European Journal of Science and Theology, December 2022, Vol.18, No.6, 129-139

MAINTENANCE OF BUILT HERITAGE OF PROTESTANT CHURCH IN GERMANY THE CASE OF WAIVING PROFESSIONAL FEES OF ARCHITECTS AND ENGINEERS AND EUROPEAN LEGISLATION

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(Received 29 June 2022, revised 1 October 2022)

Abstract

Subject of this article is the maintenance of built heritage of Protestant Church in Germany. With regard to the decrease of the members of the Protestant Church in Germany, there is not enough money to maintain all of its buildings. As a consequence, it is necessary to think about ways of how the maintenance costs can be reduced. One option is that architects and engineers act as volunteers and provide their services for free. However, according to German law, architects and engineers in Germany must provide their services at certain minimum prices. This system of minimum prices might not be compatible with European Union law. Against this background, the article will start with an examination of the current problems of the Protestant Church in Germany with regard to the maintenance of its buildings. Afterwards it will be discussed in how far architects and engineers can provide their services in Germany for free. In this context the case law of the European Court of Justice (ECJ) and the implementation of the ECJ's case law by the German courts will be examined. In the conclusion, an answer to the question of whether architects and engineers in Germany are allowed to provide their services for free will be provided.

Keywords: European Union, Protestant Church in Germany, maintenance, buildings, minimum prices

1. Introduction

One of the main current problems of the Protestant Church in Germany is the loss of members. For example, the Protestant Church in Bavaria loses about 20.000-30.000 members each year. In this context, the Protestant Church in Germany initiated research which was conducted by the University of Freiburg (the so called 'Freiburger Studie') [1]. The conclusion of the Freiburger Studie

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was that 50% of the members of the Protestant Church in Germany will leave the Church until the year 2060 [https://www.ekd.de/projektion2060-mitglieder zahlen-45532.htm].

Another problem of the Protestant Church in Germany is a financial one. In Germany, the members of the Protestant Church have to pay Church taxes and this is how the Protestant Church in Germany is mainly financed [2]. Because of the decline of memberships, there is a decrease of Church tax income and the Protestant Church in Germany is therefore very likely to have financial problems in the future [https://www.ekd.de/projektion2060-auswirkungen-kirchensteuer-45536.htm].

With regard to the decline of memberships and the decrease of Church tax incomes, there is a third problem, the Protestant Church in Germany has to deal with: the large number of buildings, which are owned by the churches (churches, parish halls and parsonages). The problem is that these buildings need to be maintained and that because of the decrease of the Church tax incomes; there is not enough money for the maintenance of these buildings. As a consequence it is necessary to find ways of reducing the maintenance costs.

One possible way of reducing the maintenance costs is that architects and engineers provide their services for free. Another option would be that architects and engineers donate the compensation for their services. Because architects and engineers can be held liable e.g. for deficiencies caused by building companies, donations of compensations do not happen in practice. If architects and engineers provide their services for free, these services are considered as courtesy and there is no liability for courtesy. Furthermore, building companies providing their services for free could be an option. However, according to this option building companies would still have to pay for the building materials. In practice building companies do not provide their services for free.

Against this background, architects and engineers providing their services for free is the most promising option for reducing the maintenance costs of the churches. Also, there is a number of architects and engineers that are willing to provide their services for free.

From a legal point of view the main question in this context is whether architects and engineers in Germany are allowed to provide their services for free. In Germany there is a law which determines the fees for architectural and engineering services, the so called official scale of fees for services of architects and engineers (in the following: the HOAI 2013) [*Honorarordnung für Architekten und Ingenieure of 10 July 2013* (BGBl, 2013, p. 2276)]. As a consequence, architects and engineers must not provide their services at prices which are below the fees determined by the HOAI and the provision of architectural and engineering services for free is therefore not possible. Accordingly, it would also not be possible to use architects and engineers as volunteers in order to solve the maintenance problem of the Church.

However, there are doubts on whether the HOAI 2013 is compatible with European Union law and proceedings before the European Court of Justice (ECJ) were initiated.

2. Does European Union law allow the gratuitous provision of architectural and engineering services

In Germany the fees for services of architects and engineers are determined on the basis of the HOAI 2013 in four steps [3]. First, the costs of the building are calculated and the degree of difficulty is identified. Next, the numbers are inserted in the table of fees, which is contained in the HOAI 2013 and the full fees of architectural and engineering services are examined. The table of fees in the HOAI 2013 offers minimum and maximum fees and it is laid down in Paragraph 7 HOAI 2013 that no fees below the minimum fees or above the maximum fees must be agreed on. In the last step, it is figured out which parts of the services written down in the HOAI 2013 are provided by the architect or engineer and the (full) fees are adjusted.

In the year 2004, the European Commission started to question whether the HOAI-system of minimum and maximum prices in Paragraph 7 HOAI 2013 is compatible with European Union law and emphasized in this context hat fixed prices for services have negative effects on competition and reduce the benefits of competitive markets for consumers [*Communication from the Commission - Report on Competition in Professional Services*, COM (2004) 83 final, p. 10ff]. Against this background the European Commission argued that the Paragraph 7 HOAI 2013 is not compatible with Art. 15 para. 1, para. 2 lit. g) and para. 3 of Directive 2006/123/EC [*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) [*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] and Art. 49 AEUV [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, para. 13].

According to Art. 15 of Directive 2006/123/EC the Member States are obliged to examine whether national law determines fixed prices (minimum or maximum prices) for services. Fixed prices in the Member States' law are only acceptable, if the Member States' law is non-discriminatory, necessary and proportionate. This provision was enacted in order to remove restrictions on the freedom of services and the freedom of establishment [4].

Art. 49 Treaty on the Functioning of the European Union (TFEU) is one of the four fundamental freedoms in EU law [5] and guarantees the freedom of establishment [6]. According to Art. 49 TFEU "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member States shall be prohibited". The freedom of establishment shall enable undertakings in Member States to use the benefits of locations in other Member States. Undertakings in Member States should therefore be able to relocate their location to other Member States [5, p. 385].

On 25 February 2016 the European Commission asked Germany with regard to Paragraph 7 HOAI 2013 to take the necessary measures in order to comply with Art. 15 of Directive 2006/123/EC and Art. 49 TFEU. However, Germany maintained its position and refused to take any measures in this context. It is against background that on 23 June 2017 the European Commission

initiated an infringement proceeding according to Art. 258 TFEU before the ECJ [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 14ff]. In an infringement proceeding, the ECJ examines the question of whether a certain national law is compatible with European Union law [7].

3. The ECJ on fixed prices for services of architects and engineers – part 1

With regard to the infringement proceeding which was initiated by the European Commission, the ECJ had to decide whether the HOAI-system of minimum and maximum prices in Paragraph 7 HOAI 2013 complies with Art. 15 of Directive 2006/123/EC and Art. 49 TFEU [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, preamble].

3.1. The European Commission's arguments for an incompatibility of Paragraph 7 HOAI 2013 with European Union law

According to the European Commission, the Paragraph 7 HOAI 2013 constitutes a restriction in the freedom of establishment which is guaranteed by Art. 15 of Directive 2006/123/EC and Art. 49 TFEU. This is because the HOAI-system of minimum and maximum prices hinders (new) architects and engineers who are based in other Member States from entering the German market. (New) service providers are only able to enter (new) markets in other Member States, when they offer their services at prices that are lower than the prices of the already established service providers. Such an approach to enter markets cannot be successful in Germany because new architects and engineers must provide their services at a price which is over the HOAI-minimum prices [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 19ff].

Kalte and Wiesner emphasize in this context that the information on prices of architectural and engineering services is asymmetric [P. Kalte and M. Wiesner, *Vertragsverletzungsverfahren der EU-Kommission gegen die Bundesrepublik Deutschland - Ein Plädoyer für die HOAI!*, IBR 2015, 1064 (nur online), paras. 12f]. As a consequence, the German market cannot be entered via offering these services at low prices and from an economic point of view new architects and engineers must provide their services at the HOAI minimum prices.

The European Commission argues further that the restriction of the freedom of establishment cannot be justified by overriding reasons to the public interest, in particular the preservation of a high quality of services and the consumer protection. Both reasons were put forward by Germany. The European Commission emphasized in this context that Germany did not sufficiently explain why the HOAI-system of minimum and maximum prices in Paragraph 7 HOAI 2013 could preserve a high quality of services and protect consumers. According to the European Commission, the HOAI-system of minimum and

maximum prices is unsuitable for achieving the preservation of a high quality of services and a protection of consumers [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 27ff].

3.2. Germany's arguments for a compatibility of Paragraph 7 HOAI 2013 with European Union law

Germany refers to the ECJ's case law on the freedom of establishment and argues that Paragraph 7 HOAI 2013 does not infringe Art. 15 of Directive 2006/123/EC or Art. 49 TFEU. This is because the HOAI-system of minimum and maximum prices is characterized by a certain flexibility and therefore there is no restriction of the freedom of establishment [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 36ff].

According to Germany Art. 15 of Directive 2006/123/EC and Art. 49 TFEU are not applicable with regard to Paragraph 7 HOAI 2013. It is settled case law that the freedom of establishment does not apply to purely internal situations. Since the HOAI 2013 applies to architectural and engineering services which are provided by architects and engineers who are based in Germany (Paragraph 1 HOAI 2013), the HOAI-system of minimum and maximum services is only relevant in the context of purely internal services. Paragraph 7 HOAI 2013 therefore does not fall within the scope of Art. 15 of Directive 2006/123/EC and Art. 49 TFEU. In this context Germany also emphasizes that the European Commission has not yet demonstrated that there are specific restrictions on the freedom of establishment which the HOAI-system of minimum and maximum prices could cause. As a consequence, Paragraph 7 HOAI 2013 does not infringe Art. 15 of Directive 2006/123/EC and Art. 49 TFEU [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, para. 39ff].

Germany argues further that a potential restriction on freedom of establishment is justified by overriding reasons to the public interest. Particularly the preservation of a high quality of services and the protection of consumers are suitable objectives which can be achieved by the HOAI-system of minimum and maximum prices. Because the information on prices for architectural and engineering services is highly asymmetric and because there is a link between price and quality of services, minimum tariffs for services of architects and engineers can preserve the quality of services and therefore protect the consumers. The link between price and quality of services is explained by Germany with the necessity of highly qualified staff in order to provide high quality services. Highly qualified staff is expensive and therefore affects the price for services [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, para. 45ff].

Also, according to Motzke [8] and Katle and Wiesner [P. Kalte and M. Wiesner, *Vertragsverletzungsverfahren der EU-Kommission gegen die Bundesrepublik Deutschland - Ein Plädoyer für die HOAI!*, IBR 2015, 1064 (nur online), paras. 12f] there is a link between the price and quality of architectural and engineering services. As already pointed out above, according to the HOAI

2013 the price for services is determined on the bases of a four-step-program. The second step is to identify the degree of difficulty of the building which is also a degree of quality. The consequence of a high degree of difficulty is a high quality of the building and accordingly a high price.

Last, Germany discusses the question of whether there is an alternative to the HOAI-system of minimum and maximum prices. One possibility could be to enact strict requirements for the access to a profession as an architect or engineer. However, a high quality of architectural and engineering services is not necessarily the consequence of such requirements. Another option could be to adapt the rules on liability and insurance. Since rules on liability and insurance only become relevant when harm has already occurred, the adaption of such rules could not ensure a high quality of services. One last possibility could be to publish information on prices for architectural and engineering services. According to Germany such information would not solve the problem of asymmetric information on prices for services. Rather, such information would reinforce a downward 'spiral' of prices and could therefore not ensure a high quality of services of architects and engineers [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 50ff].

3.3. The judgment of the ECJ

In its judgment the ECJ came to the conclusion that the HOAI-system of minimum and maximum prices in Paragraph 7 HOAI 2013 is not compatible with Art. 15 para. 1, para. 2g) and para. 3 of Directive 2006/123/EC.

First, the ECJ discussed whether Art. 15 of Directive 2006/123/EC is applicable to purely internal situations. With regard to its previous case law on Chapter III of Directive 2006/123/EC the ECJ emphasized that Art. 15 of Directive 2006/123/EC also applies to purely internal situations. As a consequence, Paragraph 7 HOAI 2013 falls within the scope of application of Art. 15 of Directive 2006/123/EC [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 57f].

Next, the ECJ examined the Member States' obligations according to Art. 15 of Directive 2006/123/EC. It pointed out that Member States can maintain requirements of the type mentioned in Art. 15 para. 2 of Directive 2006/123/EC (e.g. "fixed minimum and/or maximum tariffs with which the provider must comply"). However, in order to maintain such requirements, three conditions which are described in Art. 15 para. 3 of Directive 2006/123/EC must be fulfilled. Accordingly, such requirements must be non-discriminatory, necessary and proportionate. Based on these considerations, the ECJ concludes that the HOAI-system of minimum and maximum prices falls within the scope of Art. 15 para. 2g) of Directive 2006/123/EC and points out that it must now be examined whether the HOAI-system of minimum and maximum prices meets the three conditions which are laid down in Art. 15 para. 3 of Directive 2006/123/EC [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 59ff].

The first condition is fulfilled because the HOAI 2013 applies to all services which are provided by architects and engineers who are based in Germany (Paragraph 1 HOAI 2013). As a consequence the HOAI-system of minimum and maximum prices is not discriminatory with regard to nationality or location of office. According to the second condition, the requirement must be necessary and therefore be justified by an overriding reason relating to public interest. The ECJ qualifies the objectives relating to the quality of work and consumer protection which are pursued by the HOAI 2013 as such overriding reasons relating to public interest. Since the HOAI 2013 pursues these reasons, the second condition is met as well [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 67ff].

The third condition ('proportionality') is fulfilled, if the requirement is suitable for securing the attainment of the objective pursued. According to the ECJ there is a risk that providers of architectural and engineering services might engage in competition and that the quality of services decreases. Against this background the HOAI-system of minimum and maximum prices could achieve the objectives of a high quality of services and consumer protection [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C: 2019:562, paras. 73ff].

Nevertheless, the ECJ concluded that the third condition of Art. 15 para. 3 of Directive 2006/123/EC is not fulfilled by the HOAI-system of minimum and maximum prices. The third condition is fulfilled, if the objective is pursued in a consistent and systematic manner. According to Paragraph 1 HOAI 2013 the provision of architectural and engineering services is not reserved to a certain profession. In other words, the providers of such services must not demonstrate their capacity to provide such services and accordingly the HOAI 2013 does not ensure that the service providers are sufficiently qualified. With regard to the scope of application of the HOAI 2013, the objective of ensuring a high level of quality of architectural and engineering services is therefore not pursued in a consistent and systematic manner [*Judgment of the Court of 4 July 2019, Commission v Germany*, C-377/17, ECLI:EU:C:2019:562, paras. 89ff].

Against this background, the ECJ ruled that Paragraph 7 HOAI 2013 and the HOAI-system of minimum and maximum prices does not comply with Art. 15 of Directive 2006/123/EC and that Germany failed to fulfil its obligations under European Union law.

4. The implementation of the ECJ's judgment

The comments in the literature on this judgment were rather different. For example, Scholl [9] and Hermanns [10] consider this judgment to be consistent with the previous case law on services and minimum tariffs. Schäfer [11] and Ehlers [12] share this view and emphasise the convincing argumentation of the ECJ on the inconsistent pursuance of the high quality of services. According to Motzke [13] and Wiesner [M. Wiesner, *EuGH vs. HOAI: Höchst - und Mindestsatz - Wettbewerbsprinzip, Verbraucherschutz und richtlinienkonforme Auslegung*, IBR 2019, 1146 (nur online)] there will now be a competition of

prices for architectural and engineering services and with regard to the asymmetric information on prices the quality of services will decrease.

However, the question, which is discussed most in the literature is whether the HOAI minimum and maximum prices in Paragraph 7 HOAI 2013 still apply [14]. In other words, must architects and engineers in Germany still agree on the HOAI minimum prices for their services or can they provide their services for free?

The answer to this question depends on whether Art. 15 of Directive 2006/123/EC is capable of establishing horizontal direct effect. Horizontal direct effect means that a provision of European Union law can be applied in a proceeding between individuals. If Art. 15 if Directive 2006/123/EC was capable of establishing direct effect, Paragraph 7 HOAI 2013 and the HOAI-system of minimum and maximum prices does not apply between individuals. As a consequence, architects and engineers could agree on prices which are below the HOAI minimum prices. Should there not be a horizontal direct effect of Art. 15 of Directive 2006/123/EC, Paragraph 7 HOAI 2013 and the HOAI-system of minimum and maximum prices still applies between individuals. Architects and engineers would then have to agree on prices which are over the HOAI-minimum prices.

The German Higher Courts offered different opinions on the question of whether Art. 15 of Directive 2006/123/EC is capable of establishing horizontal direct effect. E.g., the Higher Regional Court Düsseldorf considered Art. 15 of Directive 2006/123/EC being capable of establishing direct effect and concluded that paragraph 7 HOAI 2013 can no longer be invoked by individuals before German courts [Higher Regional Court Düsseldorf, Judgment of 17 September 2019, 23 U 155/18, NJW 2020, 1450, Rn. 12ff]. On the other hand, the Higher Regional Court Berlin denied a horizontal direct effect of Art. 15 of Directive 2006/123/EC. According to this judgment, individuals still can invoke paragraph 7 HOAI 2013 before German courts in relation to individuals [Higher Regional Court Berlin, indicative court order of 18 August 2019, 21 U 20/19, NJW-Spezial 2019, 653, paras. 51ff].

The Federal High Court of Justice had to discuss the question of whether Art. 15 of the Directive 2006/123/EC is capable of establishing horizontal direct effect as well. However, it refused to decide on this question and referred it to the ECJ for a preliminary ruling [Federal High Court of Justice, decision of 14 Mai 2020, VII ZR 174/19, NZBau 2020, 447, tenor]. In the context of a preliminary ruling, a national court refers one or more questions to the ECJ. The subject of these questions must be the interpretation of European Union law or the compatibility of national law with European Union law [15].

5. The ECJ on fixed prices for services of architects and engineers - part 2

The German Federal Court referred two questions to the ECJ for a preliminary ruling. The first question was whether Art. 15 of Directive 2006/123/EC is capable of establishing horizontal direct effect. The second

question was whether Paragraph 7 HOAI 2013 and the HOAI-system of minimum and maximum prices constitutes a breach of Art. 49 TFEU or the general principles of EU Law and, if so, whether Paragraph 7 HOAI 2013 still applies between individuals [*Judgment of the Court of 18 January 2022, Thelen Technopark Berlin GmbH vs MN*, Case C-261/20, ECLI:EU:C:2022:33, para. 23].

With regard to the first question the ECJ recalled the principle of the primacy of EU law which requires all Member State bodies to give full effect to the provisions of EU law. As a consequence of this principle, national courts are obliged to interpret, to the greatest extent possible, national law in conformity with EU law. However, the ECJ emphasizes in this context that there are limits to this obligation. In particular, national law must not be interpreted 'contra legem' in order to comply with EU law. Since according to the German Federal Court an interpretation of Paragraph 7 HOAI 2013 in conformity with Art. 15 of Directive 2006/123/EC would constitute a 'contra legem' interpretation, the ECJ stated that there is no obligation of national courts to disapply Paragraph 7 HOAI 2013 [*Judgment of the Court of 18 January 2022, Thelen Technopark Berlin GmbH vs MN*, Case C-261/20, ECLI:EU:C:2022:33, paras. 25ff].

Next, the ECJ discussed the question of whether Art. 15 of Directive 2006/123/EC is capable of establishing direct effect. It emphasized that a directive establishing horizontal direct effect would confer obligations upon individuals. Since the Member States have not conferred the power upon the EU to establish obligations for individuals, a directive is not capable of establishing horizontal direct effect. Here, the disapplication of Paragraph 7 HOAI 2013 would oblige architects and engineers to accept the agreed price, even though the price is below the HOAI minimum prices. A horizontal direct effect of Art. 15 of Directive 2006/123/EC would therefore establish obligations for individuals and accordingly a horizontal direct effect of Art. 15 of Directive 2006/123/EC is not possible. It follows that national courts are not obliged to disapply Paragraph 7 HOAI 2013 with regard to the lack of a horizontal direct effect of Art. 15 of Directive 2006/123/EC [*Judgment of the Court of 18 January 2022, Thelen Technopark Berlin GmbH vs MN*, Case C-261/20, ECLI:EU:C:2022:33, paras. 31ff].

Furthermore, the ECJ discussed whether an obligation to disapply Pargraph 7 HOAI 2013 could be based on Art. 260 TFEU. According to Art. 260 TFEU, the ECJ finds within an infringement proceeding whether a Member State failed to fulfil its obligations under EU-Law. This finding shall lay down the duties of Member States when they do not fulfil their obligations. However, it does not confer rights on individuals [*Judgment of the Court of 18 January 2022, Thelen Technopark Berlin GmbH vs MN*, Case C-261/20, ECLI:EU:C: 2022:33, paras. 39f]. Therefore the judgment of the ECJ in an infringement proceeding cannot create the obligation for national courts to disapply the HOAI-system of minimum and maximum prices in Paragraph 7 HOAI 2013.

The ECJ also discussed the second question which was put forward by the German Federal Court and examined whether Paragraph 7 HOAI 2013 and the HOAI-system of minimum prices is compatible with Art. 49 TFEU. According

to its point of view, the HOAI 2013 only applies to internal situations. Since Art. 49 TFEU only applies to situations which are not purely internal, the ECJ therefore concluded that Art. 49 TFEU does not apply in the context of the HOAI 2013. The second question was therefore held inadmissible by the ECJ [*Judgment of the Court of 18 January 2022, Thelen Technopark Berlin GmbH vs MN*, Case C-261/20, ECLI:EU:C:2022:33, paras. 49ff].

Overall, the ECJ found that national courts must still apply Paragraph 7 HOAI and the HOAI-system of minimum and maximum prices. Accordingly, architects and engineers must not provide their services for free or at prices which are below the minimum prices.

6. Conclusions

It follows from the examination above that Paragraph 7 HOAI 2013 is not compatible with Art. 15 of Directive 2006/123/EC. Nevertheless, the HOAI-system of minimum and maximum prices still applies and prices above the HOAI minimum prices for architectural and engineering must be agreed. Since 1 January 2021 the HOAI 2021 entered into force. It is unclear whether the HOAI 2021 still contains a system of minimum prices for architectural and engineering services [16].

As a consequence, architects and engineers are not allowed to provide their services for free and the maintenance costs of the churches cannot be reduced by architects and engineers providing their services for free. It is therefore necessary to find other options in this context.

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