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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

2 February 2023 (*)

(Reference for a preliminary ruling – Status under EU law of churches and religious associations or communities in the Member States – Article 17(1) TFEU – Freedom of establishment – Article 49 TFEU – Restrictions – Justification – Proportionality – Subsidies for a private school – Application submitted by a religious society established in another Member State – Establishment recognised by that society as a denominational school)

In Case C-372/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 1 June 2021, received at the Court on 17 June 2021, in the proceedings

Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR

v

Bildungsdirektion für Vorarlberg,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra (Rapporteur), N. Jääskinen and M. Gavalec, Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR, by M. Krömer and P. Krömer, Rechtsanwälte,

- the Austrian Government, by A. Posch, J. Schmoll and F. Werni, acting as Agents,
- the Czech Government, by T. Machovičová, M. Smolek and J. Vláčil, acting as Agents,
- the European Commission, by L. Armati, M. Mataija and G. von Rintelen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 17 and 56 TFEU.

2 The request has been made in proceedings between the Freikirche der Siebenten-Tags-Adventisten in Deutschland KdöR (the Free Church of the Seventh-day Adventists in Germany; ‘the German Adventist Church’) and the Bildungsdirektion für Vorarlberg (Education Directorate for Vorarlberg, Austria; ‘the competent authority’) concerning a subsidy sought for a private school recognised and supported as a denominational school by that church.

Relevant provisions of Austrian law

The AnerkennungsG

3 Paragraph 1 of the Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften (Law on the legal recognition of religious societies), of 20 May 1874 (RGI., 68/1874; ‘the AnerkennungsG’), provides:

‘Members of a religious denomination previously not recognised by law shall be recognised as a religious society provided that:

1. nothing in their religious doctrine, in their religious office, in their statutes, or in the name they choose for themselves is illegal or contrary to morality;
2. the establishment and existence of at least one religious community founded in accordance with the requirements of this law are assured.’

The BekGG

4 Paragraph 11 of the Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften (Federal Law on the legal status of registered religious communities, BGBl. I, 19/1998, as published in BGBl. I, 78/2011; ‘the BekGG’), headed ‘Additional requirements for a religious community to be recognised under the AnerkennungsG’, provides:

‘In addition to the requirements set out in the [AnerkennungsG], in order to be recognised, the religious community must fulfil the following conditions.

1. The religious community must:
 - (a) have existed for at least 20 years in Austria, of which 10 years in an organised form, and at least 5 years as a religious community with legal personality under this law; or

(b) be organisationally and doctrinally integrated into an internationally active religious society which has existed for at least 100 years and has already been active in Austria in an organised form for at least 10 years; or

(c) be organisationally and doctrinally integrated into an internationally active religious society which has existed for at least 200 years; and

(d) has a membership equal to at least two per thousand of the population of Austria as determined at the last census. If the religious community cannot provide this proof from the census data, it must provide it in any other appropriate form.

...

3. The religious community must be well disposed towards society and the State.

4. It must not create unlawful disturbance in relations with churches and religious societies recognised by law or with other existing religious communities.'

The PrivSchG

5 As set out in Paragraph 17 of the Bundesgesetz über das Privatschulwesen (Privatschulgesetz) (Law on private schools), of 25 July 1962 (BGBl., 244/1962), as amended (BGBl. I, 35/2019) ('the PrivSchG'), concerning the right to the award of subsidies for denominational private schools:

'(1) Legally recognised churches and religious societies are to be granted subsidies for staff costs for denominational private schools having public law status in accordance with the following provisions.

(2) Denominational private schools are to be understood as referring to schools maintained by legally recognised churches and religious societies, as well as those schools maintained by associations, foundations and funds which are recognised as denominational schools by the competent higher authority of a church (of the religious society concerned).'

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 The German Adventist Church, which has the status of a legal person governed by public law in Germany, is not granted the status of 'church' recognised under Austrian law.

7 Since the 2016/2017 school year, that church has recognised, as a denominational school, an educational establishment situated in Austria, which is operated by an approved association to which it provides support in the form of, inter alia, subsidies, the provision of teaching material and ongoing training of teaching staff. That church applied to the competent authority for a subsidy for the staff costs of that school pursuant to Paragraph 17 of the PrivSchG, relying on Article 56 TFEU, in order to benefit from the treatment reserved to churches and religious societies recognised under Austrian law.

8 By decision of 3 September 2019, the competent authority refused that application on the basis of Paragraph 17(1) and (2) of the PrivSchG, which, it submits, is applicable only to churches and religious societies recognised under Austrian law. The German Adventist Church then brought an appeal against that decision, which was dismissed by the Bundesverwaltungsgericht (Federal Administrative Court, Austria) by judgment of 26 February 2020.

9 That court considers that EU law does not require the Republic of Austria to recognise a church or religious society that has previously been recognised in another Member State. Consequently, the fact that such a church or religious society recognises a private school established in Austria as a denominational school does not allow that church or society to rely on Paragraph 17 of the PrivSchG to obtain, for that school, subsidies to pay its staff.

10 It is against that judgment that the German Adventist Church brought an appeal on a point of law (*Revision*) before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

11 In its request for a preliminary ruling, that court states that churches and religious societies recognised, *inter alia*, on the basis of the AnerkennungsG and the BekGG are legal persons governed by public law, and enjoying special rights and having tasks, in particular in the field of education, through which they participate in the shaping of public life at State level. That court states that Paragraph 17 of the PrivSchG reserves only to those churches and religious societies the eligibility for subsidies for private schools which they recognise as denominational schools.

12 In that context, the referring court is uncertain, first of all, whether the situation at issue in the main proceedings falls within the scope of EU law.

13 In that regard, it notes, first, that, in accordance with Article 17 TFEU, the grant of subsidies to denominational private schools of churches and religious societies recognised by a Member State covers only relations between that Member State and those religious societies and that the European Union is to remain neutral towards those relations. Nevertheless, the Court of Justice has held, in paragraphs 30 to 33 of the judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43), that Article 17 TFEU does not mean that a difference in treatment to which national legislation in this area gives rise is excluded from the scope of EU law.

14 Secondly, the referring court considers that, in the light of the case-law of the Court of Justice, in particular the judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 105), the private school at issue in the main proceedings, which is financed essentially by private funds, carries out an economic activity consisting in a provision of services. However, since that school is operated by an association registered in Austria, that provision of services does not have a cross-border element, unless account is taken of the fact that the application for a subsidy for that school was submitted by a church established and recognised in Germany.

15 Next, that court is uncertain whether the German Adventist Church may rely on the freedom to provide services guaranteed by Article 56 TFEU in order to receive the same treatment as the denominational private schools of churches or religious societies legally recognised in Austria whose educational activities are financed essentially by public funds and which, therefore, cannot be classified as ‘economic activities’ within the meaning of the case-law referred to in the preceding paragraph of the present judgment.

16 Lastly, the referring court is uncertain whether the national legislation which prohibits the German Adventist Church from receiving subsidies for a private school situated in Austria, in contrast to churches and religious societies recognised in that Member State, constitutes an obstacle to the freedom to provide services guaranteed in Article 56 TFEU. The referring court states that that national legislation, in so far as it aims to supplement the State school system with denominational private schools of churches or religious societies sufficiently represented in Austria, in order to make it easier for parents to choose an education for their children according to their

religious beliefs, pursues a legitimate objective. It also considers that that legislation may be regarded as suitable for securing the attainment of that objective without going beyond what is necessary in order to attain it.

17 In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the light of Article 17 TFEU, does a situation in which a religious society that is recognised and established in one Member State of the European Union applies in another Member State for subsidisation of a private school which is recognised as denominational by that religious society and which is operated in that other Member State by an association registered under the law of that other Member State fall within the scope of EU law, in particular Article 56 TFEU?’

If Question 1 is answered in the affirmative:

(2) Is Article 56 TFEU to be interpreted as precluding a national rule which provides, as a condition for the subsidisation of denominational private schools, that the applicant must be recognised as a church or religious society under national law?’

The first question

18 By its first question, the referring court asks, in essence, whether Article 17(1) TFEU must be interpreted as having the effect of excluding from the scope of EU law a situation in which a church or a religious association or community, which has the status of a legal person governed by public law in one Member State and which recognises and supports a private school in another Member State as a denominational school, applies for the grant of a subsidy for that school which is reserved for churches and religious associations and communities recognised under the law of that other Member State.

19 In that regard, it must be borne in mind, in the first place, that, while Article 17(1) TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 58, and of 13 January 2022, *MIUR and Ufficio Scolastico Regionale per la Campania*, C-282/19, EU:C:2022:3, paragraph 50), that provision cannot be relied on in order to exclude from the scope of EU law altogether the activity of churches or religious associations and communities where that activity consists in the provision of services for remuneration in a given market (see, to that effect, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 43 and 47).

20 In the second place, courses provided by educational establishments financed essentially by private funds constitute services, since the aim of such establishments is to offer those services for remuneration (see, to that effect, judgments of 7 December 1993, *Wirth*, C-109/92, EU:C:1993:916, paragraph 17, and of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 105).

21 Conversely, courses provided by a school which is integrated into a system of public education and financed, entirely or mainly, by public funds do not constitute an economic activity. Indeed, in establishing and maintaining such a system of public education, the Member State is not

seeking to engage in gainful activity, but is fulfilling its duties towards its population in the social, cultural and educational fields (see, to that effect, judgments of 7 December 1993, *Wirth*, C-109/92, EU:C:1993:916, paragraph 15, and of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 39).

22 In the present case, it is apparent from the request for a preliminary ruling that the Austrian school recognised and supported by the German Adventist Church as a denominational school is a private establishment whose courses are financed largely by private funds, so that, subject to the matters to be verified by the referring court, that establishment is to be regarded as carrying out an economic activity within the meaning of the case-law cited above.

23 In that regard, contrary to the observations of the Austrian Government and the Commission, the fact that the subsidy applied for, once granted, would make it possible to regard the private school concerned as an establishment financed by public funds that, as such, no longer carries out an economic activity, within the meaning of the case-law referred to in paragraphs 20 and 21 above, is irrelevant for the purpose of determining whether the situation at issue in the main proceedings falls within the scope of EU law. All that matters is that the private school for which the subsidy is sought may be regarded as carrying out an economic activity on the date on which that application is submitted (see, by analogy, judgment of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 44).

24 Furthermore, contrary to the Austrian Government's observations, the situation at issue in the main proceedings is distinguishable from a situation which is confined in all respects within a single Member State. In the present case, the German Adventist Church seeks a subsidy from the Austrian authorities for a school situated in Austria which it recognises and supports as a denominational school. That cross-border element thus means that, in principle, the rules of EU law on freedom of movement apply (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47).

25 In the light of the reasons set out above, the answer to the first question is that Article 17(1) TFEU must be interpreted as not having the effect of excluding from the scope of EU law a situation in which a church or religious association or community, which has the status of a legal person governed by public law in one Member State and which recognises and supports a private school in another Member State as a denominational school, applies for a subsidy for that school which is reserved for churches and religious associations or communities recognised under the law of that other Member State.

The second question

26 It must be borne in mind at the outset that the school for which the German Adventist Church seeks a subsidy is located in Austria and is operated by an association that is registered in that Member State and has a stable and continuous presence there. Accordingly, that situation comes within the freedom of establishment guaranteed by Article 49 TFEU and not the freedom to provide services guaranteed by Article 56 TFEU (see, by analogy, judgment of 8 September 2010, *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 59).

27 In those circumstances, the second question submitted by the referring court must be understood as seeking, in essence, to determine whether Article 49 TFEU, read in conjunction with Article 17(1) TFEU, must be interpreted as precluding national legislation which makes the grant of public subsidies to private schools recognised as denominational schools conditional upon the church or religious society which submits the application for a subsidy for such a school being

recognised under the law of the Member State concerned, including where that church or religious society is recognised under the law of its Member State of origin.

28 The first paragraph of Article 49 TFEU provides that, within the framework of Chapter 2 of Title IV in Part Three of the FEU Treaty, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited. That provision thus precludes all national measures which prohibit, impede or render less attractive the exercise of the freedom of establishment (see, to that effect, judgments of 5 October 2004, *CaixaBank France*, C-442/02, EU:C:2004:586, paragraph 11, and of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 61).

29 The prohibition of all discrimination on grounds of nationality, applicable in this area, prohibits not only overt discrimination but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. It may therefore be that criteria such as place of origin or residence of a national of a Member State may, depending on the circumstances, be tantamount, as regards their practical effect, to discrimination on grounds of nationality, such as is prohibited by the FEU Treaty (see, to that effect, judgments of 12 February 1974, *Sotgiu*, 152/73, EU:C:1974:13, paragraph 11, and of 20 January 2011, *Commission v Greece*, C-155/09, EU:C:2011:22, paragraph 45).

30 In the present case, it is apparent from the order for reference that the application for subsidisation referred to in Paragraph 17 of the PrivSchG is open only to churches and religious societies recognised by Austrian law, that is to say those which satisfy the conditions laid down in Paragraph 1 of the AnerkennungsG and Paragraph 11 of the BekGG.

31 In so far as those conditions require, in general, a presence, of varying duration, of churches or religious societies in Austria and a membership equal to at least two per thousand of the population of Austria, they are likely to be satisfied more easily by churches or religious societies established in Austria. Those conditions are thus such as to place at a disadvantage churches and religious societies established in other Member States which recognise and support private schools situated in Austria as denominational schools. Those churches and religious societies are not entitled to receive subsidies for those schools in order to pay the costs of teaching staff required to implement the teaching programmes of those schools.

32 Consequently, subject to the matters which it is for the referring court to verify, it must be held that national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment.

33 Nevertheless, a restriction on the freedom of establishment may be permitted provided, first, that it is justified by an objective expressly referred to in Article 52(1) TFEU or by an overriding reason in the public interest and, secondly, that it observes the principle of proportionality, which means that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (see, to that effect, judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 65).

34 As regards, in the first place, whether there is a justification for the restriction in question, the explanatory notes to the PrivSchG, cited by the referring court, state that denominational private schools supplement the State school system, which is interdenominational, making it easier for parents to choose an education for their children according to their religious beliefs.

35 Furthermore, it is apparent from the explanatory notes to the amendment of the BekGG, as regards the criteria governing the recognition of churches and religious societies under the AnerkennungsG, that those which are recognised by Austrian law are eligible for material public aid, in particular in the area of health and education, in so far as they contribute to the well-being of individuals. Obtaining the status of church or religious society recognised under Austrian law entails obligations, including that of providing religious education.

36 The referring court, like the Austrian Government, takes the view that that legislation, by supplementing the interdenominational State school system with denominational private schools, does indeed enable parents to choose an education for their children according to their religious beliefs and therefore pursues a legitimate objective. As the Advocate General observes in point 72 of his Opinion, such an objective, which is in line with that of ensuring high standards of education, which the Court of Justice has described as an ‘overriding reason in the public interest’ (judgments of 13 November 2003, *Neri*, C-153/02, EU:C:2003:614, paragraph 46, and of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 45), is capable of justifying a restriction on the freedom of establishment.

37 In those circumstances, as is clear from paragraph 33 above, it is necessary to examine, in the second place, whether the national legislation at issue in the main proceedings, first, is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and, secondly, does not go beyond what is necessary in order to attain it.

38 It is ultimately for the referring court, which has sole jurisdiction to assess the facts of the main proceedings and to interpret the applicable national legislation, to determine whether and to what extent that legislation satisfies those conditions. However, the Court of Justice, which is called on to provide answers of use to that court to enable it to give judgment, may provide guidance based on the documents and on the written observations before it (judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraphs 72 and 73).

39 In the present case, as regards the suitability of the national legislation at issue to pursue, in a consistent and systematic manner, the legitimate objective concerned, it is apparent from the explanatory notes to the amendment of the BekGG that the recognition of churches and religious societies under the AnerkennungsG presupposes that they are of a certain size so that their actions are not limited to their members. It is accepted that, where the minimum number of members of a church or religious society laid down by that legislation is reached, the positive effects of its actions, in particular as regards education, extend beyond the scope of the community of its members. In addition, limiting the grant of public subsidies solely to denominational schools of churches and religious societies recognised under Austrian law is intended to ensure that those schools cater for a significant part of the population that may potentially choose that option of education, which is supplementary to that offered by State schools.

40 In those circumstances, the legislation at issue in the main proceedings does not appear unsuitable for the purpose of enabling parents to choose an education for their children according to their religious beliefs, in the context of high-quality interdenominational education, an objective which, as recalled in paragraph 36 above, is legitimate under EU law.

41 As regards whether that legislation does not go beyond what is necessary to attain that objective, it should be borne in mind that Article 17(1) TFEU requires the European Union to respect and not to prejudice the status of churches and religious associations or communities within the Member States, since Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with them (judgments of 17 April 2018,

Egenberger, C-414/16, EU:C:2018:257, paragraph 58, and of 13 January 2022, *MIUR and Ufficio Scolastico Regionale per la Campania*, C-282/19, EU:C:2022:3, paragraph 50). Accordingly, in circumstances such as those of the main proceedings, Article 49 TFEU, read in conjunction with Article 17(1), cannot be interpreted as requiring a Member State to recognise the status that those churches and religious associations or communities enjoy under the law of other Member States.

42 Paragraph 11 of the BekGG lays down three alternative conditions for obtaining the status of church or religious society recognised under Austrian law. First, a church or religious society that has existed in Austria for at least 20 years is eligible for that status. Secondly, even if it has not existed previously, a church or religious society that is organisationally and doctrinally integrated into an internationally active religious society which has existed for at least 200 years is eligible for that status. Thirdly, if that society has been internationally active for at least 100 years, it must have been active in Austria in an organised form for at least ten years in order for the church or religious society that is organisationally and doctrinally integrated there to be eligible for the status in question.

43 Such alternatives, which are intended to cover situations in which the recognition of a church or a religious society may contribute to the interdenominational nature of the national education system, do not appear to go beyond what is necessary to attain the objective identified in paragraph 36 above of enabling parents to choose an education for their children according to their religious beliefs.

44 Furthermore, as regards the condition regarding the representativeness, within the national population, of the church or religious society seeking recognition under Austrian law, the second sentence of Paragraph 11(1)(d) of the BeKGG provides that where it is not possible to provide proof that they have a membership equal to at least two per thousand of the population of Austria based on data from the last census, such proof may be provided in any other appropriate form. That provision, inasmuch as it is not confined to providing for a single method of proof, also demonstrates the Austrian legislature's intention not to go beyond what is necessary to attain the objective pursued by the national legislation.

45 For the reasons set out above, the answer to the second question is that Article 49 TFEU, read in conjunction with Article 17(1) of that treaty, must be interpreted as not precluding national legislation which makes the grant of public subsidies to private schools recognised as denominational schools conditional upon the church or religious society which submits the application for a subsidy for such a school being recognised under the law of the Member State concerned, including where that church or religious society is recognised under the law of its Member State of origin.

Costs

46 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 (Third Chamber) hereby rules:

1. Article 17(1) TFEU must be interpreted as not having the effect of excluding from the scope of EU law a situation in which a church or religious association or community, which has the status of a legal person governed by public law in one Member State and which recognises and supports a private school in another Member State as a denominational

school, applies for a subsidy for that school which is reserved for churches and religious associations or communities recognised under the law of that other Member State.

2. Article 49 TFEU, read in conjunction with Article 17(1) of that treaty, must be interpreted as not precluding national legislation which makes the grant of public subsidies to private schools recognised as denominational schools conditional upon the church or religious society which submits the application for a subsidy for such a school being recognised under the law of the Member State concerned, including where that church or religious society is recognised under the law of its Member State of origin.

[Signatures]

* Language of the case: German.
