Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 4 July 2024[1]

Case C-295/23

Halmer Rechtsanwaltsgesellschaft UG
v
Rechtsanwaltskammer München,
interveners:
SIVE Beratung und Beteiligung GmbH,
Daniel Halmer

(Request for a preliminary ruling from the Bayerischer Anwaltsgerichtshof (Bavarian Higher Lawyers' Court, Germany))

(Reference for a preliminary ruling – Free movement of capital – Freedom of establishment – Directive 2006/123/EC – Shareholding by a commercial company in a law firm – Revocation of the law firm's registration with the professional body on account of that holding)

1. The dispute in the proceedings which have given rise to this reference for a preliminary ruling concerns whether an Austrian company which is not authorised to provide legal advice services is entitled to acquire part of the share capital of a law firm operating in Germany.

2. The dispute arose after the Rechtsanwaltskammer München (Munich Bar Association; 'the Bar Association') prohibited that acquisition on the grounds that it did not comply with the rules governing the legal profession in Germany.[2] In accordance with those rules, a law firm operating in the legal form of a limited liability company, in which persons who did not practise certain professions were not entitled to hold shares, was permitted to practise law.

3. In order to respond to the request for a preliminary ruling, the Court must determine:

– whether, when a financial investment involves a certain degree of influence over the management of a law firm, the examination of this must be conducted in the light of one or more of the fundamental freedoms enshrined in the TFEU and, as the case may be, Directive 2006/123/EC;[3]

[1] Original language: Spanish.

[2] Bundesrechtsanwaltsordnung (Federal Lawyers' Code), in the version in force until 31 July 2022 ('the BRAO'). According to the order for reference (paragraph 3), that is the version applicable to the dispute and therefore I shall generally refer to it in my Opinion, unless it is important to draw attention to any detail of the version of the BRAO in force since 2022.

[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).

– whether national legislation which restricts the holding of shares in law firms to lawyers and the members of certain professions (but not others), and in all cases reserves to lawyers the majority of the share capital and votes, is compatible with EU law.

I. Legislative framework

A. European Union law: Directive 2006/123

4. Recital 73 reads:

'The requirements to be examined include national rules which, on grounds other than those relating to professional qualifications, reserve access to certain activities to particular providers. These requirements also include obligations on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons, and requirements which relate to the shareholding of a company, in particular obligations to hold a minimum amount of capital for certain service activities or to have a specific qualification in order to hold share capital in or to manage certain companies. …'

5. Recital 77 is worded as follows:

'Where an operator travels to another Member State to exercise a service activity there, a distinction should be made between situations covered by the freedom of establishment and those covered, due to the temporary nature of the activities concerned, by the free movement of services. As regards the distinction between the freedom of establishment and the free movement of services, … the key element is whether or not the operator is established in the Member State where it provides the service concerned. If the operator is established in the Member State where it provides its services, it should come under the scope of application of the freedom of establishment. If, by contrast, the operator is not established in the Member State where the service is provided, its activities should be covered by the free movement of services. … the temporary nature of the activities in question should be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity. …'

6. Recital 88 states:

'The provision on the freedom to provide services should not apply in cases where, in conformity with Community law, an activity is reserved in a Member State to a particular profession, for example requirements which reserve the provision of legal advice to lawyers.'

7. Pursuant to 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. These include:

…'

8. Article 4 ('Definitions') provides:

'For the purposes of this Directive, the following definitions shall apply:

…

(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; … the protection of consumers, recipients of services …'

(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;

…

(11) "regulated profession" means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC [of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22)];

…'

9. Article 9 ('Authorisation schemes') provides:

'1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.'

10. Article 11 ('Duration of authorisation') provides in paragraph 4 thereof:

'This Article shall be without prejudice to the Member States' ability to revoke authorisations, when the conditions for authorisation are no longer met.'

11. Article 15 ('Requirements to be evaluated') states:

'1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

…

(c) requirements which relate to the shareholding of a company;

…

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality 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.

…'

12. Article 25 ('Multidisciplinary activities') provides:

'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;

…

2. Where multidisciplinary activities between providers referred to in points (a) and (b) of paragraph 1 are authorised, Member States shall ensure the following:

(a) that conflicts of interest and incompatibilities between certain activities are prevented;

(b) that the independence and impartiality required for certain activities is secured;

(c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy.

…'

B. National law: the BRAO

13. Paragraph 59a provided: [4]

'(1) Lawyers may set up a partnership with members of a bar association, industrial property agents, tax advisers, tax representatives, accountants and certified auditors to practise their profession jointly in the framework of their respective areas of professional competence …

(2) Lawyers may also practise their profession jointly:

1. with members of the legal profession of other States who … are authorised to establish themselves in accordance with this law and have their law firm abroad,

2. with industrial property agents, tax advisers, tax representatives, accountants and certified auditors from other States who practise an equivalent profession, in terms of training and areas of competence, to the professions referred to in the Pastentanwaltsordnung (Regulation on industrial property agents), the Steuerberatungsgesetz (Law on the provision of tax advice) and the Wirtschaftsprüferordnung (Regulation on the auditing of accounts) and who are entitled to practise their professions jointly with industrial property agents, tax advisers, accountants and certified auditors in accordance with this law.

…'

14. Paragraph 59c permitted law firms to practise law in the form of limited liability companies.

15. Paragraph 59e provided:

'(1) Only lawyers and members of the professions referred to in the first sentence of Paragraph 59a(1) and in Paragraph 59a(2) may be partners in a law firm. They must carry on a professional activity in the law firm. …

(2) The majority of the shares and voting rights must be held by lawyers. In so far as the partners are not authorised to practise one of the professions referred to in the first sentence of subparagraph 1, they shall not have the right to vote.

[4] The wording of the BRAO which I am using is, as I have stated, the wording which preceded its amendment in 2022.

(3) The shares in a law firm must not be held on behalf of third parties and third parties must not share in the profits of the law firm.

(4) A partner may appoint as a proxy to exercise his or her voting rights only a partner who has the right to vote and is a member of the same profession or is a lawyer.'

16. Paragraph 59f provided:

'(1) Law firms must be managed responsibly by lawyers. The majority of the directors must be lawyers.

(2) Only persons authorised to practise a profession referred to in the first sentence of Paragraph 59e(1) may be directors.

…

(4) The independence of lawyers who are directors or representatives in accordance with subparagraph 3 must be guaranteed when they practise their profession as lawyers. Any influence exerted by partners, in particular through instructions or contractual links, is prohibited.'

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

17. Halmer Rechtsanwaltsgesellschaft UG ('Halmer UG') is a law firm operating in Germany in the form of a *haftungsbeschränkte Unternehmergesellschaft* (limited liability entrepreneurial company). Mr Halmer was originally its director and sole partner.

18. By a contract signed on 31 March 2021, 51 of Mr Halmer's 100 shares were transferred to SIVE Beratung und Beteiligung GmbH ('SIVE'), a limited liability company governed by Austrian law which is not authorised to provide legal advice either in Germany or in Austria. At the same time, the articles of association of Halmer UG were amended with the aim of guaranteeing the independence of the board, on which only lawyers were entitled to serve.

19. On 19 May 2021, the Bar Association informed Halmer UG that, in accordance with the BRAO, inter alia Paragraph 59a et seq. thereof, the transfer of shares to SIVE was unlawful, with the result that Halmer UG's authorisation to practise law would be revoked for as long as that transfer remained in place.

20. On 26 May 2021, Halmer UG informed the Bar Association that the transfer would remain in place and requested that it adopt a decision.

21. On 9 November 2021, the Bar Association revoked Halmer UG's authorisation to practice law.

22. On 26 November 2021, Halmer UG brought an action against the Bar Association's decision before the Bayerischer Anwaltsgerichtshof (Higher Bavarian Lawyers' Court, Germany), which decided to refer the following questions to the Court of Justice for a preliminary ruling:

'[(1)] Does it constitute an unlawful restriction of the right to free movement of capital under Article 63(1) TFEU if, under the laws of a Member State, the admission to practise law held by a law company must be withdrawn where:

[(a)] a share in the law company is transferred to a person who does not satisfy the special professional requirements governing the acquisition of a share under the law of the Member State? Under those provisions, a share in a law company may be acquired only by a lawyer or other member of a bar association, a patent attorney, tax consultant, tax representative, auditor or certified accountant, a member of a legal profession from another State who is permitted to provide legal advice in Germany, or a patent attorney, tax consultant, tax representative, auditor or certified accountant of another State who is authorised to carry on that activity in Germany or a doctor or pharmacist;

[(b)] a partner satisfies the special requirements set out in point [(a)], but is not professionally active in the law company?

[(c)] because of the transfer of one or more shares or voting rights, the majority thereof are no longer held by lawyers?

[(2)] Does it constitute an unlawful restriction of the right to free movement of capital under Article 63(1) TFEU where a partner who is not entitled to practise a profession in accordance with point [(1a)] does not have a voting right, even though the company's articles of association contain clauses, in order to protect the independence of legal professionals and of the company's legal activities, under which it is ensured that the company is represented as managing directors or authorised officers only by lawyers, partners and the partners meeting are prohibited from influencing the management board through instructions or indirectly through the threat of disadvantages, partners' resolutions in contravention of those rules are rendered ineffective and the obligation of legal confidentiality is extended to partners and persons acting on their behalf?

[(3)] Do the restrictions referred to in [1(a) and 2] satisfy the conditions laid down in Article 15(3)(a) to (c) of Directive 2006/123 … for permitted interferences with the freedom to provide services?

[(4)] In the event that, in the view of the Court of Justice, the applicant's right to free movement of capital (points [1 and 2]) is not affected and there is no infringement of [Directive 2006/123] (point [3]):

Is the right of [SIVE] to freedom of establishment under Article 49 TFEU infringed by the restrictions referred to in points [1 and 2]?'

III. Procedure before the Court of Justice

23. The request for a preliminary ruling was received at the Registry of the Court on 9 May 2023.

24. Written observations were lodged by Halmer UG and SIVE, the Bar Association, the German, Austrian, Spanish and French Governments, and the European Commission. All those parties, with the exception of the French Government and in addition to the Croatian and Slovenian Governments, attended the hearing held on 30 April 2024.

IV. Analysis

A. Preliminary considerations

25. The referring court[5] is seised of a dispute concerning the revocation of a law firm's authorisation to practise law.

26. The Bar Association submits that the law firm whose authorisation was revoked breached, subsequently, a number of the requirements laid down by the BRAO, including, in particular, the following:

– the partners must be lawyers or practise certain liberal professions;

– the partners must carry on a professional activity within the law firm;

– the majority of the shares and voting rights must be held by lawyers.

27. The referring court asks, essentially, whether those requirements, laid down by national law:

– wrongly restrict the free movement of capital guaranteed by Article 63(1) TFEU;

– fail to fulfil the conditions which, under Directive 2006/123, justify interference in the take-up or pursuit of a service activity;

– in the alternative, breach the freedom of establishment enshrined in Article 49 TFEU.

28. Since the referring court, albeit giving priority to Article 63 TFEU, also frames its questions in relation to Article 49 TFEU and Directive 2006/123, it will be necessary to identify, as a preliminary point, which freedom is directly affected.

29. I believe that it is possible to provide the referring court with a single answer which covers all its questions.

[5] Although none of the parties have questioned its judicial nature, it is helpful to note that the Bayerischer Anwaltsgerichtshof (Bavarian Higher Lawyers' Court) satisfies the conditions of a 'court or tribunal' for the purposes of Article 267 TFEU. It was created under a statutory provision (Paragraph 100(1) of the BRAO) to give rulings, on a permanent basis, on the disputes allocated to it (Paragraph 112a(1) of the BRAO). Its jurisdiction is compulsory (Paragraph 112a of the BRAO), is exercised in *inter partes* proceedings that are essentially governed by common procedural provisions (Paragraph 112c of the BRAO), and is formalised in judgments that are subject to a right of appeal (Paragraph 112e of the BRAO). In short, it is an independent court that is part of the German judicial system and is composed, jointly, of professional judges and of lawyers who are invested with the status of honorary judges in the exercise their duties (Paragraph 101, Paragraph 103(2) and Paragraph 104 of the BRAO), who are appointed for a period of five years and have security of tenure (Paragraph 103(1) and (2) of the BRAO).

B. The freedoms affected in this case

1. The free movement of capital or freedom of establishment?

30. National provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in the light of the free movement of capital (Article 63 TFEU). [6]

31. However, national legislation 'intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities' falls within the scope of Article 49 TFEU, relating to freedom of establishment. [7]

32. The referring court considers that the freedom affected in this case is the free movement of capital. It takes into account the fact that 51% of the shares in Halmer UG were transferred to SIVE, but it does not believe that that fact alone means that SIVE is in a position to exert a decisive influence over Halmer UG.

33. In the referring court's view:

– a decisive influence is not determined solely by the amount of shares but also by the rules governing the operation of the company laid down in its articles of association;

– following their amendment to enable the transfer of shares to SIVE, Halmer UG's articles of association do not permit SIVE to exert a decisive influence over the law firm; [8]

– the investment was therefore a 'portfolio' investment, that is, an investment made solely with the intention of injecting capital without any intention to influence the management and control of the undertaking. [9]

34. The amount of a shareholding is a relevant factor for assessing the influence which that holding confers on the person making the investment. However, that alone is not sufficient to conclude that a majority shareholding enables effective influence over a company. [10] Conversely, that influence may also be attained through smaller shareholdings. [11]

6 Judgment of 16 February 2023, *Gallaher* (C-707/20, EU:C:2023:101, paragraph 56).

7 Judgment of 24 February 2022, *Viva Telecom Bulgaria* (C-257/20, EU:C:2022:125, paragraph 79).

8 The referring court points out that the amended articles of association restrict the management of the company's affairs solely to lawyers; that directors may be removed only by unanimous decision; that partners are prohibited from influencing directors through instructions or threats; and that, in particular, partners may not influence the acceptance, refusal or management of a term of office. In short, the referring court believes that the articles of association are consistent with and supplement national legislation, since, pursuant to Paragraph 59f of the BRAO, they guarantee independence in the pursuit of their profession for lawyers who act as directors or act in the name of the firm (paragraph 40 of the order for reference).

9 Judgment of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 40).

10 It is, of course, where that shareholding is equivalent to 100% of the capital (judgment of 13 July 2023, *Xella Magyarország*, C-106/22, EU:C:2023:568, paragraph 43).

11 Judgment of 21 October 2010, *Idryma Typou* (C-81/09, EU:C:2010:622, paragraph 51): 'Depending on the manner in which the remainder of a company's capital is distributed, in particular if it is spread among a large number of shareholders, a holding of 25% may be sufficient to have control of a company or at least to exert a definite influence on the company's decisions and determine its activities', with the result that the national legislation 'can therefore fall within the scope of Article 49 TFEU.' See, in that connection, point 94 et seq. of this Opinion.

35. The ownership by SIVE of 51% of the shares of Halmer UG is a factor which could possibly be outweighed by others, to the extent that it would be possible to rule out that SIVE exerts an effective influence on the activities of Halmer UG. The amendments to the articles of association described by the referring court [12] would support that view.

36. That is the question of fact which the national court must examine and determine. If, as appears from the wording of the order for reference, the investment made by SIVE was simply a contribution of capital made without any intention to influence the management of the firm, the examination would have to focus on Article 63 TFEU.

37. However, the examination may take into account not only the specific circumstances of the investment made but also the more general and abstract focus of the aim of the provision at issue.

38. As the German, Austrian, Spanish and French Governments point out, the provision applied here concerns the taking-up of and the conditions for practising the profession of lawyer. [13] That is the prevailing criterion for the purpose of identifying the freedom at issue.

39. The BRAO is one of a raft of measures which, among other aims, is intended to guarantee the professional independence of lawyers. In accordance with that aim, it prohibits persons who hold a purely financial interest and are not subject to the ethical rules governing the practice of law from involvement in law firms. [14]

40. The German legislature appears to regard as undesirable the exertion by investors who are not legal practitioners (with the exception of the members of certain professions having a professional body, which the BRAO treats as equivalent to the legal profession) of even the slightest influence, not just a decisive influence, on the operation of a law firm. [15]

41. Pursuant to national law, therefore, a financial investment in a law firm by persons who are not members of the legal profession (or of the professions treated as equivalent thereto) results in influence that is such as to distort the practice of that profession.

42. The prohibition of the injection of capital into law firms by persons who are not lawyers (or do not practise an equivalent profession for the purposes of national law) constitutes a barrier to the freedom of establishment (Article 49 TFEU), which is the freedom that is primarily affected.

43. That being so, any undermining of the exercise of the free movement of capital would represent only a collateral and secondary effect of legislation which has a primary aim of a different nature. That legislation significantly limits the right of economic operators to establish themselves through limited liability companies authorised to provide legal advice services which are restricted to lawyers.

44. In those circumstances, it is not necessary to conduct a separate examination of that legislation in the light of Article 63 TFEU.

[12] See footnote 8 to this Opinion.

[13] According to settled case-law, in the context of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration. See judgment of 11 June 2020, *KOB* (C-206/19, EU:C:2020:463, paragraph 23 and the case-law cited).

[14] As stated in paragraph 53 of the order for reference.

[15] The implied assumption in the BRAO is that a financial investment in a law firm, whatever the percentage of shares acquired, entails an influence which, by definition and however small it may be, is liable to disrupt the independent practice of law.

2. Article 49 TFEU or Directive 2006/123?

45. The next step is to determine whether the contested provision should be examined in the light of Article 49 TFEU or Directive 2006/123.

46. Directive 2006/123 contains general provisions that are necessary to facilitate the exercise of the freedom of establishment for service providers (Article 1(1)).

47. The Court attaches general priority to Directive 2006/123: where a restriction of the freedom of establishment falls within the scope of Directive 2006/123, there is no need to examine it also in the light of Article 49 TFEU. [16]

48. Accordingly, the national provisions at issue must be compared with the provisions of Directive 2006/123, which, in principle, applies to legal services provided by lawyers. [17]

49. In accordance with Article 3(1) of Directive 2006/123, in the event of a conflict, the provisions of another EU act 'governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions' are to take precedence over the directive.

50. The EU legislature adopted Directive 77/249/EEC [18] and Directive 98/5/EC [19] to facilitate the freedom to provide services or the practice of the profession of lawyer on a permanent basis in the Member States. Those directives contain no specific provisions governing the acquisition of shares or the exercise of voting rights in law firms.

51. Directive 98/5 'is without prejudice in particular to national legislation governing access to and practice of the profession of lawyer'. [20] In particular, Article 11 of that directive, governing 'joint practice' by lawyers, proceeds on the basis that Member States may permit or prohibit that way of practising the profession.

52. The Court has acknowledged that, 'in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory … For that reason, the rules applicable to that profession may differ greatly from one Member State to another'. [21]

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

17 Judgment of 13 January 2022, *Minister Sprawiedliwości* (C-55/20, EU:C:2022:6, paragraph 88).

18 Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

19 Directive 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 (OJ 1998 L 77, p. 36).

20 Recital 7 of Directive 98/5.

21 Judgment of 19 February 2002, *Wouters and Others* (C-309/99, EU:C:2002:98, paragraph 99), citing judgments of 12 July 1984, *Klopp* (107/83, EU:C:1984:270, paragraph 17), and of 12 December 1996, *Reisebüro Broede* (C-3/95, EU:C:1996:487, paragraph 37).

53. As EU law currently stands, Member States are therefore free to allow the practice of law through limited liability companies. Depending on their definition of the legal profession, and the reasons relating to the public interest on which the associated decision is based, I believe, unlike the Commission, that Member States are entitled to simply prohibit that form of joint practice of the profession. [22]

54. By the same token (in the absence of harmonisation of this specific area in current EU law), States which are in favour of the practice of law by means of limited liability companies are entitled to impose certain conditions on the structure and operation of such companies. [23]

55. Based on the acceptance of differences between Member States in this area, [24] where a Member State permits the practice of law through limited liability companies, as in this case, the restrictions which it imposes must be examined in the light of Directive 2006/123.

56. The Federal Republic of Germany could, I repeat, have opted simply to preclude the practice of law through limited liability companies, without that having infringed the fundamental freedoms guaranteed by the European Union. However, since it permits the creation and establishment of such companies, the restrictions by means of which it limits the freedom of lawyers to practise their profession must be compatible, in particular, with Directive 2006/123, in the light of which those restrictions must be examined.

57. That examination requires a determination of: (a) whether the national measures at issue constitute a restriction of the freedom of establishment; and (b) whether, if the measures are found to be restrictive, they have been properly justified.

[22] In my view, there is nothing to prohibit a Member State from limiting the joint practice of law to partnerships and not limited liability companies. When deciding one way or the other, each Member State must weigh up factors such as the presence, in an increasingly globalised legal services market, of competitors operating through limited liability companies. It may also examine whether it is advisable for such firms to receive injections of foreign funds (in the form of capital and not just loans) in order to face the technological challenges which digitalisation and artificial intelligence represent for law firms. Until such time as there are harmonised rules in this area at EU level, each Member State is free to allow or prohibit, according to its own interests, the presence of limited liability companies in its legal profession.

[23] In the judgment of 19 May 2009, *Commission* v *Italy* (C-531/06, EU:C:2009:315), the Court held that national legislation pursuant to which only pharmacists could be members of companies and firms operating pharmacies was compatible with the freedom of establishment and the free movement of capital.

[24] See, in that respect, 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) 820). At paragraph II.4 of another, later, Communication (COM(2021) 385) on taking stock of and updating the reform recommendations for regulation in professional services of 2017, the Commission stated that 'the possibility to set up a law firm under a specific legal form is strongly linked to shareholding and voting rights requirements. *A vast majority of Member States require all the shares to be held by lawyers*.' Italics added.

C. Analysis of the restriction

1. Existence of the restriction

58. The restriction is derived from the conditions laid down by the BRAO on the holding of shares in a law firm. The referring court describes those conditions in the following terms:

– a shareholder must be a lawyer, industrial property agent, tax adviser, tax representative, accountant, certified auditor, [25] doctor or pharmacist; [26]

– the majority of the firm's shares must be held by lawyers;

– shareholders must carry on a professional activity within the firm;

– the majority of the voting rights must be reserved to lawyers.

59. I do not believe that there is any doubt as to whether a restriction of freedom of establishment exists in this case. Under the BRAO, SIVE is precluded from establishing itself as a partner in a firm (Halmer UG) which provides services reserved to lawyers. SIVE may not acquire shares in Halmer UG, and if it does so its authorisation to practise law will be revoked, as has occurred.

2. Justification for the restriction

60. The restriction must be examined under Article 15 of Directive 2006/123, paragraph 2(c) of which provides that Member States must assess requirements 'which relate to the shareholding of a company' in order to verify whether they satisfy the conditions referred to in paragraph 3 thereof. [27]

61. The conditions referred to in Article 15(3) are, essentially, that the requirements laid down: (a) must not be discriminatory according to nationality or the location of the registered office; (b) must be justified by an overriding reason relating to the public interest; and (c) 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'.

62. Those conditions are essentially the same as those laid down by the case-law of the Court in relation to restrictions of the freedoms of movement protected by Articles 49 and 63 TFEU. That fact tempers, to a large extent, the debate as regards identification of the freedom specifically affected in the present case.

[25] All those cases also include professionals from other States who are authorised to practise the profession in Germany.

[26] The inclusion of doctors and pharmacists reflects the broadening of the scope of Paragraph 59a of the BRAO, as a result of a judgment of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) of 12 January 2016 (BVerfGE 141, 82).

[27] The Court has held that Article 15(2)(c) of Directive 2006/123 is applicable to the holders of shares in companies. See, for example, judgment of 29 July 2019, *Commission* v *Austria (Civil engineers, patent agents and veterinary surgeons)* (C-209/18, EU:C:2019:632; 'the judgment in *Commission* v *Austria (Civil engineers)*', paragraph 84). A restriction on the exercise of voting rights constitutes a limitation of the freedom of establishment (judgment of 8 November 2012, *Commission* v *Greece*, C-244/11, EU:C:2012:694, paragraph 29), which also falls within the scope of Article 15(2)(c) of Directive 2006/123.

(a) Non-discrimination

63. The restriction at issue does not relate, directly or indirectly, to the nationality or the location of the registered office of the persons concerned and instead relates equally to nationals and non-nationals. It therefore complies with Article 15(3)(a) of Directive 2006/123.

(b) Overriding reason relating to the public interest

64. The same is true with regard to the justification required by Article 15(3)(b) of Directive 2006/123. The reasons which, according to the referring court, are the basis for the provisions of the BRAO can be classified as overriding reasons relating to the public interest.

65. That is because the restriction is intended to guarantee, on the one hand, the independence of lawyers, the proper administration of justice, compliance with the principle of transparency and the protection of professional secrecy;[28] and, on the other hand, the protection of consumers of legal services.[29]

66. More specifically, and as the Commission has stated, the national legislature identified, at the relevant time, as objectives of the measure the safeguarding of: (a) the professional independence of lawyers; (b) compliance with the legislation governing the profession; (c) the quality of services; and (d) the protection of individuals.[30]

67. It is common ground that all those justifications are permitted within the concept of 'overriding reason relating to the public interest'. The Court has recognised them as such[31] and they are included in the reasons set out in Article 4(8) of Directive 2006/123.

(c) Proportionality and consistency

68. The proportionality required by Article 15(3)(c) of Directive 2006/123 means that the requirements at issue must be suitable for securing the attainment of the objective pursued, 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.

69. Therefore, the key is the *objective* pursued by the requirements laid down. From the perspective of that objective, it is necessary to assess whether those requirements are *suitable*, strictly *necessary* and whether there are any alternative conditions which are *less restrictive* but would still guarantee the same result.

[28] Paragraphs 43 and 53 of the order for reference.

[29] Paragraphs 61 and 62 of the order for reference.

[30] The Commission's written observations, paragraph 32. In the Commission's view, the objective of the protection of individuals coincides with that of the protection of recipients of services, which Article 4(8) of Directive 2006/123 includes as an overriding reason relating to the public interest. As regards the professional independence of lawyers, this is covered by the safeguarding of the sound administration of justice, to which recital 40 of Directive 2006/123 refers.

[31] Judgment of 17 December 2020, *Onofrei* (C-218/19, EU:C:2020:1034) paragraph 34: 'the protection of consumers, in particular recipients of legal services provided by persons involved in the administration of justice, and, second, the proper administration of justice are objectives which feature among those which may be regarded as overriding reasons in the public interest capable of justifying restrictions both on the freedom to provide services … as well as … the freedom of establishment'.

70. As regards the *objectives* served by the requirements at issue, I shall concentrate primarily on the objectives of safeguarding the professional independence of lawyers and protecting the interests of individuals. The latter may legitimately expect that a lawyer to whom they have entrusted their defence will act in a way that is not influenced by pressure from third parties who are not members of the legal profession. [32]

(1) Limitation on the holding of shares to certain categories of profession

71. At the outset, the BRAO prohibits law firms from including as partners persons who do not practise law. That prohibition is suitable to safeguard the professional independence of lawyers and to protect individuals where lawyers have decided to form a partnership to practise their profession jointly. The practice of law, as such, combines a clear private interest with the satisfaction of certain public interests. [33]

72. The prohibition at issue makes sense in the light of the fact that 'lawyers are assigned a fundamental role in a democratic society, that of defending litigants … [a] fundamental task [which] entails, on the one hand, the requirement, the importance of which is recognised in all the Member States, that any person must be able, without constraint, to consult a lawyer *whose profession encompasses, by its very nature, the giving of independent legal advice to all those in need of it* and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client'. [34]

73. That is why 'the absence of conflicts of interest is essential to the practice of the profession of lawyer and requires, in particular, that lawyers should be in a situation of independence vis-à-vis the public authorities *and other operators*, by whom they must never be influenced'. [35]

74. The rules of professional ethics and discipline to which lawyers are made subject and 'which are laid down and enforced in the general interest' [36] are the necessary counterpart to the 'conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs.' [37]

75. Therefore, the reservation to lawyers of the right to be part of a law firm is suitable to safeguard the professional independence of lawyers, on the one hand, and the protection of individuals, on the other.

[32] Contributing to the sound administration of justice and the protection of professional secrecy may also be regarded as grounds for justification but I do not believe that it is necessary to conduct an examination of these, which would corroborate what has already been deduced from the other two objectives.

[33] It is possible to apply to lawyers, by analogy and in spite of the different circumstances, the Court's findings in relation to pharmacy operators: 'It is undeniable that [a lawyer] pursues, like other persons, the objective of making a profit. However, as a [lawyer] by profession, he is presumed to operate the [law firm] not with a purely economic objective, but also from a professional viewpoint. His private interest connected with the making of a profit is thus tempered by his training, by his professional experience and by the responsibility which he owes, given that any breach of the rules of law or professional conduct undermines not only the value of his investment but also his own professional existence.' Judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraph 37).

[34] Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963, paragraph 28) (italics added), citing, inter alia, the judgment of the European Court of Human Rights of 6 December 2012, *Michaud v. France* (CE:ECHR:2012:1206JUD001232311, §§ 118 and 119).

[35] Judgment of 2 December 2010, *Jakubowska* (C-225/09, EU:C:2010:729, paragraph 61); italics added to emphasise that independence must be guaranteed not only vis-à-vis the public authorities but also vis-à-vis private economic operators.

[36] Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* (C-550/07 P, EU:C:2010:512, paragraph 42).

[37] Loc. cit.

76. However, in Germany, that exclusivity does not preclude certain professionals from outside the legal profession from holding shares in law firms. (Non-legal) professionals referred to in Paragraph 59a(1) of the BRAO are entitled to be partners in a law firm.

77. It is true that those (non-legal) professionals may not hold the majority of the shares. Even so, the fact that a, possibly sizeable, percentage of the share capital of a law firm may be acquired by some (and not other) professionals from outside the legal profession makes it necessary to examine whether the provision is consistent.

78. As the Commission has observed, the treatment of those professionals as equivalent to lawyers may be explained in the context of the increasing complexity – particularly with regard to their financial aspects – of disputes in which the provision of quality legal advice necessitates the involvement of other categories of professional. [38]

79. That explanation may, perhaps, justify the treatment as equivalent to lawyers of certain professionals who have some degree of connection to legal issues, including those professionals referred to in Paragraph 59a of the BRAO.

80. In principle, the safeguarding of lawyers' professional independence and the protection of individuals is not undermined if the holding of shares in law firms is restricted to lawyers and also to other *equivalent* professionals who, as minority shareholders, [39] carry out an activity that is compatible with the independence of lawyers. [40] Those other professionals must also be subject to the discipline of a professional body which guarantees the correct legal and ethical practice of their profession.

81. However, to the extent that the obligation to provide appropriate evidence, based on specific details, of the reasons justifying the measure examined has not been fulfilled in this case, [41] it is impossible to ascertain why the class of acceptable professions does not include other professions whose involvement in the work of providing legal advice may be as relevant as the involvement of the professions to which the BRAO refers. [42]

82. Therefore, the restriction does not guarantee, in a consistent manner, the attainment of the objective pursued. For that to be the case, in accordance with the case-law, it would be necessary for it to 'genuinely [reflect] a concern to attain the objective in a consistent and systematic manner'. [43]

83. The treatment of certain professions, whose members must belong to a professional body, as equivalent to lawyers, while, at the same time, excluding others which satisfy the same (purported) justifying criteria deprives the restrictive measure, as it was configured on the material date, of the consistency necessary to achieve the aim pursued.

38 Paragraph 42 of the Commission's written observations.

39 The BRAO provides that the majority of the shares in a law firm are to be held by lawyers (Paragraph 59e(2)).

40 See, by analogy, judgment in *Commission* v *Austria (Civil engineers)*, paragraph 104, citing the judgment of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141, paragraph 86).

41 See, by way of example, judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 85).

42 For example, professionals such as engineers, architects, economists and psychologists, who are also subject to the discipline of a professional body and to ethical obligations, are omitted. That is pointed out by the Commission (paragraph 44 of its written observations).

43 Judgment in *Commission* v *Austria (Civil engineers)*, paragraph 94.

84. In my view, that assessment is confirmed by the fact that, in the version of the BRAO which has been in force since 2022, the German legislature subsequently corrected the restriction. Paragraph 59c(1)(4) (new version) provides that lawyers may form a professional partnership for the joint practice of the profession with persons who *practise a liberal profession within that partnership*, unless such a partnership is incompatible with the profession of lawyer.

(2) Requirement that a professional activity must be pursued within a law firm

85. The second restriction cited by the referring court concerns the requirement that lawyers (or members of other equivalent professions) must carry on 'a professional activity within the law firm'. [44]

86. The restriction thus worded is somewhat ambiguous. Presumably, the 'professional activity' referred to is one of the activities which may be pursued only by professionals who are authorised to hold shares in a law firm. It is also presumably the case that the professional activity pursued is the activity typical of their profession.

87. The class of those authorised to hold shares in a law firm is thus further reduced: it is not sufficient to be a lawyer (or equivalent) and instead it is necessary to practise as such within the firm. Lawyers and other equivalent professionals who merely invest in the firm or carry on in it duties other than those of a lawyer (or of an equivalent profession) are therefore excluded. [45]

88. However, as was made clear at the hearing, that restriction neither lays down a minimum level of effective activity within the firm nor, in practice, is open to scrutiny on the part of the Bar Association, which has ultimate responsibility for ensuring compliance with the BRAO. [46] It is, therefore, legitimate to question whether it is *genuinely* capable of attaining its (purported) aims.

89. In my view, this second restriction determines the scope of the first without rectifying the inconsistency which led me to find that the first restriction is unsuitable in the previous section.

(3) Reservation of the majority of votes to lawyers

90. Under Paragraph 59e(2) of the BRAO, lawyers are required to hold the majority of the shares and voting rights. [47]

91. The double majority reserved to lawyers in relation to shareholdings, on the one hand, and voting rights, on the other, is intended to ensure that persons outside the legal profession do not have a significant influence on a firm's decisions.

[44] That was the wording of Paragraph 59e(1) of the BRAO.

[45] This follows from the German Government's explanations at the hearing.

[46] The Bar Association explained how it is unable to become involved in the internal organisation of a law firm to the extent that it would know which activity in particular is carried on by each of its partners.

[47] The wording of Paragraph 59e(2) of the BRAO is difficult to understand. While, in accordance with the first part of the provision, 'the majority of the shares and voting rights must be held by lawyers', the second part states that. 'in so far as the partners are not authorised to practise one of the professions [equivalent to that of lawyer], they shall not have the right to vote.' That second statement is rather perplexing, since, in simple terms, persons who are not authorised to practise an equivalent profession may not be part of the firm. At the hearing, the German Government explained that the provision was limited to certain exceptional cases in which, on a temporary basis, a non-lawyer (or a person who did not practise an equivalent profession) could be a partner. However, the wording of the provision is more general in scope.

92. The provision is aimed at safeguarding the professional independence of lawyers and the protection of individuals. In the service of those objectives, the provision seeks to ensure that where persons who are not members of the legal profession are part of a law firm they do not exert effective control over that firm, in view of their twofold minority position.

93. Here too, the provision is rather inconsistent since, without any other precautions, the requirement that lawyers must have a double majority (in terms of shares and votes) may not be sufficient to prevent the exertion of undesirable pressure on the latter by investors who are not lawyers.

94. In relation to a different limitation of voting rights,[48] the Court held that 'it is not inconceivable that decisions about financial investment or disinvestment taken by minority shareholders holding no more than 25% of the voting rights could influence, albeit indirectly, decisions taken by the various bodies of a company.'[49]

95. The BRAO permits partners who are not lawyers to hold up to 49% of the shares in a law firm and to hold the same proportion of voting rights in that firm. Thus, partners who are not lawyers may exert a decisive influence over the firm's decisions as they would only need the assistance of 2% of the lawyers holding 2% of the shares to shape the decisions of the firm.[50] That risk is higher if the shares are spread among a large number of lawyer-shareholders.[51]

96. The rule laid down by the German legislature concerning voting majorities does not prevent non-lawyer shareholders from influencing the decisions of the firm of which they form part, thereby posing a risk to the independence of lawyers.[52] By the same token, this affects individuals' perception of the independence of lawyers, who must be protected from external pressure.

97. To overcome that difficulty, the Commission suggests that the requirements relating to the holding of shares and voting rights be separated from one another.[53] I believe, rather, that the coherence of the system calls for the strengthening of the restrictions which prevent in advance any direct or indirect breaches of the independence of lawyers, whatever percentage of the votes may be held by professionals other than lawyers.

98. Admittedly, it would be possible to create arrangements to strike a balance between shares and votes, without distorting excessively the logic of the correlation between the holding of shares and the shaping of a company's decisions (which are determined through the votes normally attaching to each member's shareholding).

[48] The national legislation in question limited to 25% the shares that could be held by members who did not practise the profession of biologist in companies operating biomedical analysis laboratories.

[49] Judgment of 16 December 2010, *Commission* v *France* (C-89/09, EU:C:2010:772, paragraph 86), referring to the Opinion of Advocate General Mengozzi in that case (EU:C:2010:305). The judgment of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141, paragraph 86), also refers to the possibility that persons who do not hold all but rather a limited number of shares may exert control over a company.

[50] In the judgment of 16 December 2010, *Commission* v *France* (C-89/09, EU:C:2010:772), the reason why the Court approved the arrangements examined was because, in that case, the most important decisions required a reinforced majority vote of the shareholders, representing at least 75% of the shares.

[51] That is acknowledged by the German Government (paragraph 56 of its written observations) which states that, where the share capital is very fragmented, even minority shares may afford considerable influence. The German Government adds that that (dispersed) capital structure is frequently typical of law firms in the Federal Republic of Germany.

[52] As was clear at the hearing, the de facto influence of a minority investor on a company's decisions may be channelled by methods other than the mere participation of that investor in a general meeting. The right of shareholders (including minority shareholders) to be informed about the organisation of an undertaking, for example, provides them with knowledge such as to enable them to exert pressure or request explanations about relevant decisions, with a view to maximising the profit that they can expect from their investment.

[53] Paragraph 64 of its written observations.

99. In any event, I believe that requirements must exist to prevent investors from outside the legal profession from influencing, directly or indirectly, the decisions of a law firm where lawyers' independence and the protection owed to their clients' interests are at risk. The precautions which a number of those participating in the proceedings proposed in that connection [54] do not appear to me to be sufficient to lessen that risk.

100. It is for the national legislature to devise the appropriate legislative solution, while the Court must not go further in these preliminary-ruling proceedings than establishing that provisions like those at issue lack the necessary consistency for the restriction to be justified by overriding reasons relating to the public interest.

101. Those considerations take into account the general framework laid down in the BRAO and not the particular situation of the two companies involved in the dispute. While Halmer UG's amended articles of association, as described by the referring court, [55] reduce the risk that SIVE may influence the law firm's decisions, that is a matter which it falls to the referring court to assess.

D. Summary

102. Member States have a broad discretion to regulate the profession of lawyer, in particular as regards the practice of law through limited liability companies.

103. In line with that discretion, if the Member States permit the practice of law through limited liability companies, they are entitled to make this subject to certain restrictions. Those restrictions must be consistent with one another and with the public-interest reasons on which they are based.

104. The restrictions imposed by the BRAO on shareholdings in law firms, with which the referring court's questions are concerned, lack the consistency required to comply with the requirements laid down by Article 15(3) of Directive 2006/123, in that:

– they prohibit members of professions other than those expressly referred to in the BRAO, who may satisfy the criteria which enabled the inclusion of the latter professions, from being partners;

– they require, in general terms and without the provision of any further details, that lawyers and other professionals authorised to go into partnership with lawyers must carry on a professional activity within the firm;

– they permit professionals other than lawyers to hold a percentage of the shares and voting rights that is sufficient to enable them to have a significant, direct or indirect, influence on determination of the decisions of the firm, which may place lawyers' independence at risk when they defend their clients.

[54] Such as the application of ethical standards; the right of any lawyer to object, within the partnership, to breaches of the guarantee of their independence; the imposition by the Bar Association, after the event, of penalties for breaches of lawyers' independence; rules for the prevention of conflicts of interest; and obligations imposed on directors of the firm.

[55] See point 33 of, and footnote 8 to, this Opinion.

V. Conclusion

105. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the Bayerischer Anwaltsgerichtshof (Bavarian Higher Lawyers' Court, Germany):

Article 15 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

(1) permits the members of certain professions to be partners in a law firm, while excluding other professions which, objectively, may satisfy the same criteria as those applied to allow the inclusion of the members of the former professions;

(2) requires, in general terms and without the provision of any further details, that lawyers and other professionals authorised to go into partnership with lawyers must carry on a professional activity within the firm;

(3) permits professionals other than lawyers to hold a percentage of the shares and voting rights that is sufficient to enable them to have a significant, direct or indirect influence, on the determination of the decisions of the firm, which may place lawyers' independence at risk when they defend their clients.