of 'brokerage activity' includes property brokerage. Consequently, a property broker cannot simultaneously engage in property management, since the latter entails representation in relation to assets in the same commercial sector. [8]

24. According to the referring court, Article 5(3) of Law No 39/1989 'guarantee[s] consumer protection via a clause which prevents any real conflict of interest between the broker and the object of the brokerage itself. … The incompatibility … proscribes simultaneously acting as a broker (which figure, according to the Civil Code, stands at an equal distance between the parties) and a party (in a substantial sense, as producer or dealer in the goods or services to be brokered or, in a formal sense, as an agent or representative of such goods). In any case, the incompatibility is limited to business activities'. [9]

[8] Property managers represent co-owners, in accordance with Article 1131 of the Civil Code, in managing the common parts of buildings as defined in Article 1117 of that code. Tecno*37 emphasised at the hearing that the incompatibility at issue is in fact much more extensive (which is to say that it goes beyond that arising from the connection between property brokerage and property management), since it extends to all of the other activities falling within the scope of the general wording of Article 5(3) of Law No 39/1989.

[9] Paragraph 16 of the order for reference.

2. Application of Directive 2005/36

25. The referring court asks the Court of Justice for an interpretation of Article 59(3) of Directive 2005/36. According to that provision, Member States must examine whether requirements under their legal system restricting access to a profession or its pursuit to the holders of a specific professional qualification are compatible with certain principles. [10]

26. That provision forms part of a directive on the recognition of professional qualifications between Member States. It therefore presupposes that a professional qualification obtained in one Member State (the home Member State) will be recognised, under certain conditions, in another Member State (the host Member State).

27. That assertion is borne out by Article 2(1) of Directive 2005/36: 'this Directive shall apply to all nationals of a Member State wishing to pursue a regulated profession in a Member State … other than that in which they obtained their professional qualifications, on either a self-employed or employed basis'.

28. The dispute to be decided by the referring court does not concern such a situation: on the contrary, the issue here is whether an Italian national may simultaneously carry on in Italy the activities of property broker and property manager.

29. In those circumstances, I take the view that, in the absence of any cross-border element (that is to say, there being no national of one Member State wishing to pursue a regulated profession in another Member State), Directive 2005/36 is not applicable to this case.

B. Second question referred for a preliminary ruling

30. The referring court asks the Court of Justice about the compatibility of Italian legislation with EU law, on the basis of the following assumptions: [11]

– Article 5(3) of Law No 39/1989 contains a preventive and general provision to the effect that the activity of property brokerage and that of property management are incompatible solely by virtue of being carried on jointly;

– such incompatibility does not require chambers of commerce subsequently to ascertain on a case-by-case basis the nature of the brokerage carried out;

– the incompatibility is not based on a specifically identified and proven overriding reason in the public interest or, in any event, on a demonstration of the proportionality 'of the general incompatibility provided' for with regard to the objective pursued.

31. The provisions of EU law the interpretation of which the referring court has requested are Article 59(3) of Directive 2005/36, Article 25(1) of Directive 2006/123 and, 'more generally', Article 49 TFEU.

[10] Those requirements: (a) must be neither directly nor indirectly discriminatory on the basis of nationality or residence; (b) must be justified by overriding reasons of general interest; (c) must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective.

[11] As reflected in the wording of the second question referred for a preliminary ruling. See, however, points 44 to 46 of this Opinion.

32. Of those provisions, I have already stated that Article 59(3) of Directive 2005/36 is not applicable in the present case. As regards the other two, I would recall that, 'if a national measure were to be examined simultaneously in the light of the provisions of Directive 2006/123 and those of the FEU Treaty, … that would be tantamount to introducing case-by-case examination, as a matter of primary law, and would thereby undermine the targeted harmonisation effected by that directive'. [12]

33. That case-law is in line with previous rulings in which the Court has held that, 'where a matter is regulated in a harmonised manner at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure'. [13] More specifically, the Court gives general priority to Directive 2006/123, stating that, where a restriction of the freedom of establishment falls within the scope of that directive, there is no need to examine it in the light also of Article 49 TFEU. [14]

34. The present analysis must therefore be confined to Article 25 of Directive 2006/123, contained in Chapter V ('Quality of services'), which contains the rules concerning multidisciplinary activities. Its interpretation is relevant even though the situation with which the reference for a preliminary ruling is concerned is purely internal. [15]

35. In fact, the Court has already interpreted another article (Article 24) in the same Chapter V of Directive 2006/123 in connection with a purely internal situation. It held in particular that that article precludes national legislation which totally prohibits the members of a regulated profession from engaging in canvassing. [16]

36. In dealing with multidisciplinary activities, Article 25 of Directive 2006/123 applies a general principle tempered by several exceptions:

– The general principle is that providers of services should not be subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.

– The exception that matters here is that relating to the regulated professions. [17] The rules relating to them are permitted to depart from the general principle, that is to say the freedom to pursue multidisciplinary activities: (a) if it is justified in order to guarantee compliance with the rules governing professional ethics and conduct that are inherent in the specific nature of

[12] Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 96).

[13] Judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913, paragraph 26).

[14] Judgment of 26 June 2019, *Commission* v *Greece* (C-729/17, EU:C:2019:534, paragraph 54 and the case-law cited).

[15] I refer to my Opinion in *FA.RO. di YK & C.* (C-16/23, EU:C:2024:240, point 41), in which I explained that 'the finding that the situation at issue is purely internal does not, however, affect the applicability of the provisions of Directive 2006/123 concerning freedom of establishment for providers. The Court has previously held that those provisions apply to a situation which is confined in all respects within a single Member State'. In that context, I cited, in relation to the provisions of Chapter III of Directive 2006/123, the judgments of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraphs 99 to 110); of 22 September 2020, *Cali Apartments* (C-724/18 and C-727/18, EU:C:2020:743, paragraph 56); and of 20 April 2023, *Autorità Garante della Concorrenza e del Mercato (Municipality of Ginosa)* (C-348/22, EU:C:2023:301, paragraph 40).

[16] Judgment of 5 April 2011, *Société fiduciaire nationale d'expertise comptable* (C-119/09, EU:C:2011:208, operative part).

[17] It is common ground that, in Italy, property brokerage is a regulated profession. This is clear from the order for reference when it cites the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on reform recommendations for regulation in professional services (COM/2016/0820 final). Point II.6 of that communication, concerning real estate agents, states that that profession is regulated in 14 Member States, including Italy.

each profession; and (b) if this is necessary in order to ensure the independence and impartiality of those pursuing that profession.[18]

37. The Member States are therefore empowered to impose more stringent restrictions on property brokers (where that profession is regulated) in relation to the joint pursuit of other activities. This is the case in Italy.

38. However, that power is not unconditional. Even though there is no need to have recourse to primary law, it being sufficient to interpret the provisions of Directive 2006/123 in order to answer the referring court's questions,[19] it is worth noting that restrictions on the fundamental freedoms may be regarded as justified if they are based on overriding reasons in the public interest and, if so, if they do not go beyond what is necessary in order to attain the objectives pursued.[20]

39. Now, point (a) of the second subparagraph of Article 25(1) of Directive 2006/123 authorises the Member States to impose, in respect of the regulated professions, requirements limiting the pursuit of multidisciplinary activities only if two requirements, which are in effect the same as those laid down in Articles 49 and 56 TFEU, are fulfilled.

40. I shall therefore analyse the national measure at issue from those two points of view.

1. Justification of the restriction

41. Point (a) of the second subparagraph of Article 25(1) of Directive 2006/123 includes among the permissible *justifications* for limiting the simultaneous pursuit of multidisciplinary activities those intended to guarantee compliance with the rules governing professional ethics and conduct that are specific to each regulated profession.

42. The Italian Government explains that the prohibition on the simultaneous pursuit of the professions of property broker and property manager is justified by the need to protect consumers and safeguard the independence and impartiality of the regulated profession (broker).

43. It supplements that explanation by stating that, if there were no incompatibility, there would be a risk that the owners of property units managed by someone who is at the same time a property broker would be unduly favoured compared with other owners offering their properties on the market. A property broker not subject to the restriction at issue could steer potential buyers towards the properties which he or she manages him- or herself.

44. The Consiglio di Stato (Council of State), however, does not appear to accept that explanation. By its second question, it wishes to ascertain whether EU law precludes legislation, such as the Italian legislation, which contains a preventive and general provision establishing incompatibility, 'without this being based on a specifically identified and [proven] "overriding reason in the public interest"'.[21]

[18] In accordance with recital 101 of Directive 2006/123, this ensures, 'in the interest of recipients, in particular consumers, … that it is possible for providers to offer multidisciplinary services and that restrictions in this regard be limited to what is necessary to ensure the impartiality, independence and integrity of the regulated professions'.

[19] According to recitals 2 and 5 thereof, Directive 2006/123 is specifically intended to eliminate restrictions on the freedom of establishment and the freedom to provide services as between the Member States.

[20] Judgments of 24 January 2013, *Stanleybet and Others* (C-186/11 and C-209/11, EU:C:2013:33, paragraph 27), and of 12 June 2014, *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 22).

[21] Second question referred for a preliminary ruling, *in fine*.

45. If that were the case (that is to say, if there were no justification in the public interest), the answer to that question would automatically be in the negative. The first and indispensable element required by point (a) of the second subparagraph of Article 25(1) of Directive 2006/123 would be lacking.

46. The written assertion by the Consiglio di Stato (Council of State) must be read, however, in the light of its own comments in paragraphs 15 and 16 of its order for reference. In those paragraphs, it refers to:

– the unfavourable consequences which the simultaneous pursuit of the two activities in question may have on the impartiality of the property broker; [22]

– consumer protection, which would be better defended by 'a clause which prevents any real conflict of interest between the broker and the object of the brokerage itself'.

47. From an abstract point of view, ensuring the impartiality of brokers by means of a preventive system of incompatibilities may be justified where one of the rules governing the ethics and conduct of that (regulated) profession is to maintain an equal distance between the parties and that rule would be put at risk by the joint pursuit of other activities.

48. As regards consumer protection, I have already explained that recital 101 of Directive 2006/123 links the offer of multidisciplinary services (and any restrictions aimed at ensuring the impartiality and independence of the regulated professions) to the 'interests of recipients, in particular consumers'. What is more, that link is latent in Article 4(8) of Directive 2006/123, which includes the protection of consumers as an overriding reason relating to the public interest. [23]

49. Consequently, there is in principle nothing to stop a Member State from invoking as justifications under point (a) of the second subparagraph of Article 25(1) of Directive 2006/123 the two just set out above.

50. It is, however, the referring court which has the final say on whether the prohibition on the parallel pursuit of two activities is justified under its domestic law. If that were found to be the case, the issue would be not so much whether a restrictive regime is justified in the abstract as whether that regime goes beyond what is necessary to attain its objective.

(a) Necessity and proportionality of the restriction

51. Tecno*37 calls into question the legality of the measure in question from the point of view of its necessity and proportionality. It argues that the objectives of protecting consumers and ensuring the independence and impartiality of property brokers could be attained by less drastic measures. The prohibition could simply be limited to cases where a broker acts as such and at the same time as a property manager in respect of the same property.

[22] According to the referring court, the impartiality of a property broker simultaneously pursuing the activity of property manager could be compromised. The fact of managing a large number of apartment buildings might prompt such a broker to steer potential buyers towards the properties which he or she manages, to the determent of other equally interesting properties.

[23] At the hearing, Tecno*37 reasoned that a broker who is at the same time a property manager also brings with him or her, for the benefit of consumers, experience of the problems that can arise in connection with common parts of the property which the consumer is looking to buy.

52. In their written observations, both the Commission and the Czech Government essentially take the same view. [24]

53. The Court has held 'that a Member State which relies on … the exception laid down in point (a) of the second subparagraph of Article 25(1) of Directive 2006/123, in order to establish that the prohibition on multidisciplinary activities that it has introduced is necessary for the purposes of ensuring the independence and impartiality [of the members of a regulated profession], must submit specific evidence substantiating its arguments'. [25]

54. To my mind, the Italian Government has not adduced such 'specific evidence'. Rather, it puts forward a line of reasoning which, ultimately, appears to link the incompatibility of pursuing the two activities in question jointly to the presence of a conflict of interest in a particular case rather than in the abstract. Even though it relies on arguments [26] to defend the preventive incompatibility arising from Article 5(3) of Law No 39/1989, its observations detract from or even distort the general scope of that incompatibility, since:

– it recalls that the prohibition is intended to ensure that the property broker is not encouraged to steer potential buyers towards properties in respect of which he or she acts as manager, to the neglect of other equally appealing properties; [27]

– in its submission, common logic and experience show that, whenever one of the managed apartments is put up for sale, there is a particular risk of a conflict of interest if the property broker is also the property manager.

55. Those arguments, as I have said, appear to change the nature of the general prohibition contained in Law No 39/1989 by replacing it with a watered-down version focused on the *particular* conflict of interest to which the joint pursuit of the two activities in question gives rise (or is liable to give rise) *in the case where both are carried on in relation to the same property*.

56. Proof of that transmutation (whereby the general prohibition disappears and is replaced by one aimed at avoiding a conflict of interest in relation to the same property) is that the Italian Government's argument that any incompatibility between the activity of a broker and that of a property manager should be assessed not by reference to a pre-established criterion but, rather, on the basis of a case-by-case assessment taking into account the particular features of each situation with a view to avoiding an actual conflict of interest. [28]

57. In the same vein, it goes on to say that the persons concerned would be able to prove that 'that incompatibility [does not exist], by adducing appropriate documentation [to show] that the activities in question are carried on in different practical and particular contexts, regardless of whether they are pursued as a business or as a professional activity'. [29]

[24] Paragraphs 11 and 65 of the written observations of the Czech Government and of the Commission, respectively.

[25] Judgment of 27 February 2020, *Commission* v *Belgium (Accountants)* (C-384/18, 'the judgment in *Commission* v *Belgium (Accountants)*', EU:C:2020:124, paragraph 48), which cites the judgment of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562, paragraph 74). At the hearing, the parties and the interveners discussed at length the impact of that case-law on the present case.

[26] Paragraphs 44, 45, 47 and 48 of its written observations.

[27] It cites for those purposes the judgment of the court of first instance in the original proceedings.

[28] Paragraph 54 of the Italian Government's written observations.

[29] Paragraph 55 of the Italian Government's written observations.

58. That approach by the Italian Government aligns in part with that advocated at the time by the Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy), in report No AS1173 of 18 February 2015, in relation to the amendment of Article 5(3) of Law No 39/1989. [30]

59. In the opinion of that authority, the general prohibition was 'disproportionate and unnecessary for the purpose of ensuring the impartiality and independence of brokers in the pursuit of their own activities'. It went on to say that, 'in order to preserve the independence and impartiality of brokers, it seems sufficient to prohibit pursuit of the activity of broker only in those cases where the broker's independence and status as a third party in the brokerage relationship may be compromised, for example, in situations where the broker is linked to one of the parties by a relationship of subordination, dependence or representation'.

60. Now, if that were how the Italian legislation is to be read, [31] the incompatibility at issue would be justified only by the need to prevent particular conflicts of interest. [32] Such conflicts do not arise, however, even in the case of immovable properties, where the broker does not simultaneously act as property manager in relation to those properties.

61. By the same token, if everything ultimately boils down to avoiding any conflict of interest in respect of the purchase of a particular property, the preventive and absolute prohibition is divested of substance and is not essential to attaining the objective pursued. As I have already said, the general prohibition becomes disproportionate if what it seeks to do is to stop individual conflicts of interest which may hypothetically arise where the same property is the subject of both management and brokerage.

62. The second question referred for a preliminary ruling having been drafted in the terms already described, the foregoing considerations prompt me to suggest an answer in the affirmative.

63. Limiting incompatibility to any conflicts of interest that may arise in cases where the same property is the subject of both management and brokerage means that the monitoring of incompatible activities will be based on case-by-case assessments rather than on a general prohibition such as that under analysis here.

64. The Italian Government states that it cannot burden the CCIAA with the task of verifying the neutrality of every specific transaction in order to assess whether there is a conflict of interest in cases where the two activities in question are pursued in relation to the same property. [33]

65. To my mind, however, this is not an insurmountably difficult task if the national legislature adopts the appropriate measures. One of these has already been incorporated into its legislation, in that deeds of sale of immovable properties must record the intervention of a property

30 Report adduced as an annex to Tecno*37's written observations.

31 It is not clear that that is the only reading or the one most in line with the text of the Italian legislation. According to a note from the Ministry of Economic Development of 22 May 2019, the general incompatibility of the activities of property manager and property broker is based on the fact that the latter profession performs, inter alia, representation activities as a business. The joint pursuit of activities in relation to the same asset triggers a particular conflict of interest constituting an additional ground of incompatibility. Consequently, if a general ground of incompatibility is present, there is no longer any need to analyse the existence of conflicts of interest on a case-by-case basis. See paragraph 47 of the Commission's written observations.

32 Paragraph 16 of the order for reference. According to that order, the limitation of the joint pursuit of the professions of property agent and property manager is intended to avoid any conflict of interest between the property agent and the object of the brokerage itself.

33 Paragraph 49 of its written observations.

broker.[34] That mechanism could be supplemented by the further requirement that such deeds of sale must include express declarations that the property broker is not also the manager of the building of which the property purchased forms part.[35]

66. In short, as in the case that gave rise to the judgment in *Commission* v *Belgium (Accountants)*:

– the Italian Republic has failed to demonstrate why the prohibition at issue is the only measure capable of attaining the desired objectives. Measures less restrictive of the freedom to provide services and more respectful of the criterion informing Article 25(1) of Directive 2006/123 could be sufficiently effective to attain those objectives;[36]

– *ex post* review by the professional chambers would constitute a less restrictive measure for attaining the objective of guaranteeing the independence and impartiality of property brokers.[37] That review, facilitated by the declarations that will compulsorily have to be included in deeds of sale, could be carried out without burdening the parties with additional bureaucratic hurdles[38] and without imposing on brokers a general prohibition, such as that in the present case, that goes beyond what is essential to safeguard their independence and impartiality.

C. Third question referred for a preliminary ruling

67. The referring court wishes to ascertain whether a property agent can also act as a property manager, provided he or she does not seek to sell or purchase the property he or she manages since a conflict of interest would arise in this case.

1. Admissibility

68. Ireland submits that the third question referred for a preliminary ruling is inadmissible, since it seeks to obtain from the Court of Justice an advisory opinion on the basis of a factual premiss that does not arise in the underlying dispute. In support of that objection, it states:

– the activity of a property broker is different from that of a property agent – the former, according to the order for reference, stands at an equal distance between the parties, whereas the latter, under the Irish model, may act as agent on behalf of one of the parties to the proposed transaction (either as a vendor's agent or as a purchaser's agent);

– the question referred is premissed on the flawed assumption that a conflict of interest would necessarily arise if a property agent were engaged to purchase or sell a property that he or she

[34] In accordance with Article 35(22) of Decreto-legge 4 luglio 2006, n. 223, Disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonchè interventi in materia di entrate e di contrasto all'evasione fiscale (Decree-Law No 223 of 4 July 2006 laying down urgent measures for economic and social revival, for the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion) (GURI No 153 of 4 July 2006) ('Decree-Law No 223/2006'), each party is obliged, as a measure to combat tax evasion and avoidance, to declare whether it has used the services of a broker. *Decree-Law No 223/2006 was converted, with amendments, into Law No 248 of 4 August 2006* (ordinary supplement to GURI No 183 of 11 August 2006).

[35] The Commission proposes (paragraph 62 of its written observations) the introduction of measures imposing specific transparency and disclosure obligations in relation to the performance of both functions.

[36] The judgment in *Commission* v *Belgium (Accountants)*, paragraph 54.

[37] The judgment in *Commission* v *Belgium (Accountants)*, paragraphs 57 and 58.

[38] The references to administrative simplification are reiterated in the preamble to Directive 2006/123 and reflected in the text thereof (in particular, Chapter II).

manages. While that may be the position in the case of a neutral property broker, it will not be so if the broker acts as agent on behalf of, for example, a vendor.

69. Requests for a preliminary ruling on the interpretation of EU law enjoy a presumption of relevance. It is, moreover, for the national court to assume responsibility for defining the factual and legislative framework, the accuracy of which it is not for the Court to verify. The latter may refuse to rule on such a request only in exceptional cases which the Court has specified. [39]

70. On that basis, Ireland's objection must be dismissed. As has already been stated, property brokers in Italy are independent professionals that stand at an equal distance between the parties to the transaction in which they are acting. Whether or not their role is the same as that of other players on that market in Ireland is irrelevant for the purposes of the present case.

71. The material premiss provided by the referring court, by which the Court must be bound, is that independent property brokers who manage properties may 'be induced' to steer potential buyers towards those properties, to the detriment of their impartiality.

72. The third question referred for a preliminary ruling, which seeks to determine whether any such conflict of interest arises where the property broker acts in the sale or purchase of the building which he or she manages, is therefore admissible.

2. Assessment

73. In my view, the substance of the question raised is adequately addressed by the foregoing considerations concerning the scope of the incompatibility at issue, which is linked to the existence of a conflict of interest in relation to the same property.

V. Conclusion

74. In the light of the foregoing, I suggest that the Court answer the second and third questions referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) as follows:

Article 25(1) 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 which imposes a preventive and general prohibition on the joint pursuit of the regulated profession of property broker and the activity of property manager; and

must be interpreted as not precluding the prohibition of the joint pursuit of those two activities where that may give rise to a conflict of interest because the property brokerage service is provided by a professional in relation to a co-owned property which he or she is responsible for managing.

[39] Thus, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the referring court. See, inter alia, judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)* (C-113/22, EU:C:2023:665, paragraphs 30 and 31).