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Pevné tarify pre architektov a inžinierov (nemecký „HOAI“) porušujú právne predpisy EÚ
Rozsudok Európskeho súdu zo 4. júla 2019 (vec C - 377/17)
Fixed tariffs for architects and engineers (German „HOAI“) violates EU Law
Judgement of the European Court of Justice, 4 July 2019 (Case C-377/17)

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Anotácia

Európsky súdny dvor (ESD) vo svojom rozhodnutí zo dňa 4.7.2019 (vec C-377/17) o štruktúre poplatkov pre architektov a inžinierov (HOAI) v konaní o nesplnení povinnosti proti Európskej komisii proti Spolkovej republike Nemecko rozhodol Európsky súdny dvor (ESD) že nemecké nariadenia HOAI o minimálnej a maximálnej výške poplatkov pre projektantov porušujú ustanovenia smernice o službách (smernica 2006/123 / ES). Nasledujúci článok preskúma, čo presne toto rozhodnutie znamená a aké účinky a požiadavky na reformu to spôsobuje.

Annotation

In its ruling of 4th July 2019 (Case C-377/17) on the Fee Structure for Architects and Engineers (HOAI) in the infringement proceedings of the EU Commission against the Federal Republic of Germany, the European Court of Justice (ECJ) ruled that the German regulations of the HOAI on minimum and maximum rates for planners‘ fees violate the provisions of the Services Directive (Directive 2006/123/EC). The following article will examine what exactly this ruling means and what effects and reform requirements it causes.

Kľúčové slová

Nesplnenie povinnosti členským štátom, Služby na vnútornom trhu, článok 49 ZFEÚ, sloboda usadiť sa, poplatky architektov a inžinierov za plánovacie služby, minimálne a maximálne tarify

Key Words

Failure of a Member State to fulfil obligations, Services in the internal market, Article 49 TFEU, Freedom of establishment, Fees of architects and engineers for planning services, Minimum and maximum tariffs

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1 Introduction

In its ruling of 4 July 2019 (Case C-377/17) on the Fee Structure for Architects and Engineers (German "HOAI") in the infringement proceedings of the EU Commission against the Federal Republic of Germany, the European Court of Justice considered the German regulations of the HOAI on minimum and maximum rates for planners' fees to be incompatible with EU law. In the opinion of the ECJ, the regulations according to which the remuneration for architectural and engineering services must lie within fixed corridors depending on the construction costs to be estimated in advance (so-called cost calculation) violate the provisions of the Services Directive (Directive 2006/123/EC).

The following article deals with the following questions:

- What is the German HOAI and what does it regulate?
- What did the European Court of Justice criticize in its decision?
- What are the consequences for German law?

2 HOAI

The Fee Structure for Architects and Engineers (HOAI) is a federal regulation governing the fees for architectural and engineering services in Germany. The HOAI applies to all persons who work in Germany for domestic projects in the field of civil engineering, regardless of their actual education, which is clarified by the long title Regulation on Fees for Architectural and Engineering Services. The HOAI, valid since July 2013, regulates the remuneration of services rendered by architects and engineers who provide planning services in the fields of architecture, urban planning and construction. The EU Commission initiated infringement proceedings against Germany in 2015 with regard to the HOAI. The reason given for this was the violation of the service directives, never in the context of the freedom of establishment.

In contrast to the price law of the Regulation No. 30/53 on prices in public contracts, the German Regulation on fees for architectural and engineering services (*Honorarordnung für Architekten und Ingenieure – HOAI*) not only links to the quality of the contracting authority and regulates the maximum permissible price from here, but also focuses on the „basic services" provided by architects and engineers (cf. Section 1 of the German HOAI). For the applicability of the German HOAI, therefore, it depends not only on the quality of the service provider/contractor but also on the type of service. In this respect a comparison of the agreed services with the services described in the German HAOI has to be made. In addition, the scope of application of the mandatory fee regulations of the German HOAI is also considered to be opened for those planners who are not members of the chambers of architects and engineers, but who nevertheless provide services from the service descriptions of the German HOAI.[1]

The basis for the provision of services (whether, what, how) is the contract between the client and the architect or engineer as contractor. Section 3 para 1 of the German HOAI stipulates that „the fees for basic services of area, object and specialist planning (…) are bindingly regulated in parts 2 to 4 of this regulation". Whether there is a claim to remuneration at all is decided by the underlying contract. The

contractual regulation of the remuneration is then subject to the mandatory German HOAI, in that the minimum and maximum rates regulated therein limit the fee in the event of under- or overrun (cf. section 7 para 1 of the German HOAI).

Therefore, the first question to be asked is whether the architect's claim to remuneration is based on the contract. Then, mandatory requirements of the German HOAI have to be sought. If these do not exist, there is no connection to the pricing according to the German HOAI. Otherwise, the fee agreement must be checked for its written form. If there is no such written form, the fee is determined according to the minimum rates of the German HOAI.

If the fee agreement is effectively concluded (in writing), it must be examined whether it complies with the rates of the German HOAI. If this is not the case, the fee will be limited by the minimum or maximum rates of the German HOAI if it falls short of or exceeds the German HOAI. If the fee agreement is within the scope of the German HOAI, the fee is to be determined according to the contract and settled in an auditable manner.

The regulation on mandatory minimum and maximum rates is found in section 7 para 3 and 4 of the German HOAI. A private autonomy of client and contractor only finds room within this framework.

In this respect, section 7 para 1 of the German HOAI stipulates unambiguously: „The fee shall be based on the written agreement which the contracting parties make when placing the order within the framework of the minimum and maximum rates set by this regulation". A deviating fee agreement is thereafter invalid. The resulting incompleteness of the contract is concluded by section 7 para 5 of the German HOAI, because according to it „it is irrefutably assumed (that) the respective minimum rates according to section 7 para 1 of the German HOAI have been agreed".

3 Judgement of the Court

The operative part of the judgment of 4 July 2019 in Case C-377/17[2] is as follows: ‚By maintaining fixed tariffs for architects and engineers, the Federal Republic of Germany failed to fulfil its obligations under Article 49 TFEU and under Article 15 (1), (2) (g) and (3) of Directive 2006/123/EC (…) on services in the internal market'. The ECJ has thus taken Directive 2006/123/EC of the European Parliament and of the Council of 12th December 2006 on services in the internal market as a direct yardstick.

3.1 Scale

This is based on the freedom of establishment under Article 49 TFEU. In this respect, the question arises whether the lower price limit creates a restriction on market access for foreign suppliers, and further, whether this can be justified by overriding reasons of public interest. In this respect, two points of view come into consideration, on the one hand quality assurance by minimum tariffs, on the other hand consumer protection due to the asymmetry of information between contractor and contracting authority. Finally, a further significant legal question would have been whether the freedom of establishment would have applied at all to purely domestic situations.[3]

In this respect, section 1 of the German HOAI stipulates that „this Regulation regulates the calculation of fees for basic services provided by architects and engineers (contractors) based in Germany, insofar as the basic services are covered by this Regulation and provided from Germany".

The ECJ circumvents this problem by referring to the Services Directive, which orders in Art. 2 (1): „This Directive applies to services provided by a service provider established in a Member State". The ECJ has already ruled elsewhere that Art. 15 of the Services Directive has direct effect.[4] There will be consequences: For according to the understanding of the ECJ, Articles 15 (1) to (3) of the Services Directive cover domestic situations and have a direct (horizontal) effect in such a way that the individual can invoke the illegality of the German HOAI provisions under Union law.[5] This does not require a preliminary ruling from the ECJ under Article 267 TFEU.

3.2 Justification

First, the ECJ confirmed the applicability of the Directive to purely domestic situations, i.e. situations in which the factual circumstances do not extend beyond a single Member State of the Union (ll. 57 – 58). It concedes that the existence of minimum rates for planning services with regard to the German market, which is characterised by a large number of small and medium-sized enterprises, could in principle contribute to ensuring a high quality of planning services (l. 88). However, a national provision was only suitable if it sought to achieve the objective in a coherent and systematic manner (l. 89).

He then attested that the German regulation was incoherent, because planning services were not reserved for certain professions which were subject to mandatory supervision under professional and chamber law, but could provide planning services not only to architects and engineers but also to other unregulated service providers. There are therefore no minimum quality assurance guarantees for the provision of services subject to minimum rates (l. 92). The ECJ is thus alluding to the so-called „*Bauvorlageberechtigung*" (right to submit building documents), which under building regulations is also available to persons other than architects and engineers.[6]

The Federal Republic of Germany assumed that discrimination against nationals was permissible under Union law (l. 39), which was also regarded as permissible under constitutional law.[7] In contrast, the ECJ refers to the standard purpose of the Directive, i.e. the completion of the internal market (l. 63) and subjects the minimum and maximum rates for planning services by architects and engineers to Art. 15 of the Services Directive (l. 66).

According to the case-law of the ECJ, regulatory exceptions only do not impair an overall regulatory concept if there are comprehensible reasons for a deviation in the sense of the exceptions and the exceptions do not change the regulatory objectives pursued or the overall system (l. 67). The Court considers that the Federal Republic of Germany has not demonstrated why certain planning services are not covered by the minimum prices of the German HOAI, while others are (l. 93).

3.3 Decision

The European Court of Justice attests a violation of secondary Union law (only) the German HOAI regulations on fixed fees. Under no circumstances has the HOAI been declared void by the ECJ as a whole. No subject of the infringement proceedings and the judgement are in particular the regulations

on services, service descriptions, service phases, etc., the regulations on incidental costs (section 14 para. 2 HOAI) and the formalities (written form, namely when the contract is concluded).

Rather, the Federal Republic of Germany is obliged to adapt section 7 para 1, 3 and 4 of the German HOAI to Union law requirements. In this regard, Art. 260 I TFEU states that the Member States must „take the measures necessary to comply with the judgment of the Court of Justice". There is no express deadline in this respect. In other cases, however, the ECJ has decided that „the execution of a judgment must begin without delay and be completed as quickly as possible". In this respect, a one-year period could be appropriate.[8]

4 Consequences

The decision of the ECJ may have consequences both for contracts that have not yet been fulfilled and for ongoing award procedures or tenders.[9]

4.1 Fees

Contracts effectively concluded in compliance with the German HOAI fixed minimum/maximum rates are not affected by the verdict of the ECJ. The contractual agreement remains valid in this respect. The fact that the German HOAI regulations on minimum and maximum rates are contrary to Union law is irrelevant. This applies both to a flat fee and in the case of a fee agreement with reference to the fee rates/tables of the German HOAI, so that the fee can only be determined by applying the German HOAI calculation works.

In the case of „open" contractual situations, especially if either no fee regulation at all or an undercutting of the minimum rate is agreed upon, the question arises whether the German HOAI regulations continue to apply until they are amended.[10] It is disputed, however, that German courts are no longer entitled to apply the rule on minimum rates under Section 7 para 1 of the German HOAI because they then disregarded the primacy of application of European law over conflicting national law.[11]

If the contract lacks a fee regulation, section 7 para 5 of the German HOAI via § 632 II Var. 1 of the German Civil Code (*BGB*) could apply. Although this HAOI standard is not mentioned in the ECJ ruling, the refutable presumption standardized therein comes very close to a binding fee, which disputes the applicability of the provision.[12] According to § 632 II Var. 2 of the German Civil Code (*BGB*), the „remuneration customary in the locality" is then decisive, i.e. remuneration that must be paid for services of the same type and quality as well as the same scope according to the place of performance according to generally accepted opinion.[13]

Here it can be considered to use the now non-binding HOAI minimum rates to fill in this element of the facts. If it has been agreed that the HOAI minimum rates will not be exceeded, architects and engineers can no longer enforce the HOAI minimum rates in court („*Aufstockungsklagen*„). Similarly, the client must now pay a fee agreed above the maximum rate and can no longer successfully defend himself against this in court („*Höchstsatzklagen*„).

4.2 Contract Award Procedure

For ongoing award procedures or invitations to tender, it is now inadmissible to exclude a tenderer on the basis of a bid below the minimum rate.[14] Tenders with reference to minimum and maximum rate requirements of the HOAI must be amended and tenders must then be resubmitted.

If necessary, an extension of the tender period, the binding period and the negotiation dates may be considered. It should be noted, however, that there are very strict requirements for changing the award criteria in ongoing procedures. Although the price has subsequently become a flexible element of the tender due to the ECJ ruling, it cannot simply be added as an award criterion. For reasons of transparency, it is therefore appropriate to publish a new contract notice. In future, price can also be included as an evaluation and award criterion for architectural and engineering services. An award of contract can also be considered for bids below HAOI minimum rates. If interpreted in conformity with EU law, section 127 (2) of the German Restriction of Competitive Act (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*), sections 76 (1), 77 (3) of the German Regulation on the Award of Public Contracts (*Vergabeverordnung, VgV*) no longer cover the minimum and maximum rate regulation of the HOAI.

The contracting authority remains called upon to examine unusually low tenders, § 60 VgV. It should be remembered here that the HOAI minimum rates act as a threshold for the „now it starts“ of an examination.[15] Traditionally, the price difference between the affected party and the next higher offer is measured and the pickup threshold is detected at a price gap of 20 %.[16]

Negotiated procedures and competitive dialogue (Sections 73 (1), 74 VgV) now also concern price competition in the case of engineering and architectural services, and no longer only service competition within the meaning of Section 76 (1) VgV. It is conceivable to provide for a priority of service competition at least in the case of complex and innovative architectural and engineering services in upper threshold awards. A weighting of the price criterion below 50 % could also be considered. One way in which the contracting authority can react is to launch a planning competition, section 78 (1) VgV. In the case of sub-threshold awards, the legal situation is in any case open in the absence of regulation.

Finally, a contracting authority has the possibility of specifying fixed prices or costs, section 58 (2) and (3) VgV. In this case, the award criteria are exclusively qualitative, environmental or social.[17]

5 Conclusion

All in all, it is essential to amend the law governing engineering and architectural services and the HOAI with regard to minimum and maximum rate regulations, including the regulations on exceeding and falling short of the minimum rate. Regulatory options exist in several respects: On the one hand, the remuneration clauses can be maintained as a nonmandatory right. They then constitute offer legislation in accordance with the contractual provisions of the German Civil Code (*BGB*). In this way, the tried and tested price regulations advance to a legal model without violating Union law. It is also indicated that the German Restriction of Competition Act (*GWB*) and the Regulation on the Award of Public Contracts (*Vergabeverordnung)* will be amended with regard to references to the price law of the HOAI.

Since the ECJ has strongly focused on the incoherence of the German regulatory system, consideration could also be given to reforming the law governing the profession. However, this would directly challenge the fundamental prohibitions of discrimination. Insofar as stricter regulation of those entitled to perform planning services is considered, for example in the sense of implementing a reservation for the provision of architectural and engineering services, it should, however, be borne in mind that there is a subjective barrier to admission to the profession. It is not convincing to standardize a more intensive encroachment on fundamental rights than the hitherto valid regulation on the exercise of the profession in order to justify a milder encroachment on fundamental rights. Irrespective of this, it is questionable whether the Federal Government would even have the legislative competence for this.

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