JUDGMENT OF THE COURT (Grand Chamber)

16 June 2015 (*)

(Request for a preliminary ruling — Articles 49 TFEU, 51 TFEU and 56 TFEU — Freedom of establishment — Connection with the exercise of official authority — Directive 2006/123/EC — Article 14 — Bodies responsible for verifying and certifying that undertakings carrying out public works comply with the conditions laid down by law — National legislation providing that the registered office of such bodies must be situated in Italy)

In Case C-593/13,

REQUEST for a preliminary ruling from the Consiglio di Stato (Italy) under Article 267 TFEU, made by decision of 3 July 2012, received at the Court on 20 November 2013, in the proceedings

Presidenza del Consiglio dei Ministri,

Consiglio di Stato,

Consiglio Superiore dei Lavori Pubblici,

Autorità per la Vigilanza sui Contratti Pubblici di lavori, servizi e forniture,

Conferenza Unificata Stato Regioni,

Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti,

Ministero per le Politiche europee,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero per i beni e le attività culturali,

Ministero dell'Economia e delle Finanze,

Ministero degli Affari esteri

v

Rina Services SpA,

Rina SpA,

SOA Rina Organismo di Attestazione SpA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz and A. Ó Caoimh, Presidents of Chambers, J. Malenovský, A. Arabadjiev (Rapporteur), D. Šváby, M. Berger, E. Jarašiūnas, C.G. Fernlund and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 2 December 2014,

after considering the observations submitted on behalf of:

– Rina Services SpA, Rina SpA and SOA Rina Organismo di Attestazione SpA, by R. Damonte, G. Giacomini, G. Scuras and G. Demartini, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by C. Pluchino and S. Fiorentino, avvocati dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Swedish Government, by A. Falk, , C. Meyer-Seitz, U. Persson, N. Otte Widgren, L. Swedenborg, F. Sjövall, E. Karlsson and C. Hagerman, acting as Agents,

– the European Commission, by E. Montaguti and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU, 51 TFEU and 56 TFEU and Articles 14 and 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in three sets of proceedings between the Presidenza del Consiglio dei Ministri, the Consiglio di Stato, the Consiglio Superiore dei Lavori Pubblici, the Autorità per la Vigilanza sui Contratti Pubblici di lavori, servizi e forniture, the Conferenza Unificata Stato Regioni, the Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti, the Ministero per le Politiche europee, the Ministero dell'Ambiente e della Tutela del Territorio e del Mare, the Ministero per i beni e le attività culturali, the Ministero dell'Economia e delle Finanze and the Ministero degli Affari esteri, the appellants in the main proceedings, and Rina Services SpA, Rina SpA and SOA Rina Organismo di Attestazione SpA, respectively, concerning, inter alia, national legislation requiring companies classified as certification bodies (Società Organismi di Attestazione) ('SOAs') to have their registered office in Italy.

Legal context

EU law

3 Recitals 1 to 7, 16 and 33 in the preamble to Directive 2006/123 state as follows:

'(1) … The elimination of barriers to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress. …

(2) A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.

(3) The report from the Commission on "The State of the Internal Market for Services" drew up an inventory of a large number of barriers which are preventing or slowing down the development of services between Member States …. The barriers affect a wide variety of service activities across all stages of the provider's activity and have a number of common features, including the fact that they often arise from administrative burdens, the legal uncertainty associated with cross-border activity and the lack of mutual trust between Member States.

(4) … Removing those barriers, while ensuring an advanced European social model, is thus a basic condition for overcoming the difficulties encountered in implementing the Lisbon Strategy and for reviving the European economy, particularly in terms of employment and investment. …

(5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.

(6) Those barriers cannot be removed solely by relying on direct application of Articles [49 TFEU and 56 TFEU], since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.

(7) This Directive establishes a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity or profession and its system of regulation. That framework is based on a dynamic and selective approach consisting in the removal, as a matter of priority, of barriers which may be dismantled quickly and, for the others, the launching of a process of evaluation, consultation and complementary harmonisation of specific issues …. Provision should be made for a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues. …

…

(16) This Directive concerns only providers established in a Member State and does not cover external aspects. …

…

(33) The services covered by this Directive concern a wide variety of ever-changing activities, including business services such as … certification …'

4 Article 2 of Directive 2006/123, entitled ‘Scope’, is worded as follows:

‘1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

…

(i) activities which are connected with the exercise of official authority as set out in Article [51 TFEU];

…’

5 Under Article 3(3) of Directive 2006/123, Member States are to apply the provisions of that directive in compliance with the rules of the Treaty on the Functioning of the European Union on the right of establishment and the free movement of services.

6 Article 14 of that directive, entitled ‘Prohibited requirements’, included in Chapter III, entitled ‘Freedom of establishment for providers’, provides that:

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

(1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office …

…

(3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

…’

7 Article 15 of Directive 2006/123, entitled ‘Requirements to be evaluated’, also included in Chapter III, requires Member States to examine whether, under their legal system, any of the requirements listed in paragraph 2 of that article are imposed and to ensure that any such requirements are compatible with the conditions of non-discrimination, necessity and proportionality, laid down in paragraph 3 of that article.

8 Chapter IV of that directive, entitled ‘Free movement of services’, includes Article 16, entitled ‘Freedom to provide services’. That article provides as follows:

‘1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

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

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

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

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

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

…

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. …’

Italian law

9 Decree No 207 of the President of the Republic of 5 October 2010 on the enforcement and application of Legislative Decree No 163 of 12 April 2006 (Ordinary Supplement to GURI No 288 of 10 December 2010), repealing Decree No 34 of the President of the Republic of 25 January 2000, provides, in Article 64(1) thereof, that SOAs are to be constituted as limited companies whose company name must expressly include the term “certification body” and that their registered office must be situated in the territory of the Italian Republic.

The facts of the main proceedings and the questions referred for a preliminary ruling

10 Rina SpA is the holding company of the Rina group. The registered office of that company is situated in Genoa (Italy).

11 Rina Services SpA is a limited company belonging to the Rina group and its registered office is also situated in Genoa. Its objective is to provide UNI CEI EN 45000 quality certification services.

12 SOA Rina Organismo di Attestazione SpA is also a limited company with its registered office in Genoa. It provides certification services and performs technical inspections concerning the organisation and production of construction companies. 99% of that company is owned by Rina SpA and 1% by Rina Services SpA.

13 Those three companies brought actions before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) seeking, inter alia, to challenge Article 64(1) of Decree No 207 of the President of the Republic of 5 October 2010 on the enforcement and application of Legislative Decree No 163 of 12 April 2006 on the ground that it is unlawful, in so far as it requires the registered offices of SOAs to be situated within the territory of the Italian Republic.

14 By judgments of 13 December 2011, that court upheld those actions on the ground, inter alia, that the requirement concerning the location of the registered office was contrary to Articles 14 and 16 of Directive 2006/123.

15 The appellants in the main proceedings appealed against those judgments before the Consiglio di Stato, claiming, in particular, that the activity performed by SOAs is connected with the exercise of official authority within the meaning of Article 51 TFEU and that, consequently, it is excluded from the scope of both Directive 2006/123 and Articles 49 TFEU and 56 TFEU.

16 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Do the TFEU principles of freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU) and the principles laid down in Directive 2006/123 preclude the adoption and application of national legislation under which SOAs constituted as limited companies “must have their registered office in the territory of the [Italian] Republic”?

2. Must the derogation provided for in Article 51 TFEU be interpreted as covering an activity such as the certification carried out by private-law bodies which, on the one hand, are required to be formed as limited companies and operate in a competitive market and, on the other hand, are connected with the exercise of official authority and, for that reason, are subject to authorisation and rigorous controls by the Supervisory Authority?’

Consideration of the questions referred

The second question

17 By its second question, which it is appropriate to examine first of all, the referring court asks, in essence, whether the first paragraph of Article 51 TFEU must be interpreted as meaning that the certification activities performed by SOAs are connected with the exercise of official authority within the meaning of that provision.

18 It should be pointed out that the Court has already ruled on that question, which was referred by the Consiglio di Stato, in its judgment in *SOA Nazionale Costruttori* (C-327/12, EU:C:2013:827).

19 In paragraph 52 of that judgment, the Court held that, in the light of the considerations referred to in paragraphs 28 to 35 of the judgment, to the effect, in particular, that SOAs are commercial undertakings performing their activities in conditions of competition and do not have any power to make decisions connected with the exercise of public powers, SOAs' certification activities are not directly and specifically connected with the exercise of official authority within the meaning of Article 51 TFEU.

20 In particular, the Court stated, in paragraph 54 of that judgment, that the check, by SOAs, of the technical and financial capacity of the undertakings subject to certification, the veracity and content of the declarations, certificates and documents presented by the persons to whom the certificate is issued and compliance with the conditions relating to the personal situation of the candidate or tenderer, cannot be regarded as an activity that enjoys the decision-making autonomy inherent in the exercise of public authority powers, since that check is regulated entirely by national legislation. Furthermore, the Court noted, in the same paragraph of that judgment, that such a check is carried out under direct State supervision and is designed to facilitate the task of the contracting authorities in the field of public works contracts, its purpose being to allow those authorities to complete their tasks with precise and detailed knowledge of both the technical and financial capacity of the tenderers.

21 In the present case, the referring court does not state, in the request for a preliminary ruling, that there has been any change in the nature of the activities carried out by SOAs since the events which gave rise to the judgment in *SOA Nazionale Costruttori* (C-327/12, EU:C:2013:827).

22 In those circumstances, the answer to the second question is that the first paragraph of Article 51 TFEU must be interpreted as meaning that the derogation from the right of establishment contained in that provision does not apply to certification activities carried out by companies classified as certification bodies.

The first question

23 By its first question, the referring court asks, with reference to a number of provisions of EU law, including Articles 49 TFEU and 56 TFEU and the principles laid

down in Directive 2006/123, whether EU law must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which SOAs must have their registered office in national territory.

24 In this respect, it should be noted that certification services fall within the scope of Directive 2006/123, since they are expressly referred to in recital 33 thereof, in the list of examples of activities covered by that directive.

25 In the present case, the requirement concerning the location of the registered office of certification bodies at issue in the main proceedings falls within the scope of Article 14 of Directive 2006/123. In so far as it requires SOAs to have their registered office in national territory, that requirement is based directly on the location of the provider's registered office within the meaning of Article 14(1) of that directive and restricts the freedom of a provider to choose between a principal or a secondary establishment, in particular by requiring the provider to have its principal establishment in national territory within the meaning of paragraph 3 of that article.

26 Article 14 of Directive 2006/123 prohibits Member States from making access to, or the exercise of, a service activity in their territory subject to compliance with any of the requirements listed in paragraphs 1 to 8 of that provision, requiring that those requirements be removed, systematically and as a matter of priority.

27 The Italian Republic nevertheless claims that the requirement that the registered offices of SOAs must be situated in national territory is justified by the need to ensure the effectiveness of the public authorities' supervision of the SOAs' activities.

28 In that respect, it should be noted, as observed by the Republic of Poland and the Commission, that no justification can be given for the requirements listed in Article 14 of Directive 2006/123, to which the national legislation at issue in the main proceedings relates.

29 This conclusion follows both from the wording of Article 14 and the general scheme of Directive 2006/123.

30 As stated in the title of that article, the requirements in paragraphs 1 to 8 are 'prohibited'. Furthermore, there is nothing in the wording of that article to indicate that Member States have the option of justifying maintaining those requirements in their national legislation.

31 Moreover, the general scheme of Directive 2006/123 is based, with regard to freedom of establishment, on a clear distinction between prohibited requirements and those subject to evaluation. While the former are governed by Article 14 of that directive, the latter are subject to the rules laid down in Article 15.

32 As regards, in particular, requirements subject to evaluation, Member States must, in accordance with Article 15(1) of Directive 2006/123, examine whether, under their

legal system, any of the requirements listed in paragraph 2 thereof are imposed and ensure that any such requirements are compatible with the conditions of non-discrimination, necessity and proportionality referred to in Article 15(3).

33 It follows from Article 15(5) and (6) of Directive 2006/123 that Member States may maintain or, if necessary, introduce requirements of the type referred to in Article 15(2), on condition that those requirements satisfy the conditions of non-discrimination, necessity and proportionality laid down in Article 15(3).

34 Furthermore, with regard to free movement of services, Article 16(3) of Directive 2006/123 provides that the Member State to which the provider moves may impose requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with Article 16(1).

35 No such possibility is provided for with regard to the 'prohibited' requirements listed in Article 14 of Directive 2006/123.

36 That conclusion is not called in question by Article 3(3) of that directive, under which Member States are to apply its provisions 'in compliance with the rules of the Treaty on the right of establishment and the free movement of services'.

37 In this respect, it should be noted, as observed by the Republic of Poland, that an interpretation of Article 3(3) of Directive 2006/123 to the effect that Member States may justify, on the basis of primary law, a requirement prohibited by Article 14 of that directive would deprive that provision of any practical effect by ultimately undermining the ad hoc harmonisation intended by that directive.

38 That interpretation would be contrary to the conclusion drawn by the EU legislature in recital 6 in the preamble to Directive 2006/123, to the effect that barriers to freedom of establishment may not be removed solely by relying on direct application of Article 49 TFEU, owing, inter alia, to the extreme complexity of addressing barriers to that freedom on a case-by-case basis. To concede that the 'prohibited' requirements under Article 14 of that directive may nevertheless be justified on the basis of primary law would in fact be tantamount to reintroducing such case-by-case examination, under the FEU Treaty, for all restrictions on freedom of establishment.

39 Moreover, it should be noted that Article 3(3) of Directive 2006/123 does not prevent Article 14 of that directive from being interpreted as meaning that there can be no justification for the prohibited requirements listed in Article 14. That prohibition, with no possibility of justification, seeks to ensure the systematic and swift removal of certain restrictions on freedom of establishment, regarded by the EU legislature and the case-law of the Court as adversely affecting the proper functioning of the internal market. That aim is consistent with the FEU Treaty.

40 Accordingly, even though Article 52(1) TFEU allows Member States to justify, on any of the grounds listed in that provision, national measures constituting a restriction on the freedom of establishment, that does not prevent the EU legislature, when adopting secondary legislation, such as Directive 2006/213, giving effect to a fundamental freedom enshrined in the FEU Treaty, from restricting certain derogations, especially when, as in the present case, the relevant provision of secondary law merely reiterates settled case-law to the effect that a requirement such as that at issue in the main proceedings is incompatible with the fundamental freedoms on which economic operators can rely (see, to that effect, inter alia, judgment in *Commission* v *France*, C-334/94, EU:C:1996:90, paragraph 19).

41 In those circumstances, the answer to the first question is that Article 14 of Directive 2006/123 must be interpreted as precluding legislation of a Member State under which SOAs must have their registered office in national territory.

Costs

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

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

1. **The first paragraph of Article 51 TFEU must be interpreted as meaning that the exception to the right of establishment laid down in that provision does not apply to the certification activities carried out by companies classified as certification bodies;**

2. **Article 14 of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding legislation of a Member State which provides that companies classified as certification bodies must have their registered office in national territory.**

[Signatures]

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* Language of the case: Italian.