Central and East European Moot Court Competition 2010

Organised by:

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C H A N C E

30th April – 3rd May 2010

In co-operation with:
St Kliment Ohridski University
SOFIA

MOOT BUNDLE 2010

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J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009, Chapter 9: State Liability	**(16 pages)**

Additional background reading on Article 234 and judicial review will also be available for teams and added to the bundle in February

Although the rules prevent competitors from citing authorities other than those in this bundle, should further background information be sought to prepare the case the following websites may be useful:

http://curia.europa.eu

http://www.amicuria.org

MOOT QUESTION 2010

Joined Cases

Atad Etavirp
v
Sroodnepo Minister for Agriculture

and

Atad Etavirp
v
Egat Obas

1. Atad Etavirp's family has been one of the prime wine producers of Sroodnepo, a Member State of the European Union, for centuries. It is said that the vines and production methods were first gifted to ancestors of Atad Etavirp during their travels in ancient Persia in the early 10th century where wine was not only produced from grapes but also from rice. On the basis of this long-held reputation, the Etavirp family has not only built a lucrative wine empire, but also attained considerable stature within Sroodnepo society. Many Etavirps have served in high political office, representing the Farming Party, which until recently was the largest political party. Atad Etavirp's father was Prime Minister, and his great grandfather the first President of Sroodnepo after the country deposed its royal family and became a republic.

2. Unfortunately for the Etavirp family, the traditional wine business has not been going well in recent years. Since the 1990s, there has been a dramatic increase in the production of 'new world' wines in Africa, Australia, the USA and Latin America, where output rose by more than 90%. Although many of the new world wines are of vastly inferior complexity and pedigree – and some of them even sold in screw top bottles! – they have significantly encroached on sales of 'old wine'. As a consequence, it is difficult to generate a profit even on the most recognised premium varieties of Sroodnepo wine, including the famous Tolrem vintage, and the costs of production have also increased requiring producers to rely mainly on cheap labourers from other Member States to pick their grapes.

3. Atad Etavirp therefore reluctantly swallowed his pride and applied for EU farm subsidies from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). To his great relief, the applications were treated speedily and resulted in the payment of several hundred thousand euros of subsidies over the last few years. When it became clear that the EU was reducing, and would eventually phase out, wine subsidies, the family reacted by increasing production of rice wine, so transferring various of their fields to rice production to ensure that the level of subsidies continued.

4. To Atad Etavirp's horror, he recently heard from his lawyer that the Sroodnepo Minister for Agriculture was planning to publish the fact that he was receiving EU subsidies, together with the complete details of the amounts paid, on a ministry website. It emerged that the publication of the details of all recipients of farming subsidies was required by EU law, namely Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy as amended by Council Regulation (EC) No 1437/2007 (the '2005 Regulation') and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of the 2005 Regulation as regards the publication of information on the beneficiaries of funds deriving from the EAGF and the EAFRD (the '2008 Regulation'). It appeared that the Minister also had a special weakness for a number of the 'new world' wines imported by Atad's main competitors and found it irritating that that the media monopoly of other members of Atad's family in Sroodnepo had been used to successfully block competitors' advertisements so reducing the available supply of his favourite wine in Sroodnepo.

5. Article 44a of the 2005 Regulation is worded as follows:

Article 44a

Publication of the beneficiaries

Pursuant to Article 53b(2)(d) of Regulation (EC, Euratom) No 1605/2002, Member States shall ensure annual ex-post publication of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds.

The publication shall contain at least:

(a) for the EAGF, the amount subdivided in direct payments within the meaning of Article 2(d) of Regulation (EC) No 1782/2003 and other expenditure;

(b) for the EAFRD, the total amount of public funding per beneficiary.

6. Point 8b of Article 42(1) of the 2005 Regulation requires the Commission to adopt:

   8b. the detailed rules on the publication of information concerning beneficiaries referred to in Article 44a and on the practical aspects related to the protection of individuals with regard to the processing of their personal data in accordance with the principles laid down in Community legislation on data protection. These rules shall ensure, in particular, that the beneficiaries of funds are informed that these data may be made public and may be processed by auditing and investigating bodies for the purpose of safeguarding the financial interests of the Communities, including the time that this information shall take place;

7. The particular rules in question were laid down in the 2008 Regulation and stipulate expressly that the first name, surname, the municipality of residence and the amount of aid received are to be published on an internet site per member state.

8. To make matters worse, Atad has also been made aware of a new internet site set up by Egat Obas (who is a resident of Troppus a neighbouring EU Member State) who wishes to draw the attention of EU citizens to the CAP and the financial support provided for unprofitable farming business, starting with the so-called 'wine lakes'. It appears that some of Atad's main competitors from Troppus have heard rumours indicating that Atad has made good use of EU financial support and that his family name will therefore feature prominently under the heading "Abusers and Misusers" which will also reveal each producer's annual income side by side with the amount of subsidies he received.

9. The internet site is set up, hosted, designed and edited in Troppus and is written both in the national language of Troppean as well as in English. The site design includes a search engine which allows users both to search on the site itself and also to search using the Google search engine. The site details also rank highly on Google search lists when the search includes terms such as: abuse, EU funds, wine, CAP subsidies, rice. As a result it has been accessed not only by citizens of Troppus but also from other member states including citizens of Sroodnepo (English is one of three official languages in Sroodnepo, but not Troppus, and it is thus easily possible for Sroodnepans to understand the site). Statistics suggest that 80% of 'hits' on the site come from Troppus but that 2% of users access the site from Sroodnepo and Atad therefore fears that this group of users will be more than sufficient to spread knowledge of the contents of the site page in Sroodnepo.

10. Atad Etavirp fears that the honour and reputation of his family will be threatened if it becomes publicly known that he had to ask for EU handouts to survive in business and would not only lead to his exposure to ridicule in front of his farmer friends, but before the people of Sroodnepo generally. His fledgling political career would be destroyed – he is currently a member of the Sroodnepo Senate and has been invited to consider putting his name forward as the leader of his political party, which would ensure that he would become the next prime minster of Sroodnepo at the elections next summer. He also believes that his wine business would be gravely threatened by the prospect of publication of his name on the list of subsidy beneficiaries; he had already noted a downturn of 1% in orders of wine in the last two months, which he puts down to the rumours that are being spread by his competitors. Atad Etavirp thus decides to hire the best lawyers available and put a stop to the planned publications as a matter of urgency.

11. His lawyers therefore launch actions in December 2008 challenging the intended publication and apply for an interim injunction in the Sroodnepo High Court restraining both the Minister for Agriculture and Egat Obas from any publication of data concerning Atad Etavirp's personal finances.

12. As regards the Minister, they argue in summary that Article 44a of the 2005 Regulation infringes EU data protection law for the protection of fundamental rights contained in both the European Convention of

Human Rights (ECHR) and the Charter of Fundamental Rights (the Charter). The information published allows personal data to be published about an individual or company enabling economic conclusions to be drawn about that person, its business practices, economic position, sustainability, viability etc. They further argue that there are no overriding public interests which can be put forward in justification. Publication of the aid for each district, without identifying individual producers, should suffice as EU citizens do not need to know the specific data for each producer. Moreover, from a technical point of view, the data accessible via the internet could be stored and processed by third parties on an unsupervised basis.

13. The Minister resists the application. He points out that the obligation on the Member States to publish the data on the Internet results from Article 44a of the 2005 Regulation in conjunction with the 2008 Regulation. In his view, those provisions are without a doubt valid Union law. Publication is effected in the public interest and is not affected by or in conflict with any of the provisions on fundamental human rights contained in the Charter, the ECHR, or from general principles of law. He adds that Article 44a facilitates transparency with regard to spending on agriculture and does not exceed what is necessary in a democratic society for the prevention of irregularities. In any event, data has been published by all Member States other than Sroodnepo (accessible via http://ec.europa.eu/agriculture/funding/) and the SMA fears that the Commission will launch an action against Sroodnepo imposing a hefty fine should it delay publication.

14. The Minister also notes that the application forms signed by Mr Etavirp to obtain subsidies contained the following notice: *'I am aware that Article 44a of Regulation (EC) No 1290/2005 may require the publication of information on the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary.*

15. In the action against Egat Obas, which is joined with the action against the Minister, Atad Etavirp's lawyers rely on Sroodnepo defamation law protecting the personality, in particular that of particularly vulnerable persons in the 'public eye'.

16. Article 12(1) of the Sroodnepo Civil Code guarantees *'as against all the world the protection of human dignity and the right to free development of the personality including the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy'.*

17. Article 12(8) of the Civil Code contains a provision designed to safeguard the independence of members of any of the branches of government in Sroodnepo and maintain a high level of public debate by insulating *'the President, his Ministers, Judges and Senators'* from scrutiny of their private affairs making it unlawful to *'publish without their express consent any details concerning their private lives, family history, military conduct or financial interests'.* There is an exception from this prohibition only as regards data required to be published by the Speaker of the Parliament, or as matter of EU Law.

18. Rights derived from these provisions are stated to be inalienable and any breach results in the imposition of severe financial penalties, without any proof of any damage to the claimant being required. There are no substantial defences, thereby practically guaranteeing the success of the claim in Sroodnepo.

19. Legislation mirroring Article 12(1) of the Sroodnepo Civil Code exists in Troppus, but differs in requiring claimants to prove the existence of actual harm and in providing a range of defences including of the truth of the matters stated. There is no equivalent to Article 12(8) of the Sroodnepo Civil Code in Troppus.

20. In the event that cases fall within the jurisdiction of either Troppus or Sroodnepo courts, the national conflict of laws rules of both Member States provides that the applicable law in cases where national jurisdiction has been established must be national law, save in cases which fall within the European Union Rome regime on applicable law.

21. Egat's sole response to this claim is to dispute the jurisdiction of the Sroodnepo High Court pointing out that jurisdiction for such tortious claims can only be established under the rules set out in the Council Regulation 44/2001 (the Brussels Regulation) either:

(i) on the basis of the domicile of the defendant as set out in Article 2 of that Regulation; or

(ii) under the special jurisdiction rules set out in Article 5(3) of that Regulation allowing jurisdiction in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

Arguments raised in the Sroodnepo High Court:

Concerning the validity of Article 44a and Point 8b of Article 42(1) of Regulation No 1295/2005

22. Whether the action is well founded depends in the view of the Sroodnepo High Court first of all on the validity of the Union provisions referred. The High Court has serious doubts about the compatibility of Article 44a and point 8b of Article 42(1) of the 2005 Regulation with primary Union law. The fact that at Union level data protection has the status of a fundamental right results from the protection of private life in Article 8 of the ECHR and from the constitutional traditions of the Member States. That is reinforced by the Charter which includes as a fundamental right, in Article 7, protection for private life and, in Article 8, protection for personal data (see Case C-275/06 *Promusicae* [2008] ECR I-271, para 63, and the Opinion of Advocate General Kokott in that case, paras 51 et seq.). It will also cover protection of personal data arising from professional activities (see Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989, para 73) and further confirmed by the entry into force of Article 6 TEU.

23. In accordance with Article 44a of the Regulation, Member States must publish information on each of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds. That constitutes an interference in the fundamental right to data protection which, according to Atad Etavirp, is not justified, in particular in the light of the proviso contained in Article 8(2) of the ECHR (see *Österreichischer Rundfunk*, para 80 et seq.). According to that provision any interference must be necessary in a democratic society in order to ensure one of the interests mentioned therein. Therefore the measure must be proportionate to the legitimate aim pursued and there must be a pressing social need.

24. According to the 14th recital in the preamble to Regulation No 1437/2007, which introduced Article 44a into Regulation No 1290/2005, the purpose of publication is to enhance transparency regarding the use of Union funds and to improve through public control the sound financial management of the funds concerned. In that regard Atad Etavirp insists that transparency does not constitute an aim in itself but a description of the measure's outcome. Admittedly, on a broad interpretation of Article 8(2) of the ECHR, improving financial controls furthers a country's economic well-being. However, in the present case the measure is not proportionate. It is to be doubted whether publication in any form is appropriate.

25. According to a letter by the Swedish Data Inspection Board written to the Commission to protest against the introduction of the publication requirements, controls on the use of funds and the prevention of irregularities are not improved by the publication requirement. In its view, comprehensive control mechanisms already exist which are subject to refinement

26. At any rate, Atad Etavirp argues that publication is disproportionate to the aim pursued. He relies in particular on the judgment in *Österreichischer Rundfunk* where the Court of Justice considered it a fundamental condition that publication – the case at hand concerned the salaries of employees of certain public law bodies – is actually necessary. That is the case only if the objective cannot be attained equally effectively by transmitting the information to the monitoring bodies alone or publishing simply the total amounts.

27. Atad Etavirp furthermore argues that point 8b of Article 42(1) of the 2005 Regulation allows the Commission too much discretion in determining the data which must be published and the manner of its publication. In particular, it is left open whether publication is to be effected via the Internet alone, as he argues that this act constitutes a particularly serious interference with fundamental rights due to the fact that once data is on the Internet, it is available to everyone, and it is virtually impossible to control its use. Even if the concept of 'implementation' is given a wide interpretation, the essential elements of the matter governed must be established in the basic act for it to remain possible to speak of implementation (see C-66/04 *UK v Council and Parliament [Smoke Flavourings]* para 21 et seq). Otherwise the institutional balance between the Council and the Commission would be disturbed. Also, the participation of the European Parliament would be undermined if fundamental legislative questions could be simply left to the Commission to decide. In that context, consideration should also be given to the fact that Article 8(2) of the ECHR refers to a democratic society.

Concerning the issues of jurisdiction and applicable law

28. Atad argues that the Court held in Case C-68/93 *Shevill* that a court has jurisdiction under Article 5(3) of the Brussels Regulation once it has been established that harm was suffered within the jurisdiction concerned, and that the existence of harm is to be assessed according to the relevant applicable law, which in this case is the national law of Sroodnepo.

29. In contrast Egat argues that *Shevill* did not conclude the question of claims concerning an internet site voluntarily accessed by citizens of another Member State and that the determination of jurisdiction under Article 5(3) of the Brussels Regulation in such a case would be a factual decision based upon a number of factors, in particular the language of the site, the location of the site host, the residence of the site provider and that no one factor would suffice to decide on jurisdiction for any tortuous claim. He adds that a particularly important factor is that there was no distribution of the information in the territory of Sroodnepo and that there was no evidence that the contents of the site were specifically directed towards citizens of Sroodnepo, a main point here being that the site was not in Sroodnepian (the national language of Sroodnepo).

30. Atad counters that if the internet service provider imposed no limitation on access by internet users from other countries, then courts of any jurisdiction are competent under Article 5(3) of the Brussels Regulation, particularly when there is evidence to show that the site was in fact accessed.

31. In the light of all these arguments and considerations, the Sroodnepo High Court decides on the 1st October 2009 to grant both injunctions being applied for by Atad Etavirp on an interim basis namely

    (i) restraining the Minister from publishing details concerning the subsidies paid to Atad; and

    (ii) restraining Egat from adding any information regarding Atad on his web site.

32. The Sroodnepo High Court further stays both proceedings and refers the following questions to the Court of Justice under Article 234 EC:

Concerning Atad Etavirp v Egat Obas

1) In a case of alleged claim for defamation or breach of personality rights by an internet site, do the words 'the place where the harmful event occurred' in Article 5(3) of the Brussels Regulation mean:

(a) the place where the internet site is hosted and put into virtual circulation; or

(b) the place or places where the internet might be accessed by particular individuals; or

(c) the place or places where the claimant has a significant reputation?

2) In determining the jurisdiction of a Member State pursuant to Article 5(3) of the Brussels Regulation if and in so far as the place(s) where the internet might be accessed by particular individuals may be relevant (because the site is accessed from more than one state) so that the courts of a particular Member State (here Sroodnepo) may claim jurisdiction under Article 5(3) at the same time as another Member State (here Troppus which has primary jurisdiction under the domicile provisions contained in Article 2 as well as the source of the alleged harm under Article 5(3)):

a) is the court seised of litigation obliged to first apply a de minimis rule requiring a sufficient connection, which is significant and substantial, between the alleged harm suffered and the territory of the first state?

b) if so, which criteria should the national court consider in order to satisfy the requirement of a significant and substantial connection?

Concerning Atad v Minister for Agriculture

3) Are Article 44a of the 2005 Regulation and/or point 8b of Article 42(1) of the 2005 Regulation and the 2008 Regulation invalid because they allows too much discretion to the Commission to lay down detailed rules on the publication of personal data and does not contain all of the 'essential elements' of such rules?

4) ***Are Article 44a of the 2005 Regulation and/or point 8b of Article 42(1) of the 2005 Regulation and the 2008 Regulation invalid because they infringe Article 6(2) of the Treaty on European Union read in the light of Article 8 of, and Article 1 of the*** *First Protocol to, the European Convention on Human Rights, and of the fundamental right for protection of private life and private data?*

33. In the meantime, the request for a preliminary ruling has also come to the attention of the Sroodnepian Organisation for Fiscal Transparency (SOFT), a national organisation which promotes full fiscal transparency in all government-related matters and regularly intervenes in cases before the Sroodnepian courts in support of parties seeking greater government transparency. SOFT seeks and receives permission from the Sroondepian High court to intervene in the case.

34. While it was at this stage procedurally impossible for SOFT to present any observations in the High Court, the High Court issued an order amending its reference to the Court of Justice, adding SOFT as a third party. The Sroodnepian Civil Procedure Rules allow interventions at any stage prior to the final judgment. SOFT then immediately contacts the Registry of the Court of Justice to say that it wishes to submit observations regarding the referred questions. Atad Etavirp's lawyers are vehemently opposed to this, since they are aware that SOFT's submissions will be unfavourable to their client. The Sroodnepo Minister for Agriculture and Egat Obas on the other hand are in favour of SOFT's intervention.

Issues raised by the Court of Justice of its own motion

35. Having received the reference, as well as the order amending the reference, the Court of Justice directs the interested parties to present written and oral observations not only on the questions referred, but also the following question:

5) ***To what extent, if any, should the answer to question 4 be influenced by the fact that the Lisbon Treaty has entered into force since the date of the preliminary reference made by the national court if the provisions of that Treaty may influence the answers to those questions, in particular Article 6 TEU in its version applicable after entry into force of the Lisbon Treaty?***

36. The Court of Justice further directs the interested parties to present oral observations during the hearing to be convened on the following issue:

6) ***Is SOFT entitled to submit observations to the Court of Justice of the European Union in circumstances such as the ones of the present case?***

COMPETITION INFORMATION

Note: Written pleadings should be prepared in relation to questions 1-5 only. Question 6 will only be considered during the oral rounds.

Questions 1, 2 and 6 will be considered in the first oral round on Saturday 1st May and questions 3, 4 and 5 in the semi-finals on Sunday morning. The court will indicate which questions it wishes to be addressed in the final.

COMPETITION RULES 2010

1. Competition

This is the sixteenth year of this annual competition, this year to be held in Sofia, Bulgaria.

This competition was originally designed to assist countries from the region which were associated with or trading with the European Union, to better understand its law and structure. In recognition of the enlargements in 2004 and 2007 the competition has widened its eligibility requirements. It will continue to include those countries who have joined the EU in 2004 and 2007 as well as those which are associated countries in the region of Central and Eastern Europe, but will be extended to allow entries from interested teams from Malta, Cyprus and Turkey.

IMPORTANT: To be eligible to participate written registration and acknowledgement is required by e-mail to the British Centre on or before the 1st March 2010 and written pleadings are to be submitted by e-mail attachment on or before the 31st March 2010 (address and contact details at end)

A moot is an argument (and not a debate) between students acting as advocates representing different parties in a legal action (a case). The facts and history together with supporting material and authorities are given in advance to the students. The aim is to reproduce, as closely as possible, the discussion and argument of a genuine hearing in the European Court of Justice. The case is based upon an area of European Union Law and has been prepared by a writing committee of the organisers and external experts.

The organisers are aware that access of the competing teams to European Union law materials will vary greatly. Therefore a full bundle of supporting materials and authorities is included and encompasses all the authorities which teams are permitted to refer to in this case, to ensure that no unfair advantage is gained from those with less facilities.

2. Language

This official language of this competition shall be English

3. Participation

The competition is open to all students, nationals of Central and East European states including southern states who have applied for entry or have just entered the EU (specifically Turkey, Cyprus and Malta) , who are enrolled on a course at a participating University and:

- are not older than 30 years
- are not practising as a lawyer and
- have not previously participated in the oral rounds of the competition.

Although it is possible for any university (with participants who are nationals from the regions mentioned) to enter more than one team (of 3-4 members accompanied by one academic/ coach) in the written round of the competition, only one team per University may be selected to proceed to the oral rounds. The choice of team will be based upon the best written pleading submitted. In cases of doubt, please e-mail the organizers directly at the address below.

4. The Case

This will be a problem based upon an area of European Union substantive and/or procedural law, containing a referral to the European Court of Justice from a Member State national court under Article 234 TEC (now 267 TFEU). Both written and oral pleadings on the part of applicant and respondent will be required from each competing team.

5. Scoring

The competition will be held over four rounds.

INITIAL ROUND

1. Submission of written pleadings
There are a maximum of 20 marks available from this round, where more than one team submits written pleadings then the team with the highest written pleading mark will be invited to participate in the oral round. Written pleadings should consider questions 1-5 only.

ORAL ROUNDS

First Round
In this round all teams will be invited to argue both the sides of the case. This will require members from the team to represent the appellant's case against another team arguing on behalf of the respondent and then represent the respondent's case against a different team arguing on behalf of the appellant. It is required that all members of the team speak as either respondent or applicant but it is not required that all members speak both as respondent and applicant during the first round. During this part of the competition, the courts will hear arguments on questions **1, 2 and 6** from those referred by the fictitious EU Member State for a ruling by the Court of Justice under the Article 234 TEC procedure, with the Applicant team representing Atad Etavirp and the Respondents representing Egat Obas (questions 1 and 2) and SOFT (question 6). Scores will be allocated at the conclusion of this round on the basis of both the written and oral pleadings.

The following scoring criteria will be applied throughout by the judges:-

Criteria	Maximum Points Awarded
Form and content of written pleadings (only in first round)	20
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Effectiveness of reply/rejoinder	20
Ability to respond effectively to judges' questions.	10
To this mark will be added the mark for the written pleadings	20

Second Round (Semi-Finals)

In this round, the best teams from the first round will be invited to plead both sides of the case against other teams. This round will focus on questions **3, 4 and 5** referred by the fictitious EU Member State national court for ruling by the ECJ, with the Applicants representing Atad Etavirp and the Respondents representing the Ministry of Agriculture. Marks will be awarded for the same criteria as apply to the first round, with the exception that marks from written pleadings are no longer counted. During this round, it is necessary for all members of the team to speak both as applicant and respondent in the semi-finals.

Third Round (Final)
In the third round (final) each team will represent one side of the case (to be chosen by lot) and the judges will indicate which questions they wish to hear. Each member of the team is expected to speak in the final and so the team must be prepared to re-allocate those questions covered to ensure that each team member speaks. It is of course permissible for one member of the team to do the reply or rejoinder at this stage. The time allowed for the main argument of each party will be a maximum of 45 minutes and will not be extendable. Teams are expected at this stage to have the experience to ensure that their main

arguments are fitted into the time allowed.
Three judges will sit in the first and second round. A plenary court will be convened for the final.

The decision of the judges will be conclusive in selecting the semi-finalists, finalists and eventual winning team and best speaker.

A special prize of a short stage in the ECJ at Luxembourg will be awarded to the individual deemed to be the best speaker to be selected only from persons whose teams have participated in the Second and Third Oral rounds (i.e. semi-finalists or finalists).

Individual speaker book prizes will also be awarded

Written and oral pleadings

Written pleadings

ALL participating teams must prepare written pleadings for both applicant and defendant. This should be an outline of your case for both applicant and defendant, not exceeding 10 typed sides of argument on A4 paper each for the applicant and respondent respectively (no specific requirements for font or spacing are prescribed and an attached list of authorities is not included in the 10 pages allowance). Arguments should be set out in numbered paragraphs, which should be supported and cross-referenced to a separate list of the authorities on which it is intended to rely (this may also be cross referenced to the relevant page of the bundle).

One copy of each of your written pleadings for the respondent and applicant must be submitted and received by the organisers prior to 22.00 on the 31st March 2010 and should be submitted to d.ashmore@uw.edu.pl. Due receipt of written pleadings will be confirmed by the organizers on **1st April 2010**. No printed copies of the pleadings will be required.

The written pleadings should be accompanied by a completed copy of the team registration form as well as evidence of payment of the team registration fee of **100 euros**.

ONLY teams lodging these pleadings in due time will be eligible to be invited to participate in the oral rounds of the competition.

In the event that more than one team sends written pleadings from one university, the team to participate will be that submitting the written pleadings awarded the highest mark.

A prize for the best written pleadings will be awarded by our main sponsors Clifford Chance.

Oral Argument

This argument need not be limited to the scope of the participant's written pleadings, but strict time limitations are to be maintained. Teams will be advised of the schedule of courts at registration on arrival in Sofia.

The main argument of each party shall be presented within 20 minutes (in the final this will be 45 minutes)
The applicant then has 5 minutes to reply, but is limited in this reply to the matters raised in the defendant's oral pleadings.

The defendant then has 5 minutes to reply in rejoinder and is also limited to matters raised in the applicant's reply.
Permission must be sought of the President of the Court, if any time limit is to be exceeded. Only a further 5 minutes can be allowed at his/ her discretion.

6. Roles

Each team may have up to four members. Teams should be in a position to argue both sides and can divide in which manner they wish to achieve that either as a full group or by dividing their teams so not all members of the teams will speak on each side.

However the rules do require that the judges will have heard from each member of the team individually at least once during the first oral round of the competition.

In the second and third rounds of the competition however judges will expect to hear from each of the team members in their presentations on behalf of both the applicant and respondent.

7. Fees

Fees are split into two parts:-

1. A registration fee of **100 euros** to be paid at the submission of the written pleadings.

This may only be paid by bank transfer, bank details are provided below.

2. Oral round participation fee of **500 euros**.

Each participating team is responsible for their return travel and any administrative or visa charges to Sofia (at the present time it is not believed that any team will need a visa to enter Bulgaria for the competition but teams should check this directly with their Bulgarian embassy representative in their country) and any additional costs incurred due to earlier arrival or later departures.

The oral round registration fee is required to participate in the first oral round in Sofia.

This fee will allow the participation of a one team to include their accommodation and basic subsistence costs during the competition dates (a team may include up to 3/4 team members and one accompanying coach).

The oral round participation fee may be paid by bank transfer in which case it must be received by the organizers and confirmation of payment sent by e-mail no later than the 15th April 2010 (the original copy of the payment confirmation is to be produced at registration).

The oral round participation fee may also be paid by cash payment on the 30th April at the registration of the team in Sofia, in which case it may be paid in either euro or in local currency. The exact amount of the fee in Bulgaria lev will be confirmed in April 2010.

PLEASE NOTE THAT ALL FEES DUE OR EXTRA MONIES PAYABLE MUST BE RECEIVED NO LATER THAN CLOSURE OF REGISTRATION ON 30th April 2010.

8. Bank Details

Account name:	Juris Angliae Scientia
Bank name and address:	Bank Handlowe w Warszawie S.A., Citibank, VII Oddzial w Warszawie, Ul Chalubinskiego 8, 00-950 Warsawa (Skr poczt 129) CITIPLPX
Account number:	PL58103016540000000031691028 (Euro currency)

CONTACT NUMBERS AND POSTAL ADDRESS FOR PLEADINGS.

Tel/Fax *until April 2009*: +48-22-831-8634

Tel *during competition*: +44-788-522-3999

E-mail: da208@cam.ac.uk or d.ashmore@uw.edu.pl

Postal Address: British Centre for English and European Legal Studies (Moot competition)
ul Rajców 2, apt 1
00-220 Warszawa
Poland.

SOFIA CONTACTS

Polina Stoycheva +359 889 599 722

Dimitar Deltchev +359 889 229 059

PRELIMINARY INFORMATION ON THE ECJ

The following is a short introductory guide to the role of the ECJ within the European Communities system and its relationship with the national courts of the Member States.

- The ECJ's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EC law. It is the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the ECJ on behalf of an EC institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 226. The power of one Member State to bring an action against another Member State comes from Article 227 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TEC on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the ECJ to rule upon a certain issue of European law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 234 reference to the ECJ asking for guidance on the interpretation, application or validity of an EC measure.

- The ECJ is assisted by Advocate-Generals, who produce reasoned opinions on a case before the ECJ rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are not binding on the ECJ but they are very influential and are often followed in practice.

- The ECJ is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the ECJ has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the ECJ's rulings on Community law but it is for the national court to apply that Community law to the facts of the case in front of it.

PROVISIONAL COMPETITION TIMETABLE*
[*NB. A final version of the timetable will be provided at the competition itself]

FRIDAY 30th April 2010

16.00-19.00 Registration of teams
19.00 Welcome Reception and Opening Ceremony

SATURDAY 1st May 2010

9.00 Opening words by Organising Committee and Judges

Round 1 of Competition

9.30 - 11.00 Group 1
11.15 - 12.45 Group 2

13.00 - 14.30 LUNCH

14.30-16.00 Group 3
16.00-17.30 Group 4

20.00 DINNER
(Announcement of semi-finalists)

SUNDAY 2nd May 2010

Round 2 of Competition

9.00 - 11.00 First semi-finals
11.15-13.15 Second semi-finals

13.30 LUNCH BREAK
(Announcement of finalists)

Round 3 of Competition

15.00 FINAL

20.00 Celebration dinner
23.00 Party

MONDAY 3rd May 2010

Departure of teams and time for sightseeing.

ACKNOWLEDGMENTS

The Organising Committee wish to thank the following for their invaluable help:

- Catherine Barnard, Trinity College, Cambridge

- Carsten Zatschler, ECJ (referendaire) and the chambers of AG Eleanor Sharpston and Judge Arabadjiev

- The University of Cambridge and the Court of Justice of the European Community (in particular Eleanor Sharpston A.G, Judge Konrad Schiemann and Judge Alexander Arabadjiev) for their continuing support of the Moot Court Competition

The Organisers would also like to thank Professors Steiner, Weatherill and Barnard for agreeing to the reproduction of extracts from their textbooks to assist the students preparing for the competition.

The Organising Committee also wish to offer special thanks to the Central and East European branches of Clifford Chance, the main financial sponsors of the moot court competition.

EXTRACTED ARTICLES FROM THE TREATY OF EUROPEAN COMMUNITY (TEC) AS AMENDED

CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY [TEC]

PART ONE: PRINCIPLES

Article 1
By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

Article 2
The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3
1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) a common commercial policy;
(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
(d) measures concerning the entry and movement of persons as provided for in Title IV;
(e) a common policy in the sphere of agriculture and fisheries;
(f) a common policy in the sphere of transport;
(g) a system ensuring that competition in the internal market is not distorted;
(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
(i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
(j) a policy in the social sphere comprising a European Social Fund;
(k) the strengthening of economic and social cohesion;
(l) a policy in the sphere of the environment;
(m) the strengthening of the competitiveness of Community industry;
(n) the promotion of research and technological development;
(o) encouragement for the establishment and development of trans-European networks;
(p) a contribution to the attainment of a high level of health protection;
(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
(r) a policy in the sphere of development cooperation;
(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
(t) a contribution to the strengthening of consumer protection;
(u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 4
1. For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the

close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in this Treaty and in accordance with the timetable and the procedures set out therein, these activities shall include the irrevocable fixing of exchange rates leading to the introduction of a single currency, the ecu, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Community shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

Article 5
The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 6
Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

Article 7
1. The tasks entrusted to the Community shall be carried out by the following institutions:
— a EUROPEAN PARLIAMENT,
— a COUNCIL,
— a COMMISSION,
— a COURT OF JUSTICE,
— a COURT OF AUDITORS.
Each institution shall act within the limits of the powers conferred upon it by this Treaty.

2. The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

[...]

Article 10
Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Article 12
Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article 13
1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

Article 14
1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

3. The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

[...]

PART THREE: COMMUNITY POLICIES
TITLE II: AGRICULTURE

Article 32
1. The common market shall extend to agriculture and trade in agricultural products. 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.

2. Save as otherwise provided in Articles 33 to 38, the rules laid down for the establishment of the common market shall apply to agricultural products.

3. The products subject to the provisions of Articles 33 to 38 are listed in Annex I to this Treaty.

4. The operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy.

Article 33
1. The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
(c) to stabilise markets;
(d) to assure the availability of supplies;
(e) to ensure that supplies reach consumers at reasonable prices.

2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:
(a) the particular nature of agricultural activity, which results from the social structure of agriculture
and from structural and natural disparities between the various agricultural regions;
(b) the need to effect the appropriate adjustments by degrees;
(c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

Article 34
1. In order to attain the objectives set out in Article 33, a common organisation of agricultural markets shall be established. This organisation shall take one of the following forms, depending on the product concerned:

(a) common rules on competition;
(b) compulsory coordination of the various national market organisations;
(c) a European market organisation.

2. The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 33, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports. The common organisation shall be limited to pursuit of the objectives set out in Article 33 and shall exclude any discrimination between producers or consumers within the Community. Any common price policy shall be based on common criteria and uniform methods of calculation.

3. In order to enable the common organisation referred to in paragraph 1 to attain its objectives, one or more agricultural guidance and guarantee funds may be set up.

Article 35
To enable the objectives set out in Article 33 to be attained, provision may be made within the framework of the common agricultural policy for measures such as:

(a) an effective coordination of efforts in the spheres of vocational training, of research and of the dissemination of agricultural knowledge; this may include joint financing of projects or institutions;
(b) joint measures to promote consumption of certain products.

Article 36
The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33. The Council may, in particular, authorise the granting of aid:

(a) for the protection of enterprises handicapped by structural or natural conditions;
(b) within the framework of economic development programmes.

Article 37
1. In order to evolve the broad lines of a common agricultural policy, the Commission shall, immediately this Treaty enters into force, convene a conference of the Member States with a view to making a comparison of their agricultural policies, in particular by producing a statement of their resources and needs.

2. Having taken into account the work of the Conference provided for in paragraph 1, after consulting the Economic and Social Committee and within two years of the entry into force of this Treaty, the Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 34(1), and for implementing the measures specified in this title. These proposals shall take account of the interdependence of the agricultural matters mentioned in this title.

The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make.

3. The Council may, acting by a qualified majority and in accordance with paragraph 2, replace the national market organisations by the common organisation provided for in Article 34(1) if:
(a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;
(b) such an organisation ensures conditions for trade within the Community similar to those existing in a national market.

4. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Community.

Article 38
Where in a Member State a product is subject to a national market organisation or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organisation or rules exist, unless that State applies a countervailing charge on export. The Commission shall fix the amount of these charges at the level required to redress the balance; it may also authorise other measures, the conditions and details of which it shall determine.

[...]

PART FIVE: INSTITUTIONS OF THE COMMUNITY

TITLE I: PROVISIONS GOVERNING THE INSTITUTIONS
***CHAPTER 1:* THE INSTITUTIONS**

SECTION 2: THE COUNCIL

Article 202
To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:
— ensure coordination of the general economic policies of the Member States,
— have power to take decisions,
— confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.

SECTION 4: THE COURT OF JUSTICE

Article 220
The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

Article 227
A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice. Before a Member State brings an action against another Member State for an alleged infringement of an
obligation under this Treaty, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

Article 228
1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 227.

Article 229
Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations.

Article 230
The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 231
If the action is well founded, the Court of Justice shall declare the act concerned to be void. In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

Article 232
Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established. The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion. The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the ECB in the areas falling within the latter's field of competence and in actions or proceedings brought against the latter.

Article 233
The institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice. This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 288. This article shall also apply to the ECB.

Article 234
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

PART SIX: GENERAL AND FINAL PROVISIONS

Article 284
The Commission may, within the limits and under conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it.

Article 286
1. From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.

2. Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.

EXTRACTED ARTICLES FROM THE TREATY ON EUROPEAN UNION (TEU) AS AMENDED

TITLE I: COMMON PROVISIONS

Article 5
The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

Article 6
1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

EXTRACTS FROM THE TREATY ON EUROPEAN UNION [TEU] (as amended by Treaty of Lisbon)

TITLE I: COMMON PROVISIONS

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

……

EXTRACTS FROM THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION [TFEU] (post-Lisbon)

PART ONE: PRINCIPLES

Article 15 **(ex Article 255 TEC)**
1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Article 16 **(ex Article 286 TEC)**
1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I: INSTITUTIONAL PROVISIONS
CHAPTER 2: LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS
SECTION 1: **THE LEGAL ACTS OF THE UNION**

Article 288 **(ex Article 249 TEC)**
To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Article 289

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;
(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.
For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.

Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word ‘implementing’ shall be inserted in the title of implementing acts.

Treaty of Lisbon: PROTOCOL ON TRANSITIONAL PROVISIONS

WHEREAS, in order to organise the transition from the institutional provisions of the Treaties applicable prior to the entry into force of the Treaty of Lisbon to the provisions contained in that Treaty, it is necessary to lay down transitional provisions,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community: [...]

TITLE VII: TRANSITIONAL PROVISIONS CONCERNING ACTS ADOPTED ON THE BASIS OF TITLES V AND VI OF THE TREATY ON EUROPEAN UNION PRIOR TO THE ENTRY INTO FORCE OF THE TREATY OF LISBON

Article 9

The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.

....

THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

Article 1
The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

TITLE I: JUDGES AND ADVOCATES-GENERAL

Article 2
Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 3
The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written. The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

Article 4
The Judges may not hold any political or administrative office. They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority. When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Article 5
Apart from normal replacement, or death, the duties of a Judge shall end when he resigns. Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench. Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

Article 6
A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court

concerned. The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council. In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

Article 7
A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

Article 8
The provisions of Articles 2 to 7 shall apply to the Advocates-General.

TITLE II: ORGANISATION OF THE COURT OF JUSTICE

Article 9
When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately. When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

Article 10
The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice.

Article 11
The Court of Justice shall arrange for replacement of the Registrar on occasions when he is prevented from attending the Court of Justice.

Article 12
Officials and other servants shall be attached to the Court of Justice to enable it to function. They shall be responsible to the Registrar under the authority of the President.

Article 13
At the request of the Court of Justice, the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur. The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council, acting by a simple majority. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 14
The Judges, the Advocates-General and the Registrar shall be required to reside at the place where the Court of Justice has its seat.

Article 15
The Court of Justice shall remain permanently in session. The duration of the judicial vacations shall be determined by the Court with due regard to the needs of its business.

Article 16
The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once. The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber. The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests. The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Article 17

Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations. Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges. Decisions of the Grand Chamber shall be valid only if nine Judges are sitting. Decisions of the full Court shall be valid only if 15 Judges are sitting. In the event of one of the Judges of a chamber being prevented from attending, a Judge of another chamber may be called upon to sit in accordance with conditions laid down in the Rules of Procedure.

Article 18

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity. If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly. Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

TITLE III: PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer. The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner. Other parties must be represented by a lawyer.
Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.
Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.
As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.
University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral. The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them. Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure. The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.
Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Article 21

A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based. The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the

Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.

Article 22

A case governed by Article 18 of the EAEC Treaty shall be brought before the Court of Justice by an appeal addressed to the Registrar. The appeal shall contain the name and permanent address of the applicant and the description of the signatory, a reference to the decision against which the appeal is brought, the names of the respondents, the subject-matter of the dispute, the submissions and a brief statement of the grounds on which the appeal is based. The appeal shall be accompanied by a certified copy of the decision of the Arbitration Committee which is contested. If the Court rejects the appeal, the decision of the Arbitration Committee shall become final. If the Court annuls the decision of the Arbitration Committee, the matter may be re-opened, where appropriate, on the initiative of one of the parties in the case, before the Arbitration Committee. The latter shall conform to any decisions on points of law given by the Court.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute. Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court. Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

***Article 23a* (*)**

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure. Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General. In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

Article 24

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

Article 25

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

Article 26
Witnesses may be heard under conditions laid down in the Rules of Procedure.

Article 27
With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

Article 28
Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

Article 29
The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence. The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions. The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

Article 30
A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

Article 31
The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

Article 32
During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

Article 33
Minutes shall be made of each hearing and signed by the President and the Registrar.

Article 34
The case list shall be established by the President.

Article 35
The deliberations of the Court of Justice shall be and shall remain secret.

Article 36
Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

Article 37
Judgments shall be signed by the President and the Registrar. They shall be read in open court.

Article 38
The Court of Justice shall adjudicate upon costs.

Article 39
The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of

the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure. The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

Article 40
Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned. An application to intervene shall be limited to supporting the form of order sought by one of the parties.

Article 41
Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

Article 42
Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute thirdparty proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

Article 43
If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

Article 44
An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision. The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground. No application for revision may be made after the lapse of 10 years from the date of the judgment.

Article 45
Periods of grace based on considerations of distance shall be determined by the Rules of Procedure. No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*.

Article 46
Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate. This Article shall also apply to proceedings against the European Central Bank regarding noncontractual liability.

TITLE IV: GENERAL COURT

Article 47

The first paragraph of Article 9, Articles 14 and 15, the first, second, fourth and fifth paragraphs of Article 17 and Article 18 shall apply to the General Court and its members. The fourth paragraph of Article 3 and Articles 10, 11 and 14 shall apply to the Registrar of the General Court *mutatis mutandis*.

Article 48

The General Court shall consist of 27 Judges.

Article 49

The Members of the General Court may be called upon to perform the task of an Advocate-General. It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task. The criteria for selecting such cases, as well as the procedures for designating the Advocates-General, shall be laid down in the Rules of Procedure of the General Court. A Member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case.

Article 50

The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once. The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court may sit as a full court or be constituted by a single Judge. The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in cases and under the conditions specified therein.

Article 51

By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:
(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:
— decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;
— acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;
— acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;
(b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union.
Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

Article 52

The President of the Court of Justice and the President of the General Court shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the General Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the General Court under the authority of the President of the General Court.

Article 53

The procedure before the General Court shall be governed by Title III. Such further and more detailed provisions as may be necessary shall be laid down in its Rules of Procedure. The Rules of Procedure may derogate from the fourth paragraph of Article 40 and from Article 41 in order to take account of the specific features of litigation in the field of intellectual property. Notwithstanding the fourth paragraph of Article 20, the Advocate-General may make his reasoned submissions in writing.

Article 54

Where an application or other procedural document addressed to the General Court is lodged by mistake with the Registrar of the Court of Justice, it shall be transmitted immediately by that Registrar to the Registrar of the General Court; likewise, where an application or other procedural document addressed to the Court of Justice is lodged by mistake with the Registrar of the General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice. Where the General Court finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice; likewise, where the Court of Justice finds that an action falls within the jurisdiction of the General Court, it shall refer that action to the General Court, whereupon that Court may not decline jurisdiction. Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue. Where a Member State and an institution of the Union are challenging the same act, the General Court shall decline jurisdiction so that the Court of Justice may rule on those applications.

Article 55

Final decisions of the General Court, decisions disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility, shall be notified by the Registrar of the General Court to all parties as well as all Member States and the institutions of the Union even if they did not intervene in the case before the General Court.

Article 56

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility. Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them. With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.

Article 57

Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application. The parties to the proceedings may appeal to the Court of Justice against any decision of the General Court made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months from their notification. The appeal referred to in the first two paragraphs of this Article shall be heard and determined under the procedure referred to in Article 39.

Article 58

An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

Article 59

Where an appeal is brought against a decision of the General Court, the procedure before the Court of Justice shall consist of a written part and an oral part. In accordance with conditions laid down in the Rules of Procedure, the Court of Justice, having heard the Advocate-General and the parties, may dispense with the oral procedure.

Article 60
Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect. By way of derogation from Article 280 of the Treaty on the Functioning of the European Union, decisions of the General Court declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the right of a party to apply to the Court of Justice, pursuant to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure.

Article 61
If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law. When an appeal brought by a Member State or an institution of the Union, which did not intervene in the proceedings before the General Court, is well founded, the Court of Justice may, if it considers this necessary, state which of the effects of the decision of the General Court which has been quashed shall be considered as definitive in respect of the parties to the litigation.

Article 62
In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court. The proposal must be made within one month of delivery of the decision by the General Court. Within one month of receiving the proposal made by the First Advocate-General, the Court of Justice shall decide whether or not the decision should be reviewed.

Article 62a
The Court of Justice shall give a ruling on the questions which are subject to review by means of an urgent procedure on the basis of the file forwarded to it by the General Court. Those referred to in Article 23 of this Statute and, in the cases provided for in Article 256(2) of the EC Treaty, the parties to the proceedings before the General Court shall be entitled to lodge statements or written observations with the Court of Justice relating to questions which are subject to review within a period prescribed for that purpose. The Court of Justice may decide to open the oral procedure before giving a ruling.

Article 62b
In the cases provided for in Article 256(2) of the Treaty on the Functioning of the European Union, without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union, proposals for review and decisions to open the review procedure shall not have suspensory effect. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court of Justice; the Court of Justice may state which of the effects of the decision of the General Court are to be considered as definitive in respect of the parties to the litigation. If, however, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court was based, the Court of Justice shall give final judgment. In the cases provided for in Article 256(3) of the Treaty on the Functioning of the European Union, in the absence of proposals for review or decisions to open the review procedure, the answer(s) given by the General Court to the questions submitted to it shall take effect upon expiry of the periods prescribed for that purpose in the second paragraph of Article 62. Should a review procedure be opened, the answer(s) subject to review shall take effect following that procedure, unless the Court of Justice decides otherwise. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, the answer given by the Court of Justice to the questions subject to review shall be substituted for that given by the General Court.

TITLE IV*a:* JUDICIAL PANELS

Article 62c
The provisions relating to the jurisdiction, composition, organisation and procedure of the judicial panels established under Article 257 of the Treaty on the Functioning of the European Union are set out in an Annex to this Statute.

TITLE V: FINAL PROVISIONS

Article 63
The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.

Article 64
The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament. Until those rules have been adopted, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply. By way of derogation from Articles 253 and 254 of the Treaty on the Functioning of the European Union, those provisions may only be amended or repealed with the unanimous consent of the Council.

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EXTRACTS OF RULES OF PROCEDURE OF THE COURT OF JUSTICE

Title III − Special forms of procedure

[…]
C h a p t e r 3: INTERVENTION

Article 93

1. An application to intervene must be made within six weeks of the publication of the notice referred to in Article 16(6) of these Rules.
The application shall contain:
(a) the description of the case;
(b) the description of the parties;
(c) the name and address of the intervener;
(d) the intervener's address for service at the place where the Court has its seat;
(e) the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene;
(f) a statement of the circumstances establishing the right to intervene, where the application is submitted pursuant to the second or third paragraph of Article 40 of the Statute.
The intervener shall be represented in accordance with Article 19 of the Statute.
Articles 37 and 38 of these Rules shall apply.

2. The application shall be served on the parties. The President shall give the parties an opportunity to submit their written or oral observations before deciding on the application. The President shall decide on the application by order or shall refer the application to the Court.

3. If the President allows the intervention, the intervener shall receive a copy of every document served on the parties. The President may, however, on application by one of the parties, omit secret or confidential documents.

4. The intervener must accept the case as he finds it at the time of his intervention.

5. The President shall prescribe a period within which the intervener may submit a statement in intervention.
The statement in intervention shall contain:
(a) a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties;
(b) the pleas in law and arguments relied on by the intervener;
(c) where appropriate, the nature of any evidence offered.

6. After the statement in intervention has been lodged, the President shall, where necessary, prescribe a time-limit within which the parties may reply to that statement.

7. Consideration may be given to an application to intervene which is made after the expiry of the period prescribed in paragraph 1 but before the decision to open the oral procedure provided for in Article 44(3). In that event, if the President allows the intervention, the intervener may submit his observations during the oral procedure, if that procedure takes place.

[…]
C h a p t e r 9: PRELIMINARY RULINGS AND OTHER REFERENCES FOR INTERPRETATION

Article 103
1. In cases governed by Article 23 of the Statute, the procedure shall be governed by the provisions of these Rules, subject to adaptations necessitated by the nature of the reference for a preliminary ruling.

[…]

Article 104

1. The decisions of national courts or tribunals referred to in Article 103 shall be communicated to the Member States in the original version, accompanied by a translation into the official language of the State to which they are addressed. Where appropriate on account of the length of the national court's decision, such translation shall be replaced by the translation into the official language of the State to which it is addressed of a summary of the decision, which will serve as a basis for the position to be adopted by that State. The summary shall include the full text of the question or questions referred for a preliminary ruling. That summary shall contain, in particular, in so far as that information appears in the national court's decision, the subject-matter of the main proceedings, the essential arguments of the parties in the main proceedings, a succinct presentation of the reasoning in the reference for a preliminary ruling and the case-law and the provisions of Community and domestic law relied on.
In the cases governed by the third paragraph of Article 23 of the Statute, the decisions of national courts or tribunals shall be notified to the States, other than the Member States, which are parties to the EEA Agreement and also to the EFTA Surveillance Authority in the original version, accompanied by a translation of the decision, or where appropriate of a summary, into one of the languages mentioned in Article 29(1), to be chosen by the addressee of the notification.
Where a non-Member State has the right to take part in proceedings for a preliminary ruling pursuant to the fourth paragraph of Article 23 of the Statute, the original version of the decision of the national court or tribunal shall be communicated to it together with a translation of the decision, or where appropriate of a summary, into one of the languages mentioned in Article 29(1), to be chosen by the non-Member State concerned.

2. As regards the representation and attendance of the parties to the main proceedings in the preliminary ruling procedure the Court shall take account of the rules of procedure of the national court or tribunal which made the reference.

3. Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law.
The Court may also give its decision by reasoned order, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 23 of the Statute and after hearing the Advocate General, where the answer to the question referred to the Court for a preliminary ruling admits of no reasonable doubt.

4. Without prejudice to paragraph (3) of this Article, the procedure before the Court in the case of a reference for a preliminary ruling shall also include an oral part.
However, after the statements of case or written observations referred to Article 23 of the Statute have been submitted, the Court, acting on a report from the Judge-Rapporteur, after informing the persons who under the aforementioned provisions are entitled to submit such statements or observations, may, after hearing the Advocate General, decide otherwise, provided that none of those persons has submitted an application setting out the reasons for which he wishes to be heard. The application shall be submitted within a period of three weeks from service on the party or person of the written statements of case or written observations which have been lodged. That period may be extended by the President.

5. The Court may, after hearing the Advocate General, request clarification from the national court.

6. It shall be for the national court or tribunal to decide as to the costs of the reference. In special circumstances the Court may grant, by way of legal aid, assistance for the purpose of facilitating the representation or attendance of a party.

[...]

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EXTRACTS FROM THE EU CHARTER OF FUNDAMENTAL RIGHTS

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble
The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I: DIGNITY

***Article 1:* Human dignity**
Human dignity is inviolable. It must be respected and protected.

***Article 3:* Right to the integrity of the person**
1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
(a) the free and informed consent of the person concerned, according to the procedures laid down by law;
(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
(c) the prohibition on making the human body and its parts as such a source of financial gain;
(d) the prohibition of the reproductive cloning of human beings.

TITLE II: FREEDOMS

***Article 7:* Respect for private and family life**
Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: **Protection of personal data**
1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 11: **Freedom of expression and information**
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 15: **Freedom to choose an occupation and right to engage in work**
1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: **Freedom to conduct a business**
The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

TITLE III: EQUALITY

Article 20: **Equality before the law**
Everyone is equal before the law.

Article 21: **Non-discrimination**
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22: **Cultural, religious and linguistic diversity**
The Union shall respect cultural, religious and linguistic diversity.

Article 23: **Equality between women and men**
Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: **The rights of the child**
1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: **The rights of the elderly**
The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: **Integration of persons with disabilities**
The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV: SOLIDARITY

Article 38: **Consumer protection**
Union policies shall ensure a high level of consumer protection.

TITLE V: CITIZENS' RIGHTS

Article 41: **Right to good administration**
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: **Right of access to documents**
Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

TITLE VI: JUSTICE

Article 47: **Right to an effective remedy and to a fair trial**
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: **Presumption of innocence and right of defence**
1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49: **Principles of legality and proportionality of criminal offences and penalties**
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

TITLE VII: GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51: **Field of application**
1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52: **Scope and interpretation of rights and principles**
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53: **Level of protection**
Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms,
and by the Member States' constitutions.

Article 54: **Prohibition of abuse of rights**
Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

Extracts from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 1 – Obligation to respect human rights
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 6 – Right to a fair trial
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 – Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 17 – Prohibition of abuse of rights
Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18 – Limitation on use of restrictions on rights
The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Council Regulation (EC) No 1290/2005

COUNCIL REGULATION (EC) No 1290/2005
of 21 June 2005
on the financing of the common agricultural policy

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular the third subparagraph of Article 37(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament (1),
Whereas:

(1) The common agricultural policy consists of a series of measures, some of which relate to rural development. It is important that financing be provided for those measures in order to contribute to the attainment of the objectives of the common agricultural policy. Since the measures have certain elements in common but also differ in a number of respects, their financing should be combined under one regulatory framework which allows for different treatment where necessary. In order to take account of those differences, two European agricultural funds should be created, namely the European Agricultural Guarantee Fund (hereinafter 'EAGF'), for the financing of market measures, and the European Agricultural Fund for Rural Development (hereinafter 'EAFRD'), for the financing of rural development programmes.

(2) The Community budget should finance common agricultural policy expenditure, including that on rural development, through the abovementioned Funds. In line with Article 53 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (2), this is done either centrally or in the context of shared management with the Member States. All the types of measure that can be financed using the said Funds should be specified.

(3) During the clearance of accounts, if the Commission does not have satisfactory assurance that the national controls are adequate and transparent and that the paying agencies verify the legality and correctness of the declarations of expenditure which they execute, it cannot determine within a reasonable period of time the total expenditure to be entered against the European Agricultural Funds. Provision should therefore be made for the accreditation of paying agencies by Member States, the establishment by them of procedures for obtaining the requisite declarations of assurance, and the certification of management and control systems, as well as the certification of annual accounts by independent bodies.

(4) In order to ensure consistency in the standards required for accreditation in the Member States, the Commission should provide guidance on the criteria to be applied. Moreover, in order to ensure the transparency of national controls, in particular as regards authorisation, validation and payment procedures, the number of authorities and bodies to which these responsibilities are delegated should, where appropriate, be restricted taking account of the constitutional arrangements of each Member State.

(5) Where a Member State accredits more than one paying agency, it is important that it designate a single coordinating body to ensure consistency in the management of the funds, to provide liaison between the Commission and the various accredited paying agencies and to ensure that the information requested by the Commission concerning the operations of several paying agencies is made rapidly available.

(6) To ensure harmonious cooperation between the Commission and the Member States regarding the financing of common agricultural policy expenditure and, more particularly, to allow the Commission to monitor closely financial management by the Member States and clear the accounts of the accredited paying agencies, certain information has to be communicated by the Member States to the Commission or has to be kept available to the Commission. Information technology must be used as fully as possible to that end.

(7) For the purposes of compiling the data to be sent to the Commission, and so that the Commission has full immediate access to expenditure data in both paper and electronic form, suitable rules on the presentation and transmission of data, and also on time limits to be observed, need to be laid down.

(8) The financing of measures and operations under the common agricultural policy will in part involve shared management. To ensure that Community funds are soundly managed, the Commission should perform checks on the management of the Funds by the Member State authorities responsible for making payments. It is appropriate to define the nature of the checks to be made by the Commission, to specify the terms of its responsibilities for implementing the budget and to clarify the Member States' cooperation obligations.

(9) Only paying agencies accredited by the Member States offer reasonable assurance that the necessary controls have been carried out before granting Community aid to beneficiaries. It should therefore be stipulated that only expenditure effected by accredited paying agencies should be liable for reimbursement by the Community budget.

(10) The financial resources required to cover the expenditure effected by the accredited paying agencies, in respect of the EAGF, are to be made available to the Member States by the Commission in the form of reimbursements against the booking of the expenditure effected by these agencies. Until these reimbursements, in the form of monthly payments, have been paid, financial resources must be mobilised by the Member States in accordance with the needs of their accredited paying agencies. The personnel costs and the administrative costs of the Member States and the beneficiaries involved in the execution of the common agricultural policy should be borne by themselves.

(11) Community aid should be paid to beneficiaries in good time so that they may use it efficiently. A failure by the Member States to comply with the payment deadlines laid down in Community legislation could create serious difficulties for the beneficiaries and could jeopardise the Community's yearly budgeting. Therefore, expenditure made without respecting deadlines for payments should be excluded from Community financing. In order to respect the principle of proportionality, the Commission should be able to provide for exceptions to this general rule.

(12) Provision should be made for an administrative procedure allowing the Commission to take a decision to reduce or temporarily suspend monthly payments where the information communicated by the Member States does not enable it to confirm that the Community rules applicable have been observed and indicates a clear misuse of Community funds. In clearly defined cases, a reduction or a suspension should also be possible without such a procedure. In both cases, the Commission should inform the Member State, indicating that any decision to reduce or suspend the monthly payments will be without prejudice to the decisions taken in the context of the clearance of accounts.

(13) In the context of respecting budget discipline, it is necessary to define the annual ceiling for the expenditure financed by the EAGF by taking into account the maximum amounts laid down for this Fund in the Financial Perspective and the sums fixed by the Commission under Article 10(2) of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (1) and the sums laid down in Articles 143d and 143e of that Regulation.

(14) Budget discipline also requires that the annual ceiling for expenditure financed by the EAGF be respected under all circumstances and at all stages of the budget procedure and the execution of the budget. This requires that the national ceiling for the direct payments per Member State, after correction in accordance with Article 10 of Regulation (EC) No 1782/2003, be regarded as a financial ceiling for such direct payments for the Member State concerned and that the reimbursement of these payments remain within this financial ceiling. Furthermore, budget discipline demands that all the legislative measures proposed by the Commission or adopted by the Council or by the Commission under the common agricultural policy and financed by the EAGF comply with the annual ceiling for the expenditure financed by this Fund. In the same context, it is necessary to authorise the Commission to set the adjustments referred to in Article 11(1) of Regulation (EC) No 1782/2003 where the Council does not fix these before 30 June of the calendar year in respect of which the adjustments apply.

(15) The measures taken to determine the financial contribution from the EAGF and the EAFRD in respect of the calculation of financial ceilings do not affect the powers of the budgetary authority designated by the Treaty. These measures must therefore be based on the reference amounts fixed in accordance with the Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure (1) (hereinafter referred to as the Interinstitutional Agreement) and the Financial Perspective set out in Annex I to that Agreement.

(16) Budget discipline also demands a continuous examination of the medium-term budget situation. The Commission, when submitting the preliminary draft budget for a given year, must therefore present its forecasts and analyses to the European Parliament and the Council and propose, if necessary, appropriate measures to the Council. Furthermore, the Commission should make full use of its management powers at all times to ensure compliance with the annual ceiling and, if necessary, propose appropriate measures to the Council to redress the budget situation. If, at the end of a budget year, the annual ceiling cannot be complied with as a result of the reimbursements requested by the Member States, the Commission should be able to take measures allowing, on the one hand, provisional distribution of the available budget among the Member States in proportion to their requests for reimbursement not yet paid and, on the other hand, compliance with the ceiling fixed for the year concerned. Payments for that year should be charged to the following budget year and the total amount of Community financing per Member State should be definitively established, as should compensation between Member States in order to comply with the established amount.

(17) When implementing the budget, the Commission should operate a monthly early-warning and monitoring system for agricultural expenditure, so that, if there is a risk of the annual ceiling being exceeded, the Commission may at the earliest opportunity take the appropriate measures under the management powers at its disposal, and then, if these measures prove insufficient, propose other measures to the Council, which should act as soon as possible. In order to have a smoothly functioning system, it should allow for the comparison of actual expenditure with profiles of expenditure established on the basis of expenditure in preceding years. A monthly report by the Commission to the European Parliament and the Council should compare the evolution of the expenditure effected so far with the profiles and give an assessment of the foreseeable implementation for the remainder of the budget year.

(18) The exchange rate used by the Commission in drawing up the budget documents which it submits to the Council should, while making allowances for the time lag between drafting and submission, reflect the most recent information available.

(19) The rural development programmes are financed from the Community budget on the basis of commitments in annual instalments. Member States must be able to draw on the Community funds provided for as soon as they begin the programmes. A suitably restricted prefinancing system ensuring a steady flow of funds so that payments to beneficiaries under the programmes are made at the appropriate time is therefore needed.

(20) Prefinancing apart, a distinction should be drawn between payments by the Commission to the accredited paying agencies, intermediate payments and payment of balances, and rules on their payment should be set.

(21) To protect the Community's financial interests the Commission must be able to suspend or reduce intermediate payments in cases where expenditure has been unduly incurred. A procedure for Member States to show that their expenditure has been correct should be set up.

(22) The automatic decommitment rule should help speed up execution of programmes and contribute to sound financial management.

(23) In order to establish the financial relationship between the accredited paying agencies and the Community budget, the Commission should clear the accounts of these paying agencies annually. The clearance of accounts decision should cover the completeness, accuracy and veracity of the accounts but not the conformity of the expenditure with Community legislation.

(24) The Commission, which is responsible for the proper application of Community law under Article 211 of the Treaty, should decide whether the expenditure incurred by the Member States complies with Community legislation. Member States should be given the right to justify their decisions to make payments and should have recourse to conciliation where there is no common agreement between them and the Commission. In order to give Member States legal and financial assurances as to expenditure effected in the past, a maximum period should be set for the Commission to decide which financial consequences should follow from non-compliance.

(25) In order to protect the financial interests of the Community budget, measures should be taken by Member States to satisfy themselves that transactions financed by the Funds are actually carried out and are executed correctly. Member States should also prevent and deal effectively with any irregularities committed by beneficiaries.

(26) As regards the EAGF, sums recovered should be paid back to this Fund where the expenditure is not in conformity with Community legislation and no entitlement existed. Provision should be made for a system of financial responsibility for irregularities in the absence of total recovery. In this respect a procedure should be established permitting the Commission to safeguard the interests of the Community budget by deciding on a partial charging to the Member State concerned of sums lost as a result of irregularities and not recovered within reasonable deadlines. In certain cases of negligence on the part of the Member State, it is justified to charge the full sum to the Member State concerned. However, subject to Member States complying with obligations under their internal procedures, the financial burden should be divided fairly between the Community and the Member State.

(27) The recovery procedures used by the Member States may have the effect of delaying recovery for a number of years, with no guarantee that the outcome will actually be successful. The cost of implementing these procedures may also be out of proportion to the amounts which are or may be collected. Consequently, Member States should be permitted to halt recovery procedures in certain cases.

(28) As regards the EAFRD, sums recovered or cancelled following irregularities should remain available to the approved rural development programmes of the Member State concerned as these sums have been allocated to that Member State. In order to protect the financial interests of the Community budget, provision should be made for cases where the required measures are not taken by Member States following the detection of irregularities.

(29) In order to permit reuse of EAGF and EAFRD funds, rules are needed on assignment of the sums recovered by Member States when conformity clearance is carried out or following proceedings in the event of discovery of irregularity or negligence and for additional levies in the milk and milk products sector.

(30) So that the Commission can fulfil its obligation to check on the existence and proper functioning of management and inspection systems for Community expenditure in the Member States, provision should be made, irrespective of the inspection carried out by Member States themselves, for checks by persons delegated by the Commission who will be able to request assistance from the Member States in their work.

(31) Information technology needs to be used as fully as possible for producing the information to be sent to the Commission. When carrying out checks, the Commission should have full and immediate access to expenditure information recorded both in paper form and in electronic files.

(32) A date should be set for the last payments for the approved rural development programmes for the period 2000 to 2006 financed by the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section. In order to allow Member States to receive reimbursements for payments made after this date, specific transitional measures should be envisaged. These measures should also include provisions for the recovery of the advances paid by the Commission on the basis of the second subparagraph of Article 5(1) of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (1) and for the amounts subjected to the voluntary modulation arrangements referred to in Articles 4 and 5 of Council Regulation (EC) No 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the common agricultural policy (2) .

(33) A date should be set at which the Commission can automatically decommit the sums committed but not spent under the approved rural development programmes financed by the EAGGF Guidance Section where the necessary documents relating to the closure of the operations have not reached the Commission by that date. The documents which are necessary for the Commission to establish whether the measures are closed should be defined.

(34) The Commission is responsible for managing the Funds and close cooperation between it and the Member States is provided for through a Committee on the agricultural funds.

(35) The extent of Community financing makes it necessary for the European Parliament and the Council to be kept regularly informed by means of financial reports.

(36) As personal data or business secrets might be involved in the application of the national control systems and the conformity clearance, the Member States and the Commission should guarantee the confidentiality of the information received in the context of these operations.

(37) In the interests of sound financial management of the Community budget and impartiality of treatment at both Member State and farmer level, rules on the use of the euro should be specified.

(38) Council Regulation No 25 on the financing of the common agricultural policy (3) , Council Regulation (EC) No 723/97 of 22 April 1997 on the implementation of Member States' action programmes on control of EAGGF Guarantee Section expenditure (4) and Council Regulation (EC) No 1258/1999 should be repealed. Certain Articles in Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Regulation (EEC) No 283/72 (5) should also be deleted as this Regulation provides for their arrangements.

(39) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (6), with a distinction being made between those measures which are subject to the management committee procedure and those which are subject to the advisory committee procedure, the advisory committee procedure being, in certain cases and with a view to increased efficiency, the most appropriate.

(40) The switch-over from the arrangements in the Regulations repealed to those in this Regulation could give rise to practical and specific difficulties, particularly in connection with the transition to the new arrangements, which are not dealt with in this Regulation. In order to deal with that eventuality, provision should be made for the Commission to adopt the necessary and duly justified measures. Those measures should be able to derogate from the provisions of this Regulation but only to the extent necessary and for a limited period.

(41) As the programming period for the rural development programmes financed on the basis of this Regulation runs from 1 January 2007, this Regulation should be applicable as from that date. However, certain provisions should apply as from an earlier date.

(42) The Court of Auditors has delivered an Opinion (1).

(43) The Economic and Social Committee has delivered an Opinion,

HAS ADOPTED THIS REGULATION:

TITLE I: GENERAL PROVISIONS

Article 1: Purpose and scope
This Regulation sets specific requirements and rules on the financing of expenditure falling under the common agricultural policy, including expenditure on rural development.

Article 2: Funds financing agricultural expenditure
1. In order to attain the objectives of the common agricultural policy defined by the Treaty and finance the various measures falling under it, including rural development, the following are hereby set up:

(a) a European Agricultural Guarantee Fund, hereinafter referred to as the 'EAGF';

(b) a European Agricultural Fund for Rural Development, hereinafter referred to as the 'EAFRD'.

2. The EAGF and the EAFRD shall come under the general budget of the European Communities.

Article 3: EAGF expenditure
1. The EAGF shall finance in a context of shared management between the Member States and the Community the following expenditure, which shall be effected in accordance with Community law:

(a) refunds for the exportation of agricultural products to third countries;

(b) intervention measures to regulate agricultural markets;

(c) direct payments to farmers under the common agricultural policy;

(d) the Community's financial contribution to information and promotion measures for agricultural products on the internal market of the Community and in third countries, undertaken by Member States on the basis of programmes other than those referred to in Article 4 and selected by the Commission.

2. The EAGF shall finance the following expenditure in a centralised manner and in accordance with Community legislation:

(a) the Community's financial contribution to specific veterinary measures, veterinary inspection measures, inspection measures for foodstuffs and animal feed, animal disease eradication and control programmes (veterinary measures) and plant-health measures;

(b) promotion of agricultural products, undertaken either directly by the Commission or via international organisations;

(c) measures, undertaken in accordance with Community legislation, to ensure the conservation, characterisation, collection and utilisation of genetic resources in agriculture;

(d) establishment and maintenance of agricultural accounting information systems;

(e) agricultural survey systems, including surveys on the structure of agricultural holdings;

(f) expenditure relating to fisheries markets.

Article 4: EAFRD expenditure
The EAFRD shall finance, in a context of shared management between the Member States and the Community, the Community's financial contribution to rural development programmes implemented in accordance with the Community legislation on support for rural development by the EAFRD.

Article 5: Other financing, including technical assistance
The EAGF and the EAFRD may each respectively finance on a centralised basis, on the initiative of the Commission and/or on its behalf, the preparatory, monitoring, administrative and technical support, evaluation, audit and inspection measures required to implement the common agricultural policy, including rural development. Those measures shall include in particular:

(a) measures required for the analysis, management, monitoring, information exchange and implementation of the common agricultural policy, as well as measures relating to the implementation of control systems and technical and administrative assistance;

(b) measures required to maintain and develop methods and technical means for information, interconnection, monitoring and control of the financial management of the funds used to finance the common agricultural policy;

(c) provision of information on the common agricultural policy, undertaken on the Commission's initiative;

(d) studies on the common agricultural policy and evaluation of measures financed by the EAGF and the EAFRD, including improvement of evaluation methods and exchange of information on practices;

(e) where relevant, executive agencies set up in accordance with Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of

common agricultural policy;

(f) measures relating to dissemination, raising awareness, promoting cooperation and exchanging experience at Community level, undertaken in the context of rural development, including networking of the parties concerned.

Article 6: Accreditation and withdrawal of accreditation of paying agencies and coordinating bodies

1. Paying agencies shall be the departments or bodies of the Member States which, in respect of payments made by them and as regards communicating and keeping information, provide sufficient guarantees that:

(a) the eligibility of requests and, in the framework of rural development, the procedure for allocating aid, as well as their compliance with Community rules are checked before payment is authorised;

(b) accurate and exhaustive accounts are kept of the payments made;

(c) the checks laid down by Community legislation are made;

(d) the requisite documents are presented within the timelimits and in the form stipulated by Community rules;

(e) the documents are accessible and kept in a manner which ensures their completeness, validity and legibility over time, including with regard to electronic documents within the meaning of Community rules.

With the exception of the payment of Community aid, the execution of these tasks may be delegated.

2. Member States shall accredit as paying agencies departments or bodies which fulfil the conditions laid down in paragraph 1.

Each Member State shall, taking into account its constitutional provisions and institutional structure, restrict the number of its accredited paying agencies to the minimum necessary to ensure that the expenditure referred to in Article 3(1) and Article 4 is effected under sound administrative and accounting conditions.

3. Where more than one paying agency is accredited, the Member State shall communicate to the Commission the particulars of the department or body to which it assigns the following tasks:

(a) collecting the information to be made available to the Commission and sending that information to the Commission;

(b) promoting harmonised application of the Community rules.

Community programmes, acting in connection with the

This department or body, hereinafter referred to as the ‘coordinating body’, shall be subject to specific accreditation by the Member States as regards the processing of the financial information referred to in point (a).

4. Where an accredited paying agency does not meet or no longer meets one or more of the conditions laid down in paragraph 1, the Member State shall withdraw accreditation unless the paying agency makes the necessary changes within a period to be determined according to the severity of the problem.

Article 7: Certification bodies

The certification body shall be a public or private legal entity designated by the Member State with a view to certifying the truthfulness, completeness and accuracy of the accounts of the accredited paying agency, taking account of the management and control systems set up.

Article 8: Communication of information and access to documents

1. In addition to the provisions laid down in the sectoral Regulations, Member States shall send to the Commission the following information, declarations and documents:

(a) for accredited paying agencies and accredited coordinating bodies:
(i) their accreditation document;
(ii) their function (accredited paying agency or accredited coordinating body);
(iii) where relevant, the withdrawal of their accreditation,

(b) for certification bodies:
(i) their name;
(ii) their address details,

(c) for measures relating to operations financed by the EAGF and the EAFRD:
(i) declarations of expenditure, which also act as payment requests, signed by the accredited paying agency or the accredited coordinating body and accompanied by the requisite information;
(ii) estimates of their financial requirements, with regard to the EAGF and, with regard to the EAFRD, an update of estimated declarations of expenditure which will be submitted during the year and estimated declarations of expenditure in respect of the following financial year;
(iii) the annual accounts of the accredited paying agencies with a statement of assurance signed by the person in charge of the accredited paying agency, accompanied by the requisite information for their clearance, and a certification report drawn up by the certification body referred to in Article 7.

The annual accounts of accredited paying agencies relating to EAFRD expenditure shall be submitted at the level of each programme.

2. The accredited paying agencies shall keep supporting documents relating to payments made and documents relating to the performance of the administrative and physical checks required by Community legislation, and shall make the documents and information available to the Commission.

Where those documents are kept by an authority acting under delegation from a paying agency and responsible for authorising expenditure, that authority shall send reports to the accredited paying agency on the number of checks made, their content and the measures taken in the light of their results.

Article 9: Protection of the financial interests of the Community and assurances regarding the management of Community funds

1. Member States shall:

(a) within the framework of the common agricultural policy, adopt all legislative, regulatory and administrative provisions and take any other measures necessary to ensure effective protection of the financial interests of the Community, and particularly in order to:
(i) check the genuineness and compliance of operations financed by the EAGF and the EAFRD;
(ii) prevent and pursue irregularities;
(iii) recover sums lost as a result of irregularities or negligence,

(b) set up an efficient management and control system comprising the certification of accounts and a declaration of assurance based on the signature of the person in charge of the accredited paying agency.

2. The Commission shall ensure that Member States check the legality and compliance of the expenditure referred to in Articles 3(1) and 4, and that they observe the principles of sound financial management; it shall carry out the following measures and checks in this connection:

(a) it shall check that management and control systems exist and function properly in the Member States;

(b) it shall reduce or suspend intermediate payments in full or in part and apply the requisite financial corrections, particularly where the management and control systems fail;

(c) it shall check that prefinancing is reimbursed and shall, if necessary, automatically decommit budget commitments.

3. Member States shall inform the Commission of the provisions adopted and measures taken under paragraph 1 and, with regard to rural development programmes, the measures taken for management and control in compliance with Community legislation concerning support for rural development by the EAFRD in order to protect the financial

Article 10: Admissibility of payments made by the paying agencies

The expenditure referred to in Articles 3(1) and 4 may be covered by Community financing only if it has been effected by accredited paying agencies designated by Member States.

Article 11: Payment in full to beneficiaries
Save provision to the contrary under Community legislation, payments relating to the financing provided for under this Regulation or to amounts corresponding to the public financial contribution under the rural development programmes shall be disbursed in full to the beneficiaries.

TITLE II: EAGF

CHAPTER 1: Community financing

Article 12: Budget ceiling
1. The annual ceiling for EAGF expenditure shall be constituted by the maximum amounts set for it under the multiannual financial framework provided for in the Interinstitutional Agreement, less the amounts referred to in paragraph 2.

2. The Commission shall set the amounts which, pursuant to Articles 10(2), 143d and 143e of Regulation (EC) No 1782/2003, are made available to the EAFRD.

3. The Commission shall set, on the basis of the data referred to in paragraphs 1 and 2, the net balance available for EAGF expenditure.

Article 13: Administrative and personnel costs
Expenditure relating to administrative and personnel costs incurred by Member States and beneficiaries of aid from the EAGF shall not be borne by the Fund.

Article 14: Monthly payments
1. The appropriations necessary to finance the expenditure referred to in Article 3(1) shall be made available to Member States by the Commission in the form of monthly reimbursements, hereinafter referred to as 'monthly payments', on the basis of the expenditure effected by the accredited paying agencies during a reference period.

2. Until transfer of the monthly payments by the Commission, the resources required to undertake expenditure shall be mobilised by the Member States according to the needs of their accredited paying agencies.

3. Monthly payments shall be made to each Member State at the latest on the third working day of the second month following that in which the expenditure is effected.

4. Expenditure effected by Member States between 1 and 15 October shall count as being made in the month of October. Expenditure effected between 16 and 31 October shall count

interests of the Community.

5. The Commission may decide to make supplementary payments or deductions. In such cases, the Committee on the agricultural funds shall be informed at its next meeting.

Article 16: Compliance with payment deadlines

Where payment deadlines are laid down by Community legislation, any overrun of those deadlines by the paying agencies shall make the payments ineligible for Community financing, except in the cases, conditions and limits determined, according to the principle of proportionality.

Article 17: Reduction and suspension of monthly payments

1. Where the declarations of expenditure or the information referred to in Article 15(2) do not enable the Commission to establish that the commitment of funds is in accordance with the applicable Community rules, the Commission shall ask the Member State concerned to supply further information within a period which the Commission shall determine according to the severity of the problem and which generally may not be less than 30 days.

If the Member State fails to respond to the Commission request referred to in the first subparagraph, or if the response is considered unsatisfactory or demonstrates that the Community rules applicable have not been complied with or that Community funds have been improperly used, the Commission may reduce or temporarily suspend monthly payments to the Member State. It shall inform the Member State accordingly, pointing out that reduction or suspension has taken place.

2. Where the declarations of expenditure or the information referred to in Article 15(2) enable the Commission to establish that a financial ceiling set by Community legislation has been exceeded or that the Community rules applicable have clearly not been complied with, the Commission may apply the reductions or suspensions referred to in the second subparagraph of paragraph 1 of this Article, after giving the Member State an opportunity to submit its comments.

3. Reductions and suspensions shall be applied according to the principle of proportionality, under the decision on monthly payments referred to in Article 15(2), without prejudice to the decisions referred to in Articles 30 and 31.

as being made in the month of November.

CHAPTER 2: Budget discipline

Article 18: Compliance with the ceiling

1. Throughout the budget procedure and the implementation of the budget, appropriations relating to EAGF expenditure shall not exceed the net balance referred to in Article 12(3).

All legislative instruments proposed by the Commission or adopted by the Council or the Commission and having an influence on the EAGF budget shall comply with the net balance referred to in Article 12(3).

2. Where Community legislation stipulates a financial ceiling in euro for agricultural expenditure in respect of a Member State, such expenditure shall be reimbursed subject to that limit set in euro, with any necessary adjustments being made if Article 11 of Regulation (EC) No 1782/2003 applies.

3. National ceilings for direct payments set by Community legislation, including those set by Articles 41(1) and 71c of Regulation (EC) No 1782/2003, corrected by the percentages and adjustments laid down in Articles 10(1) and 11(1) of that Regulation, shall be deemed to be financial ceilings in euro.

4. If by 30 June in any year the Council has not set the adjustments referred to in Article 11(1) of Regulation (EC) No 1782/2003, the Commission shall set those adjustments in accordance with the procedure laid down in Article 41(3) of this Regulation and shall inform the Council of them immediately.

5. Until 1 December, on a proposal by the Commission, on the basis of new information in its possession, the Council may adapt the adjustment rate for direct payments set in accordance with Article 11(1) of Regulation (EC) No 1782/ 2003.

Article 19: Budget discipline procedure

1. The Commission shall present to the European Parliament and to the Council, at the same time as the preliminary draft budget for financial year N, its forecasts for financial years N — 1, N and N + 1. It shall simultaneously present an analysis of the differences observed between the initial forecasts and actual expenditure for financial years N — 2 and N — 3.

2. If, on drawing up the preliminary draft budget for financial year N, there appears to be a risk that the net balance referred to in Article 12(3) for financial year N will be exceeded, taking account of the margin laid down in Article 11 of Regulation (EC) No 1782/2003, the Commission shall propose to the Council the measures necessary, including those required under Article 11(2) of Regulation (EC) No 1782/2003.

3. At any time, if the Commission considers that there is a risk of the net balance referred to in Article 12(3) being exceeded and that it cannot take adequate measures to remedy the situation under its management powers, it shall propose other measures to the Council to ensure compliance with that balance.

The Council shall decide on those measures, in accordance with the procedure laid down in Article 37 of the Treaty, within two months following receipt of the proposal from the Commission. The European Parliament shall give its opinion in time for the Council to take note of it and decide within the period stated.

4. If, at the end of financial year N, reimbursement requests from the Member States exceed or are likely to exceed the net balance set in accordance with Article 12(3), the Commission shall:

(a) consider the requests presented by Member States pro rata and within the limit of the available budget, and shall provisionally set the amount of the payments for the month concerned;

(b) determine, for all Member States, at the latest by 28 February of the following year, their situation with regard to Community financing for the previous financial year;

(c) set, in accordance with the procedure laid down in Article 41(3), the total amount of Community financing broken down by Member State, on the basis of a single rate of Community financing, within the limit of the budget which was available for the monthly payments;

(d) effect, at the latest when the monthly payments are made for March of year N + 1, any compensations to be carried out between Member States.

Article 20: Early-warning system

In order to ensure that the budget ceiling will not be exceeded, the Commission shall implement a monthly early-warning and monitoring system in respect of EAGF expenditure.

Before the beginning of each financial year, the Commission shall determine for that purpose monthly expenditure profiles based, if necessary, on average monthly expenditure during the previous three years.

The Commission shall present to the European Parliament and to the Council a monthly report examining the development of expenditure effected in relation to the profiles and containing an assessment of the foreseeable implementation for the current financial year.

Article 21: Reference exchange rates

1. When adopting the preliminary draft budget, or a letter of amendment to the preliminary draft budget which concerns agricultural expenditure, the Commission shall use for EAGF budget estimates the average euro/US dollar exchange rate recorded on the market during the latest quarter ending at least 20 days before adoption of the budget document by the Commission.

2. When adopting a preliminary draft amending and supplementary budget or a letter of amendment thereto, in so far as those documents concern appropriations relating to the measures referred to in Article 3(1)(a) and (b), the Commission shall use:

(a) firstly, the average euro/US dollar exchange rate actually recorded on the market from 1 August of the previous financial year until the end of the latest quarter ending at least 20 days before adoption of the budget document by the Commission and at the latest on 31 July of the current financial year, and

(b) secondly, as a forecast for the remainder of the financial year, the average exchange rate actually recorded during the latest quarter ending at least 20 days before adoption of the budget document by the Commission.

TITLE III: EAFRD
CHAPTER 1: Method of financing

Article 22: Financial contribution from the EAFRD

The financial contribution from the EAFRD towards expenditure under rural development programmes shall be determined for each programme, within the ceilings established by Community legislation concerning support for rural development by the EAFRD, plus the amounts set by the Commission under Article 12(2) of this Regulation. Expenditure financed under this Regulation shall not be the subject of any other financing under the Community budget.

Article 23: Budget commitments

The Community's budget commitments for rural development programmes (hereinafter referred to as ‘budget commitments’) shall be made in annual instalments over the period from 1 January 2007 to 31 December 2013.

The Commission decision adopting each rural development programme submitted by a Member State shall constitute a financing decision within the meaning of Article 75(2) of Regulation (EC) No 1605/2002 and, once notified to the Member State concerned, a legal commitment within the meaning of that Regulation.

For each programme, the budget commitment for the first instalment shall follow the adoption of the programme by the Commission. The budget commitments for subsequent instalments shall be made by the Commission, before 1 May of each year, on the basis of the decision referred to in the

second paragraph of this Article.

CHAPTER 2: **Financial management**

Article 24: Provisions applying to all payments
1. Payment by the Commission of the EAFRD contribution shall be in line with the budget commitments.

2. The Commission shall make the appropriations needed to cover expenditure as indicated in Article 4 available to the Member States through prefinancing, intermediate payments and the payment of a balance. Articles 25, 26, 27 and 28 shall apply to these appropriations.

3. Payments shall be assigned to the oldest open budget commitment.

4. The combined total of prefinancing and intermediate payments shall not exceed 95 % of the EAFRD's contribution to each rural development programme.

Article 25: Prefinancing arrangements
1. After adopting a rural development programme, the Commission shall pay a single prefinancing amount for that programme to the Member State. This shall represent 7 % of the EAFRD contribution to the programme concerned. It may be split between two financial years depending on resource availability.

2. The total amount paid as prefinancing shall be reimbursed to the Commission if no declaration of expenditure for the rural development programme is sent within 24 months of the date on which the Commission pays the first instalment of the prefinancing amount.

3. Interest generated on the prefinancing shall be posted to the rural development programme concerned and deducted from the amount of public expenditure indicated on the final declaration of expenditure.

4. The total prefinancing amount shall be cleared when the rural development programme is closed.

Article 26: Intermediate payments
1. Intermediate payments shall be made for each rural development programme. They shall be calculated by applying the part-financing rate for each priority to the certified public expenditure pertaining to it.

2. Subject to resource availability, the Commission shall make intermediate payments in order to reimburse the expenditure incurred by accredited paying agencies in implementing the programmes.

3. Each intermediate payment shall be made subject to compliance with the following requirements:

(a) transmission to the Commission of a declaration of expenditure signed by the accredited paying agency, in accordance with Article 8(1)(c);

(b) no overrun of the total EAFRD contribution to each priority for the entire period covered by the programme concerned;

(c) transmission to the Commission of the last annual execution report on the implementation of the rural development programme.

4. If one of the requirements laid down in paragraph 3 of this Article is not met and the declaration of expenditure cannot therefore be accepted, the Commission shall forthwith inform the accredited paying agency and the coordinating body, where one has been appointed.

5. The Commission shall make intermediate payments within 45 days of registering a declaration of expenditure for which the requirements set out in paragraph 3 of this Article are met, without prejudice to the decisions referred to in Articles 30 and 31.

6. Accredited paying agencies shall establish and forward, via the intermediary of the coordinating body or directly, where one has not been appointed, intermediate declarations of expenditure relating to rural development programmes to the Commission, at intervals set by the Commission.

Declarations of expenditure shall cover expenditure that the agency has incurred during each of the periods concerned. Intermediate declarations of expenditure in respect of expenditure incurred from 16 October onwards shall be booked to the following year's budget.

Article 27: Suspension and reduction of intermediate payments
1. Intermediate payments shall be made on the basis of the declarations of expenditure and financial information provided by Member States. Article 81 of the Regulation (EC) No 1605/2002 shall apply.

2. If the declarations of expenditure or financial information communicated by a Member State do not make it possible to find that the declaration of expenditure satisfies the relevant Community rules, the Member State shall be asked to provide additional information within a period set according to the seriousness of the problem but which may not normally be less than 30 days.

3. If the Member State fails to respond to the request referred to in paragraph 2, or if the response is considered unsatisfactory or demonstrates that the rules applicable have not been complied with or that Community funds have been improperly used, the Commission may reduce or temporarily suspend intermediate payments to the Member State. It shall inform the Member State accordingly.

4. The suspension or reduction of intermediate payments as indicated in Article 26 shall comply with the principle of proportionality and shall be without prejudice to the decisions referred to in Articles 30 and 31.

Article 28: Payment of the balance and closure of the programme
1. After receiving the last annual execution report on the implementation of a rural development programme, the Commission shall pay the balance, subject to resource availability, on the basis of the part-financing rate per priority, the annual accounts for the last execution year for the relevant rural development programme and of the corresponding clearance decision. These accounts shall be presented to the Commission by 30 June 2016 and shall cover the expenditure incurred by the paying agency up to 31 December 2015.

2. The balance shall be paid not later than six months after the information and documents mentioned in paragraph 1 of this Article are received. The amounts still committed after the balance is paid shall be decommitted by the Commission within a period of six months, without prejudice to Article 29(6).

3. If by 30 June 2016 the Commission has not been sent the last annual execution report and the documents needed for clearance of the accounts of the last execution year for the programme the balance shall be automatically decommitted in accordance with Article 29.

Article 29: Automatic decommitment
1. The Commission shall automatically decommit any portion of a budget commitment for a rural development programme that has not been used for the purpose of prefinancing or making intermediate payments or for which no declaration of expenditure meeting the conditions laid down in Article 26(3) has been presented to it in relation to expenditure incurred by 31 December of the second year following that of the budget commitment.

2. That part of budget commitments still open on 31 December 2015 for which a declaration of expenditure has not been made by 30 June 2016 shall be automatically decommitted.

3. If a Commission decision subsequent to the decision approving the rural development programme is needed for authorisation of assistance or of an aid scheme, the period leading to automatic decommitment shall run from the date of that subsequent decision. The amount in question shall be established using a schedule provided by the Member State.

4. In the event of any legal proceedings or an administrative appeal having suspensory effect, the period for automatic decommitment referred to in paragraph 1 or paragraph 2 shall be interrupted, in respect of the amount relating to the operations concerned, for the duration of those proceedings or that administrative appeal, provided that the Commission receives substantiated notification from the Member State by 31 December of year N + 2.

5. The following shall be disregarded in calculating the (a) that part of the budget commitments for which a declaration of expenditure has been made but reimbursement of which has been reduced or suspended by the Commission at 31 December of year N + 2;

(b) that part of the budget commitments which a paying agency has been unable to disburse for reasons of force majeure seriously affecting implementation of the rural development programme. National authorities claiming force majeure must demonstrate the direct consequences on the implementation of all or part of the programme.

6. The Commission shall inform Member States and the authorities concerned in good time if there is a risk of automatic decommitment. It shall inform them of the amount involved as indicated by the information in its possession. The Member States shall have two months from receiving this information to agree to the amount in question or present observations. The Commission shall carry out the automatic decommitment not later than nine months after the time-limit laid down in paragraphs 1 to 4.

7. In the event of automatic decommitment, the EAFRD contribution to the rural development programme concerned shall be reduced, for the year in question, by the amount automatically decommitted. The Member State shall produce a revised financing plan splitting the reduction of the aid between the priorities. If it does not do so, the Commission shall reduce the amounts allocated to each priority pro rata.

8. If this Regulation enters into force after 1 January 2007, the periods on expiry of which the first automatic decommitment referred to in paragraph 1 is liable to occur shall be extended for the first commitment by the number of months between 1 January 2007 and the date of adoption by the Commission of the corresponding rural development programme.

TITLE IV: CLEARANCE OF ACCOUNTS AND COMMISSION MONITORING

CHAPTER 1: Clearance

Article 30: Clearance of accounts
1. Prior to 30 April of the year following the budget year in question, the Commission shall take a decision concerning the clearance of the accounts of the accredited paying agencies under the procedure laid down in Article 41(3), on the basis of the information transmitted in accordance with Article 8(1)(c)(iii).

2. The clearance decision shall cover the completeness, accuracy and veracity of the annual accounts submitted. The decision shall be without prejudice to decisions taken subsequently under Article 31.

automatic decommitment:	
Article 31: Conformity clearance 1. If the Commission finds that expenditure as indicated in Article 3(1) and Article 4 has been incurred in a way that has infringed Community rules, it shall decide what amounts are to be excluded from Community financing in accordance with the procedure referred to in Article 41(3). 2. The Commission shall assess the amounts to be excluded on the basis of the gravity of the non-conformity recorded. It shall take due account of the nature and gravity of the infringement and of the financial damage caused to the Community. 3. Before any decision to refuse financing is taken, the findings from the Commission's inspection and the Member State's replies shall be notified in writing, following which the two parties shall attempt to reach agreement on the action to be taken. If agreement is not reached, the Member State may request opening of a procedure aimed at reconciling each party's position within four months. A report of the outcome of the procedure shall be given to the Commission, which shall examine it before deciding on any refusal of financing. 4. Financing may not be refused for: (a) expenditure as indicated in Article 3(1) which is incurred more than 24 months before the Commission notifies the Member State in writing of its inspection findings; (b) expenditure on multiannual measures falling within the scope of Article 3(1) or within the scope of the programmes as indicated in Article 4, where the final obligation on the recipient occurs more than 24 months before the Commission notifies the Member State in writing of its inspection findings; (c) expenditure on measures in programmes, as indicated in Article 4, other than those referred to in point (b), for which the payment or, as the case may be, the payment of the balance, by the paying agency, is made more than 24 months before the Commission notifies the Member State in writing of its inspection findings. 5. Paragraph 4 shall not apply in the case of: (a) irregularities covered by Articles 32 and 33; (b) national aids or infringements for which the procedure indicated in Article 88 or Article 226 of the Treaty has begun.	*CHAPTER 2:* ***Irregularities*** ***Article 32: Provisions specific to the EAGF*** 1. Sums recovered following the occurrence of irregularity or negligence and the interest on these shall be made over to the paying agency and booked by it as revenue assigned to the EAGF in the month in which the money is actually received. 2. When the Community budget is credited, the Member State may retain 20 % of the corresponding amounts as flatrate recovery costs, except in cases of irregularity or negligence attributable to its administrative authorities or other official bodies. 3. When the annual accounts are sent, as provided for in Article 8(1)(c)(iii), Member States shall provide the Commission with a summary report on the recovery procedures undertaken in response to irregularities. This shall give a breakdown of the amounts not yet recovered, by administrative and/or judicial procedure and by year of the primary administrative or judicial finding of the irregularity. Member States shall make available to the Commission detailed particulars of the individual recovery procedures and of the individual sums not yet recovered. 4. After the procedure laid down in Article 31(3) has been followed, the Commission may decide to charge the sums to be recovered to the Member State in the following cases: (a) if the Member State has not for recovery purposes initiated all the appropriate administrative or judicial procedures laid down in national and Community legislation within one year of the primary administrative or judicial finding; (b) if there has been no administrative or judicial finding, or the delay in making it is such as to jeopardise recovery, or the irregularity has not been included in the summary report provided for in the first subparagraph of paragraph 3 of this Article for the year in which the primary administrative or judicial finding is made. 5. If recovery has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts, 50 % of the financial consequences of non-recovery shall be borne by the Member State concerned and 50 % by the Community budget. Member States shall indicate separately in the summary report referred to in the first subparagraph of paragraph 3 the amounts not recovered within the time-limits specified in the first subparagraph of this paragraph. The distribution of the financial burden of non-recovery in line with the first subparagraph shall be without prejudice to the requirement that the Member State concerned must pursue recovery procedures in compliance with Article 9(1)

	of this Regulation. Fifty percent of the amounts recovered in

this way shall be credited to the EAGF, after application of the deduction provided for in paragraph 2 of this Article. Where, in the context of the recovery procedure, the absence of any irregularity is recorded by an administrative or legal instrument of a definitive nature, the Member State concerned shall declare as expenditure to the EAGF the financial burden borne by it under the first subparagraph. However, if for reasons not attributable to the Member State concerned, recovery could not take place within the timelimits specified in the first subparagraph, and the amount to be recovered exceeds EUR 1 million, the Commission may, at the request of the Member State, extend the time-limits by a maximum of 50 % of the initial time-limits. 6. If there is justification for doing so, Member States may decide not to pursue recovery. A decision to this effect may be taken only in the following cases: (a) if the costs already and likely to be incurred total more than the amount to be recovered, or (b) if recovery proves impossible owing to the insolvency, recorded and recognised under national law, of the debtor or the persons legally responsible for the irregularity. The Member State shall show separately in the summary report referred to in the first subparagraph of paragraph 3 the amounts for which it has been decided not to pursue recovery and the grounds for its decision. 7. Member States shall enter in the annual accounts to be sent to the Commission under Article 8(1)(c)(iii) the amounts to be borne by them under paragraph 5. The Commission shall check that this has been done and make any adjustments needed as part of the decision specified in Article 30(1). 8. Following completion of the procedure laid down in Article 31(3), the Commission may decide to exclude from financing sums charged to the Community budget in the following cases: (a) under paragraphs 5 and 6 of this Article, if it finds that the irregularity or lack of recovery is the outcome of irregularity or negligence attributable to the administrative authorities or another official body of the Member State; (b) under paragraph 6 of this Article, if it considers that the grounds stated by the Member State do not justify its decision to halt the recovery procedure. ***Article 33: Provisions specific to the EAFRD*** 1. Member States shall make financial adjustments where irregularities or negligence are detected in rural development operations or programmes by totally or	Member States shall take into consideration the nature and gravity of the irregularities detected and the level of the financial loss to the EAFRD. 2. Where the Community funds have already been paid to the beneficiary, they shall be recovered by the accredited paying agency in accordance with its own recovery procedures and reused in accordance with paragraph 3(c). 3. The financial adjustments and reuse of funds shall be undertaken by Member States subject to the following conditions: (a) where irregularities are detected, Member States shall extend their inquiries to cover all operations liable to be affected by such irregularities; (b) Member States shall notify the corresponding adjustments to the Commission; (c) amounts of Community financing which are cancelled and amounts recovered, as well as the interest thereon, shall be reallocated to the programme concerned. However, the cancelled or recovered Community funds may be reused by Member States only for an operation under the same rural development programme and provided the funds are reallocated to operations which have been the subject of a financial adjustment. 4. When the annual accounts are sent, as provided for in Article 8(1)(c)(iii), Member States shall provide the Commission with a summary report on the recovery procedures undertaken in response to irregularities. This shall give a breakdown of the amounts not yet recovered, by administrative and/or judicial procedure and by year of the primary administrative or judicial finding of the irregularity. They shall inform the Commission how they have decided or plan to reuse the cancelled funds and, where appropriate, to amend the financing plan for the rural development programme concerned. 5. After the procedure laid down in Article 31(3) has been followed, the Commission may decide to charge the sums to be recovered to the Member State in the following cases: (a) where the Member State has not initiated all the administrative or judicial procedures laid down in national and Community legislation for the recovery of the funds paid to the beneficiaries within the year which follows the first administrative or judicial finding; (b) where the Member State has failed to comply with its obligations under paragraph 3(a) and (c) of this Article. 6. Where it has been possible to effect the recovery referred to in paragraph 2 after closure of a rural development

partially cancelling the Community financing concerned.

programme, the Member State shall refund the sums recovered to the Community budget.

7. After closure of a rural development programme a Member State may decide to halt the recovery procedure, subject to the conditions laid down in Article 32(6).

8. If recovery has not taken place prior to the closure of a rural development programme, 50 % of the financial consequences of non-recovery shall be borne by the Member State concerned and 50 % by the Community budget and shall be taken into account either at the end of the period of four years following the first administrative or judicial finding or eight years where recovery action is taken in the national courts, or on the closure of the programme if those deadlines expire prior to such closure.

However, if for reasons not attributable to the Member State concerned, recovery could not take place within the timelimits specified in the first subparagraph, and the amount to be recovered exceeds EUR 1 million, the Commission may, at the request of the Member State, extend the time-limits by a maximum of 50 % of the initial time-limits.

9. In cases as referred to in paragraph 8, the amounts corresponding to the 50 % borne by the Member State shall be paid by the Member State to the Community budget.

10. Where the Commission makes a financial adjustment, this shall not affect the obligations of the Member State to recover the sums paid as part of its own financial contribution under Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (1)

Article 34 Assignment of revenue from the Member States

1. The following shall be regarded as assigned revenue within the meaning of Article 18 of Regulation (EC) No 1605/2002:

(a) sums which, under Articles 31, 32 and 33 of this Regulation, must be paid to the Community budget, including interest thereon;

(b) sums which are collected or recovered under Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector

2. The sums referred to in paragraph 1(a) and (b) shall be paid to the Community budget and, in the event of reuse, shall be used exclusively to finance EAGF or EAFRD expenditure.

Article 35: Definition of administrative or judicial finding

For the purposes of this Chapter the primary administrative or judicial finding means the first written assessment of a competent authority, either administrative or judicial, concluding on the basis of actual facts that an irregularity has been committed, without prejudice to the possibility that this conclusion may subsequently have to be adjusted or withdrawn as a result of developments in the course of the administrative or judicial procedure.

CHAPTER 3: **Commission monitoring**

Article 36: Access to information

1. Member States shall make available to the Commission all information necessary for the smooth operation of the EAGF and the EAFRD and shall take all appropriate measures to facilitate the checks which the Commission deems appropriate in connection with the management of Community financing, including on-the-spot checks.

2. Member States shall communicate to the Commission on request the laws, regulations and administrative provisions which they have adopted for implementing the Community instruments relating to the common agricultural policy, where those acts have a financial impact on the EAGF or the EAFRD.

3. Member States shall make available to the Commission all information about irregularities detected, in accordance with Articles 32 and 33, and about the steps taken to recover undue payments in connection with those irregularities.

Article 37: On-the-spot checks

1. Without prejudice to the checks carried out by Member States under national laws, regulations and administrative provisions or Article 248 of the Treaty, and any check organised under Article 279 of the Treaty, the Commission may organise on-the-spot checks with a view to verifying in particular:

(a) compliance of administrative practices with Community rules;

(b) the existence of the requisite supporting documents and their correlation with the operations financed by the EAGF or the EAFRD;

(c) the terms on which the operations financed by the EAGF or the EAFRD have been undertaken and checked.

Persons delegated by the Commission to carry out on-the-spot inspections or Commission agents acting within the scope of the powers conferred upon them shall have access to the books and all other documents, including documents and metadata drawn up or received and recorded on an electronic medium, relating to expenditure financed by the EAGF or the EAFRD.

The aforementioned powers of inspection shall not affect the application of national provisions which reserve certain acts for agents specifically designated by national legislation. Persons delegated by the Commission shall not take part, inter alia, in home visits or the formal questioning of persons within the framework of the national legislation of the Member State concerned. However, they shall have access to information thus obtained.

2. The Commission shall give sufficient prior notice of an inspection to the Member State concerned or the Member State within whose territory the inspection is to take place. Personnel from the Member State concerned may take part in such checks.

At the request of the Commission and with the agreement of the Member State, additional checks or inquiries into the operations covered by this Regulation shall be undertaken by the competent bodies of that Member State. Commission agents or persons delegated by the Commission may take part in such checks.

In order to improve checks, the Commission may, with the agreement of the Member States concerned, enlist the assistance of the authorities of those Member States for certain inspections or inquiries.

TITLE V: TRANSITIONAL AND FINAL PROVISIONS

Article 38: Expenditure under the EAGGF Guarantee Section other than on rural development

1. The Guarantee Section of the EAGGF shall finance the expenditure incurred by Member States in accordance with Article 2 and Article 3(2) and (3) of Regulation (EC) No 1258/1999 until 15 October 2006.

2. Expenditure by Member States from 16 October 2006 shall follow the rules laid down in this Regulation.

Article 39 Expenditure on rural development under the EAGGF Guarantee Section

1. For Member States belonging to the European Union before 1 May 2004, the following rules shall apply to rural development programmes for the period 2000 to 2006, which are financed by the EAGGF Guarantee Section in accordance with Article 3(1) of Regulation (EC) No 1258/ 1999.

(a) Payments to beneficiaries shall cease no later than 15 October 2006 and related expenditure by the Member States shall be reimbursed to them by the Commission no later than under the declaration concerning expenditure for October 2006. However, the Commission may in justified cases and in accordance with the procedure referred to in Article 41(2) authorise payments until 31 December 2006, subject to reimbursement of identical amounts to the period of implementation of these programmes under the second subparagraph of Article 5(1) of Regulation (EC) No 1258/1999.

(b) Advances made to the Member States for the period of implementation of these programmes under the second subparagraph of Article 5(1) of Regulation (EC) No 1258/1999 shall be deducted by them from expenditure financed by the EAGF at the latest with the declaration of expenditure for December 2006.

(c) At the request of the Member States, expenditure incurred by accredited paying agencies between 16 October and 31 December 2006 with the exception of expenditure authorised in accordance with the second sentence of point (a) of this Article shall be taken over by the EAFRD budget under the programming of rural development for 2007 to 2013.

(d) The financial resources available in a Member State on 1 January 2007 following reductions in or cancellations of the amounts of payments which that State has made voluntarily or by way of a penalty, under Articles 3, 4 and 5 of Regulation (EC) No 1259/1999, shall be used by that Member State to finance the rural development measures referred to in Article 4 of this Regulation.

(e) If Member States do not use the financial resources referred to in paragraph (d) within a period to be determined in accordance with the procedure laid down in Article 41(2), the corresponding amounts shall be repaid to the EAGF budget.

2. For Member States joining the European Union on 1 May 2004, amounts committed to finance rural development measures in accordance with Article 3(1) under a Commission decision taken between 1 January 2004 and 31 December 2006, in respect of which the documents required for closure of the assistance have not been sent to the Commission by the end of the time allowed for transmission of the final report, shall be automatically decommitted by the Commission no later than 31 December 2010 and shall result in the reimbursement by the Member States of amounts wrongly received.

3. Amounts relating to operations or programmes which are the subject of legal proceedings or an administrative appeal which, under the legislation of the Member State, has a suspensory effect shall be excluded from the calculation of the amount to be automatically decommitted, as provided for in paragraphs 1 and 2.

Article 40: Expenditure under the EAGGF Guidance Section

1. Amounts committed to finance rural development measures from the EAGGF Guidance Section under a Commission decision adopted between 1 January 2000 and 31 December 2006, in respect of which the documents

EAGF of the advances made to the Member States for the

the Commission by the end of the time allowed for transmission of the final report, shall be automatically decommitted by the Commission no later than 31 December 2010 and shall result in the reimbursement by the Member States of amounts wrongly received. The documents required for closure of the assistance shall be the declaration of expenditure relating to payment of the balance, the final implementing report and the declaration provided for in Article 38(1)(f) of Council Regulation (EC) No 1260/99 of 21 June 1999 laying down general provisions on the Structural Funds.

2. Amounts relating to operations or programmes which are the subject of legal proceedings or an administrative appeal which, under the legislation of the Member State, has a suspensory effect shall be excluded from the calculation of the amount to be automatically decommitted, as provided for in paragraph 1.

Article 41: Committee on the Funds

1. The Commission shall be assisted by a Committee on the Agricultural Funds (hereinafter referred to as the ‘Committee’).

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at one month.

3. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

4. The Committee shall adopt its Rules of Procedure.

Article 42: Scope

Detailed rules for the application of this Regulation shall be adopted by the Commission in accordance with the procedure provided for in Article 41(2). Pursuant to this Regulation and in particular Articles 6, 7, 8, 9, 16, 26, 28, 31, 32, 33, 34, 37 and 48 thereof, the Commission shall adopt:

1. the conditions applicable to the accreditation of paying agencies and certification bodies as well as the specific accreditation of coordinating bodies; their respective functions, the information required and the arrangements for it to be made available or transmitted to the Commission;

2. the conditions under which the tasks of the paying agencies may be delegated;

3. the admissible standards for certification, the nature of certification, its scope, and the time-limits in which certification must take place;

4. the implementing rules for the procedures for automatic decommitment, conformity clearance and the clearance

required for closure of the assistance have not been sent to

5. arrangements for receiving and assigning revenue from the Member States;

6. the general rules applicable to on-the-spot checks;

7. the form, content, timing, deadlines and arrangements for transmitting or making available to the Commission:

— declarations of expenditure and estimates of expenditure and their updates,

— the statement of assurance and annual accounts of the paying agencies,

— the account certification reports,

— the names and particulars of accredited paying agencies, accredited coordinating bodies and certification bodies,

— arrangements for taking account of and paying expenditure financed by the EAGF and the EAFRD,

— notifications of financial adjustments made by Member States in connection with rural development operations or programmes, and summary reports on the recovery procedures undertaken by the Member States in response to irregularities,

— information on the measures taken pursuant to Article 9,

8. rules on the conservation of documents and information;

9. the transitional measures necessary for this Regulation to be implemented.

Article 43; Annual financial report

By 1 September of each year following the budget year, the Commission shall draw up a financial report on the administration of the EAGF and the EAFRD during the previous financial year and shall submit it to the European Parliament and the Council.

Article 44: Confidentiality

Member States and the Commission shall take all necessary steps to ensure the confidentiality of the information communicated or obtained under inspection and clearance of accounts measures implemented under this Regulation. The principles mentioned in Article 8 of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities shall apply to that information.

Article 45: Use of the euro

1. The amounts given in the Commission decisions adopting rural development programmes, the amounts of commitments and payments by the Commission and the amounts of expenditure attested or certified and amounts in declarations of expenditure by the Member States shall be

of accounts;	

expressed and paid in euro.

2. Where a direct payment as provided for in Regulation (EC) No 1782/2003 is made to a beneficiary in a currency other than the euro, Member States shall convert the amount of aid expressed in euro into the national currency on the basis of the most recent exchange rate set by the European Central Bank prior to 1 October of the year for which the aid is granted.

3. Where paragraph 2 applies, reimbursements to Member States of the amounts paid to beneficiaries shall be made by the Commission on the basis of declarations of expenditure by the Member States. When drawing up those declarations of expenditure, Member States shall use the same conversion rate as that used for payment to the beneficiary.

Article 46: Amendment to Regulation (EEC) No 595/91
Regulation (EEC) No 595/91 is hereby amended as follows:
1. Article 5(2) shall be deleted;
2. Article 7(1) shall be deleted.

Article 47: Repeal
1. Regulation No 25, Regulation (EC) No 723/97 and Regulation (EC) No 1258/1999 are hereby repealed. However, Regulation (EC) No 1258/1999 shall continue to apply until 15 October 2006 to expenditure incurred by Member States and until 31 December 2006 for expenditure incurred by the Commission.

2. References to the Regulations repealed shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

Article 48: Transitional measures
For the implementation of this Regulation, the Commission shall adopt the measures which are both necessary and duly justified to resolve, in cases of urgency, practical and specific problems, in particular those relating to the transition between the provisions of Regulations No 25, (EC) No 723/97 and (EC) No 1258/1999 and this Regulation. These measures may derogate from certain parts of this Regulation, but only to the extent and for the time strictly necessary.

Article 49: Entry into force
This Regulation shall enter into force on the seventh day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 January 2007, except for Article 18(4), which shall apply as soon as it enters into force, without prejudice to the provisions of Article 47. However, the following provisions shall apply from 16 October 2006:

— Articles 30 and 31, as regards expenditure incurred from 16 October 2006,
— Article 32, as regards cases notified under Article 3 of Regulation (EEC) No 595/91 and for which full recovery has not yet taken place by 16 October 2006,
— Articles 38, 39, 41, 44 and 45 for expenditure declared in 2006 under the 2007 budget year.

This Regulation shall be binding in is entirety and directly applicable in all Member States.

Done at Luxembourg, 21 June 2005.

For the Council
The President
F. BODEN

Council Regulation (EC) No 1437/2007

COUNCIL REGULATION (EC) No 1437/2007
of 26 November 2007
amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular the third subparagraph of Article 37(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

(1) In the case of intervention measures in respect of which a sum per unit is not determined within the framework of a common organisation of the markets, implementing rules should be laid down, with regard in particular to the method for determining the amounts to be financed, the financing of expenditure resulting from the tying-up of the funds necessary for buying-in products and the financing of expenditure resulting from storage and, where appropriate, processing operations.

(2) In view of the nature of the measures and programmes covered by Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field (2), provision should be made that in duly justified exceptional cases the European Agricultural Guarantee Fund (EAGF) may finance administrative and personnel costs incurred in the execution of such measures and programmes.

(3) Council Regulation (EC) No 1290/2005 (3) sets out the procedure to be followed by the Commission to decide to reduce or suspend monthly payments as well as the procedure to be followed to decide to suspend or reduce intermediate payments.

(4) Pursuant to Regulation (EC) No 1290/2005, the Commission decides on amounts that are to be excluded from Community financing if it finds that this expenditure has been incurred in a way that has infringed Community rules. In the context of the procedure leading to the exclusion from Community financing, the Commission, in order to remedy the situation, makes recommendations to the Member State concerned as to how to apply Community legislation. If the Member State fails to implement these recommendations, further decisions excluding the expenditure will be taken by the Commission. In addition to this it can be established in certain cases that such recommendations will not or cannot be implemented in the immediate future.

(5) Under such circumstances the possibility to suspend or reduce monthly or intermediate payments as it is currently protect sufficiently the financial interest of the Community. In this respect, it is considered useful to provide for a new procedure permitting the Commission to suspend or reduce payments in specific situations in a more effective way.

(6) An *ex-ante* suspension or reduction of payments in the agricultural field could have serious financial implications for the Member State concerned. In addition, in comparison with the procedure for the conformity clearance decision, the Member State has only limited possibilities to defend its position vis-à-vis the Commission. For these reasons the new procedure of suspension or reduction of payments should only be used where one or more of the key components of the national control system in question do not exist or are not effective due to the gravity or persistence of the deficiencies found.

(7) Provision should be made to clarify the conditions under which an intermediate declaration of expenditure under the European Agricultural Fund for Rural Development (EAFRD) is inadmissible.

(8) Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (1) requires Member States to carry out *ex-post* controls on certain common agricultural policy expenditure of financial year ‘n’ in the period from 1 July n + 1 to 30 June n + 2. The report to the Commission on the control activities in that period is only due by the end of the year n + 2.

(9) The limitation in time for the conformity clearance decisions laid down in Regulation (EC) No 1290/2005 makes it effectively impossible for the Commission to decide on an exclusion from Community financing where a Member State does not comply with its control obligations under Regulation (EEC) No 4045/89. In order to deal with this problem, the limitation in time should not apply for infringements of the Member States’ control obligations under Regulation (EEC) No 4045/89, provided that the Commission acts upon the Member States’ report within a period of 12 months after receipt of that report.

(10) Since there is no need for Member States to inform the Commission on the way they have decided or plan to reuse the cancelled funds and to amend the financing plan for the rural development programme concerned, the relevant provision of Regulation (EC) No 1290/2005 should be deleted.

(11) In order to align the transitional rules for the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance Section to the new provisions applicable for the next programming period of the Structural Funds, Regulation (EC) No 1290/2005 should be amended in line with Council Regulation (EC) No 1083/2006 of 11 July

provided for in Regulation (EC) No 1290/2005 does not	2006 laying down general provisions on the European
Regional Development Fund, the European Social Fund and the Cohesion Fund (2). (12) It is necessary to clarify the legal basis for the adoption of detailed rules for the application of Regulation (EC) No 1290/2005. In particular, the Commission should be able to adopt detailed rules of application in respect of the publication of information on beneficiaries of the common agricultural policy, in respect of intervention measures where no fixed sum per item has been laid down in a common market organisation and in respect of appropriations which have been carried over to finance direct payments to farmers under the common agricultural policy. (13) In the context of the revision of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (3), the provisions on the annual *ex-post* publication of beneficiaries of funds deriving from the budget were inserted into that Regulation in order to implement the European Transparency Initiative. Sector-specific Regulations are to provide the means for such a publication. Both the EAGF and the EAFRD form part of the general budget of the European Communities and finance expenditure in a context of shared management between the Member States and the Community. Rules should therefore be laid down for the publication of information on the beneficiaries of these Funds. To that end, Member States should ensure annual *ex-post* publication of the beneficiaries and the amounts received per beneficiary under each of these Funds. (14) Making this information accessible to the public enhances transparency regarding the use of Community funds in the common agricultural policy and improves the sound financial management of these funds, in particular by reinforcing public control of the money used. Given the overriding weight of the objectives pursued, it is justified with regard to the principle of proportionality and the requirement of the protection of personal data to provide for the general publication of the relevant information as it does not go beyond what is necessary in a democratic society and for the prevention of irregularities. Taking into account the opinion of the European Data Protection Supervisor of 10 April 2007 (4), it is appropriate to make provision for the beneficiaries of funds to be informed that those data may be made public and that they may be processed by auditing and investigating bodies. (15) Regulation (EC) No 1290/2005 should therefore be amended accordingly, HAS ADOPTED THIS REGULATION:	***Article 1*** Regulation (EC) No 1290/2005 is hereby amended as follows: 1. In Article 3, the following paragraph shall be added: ‘3. Where, within the framework of a common organisation of the markets, a sum per unit is not determined in respect of an intervention measure, the EAGF shall finance the measure concerned on the basis of standard amounts uniform throughout the Community, in particular for funds originating in the Member States used for buying-in products, for material operations arising from storage and, where appropriate, for processing of intervention products. The respective charges and costs shall be calculated in accordance with the procedure referred to in Article 41(3).’; 2. In Article 13, the following subparagraph shall be added: ‘In duly justified exceptional cases, the first subparagraph shall not apply to measures and programmes covered by Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field. 3. The following article shall be inserted: *‘Article 17a* **Reduction and suspension of monthly payments in specific cases** 1. Without prejudice to Article 17, the Commission may take a decision, in accordance with paragraphs 2 and 3 of this Article, to reduce or suspend monthly payments referred to in Article 14 for a period to be determined in the decision, which shall not exceed twelve months but which may be prolonged for further periods not exceeding twelve months if the conditions set out in paragraph 2 of this Article continue to be met. 2. The monthly payments may be reduced or suspended if all of the following conditions are met: (a) one or more of the key components of the national control system in question do not exist or are not effective due to the gravity or persistence of the deficiencies found; (b) the deficiencies referred to in point (a) are of a continuous nature and have been the reason for at least two decisions pursuant to Article 31, excluding from Community financing expenditure from the Member State concerned, and (c) the Commission concludes that the Member State concerned has not implemented its recommendations to remedy the situation and is not in a position to do so in the immediate future. 3. Before taking the decision referred to in paragraph 1, the Commission shall inform the Member State concerned of its intention and shall ask it to react within a period determined by the Commission according to the severity of the problem and which generally may not be less than 30

	days.
The percentage by which the monthly payments may be reduced or suspended shall be equal to the percentage decided by the Commission in its latest decision as referred to in paragraph 2(b). It shall be applied to the relevant expenditure effected by the paying agency where the deficiencies referred to in paragraph 2(a) exist. 4. The reduction or suspension shall not be continued if the conditions laid down in paragraph 2 are no longer met. It shall be without prejudice to the conformity clearance pursuant to Article 31.’ 4. In Article 26, paragraph 4 shall be replaced by the following: ‘4. If one of the requirements laid down in paragraph 3 is not met, the Commission shall forthwith inform the accredited paying agency and the coordinating body, where one has been appointed. If one of the requirements laid down in point (a) or (c) of paragraph 3 is not respected, the declaration of expenditure shall be inadmissible.’ 5. The following article shall be inserted: *‘Article 27a* **Suspension and reduction of intermediate payments in specific cases** Article 17a shall apply *mutatis mutandis* to the suspension and reduction of intermediate payments referred to in Article 26.’ 6. In Article 31(5), the following point shall be added: ‘(c) infringements by Member States of their obligations under Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (*), provided that the Commission notifies the Member State in writing of its inspection findings within 12 months following receipt of the Member State’s report on the results of its controls of the expenditure concerned. 7. In Article 33(4), the second subparagraph shall be deleted; 8. In Article 40, paragraph 1 shall be replaced by the following: ‘1. By way of derogation from Articles 31(2), 32(4) and 37(1) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural funds, partial sums committed for assistance co-financed by the EAGGF Guidance Section approved by the Commission between 1 January 2000 and 31 December 2006, for which the certified statement of expenditure actually paid, the final report on implementation and the statement referred to in Article 38(1)(f) of that Regulation have not been sent to the Commission within 15 months after the final date of eligibility of expenditure laid down in the decision granting a contribution from the Funds, shall be automatically de-	That deadline, giving rise to the repayment of amounts unduly paid. 9. Article 42 is hereby amended as follows: (a) point 1 shall be replaced by the following: ‘1. the conditions applicable to the accreditation of paying agencies as well as the specific accreditation of coordinating bodies, their respective functions, the information required and the arrangements for it to be made available or transmitted to the Commission;’; (b) the following points shall be inserted: ‘8a. detailed rules on the financing and accounting of intervention measures in the form of public storage as well as on other expenditure financed by the EAGF and the EAFRD; 8b. the detailed rules on the publication of information concerning beneficiaries referred to in Article 44a and on the practical aspects related to the protection of individuals with regard to the processing of their personal data in accordance with the principles laid down in Community legislation on data protection. These rules shall ensure, in particular, that the beneficiaries of funds are informed that these data may be made public and may be processed by auditing and investigating bodies for the purpose of safeguarding the financial interests of the Communities, including the time that this information shall take place; 8c. the conditions and detailed rules applicable to appropriations which have been carried over in accordance with Article 149(3) of Regulation (EC, Euratom) No 1605/2002 to finance the expenditure referred to in Article 3(1)(c) of this Regulation.’ 10. The following article shall be inserted: *‘Article 44a* **Publication of the beneficiaries** Pursuant to Article 53b(2)(d) of Regulation (EC, Euratom) No 1605/2002, Member States shall ensure annual *ex-post* publication of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds. The publication shall contain at least: (a) for the EAGF, the amount subdivided in direct payments within the meaning of Article 2(d) of Regulation (EC) No 1782/2003 and other expenditure; (b) for the EAFRD, the total amount of public funding per beneficiary.’ ***Article 2*** This Regulation shall enter into force on the seventh day following its publication in the *Official Journal of the*

committed by the Commission not later than 6 months after	*European Union*.

Point (3) and Article 1(5) shall apply as from 1 July 2008. Article 1(6) shall apply with respect to the Member States' reports received by the Commission after 1 January 2008, excluding any expenditure effected by Member States before the financial year 2006. Article 1(10) shall apply to EAGF expenditure incurred from 16 October 2007 and to EAFRD expenditure from 1 January 2007. This Regulation shall be binding in its entirety and directly applicable in all Member States. Done at Brussels, 26 November 2007. *For the Council* *The President* J. SILVA	

Commission Regulation (EC) No 259/2008

COMMISSION REGULATION (EC) No 259/2008
of 18 March 2008

laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (1), and in particular point 8b of Article 42 thereof,

After consulting the European Data Protection Supervisor,

Whereas:

(1) Article 44a of Regulation (EC) No 1290/2005 lays down that Member States have to ensure the annual ex-post publication of the beneficiaries of the European Agricultural Guarantee Fund (EAGF), and of the European Agricultural Fund for Rural Development (EAFRD), hereinafter referred to as Funds, and the amounts received per beneficiary under each of these Funds.

(2) The purpose of the publication, which should be in accordance with the information held by the paying agencies in their books and records and which should only concern payments received in the preceding financial year, is to enhance transparency regarding the use of the Funds and improve their sound financial management. In order to meet these objectives, the information should be presented to the public in a clear, harmonised and searchable manner by the due date of 30 April. In respect of EAFRD expenditure paid between 1 January and 15 October 2007, a special date for publication should be fixed.

(3) To this end, the minimum requirements as to the content of the publication should be laid down. These requirements should not go further than what is necessary in a democratic society in order to reach the objectives pursued.

(4) Publication of the information should be implemented via the internet in the form of a search tool which ensures that the public at large is in the position to consult it. The search tool should permit to search on the basis of certain criteria and the results of the search should be presented in an easily accessible form.

(5) The publication of the information concerning the closure of the financial year in order to ensure transparency towards the public. At the same time, Member States should have sufficient time to undertake the necessary work. As the objective of transparency does not require that the information remains available indefinitely, a reasonable period of availability of the published information should be laid down.

(6) Making this information accessible to the public enhances transparency regarding the use of Community funds in the common agricultural policy and improves the sound financial management of these funds, in particular by reinforcing public control of the money used. Given the overriding weight of the objectives pursued, it is justified with regard to the principle of proportionality and the requirement of the protection of personal data to provide for the general publication of the relevant information as it does not go beyond what is necessary in a democratic society and for the prevention of irregularities.

(7) To comply with the data protection requirements beneficiaries of the Funds should be informed of the publication of their data before the publication takes place. The information of the beneficiaries should take place through the application forms for aid or when the data are collected otherwise. Furthermore, the beneficiaries should be informed about their rights under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (2) and the procedures applicable for exercising these rights. As regards expenditure incurred in financial years 2007 and 2008, in so far as information of the beneficiaries is not possible at the moment of collecting the personal data, the beneficiaries should still be informed within a reasonable period of time before publication actually takes place.

(8) For the sake of transparency, beneficiaries of the Funds should also be informed that, for the purpose of safeguarding the financial interests of the Communities, their personal data may be processed by auditing and investigating bodies of the Communities and the Member States. This information should be given at the same moment as the information on the publication and on the rights of individuals is given.

(9) In order to facilitate the access of the public to the data published, the Commission should provide for a Community website including links to the websites of the Member States on which the information has been made available. In view of the different organisational structures within the Member States, they should determine themselves which body is in charge of setting up and maintaining their single website and of publishing the data.

(10) Since Article 2 of Regulation (EC) No 1437/2007

beneficiaries should occur as quickly as possible after the	provides that Article 44a of Regulation (EC) No 1290/2005,

inserted by Regulation (EC) No 1437/2007, applies to EAGF expenditure incurred from 16 October 2007 and to EAFRD expenditure incurred from 1 January 2007, it is therefore necessary to apply also the implementing rules for the same time period.

(11) The measures provided for in this Regulation are in accordance with the opinion of the Committee on the Agricultural Funds,

HAS ADOPTED THIS REGULATION:

Article 1: Content of the publication
1. The publication referred to in Article 44a of Regulation (EC) No 1290/2005 shall include the following information:

(a) the first name and the surname where the beneficiaries are natural persons;

(b) the full legal name as registered where the beneficiaries are legal persons;

(c) the full name of the association as registered or otherwise officially recognised where the beneficiaries are associations of natural or legal persons without an own legal personality;

(d) the municipality where the beneficiary resides or is registered and, where available, the postal code or the part thereof identifying the municipality;

(e) for the European Agricultural Guarantee Fund, hereinafter referred to as EAGF, the amount of direct payments within the meaning of Article 2(d) of Regulation (EC) No 1782/2003 received by each beneficiary in the financial year concerned;

(f) for the EAGF, the amount of payments other than those referred to in point (e) received by each beneficiary in the financial year concerned;

(g) for the European Agricultural Fund for Rural Development, hereinafter referred to as EAFRD, the total amount of public funding received by each beneficiary in the financial year concerned, which includes both the Community and the national contribution;

(h) the sum of the amounts referred to in points (e), (f) and (g) received by each beneficiary in the financial year concerned;

(i) the currency of these amounts.

2. Member States may publish more detailed information than provided for in paragraph 1.

Article 2: Form of the publication
The information referred to in Article 1 shall be made search tool allowing the users to search for beneficiaries by name, municipality, amounts received as referred to in (e), (f), (g) and (h) of Article 1 or a combination thereof and to extract all the corresponding information as a single set of data.

Article 3: Date of the publication
1. The information referred to in Article 1 shall be published by 30 April each year for the preceding financial year.

2. For the EAFRD expenditure paid between 1 January and 15 October 2007, the information shall be published by 30 September 2008, provided that the expenditure has been reimbursed by the EAFRD to the Member State concerned by that date. Otherwise, the information shall be published together with the information for the financial year 2008.

3. The information shall remain available on the website for two years from the date of their initial publication.

Article 4: Information of the beneficiaries
1. Member States shall inform the beneficiaries that their data will be made public in accordance with Regulation (EC) No 1290/2005 and this Regulation and that they may be processed by auditing and investigating bodies of the Communities and the Member States for the purpose of safeguarding the Communities' financial interests.

2. In case of personal data, the information referred to in paragraph 1 shall be provided in accordance with the requirements of Directive 95/46/EC and the beneficiaries shall be informed of their rights as data subjects under this Directive and of the procedures applicable for exercising these rights.

3. The information referred to in paragraphs 1 and 2 shall be provided to the beneficiaries by including it in the application forms for receiving funds deriving from the EAGF and EAFRD, or otherwise at the time when the data are collected.

By way of derogation from the first subparagraph, as regards data related to payments received in the financial years 2007 and 2008, the information shall be provided at least four weeks before the date of their publication.

Article 5: Cooperation between the Commission and Member States
1. The Commission shall set up and maintain a Community website under its central internet address which includes the links to the websites of the Member States. The Commission shall provide updates of the internet links according to the information sent by Member States.

available on a single website per Member State through a	

2. The Member States shall send to the Commission the internet address of their website as soon as it has been set up as well as any subsequent changes thereof having an influence on the accessibility of their website from the Community website. 3. Member States shall nominate a body in charge of setting up and maintaining the single website referred to in Article 2. They shall inform the Commission of the name and address details of this body. ***Article 6: Entry into force and application*** This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*. It shall apply to EAGF expenditure incurred from 16 October 2007 and to EAFRD expenditure incurred from 1 January 2007. This Regulation shall be binding in its entirety and directly applicable in all Member States. Done at Brussels, 18 March 2008. *For the Commission* Mariann FISCHER BOEL *Member of the Commission*	

Extracts from COUNCIL REGULATION (EC) No 44/2001

Council Regulation (EC) No 44/2001
of 22 December 2000
on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the "Brussels Convention")(4). On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

(14) The autonomy of the parties to a contract, other than an

Jurisdiction and the Enforcement of Judgments in Civil and	insurance, consumer or employment contract, where only

limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol(5) should remain applicable also to cases already pending when this Regulation enters into force.

(20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject

(22) Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation.

(23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

(24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

(29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(6),

HAS ADOPTED THIS REGULATION:

to its application.

CHAPTER I: SCOPE

Article 1
1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

CHAPTER II: JURISDICTION

Section 1: General provisions

Article 2
1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3
1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4
1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2: Special jurisdiction

Article 5
A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;
provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6
A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7
Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

[...]

Section 6: Exclusive jurisdiction

Article 22
The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.
However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.
Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7: Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8: Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters(10) shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9: Lis pendens - related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is

virtue of Article 22, it shall declare of its own motion that it

expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29
Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30
For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10: Provisional, including protective, measures

Article 31
Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III: RECOGNITION AND ENFORCEMENT

Article 32
For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1: Recognition

Article 33
1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that

Article 34
A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35
1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36
Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37
1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

question.

Section 2: Enforcement

Article 38
1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39
1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40
1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41
The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42
1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43
1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44
The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45
1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46
1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47
1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48
1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49
A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 50
An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 51
No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52
In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Section 3: Common provisions

Article 53
1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54
The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55
1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 56
No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative ad litem.

CHAPTER IV: AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 57
1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

Article 58
A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

CHAPTER V: GENERAL PROVISIONS

Article 59
1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 60
1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.

2. For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

CHAPTER VI: TRANSITIONAL PROVISIONS

Article 66
1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII: RELATIONS WITH OTHER INSTRUMENTS

Article 67
This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 68
1. This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

C-25/70
KOESTER

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE HESSISCHER VERWALTUNGSGERICHTSHOF (HIGHER ADMINISTRATIVE COURT OF THE LAND OF HESSE), KASSEL, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN
EINFUHR - UND VORRATSSTELLE FUER GETREIDE UND FUTTERMITTEL, FRANKFURT-AM-MAIN,
AND
KOESTER, BERODT UND CO ., HAVING ITS REGISTERED OFFICE IN HAMBURG,

Subject of the case
ON THE VALIDITY OF REGULATION NO 102/64/EEC OF THE COMMISSION OF 28 JULY 1964 ON IMPORT AND EXPORT LICENCES FOR CEREALS AND PROCESSED CEREAL PRODUCTS, RICE, BROKEN RICE AND PROCESSED RICE PRODUCTS,

Grounds
1 BY ORDER OF 21 APRIL 1970 RECEIVED AT THE COURT ON 28 MAY 1970, THE HESSISCHER VERWALTUNGSGERICHTSHOF, BY VIRTUE OF ARTICLE 177 OF THE EEC TREATY, HAS ASKED THE COURT TO GIVE A RULING ON " THE VALIDITY OF REGULATION NO 102/64/EEC OF THE COMMISSION OF 28 JULY 1964, ON IMPORT AND EXPORT LICENCES FOR CEREALS AND PROCESSED CEREAL PRODUCTS, RICE, BROKEN RICE AND PROCESSED RICE PRODUCTS (OJ 1964, P . 2125) AND, IN PARTICULAR, ON THE QUESTION WHETHER ARTICLES 1 AND 7 OF THAT REGULATION ARE VALID IN SO FAR AS THEY RELATE TO EXPORT LICENCES AND DEPOSITS LODGED FOR THE PURPOSE OF OBTAINING EXPORT LICENCES .

2 IT APPEARS FROM THE ORDER REFERRING THE MATTER THAT THE QUESTION PUT WAS RAISED IN THE CONTEXT OF AN APPEAL AGAINST A JUDGMENT OF THE VERWALTUNGSGERICHT FRANKFURT-AM-MAIN, ANNULLING A DECISION OF THE EINFUHR - UND VORRATSSTELLE FUER GETREIDE UND FUTTERMITTEL WHICH HAD DECLARED A DEPOSIT FORFEITED ON THE FAILURE OF THE RESPONDENT TO EFFECT WITHIN THE PRESCRIBED PERIOD AN EXPORT COVERED BY A LICENCE ISSUED UNDER ARTICLE 7 OF REGULATION NO 102/64 . IN VIEW OF THE GROUNDS OF THE JUDGMENT AT FIRST INSTANCE AND OF THE SUBMISSIONS MADE BY THE RESPONDENT IN THE APPEAL CONCERNING THE LEGALITY OF THE SYSTEM OF DEPOSITS ESTABLISHED BY ARTICLES 1 AND 7 OF REGULATION NO 102/64, THE HESSISCHER VERWALTUNGSGERICHTSHOF HAS FORMULATED ITS QUESTION BY WAY OF FOUR SUBORDINATE QUESTIONS WHICH IT IS APPROPRIATE TO CONSIDER SEPARATELY .

1 - THE QUESTION RELATING TO THE " MANAGEMENT COMMITTEE " PROCEDURE

3 THE COURT IS ASKED FIRST WHETHER THE PROCEDURE LAID DOWN BY ARTICLE 26 OF REGULATION NO 19 OF THE COUNCIL OF 4 APRIL 1962 ON THE PROGRESSIVE ESTABLISHMENT OF A COMMON ORGANIZATION OF THE MARKET IN CEREALS (OJ 1962, P . 933), IN IMPLEMENTATION OF WHICH REGULATION NO 102/64 OF THE COMMISSION WAS ADOPTED, MUST BE CONSIDERED TO BE CONTRARY TO THE EEC TREATY AND WHETHER IN PARTICULAR THAT PROCEDURE IS COMPATIBLE WITH ARTICLES 43 (2), 155, 173 AND 177 AND THE FIRST PARAGRAPH OF ARTICLE 189 OF THE EEC TREATY .

4 THIS QUESTION CONCERNS THE LEGALITY OF THE SO-CALLED MANAGEMENT COMMITTEE PROCEDURE INTRODUCED BY ARTICLES 25 AND 26 OF REGULATION NO 19 AND RE-ENACTED BY NUMEROUS OTHER AGRICULTURAL REGULATIONS . THE ABOVEMENTIONED PROVISIONS OF THE TREATY REVEAL THAT THE QUESTION PUT CONCERNS MORE PARTICULARLY THE COMPATIBILITY OF THE MANAGEMENT COMMITTEE PROCEDURE WITH THE COMMUNITY STRUCTURE AND THE INSTITUTIONAL BALANCE AS REGARDS BOTH THE RELATIONSHIP BETWEEN INSTITUTIONS AND THE EXERCISE OF THEIR RESPECTIVE POWERS .

5 IT IS ALLEGED IN THE FIRST PLACE THAT THE POWER TO ADOPT THE SYSTEM IN DISPUTE BELONGED TO THE COUNCIL WHICH, UNDER THE TERMS OF THE THIRD SUBPARAGRAPH OF ARTICLE 43 (2) OF THE TREATY, SHOULD HAVE ACTED ON A PROPOSAL FROM THE COMMISSION AND AFTER CONSULTING THE ASSEMBLY AND THAT THEREFORE THE PROCEDURE FOLLOWED DEROGATED FROM THE PROCEDURES AND POWERS FIXED BY THIS PROVISION OF THE TREATY .

6 BOTH THE LEGISLATIVE SCHEME OF THE TREATY, REFLECTED IN PARTICULAR BY THE LAST INDENT OF ARTICLE 155, AND THE CONSISTENT PRACTICE OF THE COMMUNITY INSTITUTIONS ESTABLISH A DISTINCTION, ACCORDING TO THE LEGAL CONCEPTS RECOGNIZED IN ALL THE MEMBER STATES, BETWEEN THE MEASURES DIRECTLY BASED ON THE TREATY ITSELF AND DERIVED LAW INTENDED TO ENSURE THEIR IMPLEMENTATION . IT CANNOT THEREFORE BE A REQUIREMENT THAT ALL THE DETAILS OF THE REGULATIONS CONCERNING THE COMMON AGRICULTURAL POLICY BE DRAWN UP BY THE COUNCIL ACCORDING TO THE PROCEDURE IN ARTICLE 43 . IT IS SUFFICIENT FOR THE PURPOSES OF THAT PROVISION THAT THE BASIC ELEMENTS OF THE MATTER TO BE DEALT WITH HAVE BEEN ADOPTED IN ACCORDANCE WITH THE PROCEDURE LAID DOWN BY THAT PROVISION . ON THE OTHER HAND, THE PROVISIONS IMPLEMENTING THE BASIC REGULATIONS MAY BE ADOPTED ACCORDING TO A PROCEDURE DIFFERENT FROM THAT IN ARTICLE 43, EITHER BY THE COUNCIL ITSELF OR BY THE COMMISSION BY VIRTUE OF AN AUTHORIZATION COMPLYING WITH ARTICLE 155 .

7 THE MEASURE DEALT WITH BY IMPLEMENTING REGULATION NO 102/64 OF THE COMMISSION DO NOT GO BEYOND THE LIMITS OF THE IMPLEMENTATION OF THE PRINCIPLES OF BASIC REGULATION NO 19 . THE COMMISSION WAS THUS VALIDLY AUTHORIZED BY REGULATION NO 19 TO ADOPT THE IMPLEMENTING MEASURES IN QUESTION, THE VALIDITY OF WHICH CANNOT THEREFORE BE DISPUTED WITHIN THE CONTEXT OF THE REQUIREMENTS OF ARTICLE 43 (2) OF THE TREATY .

8 SECONDLY, THE RESPONDENT IN THE MAIN ACTION CRITICIZES THE MANAGEMENT COMMITTEE PROCEDURE IN THAT IT CONSTITUTES AN INTERFERENCE IN THE COMMISSION' S RIGHT OF DECISION, TO SUCH AN EXTENT AS TO PUT IN ISSUE THE INDEPENDENCE OF THAT INSTITUTION . FURTHER, THE INTERPOSITION BETWEEN THE COUNCIL AND THE COMMISSION OF A BODY WHICH IS NOT PROVIDED FOR BY THE TREATY IS ALLEGED TO HAVE THE EFFECT OF DISTORTING THE RELATIONSHIPS BETWEEN THE INSTITUTIONS AND THE EXERCISE OF THE RIGHT OF DECISION .

9 ARTICLE 155 PROVIDES THAT THE COMMISSION SHALL EXERCISE THE POWERS CONFERRED ON IT BY THE COUNCIL FOR THE IMPLEMENTATION OF THE RULES LAID DOWN BY THE LATTER . THIS PROVISION, THE USE OF WHICH IS OPTIONAL, ENABLES THE COUNCIL TO DETERMINE ANY DETAILED RULES TO WHICH THE COMMISSION IS SUBJECT IN EXERCISING THE POWER CONFERRED ON IT . THE SO-CALLED MANAGEMENT COMMITTEE PROCEDURE FORMS PART OF THE DETAILED RULES TO WHICH THE COUNCIL MAY LEGITIMATELY SUBJECT A DELEGATION OF POWER TO THE COMMISSION . IT FOLLOWS FROM AN ANALYSIS OF THE MACHINERY SET UP BY ARTICLES 25 AND 26 OF REGULATION NO 19 THAT THE TASK OF THE MANAGEMENT COMMITTEE IS TO GIVE OPINIONS ON DRAFT MEASURES PROPOSED BY THE COMMISSION, WHICH MAY ADOPT IMMEDIATELY APPLICABLE MEASURES WHATEVER THE OPINION OF THE MANAGEMENT COMMITTEE . WHERE THE COMMITTEE ISSUES A CONTRARY OPINION, THE ONLY OBLIGATION ON THE COMMISSION IS TO COMMUNICATE TO THE COUNCIL THE MEASURES TAKEN . THE FUNCTION OF THE MANAGEMENT COMMITTEE IS TO ENSURE PERMANENT CONSULTATION IN ORDER TO GUIDE THE COMMISSION IN THE EXERCISE OF THE POWERS CONFERRED ON IT BY THE COUNCIL AND TO ENABLE THE LATTER TO SUBSTITUTE ITS OWN ACTION FOR THAT OF THE COMMISSION . THE MANAGEMENT COMMITTEE DOES NOT THEREFORE HAVE THE POWER TO TAKE A DECISION IN PLACE OF THE COMMISSION OR THE COUNCIL . CONSEQUENTLY, WITHOUT DISTORTING THE COMMUNITY STRUCTURE AND THE INSTITUTIONAL BALANCE, THE MANAGEMENT COMMITTEE MACHINERY ENABLES THE COUNCIL TO DELEGATE TO THE COMMISSION AN IMPLEMENTING POWER OF APPRECIABLE SCOPE, SUBJECT TO ITS POWER TO TAKE THE DECISION ITSELF IF NECESSARY .

10 THE LEGALITY OF THE SO-CALLED MANAGEMENT COMMITTEE PROCEDURE, AS ESTABLISHED BY ARTICLES 25 AND 26 OF REGULATION NO 19, CANNOT THEREFORE BE DISPUTED IN THE CONTEXT OF THE INSTITUTIONAL STRUCTURE OF THE COMMUNITY .

11 THE RESPONDENT IN THE MAIN ACTION HAS ALSO CRITICIZED THE MANAGEMENT COMMITTEE PROCEDURE INASMUCH AS THAT MACHINERY HAS DEPRIVED THE COURT OF JUSTICE OF CERTAIN OF ITS FUNCTIONS BY INSTITUTING " A RIGHT OF ANNULMENT " RESERVED TO THE COUNCIL FOR MEASURES TAKEN BY THE COMMISSION .

12 THAT OBJECTION IS BASED ON A FALSE ANALYSIS OF THE COUNCIL' S RIGHT TO TAKE OVER THE DECISION . THE PROCEDURE LAID DOWN BY ARTICLE 26 OF REGULATION NO 19 HAS THE EFFECT OF ENABLING THE COUNCIL TO SUBSTITUTE ITS OWN ACTION FOR THAT OF THE COMMISSION WHERE THE MANAGEMENT COMMITTEE GIVES A NEGATIVE OPINION . THE SYSTEM IS THEREFORE ARRANGED IN SUCH A WAY THAT THE IMPLEMENTING DECISIONS ADOPTED BY VIRTUE OF THE BASIC REGULATION ARE IN ALL CASES TAKEN EITHER

BY THE COMMISSION OR, EXCEPTIONALLY, BY THE COUNCIL . THESE MEASURES WHATEVER THEIR AUTHOR, ARE CAPABLE OF GIVING RISE IN IDENTICAL CIRCUMSTANCES EITHER TO AN APPLICATION FOR ANNULMENT UNDER ARTICLE 173 OR TO A REFERENCE FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE TREATY . IT THEREFORE APPEARS THAT THE EXERCISE BY THE COUNCIL OF ITS RIGHT TO TAKE OVER THE DECISION IN NO WAY LIMITS THE JURISDICTION OF THE COURT OF JUSTICE .

2 - THE QUESTION RELATING TO THE DELEGATION OF POWERS TO THE COMMISSION

13 THE COURT IS ASKED TO RULE WHETHER REGULATION NO 102/64 OF THE COMMISSION IS DEPRIVED OF A VALID BASIS OF AUTHORIZATION IN THAT IT LAYS DOWN IN ARTICLE 1 THEREOF THE OBLIGATION TO EXPORT INVOLVED BY THE EXPORT LICENCE, IN ARTICLE 7 (1) THEREOF THE NECESSITY TO LODGE A DEPOSIT IN ORDER TO OBTAIN THAT LICENCE AND IN ARTICLE 7 (2) THEREOF FORFEITURE OF THE DEPOSIT SHOULD THE OBLIGATION TO EXPORT NOT BE FULFILLED, OR WHETHER THE COMMISSION' S POWERS IN THIS CONNEXION ARE TO BE FOUND IN EITHER THE EEC TREATY IN GENERAL OR THE COMBINED PROVISIONS OF ARTICLE 16 (2) AND (3) OR ARTICLES 19 AND 20 OF REGULATION NO 19 OF THE COUNCIL .

14 IT APPEARS FROM BOTH THE GROUNDS OF THE JUDGMENT AT FIRST INSTANCE AND THE OBSERVATIONS OF THE RESPONDENT IN THE MAIN ACTION THAT THIS QUESTION CONCERNS A DOUBT AS TO THE AUTHORITY OF THE COMMISSION TO EXTEND THE SYSTEM OF DEPOSITS BOTH TO EXPORTS OF CEREALS AND TO IMPORTS OR EXPORTS OF PROCESSED CEREAL PRODUCTS . SINCE THIS DOUBT SPRINGS FROM THE WORDING OF ARTICLE 16 OF REGULATION NO 19, IT SHOULD BE ASCERTAINED WHETHER THAT PROVISION SUPPLIES A SUFFICIENT BASIS OF AUTHORITY FOR THE IMPLEMENTING MEASURES TAKEN WITHIN THE FRAMEWORK OF REGULATION NO 102/64 WITH REGARD TO EXPORTS AND TO PROCESSED PRODUCTS IN GENERAL .

15 UNDER THE TERMS OF ARTICLE 16 (1) OF REGULATION NO 19, ANY IMPORTATION OR EXPORTATION OF THE PRODUCTS REFERRED TO IN ARTICLE 1 IS CONDITIONAL ON THE PRESENTATION OF AN IMPORT OR EXPORT LICENCE . TO THIS GENERAL PROVISION, PARAGRAPH (2) OF THE SAME ARTICLE ADDS VARIOUS DETAILS WITH REGARD TO THE DURATION OF THE IMPORT LICENCE FOR CEREALS, ADDING THAT " THE ISSUE OF A LICENCE SHALL BE CONDITIONAL ON THE LODGING OF A DEPOSIT ... ". LASTLY, PARAGRAPH (3) PROVIDES THAT " THE DETAILED RULES FOR THE APPLICATION OF THIS ARTICLE ... SHALL BE ADOPTED IN ACCORDANCE WITH THE PROCEDURE LAID DOWN IN ARTICLE 26 ", SPECIFYING THAT THE PROVISION APPLIES " IN PARTICULAR " TO THE FIXING OF THE DURATION OF THE VALIDITY OF THE IMPORT LICENCE FOR PROCESSED CEREAL PRODUCTS . THE WORDING OF THAT ARTICLE HAS GIVEN RISE TO THE QUESTION WHETHER, SINCE THE SYSTEM OF DEPOSITS IS ONLY MENTIONED IN ARTICLE 16 (2) IN RELATION TO IMPORT LICENCES FOR CEREALS PROPERLY SO CALLED, THE COMMISSION WAS LEGITIMATELY ABLE TO EXTEND IT, THROUGH IMPLEMENTING REGULATION NO 102/64, TO EXPORTS AND PROCESSED PRODUCTS .

16 THESE VARIOUS PROVISIONS MUST BE INTERPRETED IN THE LIGHT OF THE SCHEME AND OBJECTIVES BOTH OF ARTICLE 16 AND OF REGULATION NO 19 AS A WHOLE . ARTICLE 16 (1) REVEALS THE INTENTION TO ESTABLISH A SYSTEM INTENDED TO GOVERN INDISCRIMINATELY IMPORTS AND EXPORTS OF ALL THE PRODUCTS SUBJECTED TO AN ORGANIZATION OF THE MARKET BY REGULATION NO 19 . IN THE SAME WAY, PARAGRAPH (3) REFERS TO THE PROCEDURE LAID DOWN IN ARTICLE 26 FOR THE DETERMINATION OF ALL DETAILED RULES OF APPLICATION TO BE ADOPTED IN THE CONTEXT OF ARTICLE 16 .

17 PARAGRAPH (2), WHICH IS PLACED BETWEEN THESE TWO PROVISIONS OF GENERAL SCOPE, CONSTITUTES A SPECIAL MEASURE OF APPLICATION INTENDED TO IMPLEMENT A PART OF THE PROVISIONS ENVISAGED IN PARAGRAPH (1). AN INTERPRETATION WHICH RESTRICTED THE GUARANTEES OF EFFECTIVENESS PROVIDED FOR BY THE REGULATION MERELY TO IMPORT LICENCES AND TO A PART ONLY OF THE PRODUCTS SUBJECT TO THE ORGANIZATION OF THE MARKET WOULD HAVE THE EFFECT OF DISTURBING THE HARMONIOUS FUNCTIONING OF THE SYSTEM .

18 ARTICLE 16 MUST THEREFORE BE INTERPRETED AS HAVING INCLUDED, IN THE REFERENCE TO THE MEASURES OF APPLICATION MENTIONED IN PARAGRAPH (3) ALL PROVISIONS INTENDED TO SUPPLEMENT THE PARTIAL MEASURES LAID DOWN IN PARAGRAPH (2), ACCORDING TO THE PATTERN OF THAT SAME PROVISION . THE COMMISSION WAS THUS AUTHORIZED TO INCLUDE IN REGULATION NO 102/64, AS REGARDS EXPORT LICENCES, THE PROVISIONS RELATING TO THE OBLIGATION TO EXPORT AND TO THE DEPOSIT, WHICH FORM THE SUBJECT-MATTER OF ARTICLES 1 AND 7, AS WELL AS THOSE WHICH CONCERN PROCESSED

PRODUCTS, A CATEGORY INTO WHICH THE GOODS THE NON-EXPORTATION OF WHICH IS AT THE ORIGIN OF THE DISPUTE FALL .

19 THUS, IT DOES NOT APPEAR NECESSARY TO EXAMINE THE EXTENT TO WHICH ARTICLES 19 AND 20 OF REGULATION NO 19 COULD HAVE PROVIDED A LEGAL BASIS FOR THE PROVISIONS OF REGULATION NO 102/64 .

3 - THE QUESTION RELATING TO THE PRINCIPLES OF ECONOMIC FREEDOM AND PROPORTIONALITY

20 THE COURT IS ASKED TO RULE WHETHER THE PROVISIONS OF REGULATION NO 102/64 OF THE COMMISSION RELATING TO THE OBLIGATION TO EXPORT INHERENT IN EVERY EXPORT LICENCE (ARTICLE 1) AND THE LODGING AND FORFEITURE OF THE DEPOSIT LODGED FOR THE PURPOSE OF OBTAINING EXPORT LICENCES (ARTICLE 7) VIOLATE A PRINCIPLE WHEREBY THE ADMINISTRATION IS OBLIGED TO APPLY ONLY MEASURES PROPORTIONATE TO THE OBJECTIVE TO BE ATTAINED OR PROHIBITING IT FROM RECOURSE TO EXCESSIVE MEASURES AND WHETHER THIS IS SO IN PARTICULAR IN THE CASE REFERRED TO IN ARTICLE 7 (1) WHERE THE DEPOSIT IS LODGED FOR THE PURPOSE OF OBTAINING EXPORT LICENCES IN RESPECT OF WHICH THE AMOUNT OF THE REFUND IS NOT FIXED IN ADVANCE .

21 IT APPEARS FROM THE GROUNDS OF THE JUDGMENT AT FIRST INSTANCE THAT THE VERWALTUNGSGERICHT CONSIDERED THE UNDERTAKING ATTACHED TO THE ISSUE OF THE IMPORT OR EXPORT LICENCES, UNDER ARTICLE 1 OF REGULATION NO 102/64, AND THE DEPOSIT PROVIDED FOR BY ARTICLE 7 (1) OF THE SAME REGULATION GUARANTEEING THE FULFILMENT OF THAT OBLIGATION TO BE INVALID, BECAUSE IT ALLEGEDLY CONSTITUTES AN ULTRA VIRES MEASURE CONTRARY TO THE PRINCIPLES OF ECONOMIC FREEDOM AND PROPORTIONALITY . ACCORDING TO THE COURT, THESE PRINCIPLES WHICH ARE INTENDED TO GUARANTEE PROTECTION OF FUNDAMENTAL RIGHTS FORM AN INTEGRAL PART OF BOTH INTERNATIONAL LAW AND THE SUPRANATIONAL LEGAL ORDER, SUCH THAT A COMMUNITY MEASURE CONTRARY TO THESE CONCEPTS MUST BE CONSIDERED NULL AND VOID .

22 RESPECT FOR FUNDAMENTAL RIGHTS FORMS AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF LAW PROTECTED BY THE COURT OF JUSTICE . IT IS THEREFORE APPROPRIATE TO INQUIRE, IN REPLYING TO THE QUESTION REFERRED TO THE COURT AND IN THE LIGHT OF THE PRINCIPLES INVOKED, WHETHER THE SYSTEM OF DEPOSITS HAS INFRINGED RIGHTS OF A FUNDAMENTAL NATURE, RESPECT FOR WHICH MUST BE ENSURED IN THE COMMUNITY LEGAL SYSTEM .

23 THE OBJECTIVE OF THE SYSTEM OF DEPOSITS IS SET OUT IN THE SIXTH RECITAL OF THE PREAMBLE TO REGULATION NO 102/64, ACCORDING TO WHICH " PROVISION SHOULD BE MADE TO AVOID LICENCES BEING PUT INTO CIRCULATION WHICH ARE NOT THEN FOLLOWED BY IMPORT OR EXPORT " , IN VIEW OF THE FACT THAT " SUCH LICENCES WOULD GIVE A MISTAKEN VIEW OF THE MARKET SITUATION " , AND TO THIS END THE ISSUE OF LICENCES CONDITIONAL ON THE LODGING OF A DEPOSIT WHICH IS TO BE FORFEITED IF THE OBLIGATION TO IMPORT OR EXPORT IS NOT FULFILLED . IT FOLLOWS FROM THESE CONSIDERATIONS AND FROM THE GENERAL SCHEME OF REGULATIONS NO 19 AND 102/64 THAT THE SYSTEM OF DEPOSITS IS INTENDED TO GUARANTEE THAT THE IMPORTS AND EXPORTS FOR WHICH THE LICENCES ARE REQUESTED ARE ACTUALLY EFFECTED IN ORDER TO ENSURE BOTH FOR THE COMMUNITY AND FOR THE MEMBER STATES PRECISE KNOWLEDGE OF THE INTENDED TRANSACTIONS .

24 THIS KNOWLEDGE, TOGETHER WITH OTHER AVAILABLE INFORMATION ON THE STATE OF THE MARKET, IS ESSENTIAL TO ENABLE THE COMPETENT AUTHORITIES TO MAKE JUDICIOUS USE OF THE INSTRUMENTS OF INTERVENTION, BOTH ORDINARY AND EXCEPTIONAL, WHICH ARE AT THEIR DISPOSAL FOR GUARANTEEING THE FUNCTIONING OF THE SYSTEM OF PRICES INSTITUTED BY THE REGULATION, SUCH AS PURCHASING, STORING AND DISTRIBUTING, FIXING DENATURING PREMIUMS AND EXPORT REFUNDS, APPLYING PROTECTIVE MEASURES AND CHOOSING MEASURES INTENDED TO AVOID DEFLECTIONS OF TRADE . THIS IS ALL THE MORE IMPERATIVE IN THAT THE IMPLEMENTATION OF THE COMMON AGRICULTURAL POLICY INVOLVES HEAVY FINANCIAL RESPONSIBILITIES FOR THE COMMUNITY AND THE MEMBER STATES .

25 IT IS NECESSARY, THEREFORE, FOR THE COMPETENT AUTHORITIES TO HAVE AVAILABLE NOT ONLY STATISTICAL INFORMATION ON THE STATE OF THE MARKET BUT ALSO PRECISE FORECASTS ON FUTURE IMPORTS AND EXPORTS . SINCE THE MEMBER STATES ARE OBLIGED BY ARTICLE 16 OF REGULATION NO 19 TO ISSUE IMPORT AND EXPORT LICENCES TO ANY APPLICANT, A FORECASE WOULD LOSE ALL SIGNIFICANCE IF THE LICENCES DID NOT INVOLVE THE RECIPIENTS IN AN UNDERTAKING TO ACT ON THEM . AND THE UNDERTAKING WOULD BE INEFFECTUAL IF OBSERVANCE OF IT WERE NOT ENSURED BY APPROPRIATE MEANS

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26 THE CHOICE FOR THAT PURPOSE BY THE COMMUNITY LEGISLATURE OF THE DEPOSIT CANNOT BE CRITICIZED IN VIEW OF THE FACT THAT THAT MACHINERY IS ADAPTED TO THE VOLUNTARY NATURE OF REQUESTS FOR LICENCES AND THAT IT HAS THE DUAL ADVANTAGE OVER OTHER POSSIBLE SYSTEMS OF SIMPLICITY AND EFFICACY .

27 A SYSTEM OF MERE DECLARATION OF EXPORTS EFFECTED AND OF UNUSED LICENCES, AS PROPOSED BY THE RESPONDENT IN THE MAIN ACTION, WOULD, BY REASON OF ITS RETROSPECTIVE NATURE AND LACK OF ANY GUARANTEE OF APPLICATION, BE INCAPABLE OF PROVIDING THE COMPETENT AUTHORITIES WITH SURE DATA ON TRENDS IN THE MOVEMENT OF GOODS . LIKEWISE, A SYSTEM OF FINES IMPOSED A POSTERIORI WOULD INVOLVE CONSIDERABLE ADMINISTRATIVE AND LEGAL COMPLICATIONS AT THE STAGE OF DECISION AND OF EXECUTION .

28 IT THEREFORE APPEARS THAT THE REQUIREMENT OF IMPORT AND EXPORT LICENCES INVOLVING FOR THE LICENSEES AN UNDERTAKING TO EFFECT THE PROPOSED TRANSACTIONS UNDER THE GUARANTEE OF A DEPOSIT CONSTITUTES A METHOD WHICH IS BOTH NECESSARY AND APPROPRIATE TO ENABLE THE COMPETENT AUTHORITIES TO DETERMINE IN THE MOST EFFECTIVE MANNER THEIR INTERVENTIONS ON THE MARKET IN EREALS .

29 THE PRINCIPLE OF THE SYSTEM OF DEPOSITS CANNOT THEREFORE BE DISPUTED .

30 HOWEVER, EXAMINATION SHOULD BE MADE AS TO WHETHER OR NOT CERTAIN DETAILED RULES OF THE SYSTEM OF DEPOSITS MIGHT BE CONTESTED IN THE LIGHT OF THE PRINCIPLES ENOUNCED BY THE QUESTION, ESPECIALLY IN VIEW OF THE ALLEGATION OF THE RESPONDENT IN THE MAIN ACTION THAT THE BURDEN OF THE DEPOSIT IS EXCESSIVE FOR TRADE, TO THE EXTENT OF VIOLATING FUNDAMENTAL RIGHTS .

31 IN ORDER TO ASSESS THE REAL BURDEN OF THE DEPOSIT ON TRADE, ACCOUNT SHOULD BE TAKEN NOT SO MUCH OF THE AMOUNT OF THE DEPOSIT WHICH IS REPAYABLE - NAMELY 0.5 UNIT OF ACCOUNT PER 1 000 KG - AS OF THE COSTS AND CHARGES INVOLVED IN LODGING IT . IN ASSESSING THIS BURDEN, ACCOUNT CANNOT BE TAKEN OF FORFEITURE OF THE DEPOSIT ITSELF, SINCE TRADERS ARE ADEQUATELY PROTECTED BY THE PROVISIONS OF THE REGULATION RELATING TO CIRCUMSTANCES RECOGNIZED AS CONSTITUTING FORCE MAJEURE . THE COSTS INVOLVED IN THE DEPOSIT DO NOT CONSTITUTE AN AMOUNT DISPROPORTIONATE TO THE TOTAL VALUE OF THE GOODS IN QUESTION AND OF THE OTHER TRADING COSTS .

32 IT APPEARS THEREFORE THAT THE BURDENS RESULTING FROM THE SYSTEM OF DEPOSITS ARE NOT EXCESSIVE AND ARE THE NORMAL CONSEQUENCE OF A SYSTEM OF ORGANIZATION OF THE MARKETS CONCEIVED TO MEET THE REQUIREMENTS OF THE GENERAL INTEREST, DEFINED IN ARTICLE 39 OF THE TREATY, WHICH AIMS AT ENSURING THAT SUPPLIES REACH CONSUMERS AT REASONABLE PRICES .

33 THE RESPONDENT IN THE MAIN ACTION ALSO POINTS OUT THAT FORFEITURE OF THE DEPOSIT IN THE EVENT OF THE UNDERTAKING TO IMPORT OR EXPORT NOT BEING FULFILLED REALLY CONSTITUTES A FINE OR A PENALTY WHICH THE TREATY HAS NOT AUTHORIZED THE COUNCIL AND THE COMMISSION TO INSTITUTE .

34 THIS ARGUMENT IS BASED ON A FALSE ANALYSIS OF THE SYSTEM OF DEPOSITS WHICH CANNOT BE EQUATED WITH A PENAL SANCTION, SINCE IT IS MERELY THE GUARANTEE THAT AN UNDERTAKING VOLUNTARILY ASSUMED WILL BE CARRIED OUT .

35 FINALLY, THE ARGUMENTS RELIED UPON BY THE RESPONDENT IN THE MAIN ACTION BASED ON THE FACT THAT THE DEPARTMENTS OF THE COMMISSION ARE NOT TECHNICALLY IN A POSITION TO EXPLOIT THE INFORMATION SUPPLIED BY THE SYSTEM CRITICIZED, SO THAT IT IS DEVOID OF ALL PRACTICAL USEFULNESS, IS IRRELEVANT, AS IT CANNOT PUT IN ISSUE THE ACTUAL PRINCIPLE OF THE SYSTEM OF DEPOSITS .

36 IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT THE FACT THAT THE SYSTEM OF LICENCES INVOLVES AN UNDERTAKING, BY THOSE WHO APPLY FOR THEM, TO IMPORT OR EXPORT, GUARANTEED BY A DEPOSIT, DOES NOT VIOLATE ANY RIGHT OF A FUNDAMENTAL NATURE . THE MACHINERY OF DEPOSITS CONSTITUTES AN APPROPRIATE, AND IN NO WAY EXCESSIVE, METHOD, FOR THE PURPOSES OF ARTICLE 40 (3) OF THE TREATY, FOR CARRYING OUT THE COMMON ORGANIZATION OF THE AGRICULTURAL MARKETS AND ALSO CONFORM TO THE REQUIREMENTS OF ARTICLE 43 .

4 - THE QUESTION RELATION TO THE CONCEPT OF FORCE MAJEURE

37 THE COURT IS ASKED TO RULE WHETHER THE PROVISION OF REGULATION NO 102/64 CONCERNING FORFEITURE OF THE DEPOSIT (ARTICLE 7 (2)) IS INVALID BY REASON OF THE FACT THAT, EVEN WITHOUT THE LEGISLATURE ' S ATTEMPTING TO ESTABLISH WHETHER OR NOT THE FAILURE TO CARRY OUT THE OBLIGATION TO EXPORT IS INDEPENDENT OF FAULT, THE ONLY CASE IN WHICH THE DEPOSIT IS NOT FORFEITED IS, UNDER ARTICLE 8, WHEN EXPORTATION CANNOT BE EFFECTED DURING THE PERIOD OF VALIDITY OF THE LICENCE AS A RESULT OF CIRCUMSTANCES WHICH MAY BE CONSIDERED TO BE A CASE OF FORCE MAJEURE .

38 THE CONCEPT OF FORCE MAJEURE ADOPTED BY THE AGRICULTURAL REGULATIONS TAKES INTO ACCOUNT THE PARTICULAR NATURE OF THE RELATIONSHIPS IN PUBLIC LAW BETWEEN TRADERS AND THE NATIONAL ADMINISTRATION, AS WELL AS THE OBJECTIVES OF THOSE REGULATIONS . IT FOLLOWS FROM THOSE OBJECTIVES AS WELL AS FROM THE POSITIVE PROVISIONS OF THE REGULATIONS IN QUESTION THAT THE CONCEPT OF FORCE MAJEURE IS NOT LIMITED TO ABSOLUTE IMPOSSIBILITY BUT MUST BE UNDERSTOOD IN THE SENSE OF UNUSUAL CIRCUMSTANCES, OUTSIDE THE CONTROL OF THE IMPORTER OR EXPORTER, THE CONSEQUENCES OF WHICH, IN SPITE OF THE EXERCISE OF ALL DUE CARE, COULD NOT HAVE BEEN AVOIDED EXCEPT AT THE COST OF EXCESSIVE SACRIFICE . THIS CONCEPT IMPLIES A SUFFICIENT FLEXIBILITY REGARDING NOT ONLY THE NATURE OF THE OCCURRENCE RELIED UPON BUT ALSO THE CARE WHICH THE EXPORTER SHOULD HAVE EXERCISED IN ORDER TO MEET IT AND THE EXTENT OF THE SACRIFICES WHICH HE SHOULD HAVE ACCEPTED TO THAT END .

39 THE SYSTEM ESTABLISHED BY REGULATION NO 102/64 IS INTENDED TO RELEASE TRADERS FROM THEIR UNDERTAKING ONLY IN CASES IN WHICH THE IMPORT OR EXPORT TRANSACTION WAS NOT ABLE TO BE CARRIED OUT DURING THE PERIOD OF VALIDITY OF THE LICENCE AS A RESULT OF THE OCCURRENCES REFERRED TO BY THE SAID PROVISIONS . BEYOND SUCH OCCURRENCES, FOR WHICH THEY CANNOT BE HELD RESPONSIBLE, IMPORTERS AND EXPORTERS ARE OBLIGED TO COMPLY WITH THE PROVISIONS OF THE AGRICULTURAL REGULATIONS AND MAY NOT SUBSTITUTE FOR THEM CONSIDERATIONS BASED UPON THEIR OWN INTERESTS .

40 IT THEREFORE APPEARS THAT BY LIMITING THE CANCELLATION OF THE UNDERTAKING TO EXPORT AND THE RELEASE OF THE DEPOSIT TO CASES OF FORCE MAJEURE THE COMMUNITY LEGISLATURE ADOPTED A PROVISION WHICH, WITHOUT IMPOSING AN UNDUE BURDEN ON IMPORTERS OR EXPORTERS, IS APPROPRIATE FOR ENSURING THE NORMAL FUNCTIONING OF THE ORGANIZATION OF THE MARKET IN CEREALS, IN THE GENERAL INTEREST AS DEFINED IN ARTICLE 39 OF THE TREATY . IT FOLLOWS THAT NO ARGUMENT AGAINST THE VALIDITY OF THE SYSTEM OF DEPOSITS CAN BE BASED ON THE PROVISIONS LIMITING RELEASE OF THE DEPOSIT TO CASES OF FORCE MAJEURE .

Decision on costs

41 THE COSTS INCURRED BY THE COUNCIL AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE HESSISCHER VERWALTUNGSGERICHTSHOF, THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

Operative part

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HESSISCHER VERWALTUNGSGERICHTSHOF KASSEL BY ORDER OF THAT COURT OF 21 APRIL 1970, HEREBY RULES :

EXAMINATION OF THE QUESTIONS PUT REVEALS NO FACTOR CAPABLE OF AFFECTING THE VALIDITY OF :

(1) REGULATION NO 102/64/EEC OF THE COMMISSION OF 28 JULY 1964 ON IMPORT AND EXPORT LICENCES FOR CEREALS AND PROCESSED CEREAL PRODUCTS, RICE, BROKEN RICE AND PROCESSED RICE PRODUCTS, ADOPTED BY VIRTUE OF ARTICLE 16 (3) OF REGULATION NO 19 ACCORDING TO THE MANAGEMENT COMMITTEE PROCEDURE SET UP BY ARTICLE 26 OF THE SAME REGULATION;

(2) ARTICLES 1 AND 7 OF REGULATION NO 102/64/EEC OF THE COMMISSION IN SO FAR AS THEY CONCERN

EXPORT LICENCES AND DEPOSITS LODGED FOR THE PURPOSE OF OBTAINING THOSE LICENCES .

C-21/76
MINES DE POTASSE D ' ALSACE S.A

Keywords
' CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENT , ARTICLE 5 (3) (LIABILITY IN TORT , DELICT OR QUASI-DELICT ')
CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - POLLUTION OF THE ATMOSPHERE OR OF WATER - DISPUTE OF AN INTERNATIONAL CHARACTER - MATTERS RELATING TO TORT , DELICT OR QUASI-DELICT - COURTS HAVING JURISDICTION - SPECIAL JURISDICTION - PLACE WHERE THE HARMFUL EVENT OCCURRED - PLACE OF THE EVENT GIVING RISE TO THE DAMAGE AND PLACE WHERE THE DAMAGE OCCURRED - CONNECTING FACTORS OF SIGNIFICANCE AS REGARDS JURISDICTION - RIGHT OF PLAINTIFF TO ELECT (CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 (3))

Summary
WHERE THE PLACE OF THE HAPPENING OF THE EVENT WHICH MAY GIVE RISE TO LIABILITY IN TORT , DELICT OR QUASI-DELICT AND THE PLACE WHERE THAT EVENT RESULTS IN DAMAGE ARE NOT IDENTICAL , THE EXPRESSION ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , IN ARTICLE 5 (3) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , MUST BE UNDERSTOOD AS BEING INTENDED TO COVER BOTH THE PLACE WHERE THE DAMAGE OCCURRED AND THE PLACE OF THE EVENT GIVING RISE TO IT . THE RESULT IS THAT THE DEFENDANT MAY BE SUED , AT THE OPTION OF THE PLAINTIFF , EITHER IN THE COURTS FOR THE PLACE WHERE THE DAMAGE OCCURRED OR IN THE COURTS FOR THE PLACE OF THE EVENT WHICH GIVES RISE TO AND IS AT THE ORIGIN OF THAT DAMAGE .

Parties
REFERENCE TO THE COURT PURSUANT TO ARTICLE 1 OF THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE GERECHTSHOF (APPEAL COURT) OF THE HAGUE FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

HANDELSKWEKERIJ G . J . BIER B.V ., OF NIEUWERKERK AAN DEN IJSSEL (THE NETHERLANDS), AND THE REINWATER FOUNDATION , HAVING ITS REGISTERED OFFICE AT AMSTERDAM ,
AND
MINES DE POTASSE D ' ALSACE S.A ., HAVING ITS REGISTERED OFFICE AT MULHOUSE ,

Subject of the case

ON THE INTERPRETATION OF THE MEANING OF ' THE PLACE WHERE THE HARMFUL EVENT OCCURRED ' IN ARTICLE 5 (3) OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

Grounds

1 BY JUDGMENT OF 27 FEBRUARY 1976 , WHICH REACHED THE COURT REGISTRY ON THE FOLLOWING 2 MARCH , THE GERECHTSHOF (APPEAL COURT) OF THE HAGUE HAS REFERRED A QUESTION , PURSUANT TO THE PROTOCOL ON 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (HEREINAFTER CALLED ' THE CONVENTION '), ON THE INTERPRETATION OF ARTICLE 5 (3) OF THE SAID CONVENTION .

2 IT APPEARS FROM THE JUDGMENT MAKING THE REFERENCE THAT AT THE PRESENT STAGE THE MAIN ACTION , WHICH HAS COME BEFORE THE GERECHTSHOF BY WAY OF APPEAL , CONCERNS THE JURISDICTION OF THE COURT OF FIRST INSTANCE AT ROTTERDAM , AND IN GENERAL , OF THE NETHERLANDS COURTS , TO ENTERTAIN AN ACTION BROUGHT BY AN UNDERTAKING ENGAGED IN HORTICULTURE , ESTABLISHED WITHIN

THE AREA FOR WHICH THE COURT BEFORE WHICH THE ACTION WAS FIRST BROUGHT HAS JURISDICTION , AND BY THE REINWATER FOUNDATION , WHICH EXISTS TO PROMOTE THE IMPROVEMENT OF THE QUALITY OF THE WATER IN THE RHINE BASIN , AGAINST MINES DE POTASSE D ' ALSACE , ESTABLISHED AT MULHOUSE (FRANCE), CONCERNING THE POLLUTION OF THE WATERS OF THE RHINE BY THE DISCHARGE OF SALINE WASTE FROM THE OPERATIONS OF THE DEFENDANT INTO THAT INLAND WATERWAY .

3 IT APPEARS FROM THE FILE THAT AS REGARDS IRRIGATION THE HORTICULTURAL BUSINESS OF THE FIRST-NAMED APPELLANT DEPENDS MAINLY ON THE WATERS OF THE RHINE , THE HIGH SALT CONTENT OF WHICH , ACCORDING TO THE SAID APPELLANT , CAUSES DAMAGE TO ITS PLANTATIONS AND OBLIGES IT TO TAKE EXPENSIVE MEASURES IN ORDER TO LIMIT THAT DAMAGE .

4 THE APPELLANTS CONSIDER THAT THE EXCESSIVE SALINIZATION OF THE RHINE IS DUE PRINCIPALLY TO THE MASSIVE DISCHARGES CARRIED OUT BY MINES DE POTASSE D ' ALSACE AND THEY DECLARE THAT IT IS FOR THAT REASON THAT THEY HAVE CHOSEN TO BRING AN ACTION FOR THE PURPOSES OF ESTABLISHING THE LIABILITY OF THAT UNDERTAKING .

5 BY JUDGMENT DELIVERED ON 12 MAY 1975 , THE COURT AT ROTTERDAM HELD THAT IT HAD NO JURISDICTION TO ENTERTAIN THE ACTION , TAKING THE VIEW THAT UNDER ARTICLE 5 (3) OF THE CONVENTION THE CLAIM DID NOT COME WITHIN ITS JURISDICTION BUT UNDER THAT OF THE FRENCH COURT FOR THE AREA IN WHICH THE DISCHARGE AT ISSUE TOOK PLACE .

6 BIER AND REINWATER BROUGHT AN APPEAL AGAINST THAT JUDGMENT BEFORE THE GERECHTSHOF , THE HAGUE , WHICH SUBSEQUENTLY REFERRED THE FOLLOWING QUESTION TO THE COURT :

' ARE THE WORDS ' ' THE PLACE WHERE THE HARMFUL EVENT OCCURRED ' ' , APPEARING IN THE TEXT OF ARTICLE 5 (3) OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , CONCLUDED AT BRUSSELS ON 27 SEPTEMBER 1968 , TO BE UNDERSTOOD AS MEANING ' ' THE PLACE WHERE THE DAMAGE OCCURRED (THE PLACE WHERE THE DAMAGE TOOK PLACE OR BECAME APPARENT) ' ' OR RATHER ' ' THE PLACE WHERE THE EVENT HAVING THE DAMAGE AS ITS SEQUEL OCCURRED (THE PLACE WHERE THE ACT WAS OR WAS NOT PERFORMED) ' ' ?

7 ARTICLE 5 OF THE CONVENTION PROVIDES : ' A PERSON DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED : . . . (3) IN MATTERS RELATING TO TORT , DELICT OR QUASI-DELICT , IN THE COURTS FOR THE PLACE WHERE THE HARMFUL EVENT OCCURRED ' .

8 THAT PROVISION MUST BE INTERPRETED IN THE CONTEXT OF THE SCHEME OF CONFERMENT OF JURISDICTION WHICH FORMS THE SUBJECT-MATTER OF TITLE II OF THE CONVENTION .

9 THAT SCHEME IS BASED ON A GENERAL RULE , LAID DOWN BY ARTICLE 2 , THAT THE COURTS OF THE STATE IN WHICH THE DEFENDANT IS DOMICILED SHALL HAVE JURISDICTION .

10 HOWEVER , ARTICLE 5 MAKES PROVISION IN A NUMBER OF CASES FOR A SPECIAL JURISDICTION , WHICH THE PLAINTIFF MAY OPT TO CHOOSE .

11 THIS FREEDOM OF CHOICE WAS INTRODUCED HAVING REGARD TO THE EXISTENCE , IN CERTAIN CLEARLY DEFINED SITUATIONS , OF A PARTICULARLY CLOSE CONNECTING FACTOR BETWEEN A DISPUTE AND THE COURT WHICH MAY BE CALLED UPON TO HEAR IT , WITH A VIEW TO THE EFFICACIOUS CONDUCT OF THE PROCEEDINGS .

12 THUS IN MATTERS OF TORT , DELICT OR QUASI-DELICT ARTICLE 5 (3) ALLOWS THE PLAINTIFF TO BRING HIS CASE BEFORE THE COURTS FOR ' THE PLACE WHERE THE HARMFUL EVENT OCCURRED ' .

13 IN THE CONTEXT OF THE CONVENTION , THE MEANING OF THAT EXPRESSION IS UNCLEAR WHEN THE PLACE OF THE EVENT WHICH IS AT THE ORIGIN OF THE DAMAGE IS SITUATED IN A STATE OTHER THAN THE ONE IN WHICH THE PLACE WHERE THE DAMAGE OCCURRED IS SITUATED , AS IS THE CASE INTER INTER ALIA WITH ATMOSPHERIC OR WATER POLLUTION BEYOND THE FRONTIERS OF A STATE .

14 THE FORM OF WORDS ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , USED IN ALL THE LANGUAGE VERSIONS OF THE CONVENTION , LEAVES OPEN THE QUESTION WHETHER , IN THE SITUATION DESCRIBED , IT IS NECESSARY , IN DETERMINING JURISDICTION , TO CHOOSE AS THE CONNECTING FACTOR THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE , OR THE PLACE WHERE THE DAMAGE OCCURRED , OR TO ACCEPT THAT THE PLAINTIFF HAS AN OPTION BETWEEN THE ONE AND THE OTHER OF THOSE TWO CONNECTING

FACTORS .

15 AS REGARDS THIS , IT IS WELL TO POINT OUT THAT THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE NO LESS THAN THE PLACE WHERE THE DAMAGE OCCURRED CAN , DEPENDING ON THE CASE , CONSTITUTE A SIGNIFICANT CONNECTING FACTOR FROM THE POINT OF VIEW OF JURISDICTION .

16 LIABILITY IN TORT , DELICT OR QUASI-DELICT CAN ONLY ARISE PROVIDED THAT A CAUSAL CONNEXION CAN BE ESTABLISHED BETWEEN THE DAMAGE AND THE EVENT IN WHICH THAT DAMAGE ORIGINATES .

17 TAKING INTO ACCOUNT THE CLOSE CONNEXION BETWEEN THE COMPONENT PARTS OF EVERY SORT OF LIABILITY , IT DOES NOT APPEAR APPROPRIATE TO OPT FOR ONE OF THE TWO CONNECTING FACTORS MENTIONED TO THE EXCLUSION OF THE OTHER , SINCE EACH OF THEM CAN , DEPENDING ON THE CIRCUMSTANCES , BE PARTICULARLY HELPFUL FROM THE POINT OF VIEW OF THE EVIDENCE AND OF THE CONDUCT OF THE PROCEEDINGS .

18 TO EXCLUDE ONE OPTION APPEARS ALL THE MORE UNDESIRABLE IN THAT , BY ITS COMPREHENSIVE FORM OF WORDS , ARTICLE 5 (3) OF THE CONVENTION COVERS A WIDE DIVERSITY OF KINDS OF LIABILITY .

19 THUS THE MEANING OF THE EXPRESSION ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' IN ARTICLE 5 (3) MUST BE ESTABLISHED IN SUCH A WAY AS TO ACKNOWLEDGE THAT THE PLAINTIFF HAS AN OPTION TO COMMENCE PROCEEDINGS EITHER AT THE PLACE WHERE THE DAMAGE OCCURRED OR THE PLACE OF THE EVENT GIVING RISE TO IT .

20 THIS CONCLUSION IS SUPPORTED BY THE CONSIDERATION , FIRST , THAT TO DECIDE IN FAVOUR ONLY OF THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE WOULD , IN AN APPRECIABLE NUMBER OF CASES , CAUSE CONFUSION BETWEEN THE HEADS OF JURISDICTION LAID DOWN BY ARTICLES 2 AND 5 (3) OF THE CONVENTION , SO THAT THE LATTER PROVISION WOULD , TO THAT EXTENT , LOSE ITS EFFECTIVENESS .

21 SECONDLY , A DECISION IN FAVOUR ONLY OF THE PLACE WHERE THE DAMAGE OCCURRED WOULD , IN CASES WHERE THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE DOES NOT COINCIDE WITH THE DOMICILE OF THE PERSON LIABLE , HAVE THE EFFECT OF EXCLUDING A HELPFUL CONNECTING FACTOR WITH THE JURISDICTION OF A COURT PARTICULARLY NEAR TO THE CAUSE OF THE DAMAGE .

22 MOREOVER , IT APPEARS FROM A COMPARISON OF THE NATIONAL LEGISLATIVE PROVISIONS AND NATIONAL CASE-LAW ON THE DISTRIBUTION OF JURISDICTION - BOTH AS REGARDS INTERNAL RELATIONSHIPS , AS BETWEEN COURTS FOR DIFFERENT AREAS , AND IN INTERNATIONAL RELATIONSHIPS - THAT , ALBEIT BY DIFFERING LEGAL TECHNIQUES , A PLACE IS FOUND FOR BOTH OF THE TWO CONNECTING FACTORS HERE CONSIDERED AND THAT IN SEVERAL STATES THEY ARE ACCEPTED CONCURRENTLY .

23 IN THESE CIRCUMSTANCES , THE INTERPRETATION STATED ABOVE HAS THE ADVANTAGE OF AVOIDING ANY UPHEAVAL IN THE SOLUTIONS WORKED OUT IN THE VARIOUS NATIONAL SYSTEMS OF LAW , SINCE IT LOOKS TO UNIFICATION , IN CONFORMITY WITH ARTICLE 5 (3) OF THE CONVENTION , BY WAY OF A SYSTEMATIZATION OF SOLUTIONS WHICH , AS TO THEIR PRINCIPLE , HAVE ALREADY BEEN ESTABLISHED IN MOST OF THE STATES CONCERNED .

24 THUS IT SHOULD BE ANSWERED THAT WHERE THE PLACE OF THE HAPPENING OF THE EVENT WHICH MAY GIVE RISE TO LIABLITY IN TORT , DELICT OR QUASIDELICT AND THE PLACE WHERE THAT EVENT RESULTS IN DAMAGE ARE NOT IDENTICAL , THE EXPRESSON ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , IN ARTICLE 5 (3) OF THE CONVENTION , MUST BE UNDERSTOOD AS BEING INTENDED TO COVER BOTH THE PLACE WHERE THE DAMAGE OCCURRED AND THE PLACE OF THE EVENT GIVING RISE TO IT .

25 THE RESULT IS THAT THE DEFENDANT MAY BE SUED , AT THE OPTION OF THE PLAINTIFF , EITHER IN THE COURTS FOR THE PLACE WHERE THE DAMAGE OCCURRED OR IN THE COURTS FOR THE PLACE OF THE EVENT WHICH GIVES RISE TO AND IS AT THE ORIGIN OF THAT DAMAGE .

Decision on costs

COSTS

26 THE COSTS INCURRED BY THE GOVERNMENT OF THE FRENCH REPUBLIC , THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE

SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE .

27 AS THESE PROCEEDINGS ARE , SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , A STEP IN THE ACTION PENDING BEFORE THE GERECHTSHOF , THE HAGUE , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS

THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE GERECHTSHOF , THE HAGUE , BY JUDGMENT OF 27 FEBRUARY 1976 , HEREBY RULES :

WHERE THE PLACE OF THE HAPPENING OF THE EVENT WHICH MAY GIVE RISE TO LIABILITY IN TORT , DELICT OR QUASIDELICT AND THE PLACE WHERE THAT EVENT RESULTS IN DAMAGE ARE NOT IDENTICAL , THE EXPRESSION ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , IN ARTICLE 5 (3) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , MUST BE UNDERSTOOD AS BEING INTENDED TO COVER BOTH THE PLACE WHERE THE DAMAGE OCCURRED AND THE PLACE OF THE EVENT GIVING RISE TO IT .

THE RESULT IS THAT THE DEFENDANT MAY BE SUED , AT THE OPTION OF THE PLAINTIFF , EITHER IN THE COURTS FOR THE PLACE WHERE THE DAMAGE OCCURRED OR IN THE COURTS FOR THE PLACE OF THE EVENT WHICH GIVES RISE TO AND IS AT THE ORIGIN OF THAT DAMAGE .

CASE C-44/79
Hauer

Judgment of the Court of 13 December 1979.

Liselotte Hauer v Land Rheinland-Pfalz.

Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany.
Prohibition on new planting of vines.

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE VERWALTUNGSGERICHT (ADMINISTRATIVE COURT) NEUSTADT AN DER WEINSTRASSE FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN
LISELOTTE HAUER , RESIDING AT BAD DURKHEIM
AND
LAND RHEINLAND-PFALZ

Subject of the case

ON THE INTERPRETATION OF ARTICLE 2 OF COUNCIL REGULATION (EEC) NO 1162/76 OF 17 MAY 1976 ON MEASURES DESIGNED TO ADJUST WINE-GROWING POTENTIAL TO MARKET REQUIREMENTS , AS AMENDED BY COUNCIL REGULATION (EEC) NO 2776/78 OF 23 NOVEMBER 1978 , WITH REGARD TO ARTICLE 1 OF THE GESETZ UBER MASSNAHMEN AUF DEM GEBIETE DER WEINWIRTSCHAFT (WEINWIRTSCHAFTSGESETZ),
Grounds

1 BY AN ORDER OF 14 DECEMBER 1978 , RECEIVED AT THE COURT ON 20 MARCH 1979 , THE VERWALTUNGSGERICHT NEUSTADT AN DER WEINSTRASSE SUBMITTED TWO QUESTIONS TO THE COURT FOR A PRELIMINARY RULING , PURSUANT TO ARTICLE 177 OF THE EEC TREATY , ON THE INTERPRETATION OF COUNCIL REGULATION (EEC) NO 1162/76 OF 17 MAY 1976 ON MEASURES DESIGNED TO ADJUST WINE-GROWING POTENTIAL TO MARKET REQUIREMENTS (OFFICIAL JOURNAL L 135 , P . 32), AMENDED BY COUNCIL REGULATION (EEC) NO 2776/78 OF 23 NOVEMBER 1978 (OFFICIAL JOURNAL L 333 , P . 1).

2 THE FILE ON THE CASE SHOWS THAT ON 6 JUNE 1975 THE PLAINTIFF IN THE MAIN ACTION APPLIED TO THE COMPETENT ADMINISTRATIVE AUTHORITY OF THE LAND RHEINLAND-PFALZ FOR AUTHORIZATION TO PLANT VINES ON A PLOT OF LAND WHICH SHE OWNS IN THE REGION OF BAD DURKHEIM . THAT AUTHORIZATION WAS REFUSED INITIALLY OWING TO THE FACT THAT UNDER THE PROVISIONS OF THE GERMAN LEGISLATION APPLICABLE TO THAT SPHERE , NAMELY THE LAW RELATING TO THE WINE INDUSTRY (WEINWIRTSCHAFTSGESETZ) OF 10 MARCH 1977 , THE PLOT OF LAND IN QUESTION WAS NOT CONSIDERED SUITABLE FOR WINE-GROWING . ON 22 JANUARY 1976 THE PERSON CONCERNED LODGED AN OBJECTION AGAINST THAT DECISION . WHILE PROCEEDINGS RELATING TO THAT OBJECTION WERE PENDING BEFORE THE COMPETENT ADMINISTRATIVE AUTHORITY , REGULATION NO 1162/76 OF 17 MAY 1976 WAS ADOPTED , ARTICLE 2 OF WHICH IMPOSES A PROHIBITION FOR A PERIOD OF THREE YEARS ON ALL NEW PLANTING OF VINES . ON 21 OCTOBER OF THAT YEAR THE ADMINISTRATIVE AUTHORITY OVERRULED THE OBJECTION , STATING TWO GROUNDS : ON THE ONE HAND , THE UNSUITABILITY OF THE LAND AND , ON THE OTHER HAND , THE PROHIBITION ON PLANTING AS A RESULT OF THE COMMUNITY REGULATION REFERRED TO .

3 THE PERSON CONCERNED APPEALED TO THE VERWALTUNGSGERICHT . AS A RESULT OF EXPERTS ' REPORTS ON THE GRAPES GROWN IN THE SAME AREA AND TAKING INTO ACCOUNT A SETTLEMENT REACHED WITH VARIOUS OTHER OWNERS OF PLOTS OF LAND ADJACENT TO THAT OF THE APPLICANT , THE ADMINISTRATIVE AUTHORITY ACCEPTED THAT THE PLAINTIFF ' S LAND MAY BE CONSIDERED SUITABLE FOR WINE-GROWING IN ACCORDANCE WITH THE MINIMUM REQUIREMENTS LAID DOWN BY NATIONAL LEGISLATION . CONSEQUENTLY , THE AUTHORITY STATED ITS WILLINGNESS TO GRANT THE AUTHORIZATION AS FROM THE END OF THE PROHIBITION ON NEW PLANTING IMPOSED BY THE COMMUNITY RULES . THUS IT APPEARS THAT THE DISPUTE BETWEEN THE PARTIES IS HENCEFORTH SOLELY CONCERNED WITH QUESTIONS OF COMMUNITY LAW .

4 FOR HER PART , THE PLAINTIFF IN THE MAIN ACTION CONSIDERS THAT THE AUTHORIZATION APPLIED FOR SHOULD BE GRANTED TO HER ON THE GROUND THAT THE PROVISIONS OF REGULATION NO 1162/76 ARE NOT APPLICABLE IN THE CASE OF AN APPLICATION INTRODUCED LONG BEFORE THE ENTRY INTO FORCE OF THAT REGULATION . EVEN SUPPOSING THAT THE REGULATION IS APPLICABLE IN THE CASE OF APPLICATIONS SUBMITTED BEFORE ITS ENTRY INTO FORCE , ITS PROVISIONS MAY IN THE APPLICANT ' S SUBMISSION STILL NOT BE RELIED UPON AGAINST HER BECAUSE THEY ARE CONTRARY TO HER RIGHT TO PROPERTY AND TO HER RIGHT FREELY TO PURSUE A TRADE OR PROFESSION RIGHTS WHICH ARE GUARANTEED BY ARTICLES 12 AND 14 OF THE GRUNDGESETZ OF THE FEDERAL REPUBLIC OF GERMANY .

5 IN ORDER TO RESOLVE THAT DISPUTE , THE VERWALTUNGSGERICHT DRAFTED TWO QUESTIONS WORDED AS FOLLOWS :

1 . IS COUNCIL REGULATION (EEC) NO 1162/76 OF 17 MAY 1976 AS AMENDED BY COUNCIL REGULATION (EEC) NO 2776/78 OF 23 NOVEMBER 1978 TO BE INTERPRETED AS MEANING THAT ARTICLE 2 (1) THEREOF ALSO APPLIES TO THOSE APPLICATIONS FOR AUTHORIZATION OF NEW PLANTING OF VINEYARDS WHICH HAD ALREADY BEEN MADE BEFORE THE SAID REGULATION ENTERED INTO FORCE?

AND IF THE ANSWER TO QUESTION 1 IS IN THE AFFIRMATIVE

2 . IS ARTICLE 2 (1) OF THE SAID REGULATION TO BE INTERPRETED AS MEANING THAT THE PROHIBITION LAID DOWN THEREIN ON THE GRANTING OF AUTHORIZATIONS FOR NEW PLANTING - DISREGARDING THE EXCEPTIONS SPECIFIED IN ARTICLES 2 (2) OF THE REGULATION - IS OF INCLUSIVE APPLICATION , THAT IS TO SAY , IS IN PARTICULAR UNAFFECTED BY THE QUESTION OF THE UNSUITABILITY OF THE LAND AS PROVIDED IN ARTICLE 1 (2) AND ARTICLE 2 OF THE GERMAN LAW ON MEASURES APPLICABLE IN THE WINE INDUSTRY (WEINWIRTSCHAFTSGESETZ (LAW RELATING TO THE WINE INDUSTRY))?

THE FIRST QUESTION (APPLICATION OF REGULATION NO 1162/76 IN TIME)

6 IN THIS REGARD , THE PLAINTIFF IN THE MAIN ACTION CLAIMS THAT HER APPLICATION , SUBMITTED TO THE COMPETENT ADMINISTRATIVE AUTHORITY ON 6 JUNE 1975 , SHOULD IN THE NORMAL COURSE OF EVENTS HAVE LED TO A DECISION IN HER FAVOUR BEFORE THE ENTRY INTO FORCE OF THE COMMUNITY REGULATION IF THE ADMINISTRATIVE PROCEDURE HAD TAKEN ITS USUAL COURSE AND IF THE ADMINISTRATION HAD RECOGNIZED WITHOUT DELAY THE FACT THAT HER PLOT OF LAND IS SUITABLE FOR WINE-GROWING IN ACCORDANCE WITH THE REQUIREMENTS OF NATIONAL LAW . IT IS , SHE ARGUES , NECESSARY TO TAKE ACCOUNT OF THAT SITUATION IN DECIDING THE TIME FROM WHICH THE COMMUNITY REGULATION IS APPLICABLE , THE MORE SO AS THE PRODUCTION OF THE VINEYARD IN QUESTION WOULD NOT HAVE HAD ANY APPRECIABLE INFLUENCE ON MARKET CONDITIONS , IN VIEW OF THE TIME WHICH ELAPSES BETWEEN THE PLANTING OF A VINEYARD AND ITS FIRST PRODUCTION .

7 THE ARGUMENTS ADVANCED BY THE PLAINTIFF IN THE MAIN ACTION CANNOT BE UPHELD . INDEED THE SECOND SUBPARAGRAPH OF ARTICLE 2 (1) OF REGULATION NO 1162/76 EXPRESSLY PROVIDES THAT MEMBER STATES SHALL NO LONGER GRANT AUTHORIZATIONS FOR NEW PLANTING ' ' AS FROM THE DATE ON WHICH THIS REGULATION ENTERS INTO FORCE ' ' . BY REFERRING TO THE ACT OF GRANTING AUTHORIZATION , THAT PROVISION RULES OUT THE POSSIBILITY OF TAKING INTO CONSIDERATION THE TIME AT WHICH AN APPLICATION WAS SUBMITTED . IT INDICATES THE INTENTION TO GIVE IMMEDIATE EFFECT TO THE REGULATION , TO SUCH AN EXTENT THAT EVEN THE EXERCISE OF RIGHTS TO PLANT OR RE-PLANT ACQUIRED PRIOR TO THE ENTRY INTO FORCE OF THE REGULATION IS SUSPENDED DURING THE PERIOD OF THE PROHIBITION AS A RESULT OF ARTICLE 4 OF THE SAME REGULATION .

8 AS IS STATED IN THE SIXTH RECITAL OF THE PREAMBLE , WITH REGARD TO THE LAST-MENTIONED PROVISION , THE PROHIBITION ON NEW PLANTINGS IS REQUIRED BY AN ' ' UNDENIABLE PUBLIC INTEREST ' ' , MAKING IT NECESSARY TO PUT A BRAKE ON THE OVERPRODUCTION OF WINE IN THE COMMUNITY , TO RE-ESTABLISH THE BALANCE OF THE MARKET AND TO PREVENT THE FORMATION OF STRUCTURAL SURPLUSES . THUS IT APPEARS THAT THE OBJECT OF REGULATION NO 1162/76 IS THE IMMEDIATE PREVENTION OF ANY EXTENSION IN THE AREA COVERED BY VINEYARDS . THEREFORE NO EXCEPTION MAY BE MADE IN FAVOUR OF AN APPLICATION SUBMITTED BEFORE ITS ENTRY INTO FORCE .

9 IT IS THEREFORE NECESSARY TO REPLY TO THE FIRST QUESTION THAT COUNCIL REGULATION NO 1162/76 OF 17 MAY 1976 , AMENDED BY REGULATION NO 2776/78 OF 23 NOVEMBER 1978 , MUST BE INTERPRETED AS MEANING THAT ARTICLE 2 (1) THEREOF ALSO APPLIES TO APPLICATIONS FOR AUTHORIZATION OF NEW

PLANTING OF VINES MADE BEFORE THE ENTRY INTO FORCE OF THE FIRST REGULATION .

THE SECOND QUESTION (THE SUBSTANTIVE SCOPE OF REGULATION NO 1162/76)

10 IN ITS SECOND QUESTION THE VERWALTUNGSGERICHT ASKS THE COURT TO RULE WHETHER THE PROHIBITION ON GRANTING AUTHORIZATIONS FOR NEW PLANTING LAID DOWN BY ARTICLE 2 (1) OF REGULATION NO 1162/76 IS OF INCLUSIVE APPLICATION , THAT IS TO SAY WHETHER IT ALSO INCLUDES LAND RECOGNIZED AS SUITABLE FOR WINE-GROWING IN ACCORDANCE WITH THE CRITERIA APPLIED BY NATIONAL LEGISLATION .

11 IN THIS REGARD , THE TEXT OF THE REGULATION IS EXPLICIT IN SO FAR AS ARTICLE 2 PROHIBITS ' ' ALL NEW PLANTING ' ' WITHOUT MAKING ANY DISTINCTION ACCORDING TO THE QUALITY OF THE LAND CONCERNED . IT IS CLEAR FROM BOTH THE TEXT AND THE STATED OBJECTIVES OF REGULATION NO 1162/76 THAT THE PROHIBITION MUST APPLY TO NEW PLANTINGS IRRESPECTIVE OF THE NATURE OF THE LAND AND OF THE CLASSIFICATION THEREOF UNDER NATIONAL LEGISLATION . IN FACT , THE OBJECT OF THE REGULATION , AS IS CLEAR IN PARTICULAR FROM THE SECOND RECITAL OF THE PREAMBLE THERETO , IS TO BRING TO AN END THE SURPLUS IN EUROPEAN WINE PRODUCTION AND TO RE-ESTABLISH THE BALANCE OF THE MARKET BOTH IN THE SHORT AND IN THE LONG TERM . ONLY ARTICLE 2 (2) OF THE REGULATION PROVIDES FOR SOME EXCEPTIONS TO THE GENERAL NATURE OF THE PROHIBITION LAID DOWN BY PARAGRAPH (1) OF THE SAME ARTICLE , BUT IT IS COMMON GROUND THAT NONE OF THOSE EXCEPTIONS APPLIES IN THIS CASE .

12 THEREFORE THE REPLY TO THE SECOND QUESTION MUST BE THAT ARTICLE 2 (1) OF REGULATION NO 1162/76 MUST BE INTERPRETED AS MEANING THAT THE PROHIBITION LAID DOWN THEREIN ON THE GRANTING OF AUTHORIZATIONS FOR NEW PLANTING - DISREGARDING THE EXCEPTIONS SPECIFIED IN ARTICLE 2 (2) OF THE REGULATION - IS OF INCLUSIVE APPLICATION , THAT IS TO SAY , IS IN PARTICULAR UNAFFECTED BY THE QUESTION OF THE SUITABILITY OR OTHERWISE OF A PLOT OF LAND FOR WINE-GROWING , AS DETERMINED BY THE PROVISIONS OF A NATIONAL LAW .

THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE COMMUNITY LEGAL ORDER

13 IN ITS ORDER MAKING THE REFERENCE , THE VERWALTUNGSGERICHT STATES THAT IF REGULATION NO 1162/76 MUST BE INTERPRETED AS MEANING THAT IT LAYS DOWN A PROHIBITION OF GENERAL APPLICATION , SO AS TO INCLUDE EVEN LAND APPROPRIATE FOR WINE GROWING , THAT PROVISION MIGHT HAVE TO BE CONSIDERED INAPPLICABLE IN THE FEDERAL REPUBLIC OF GERMANY OWING TO DOUBTS EXISTING WITH REGARD TO ITS COMPATIBILITY WITH THE FUNDAMENTAL RIGHTS GUARANTEED BY ARTICLES 14 AND 12 OF THE GRUNDGESETZ CONCERNING , RESPECTIVELY , THE RIGHT TO PROPERTY AND THE RIGHT FREELY TO PURSUE TRADE AND PROFESSIONAL ACTIVITIES .

14 AS THE COURT DECLARED IN ITS JUDGMENT OF 17 DECEMBER 1970 , INTERNATIONALE HANDELSGESELLSCHAFT (1970) ECR 1125 , THE QUESTION OF A POSSIBLE INFRINGEMENT OF FUNDAMENTAL RIGHTS BY A MEASURE OF THE COMMUNITY INSTITUTIONS CAN ONLY BE JUDGED IN THE LIGHT OF COMMUNITY LAW ITSELF . THE INTRODUCTION OF SPECIAL CRITERIA FOR ASSESSMENT STEMMING FROM THE LEGISLATION OR CONSTITUTIONAL LAW OF A PARTICULAR MEMBER STATE WOULD , BY DAMAGING THE SUBSTANTIVE UNITY AND EFFICACY OF COMMUNITY LAW , LEAD INEVITABLY TO THE DESTRUCTION OF THE UNITY OF THE COMMON MARKET AND THE JEOPARDIZING OF THE COHESION OF THE COMMUNITY .

15 THE COURT ALSO EMPHASIZED IN THE JUDGMENT CITED , AND LATER IN THE JUDGMENT OF 14 MAY 1974 , NOLD (1974) ECR 491 , THAT FUNDAMENTAL RIGHTS FORM AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF THE LAW , THE OBSERVANCE OF WHICH IT ENSURES ; THAT IN SAFEGUARDING THOSE RIGHTS , THE COURT IS BOUND TO DRAW INSPIRATION FROM CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES , SO THAT MEASURES WHICH ARE INCOMPATIBLE WITH THE FUNDAMENTAL RIGHTS RECOGNIZED BY THE CONSTITUTIONS OF THOSE STATES ARE UNACCEPTABLE IN THE COMMUNITY ; AND THAT , SIMILARLY , INTERNATIONAL TREATIES FOR THE PROTECTION OF HUMAN RIGHTS ON WHICH THE MEMBER STATES HAVE COLLABORATED OR OF WHICH THEY ARE SIGNATORIES , CAN SUPPLY GUIDELINES WHICH SHOULD BE FOLLOWED WITHIN THE FRAMEWORK OF COMMUNITY LAW . THAT CONCEPTION WAS LATER RECOGNIZED BY THE JOINT DECLARATION OF THE EUROPEAN PARLIAMENT , THE COUNCIL AND THE COMMISSION OF 5 APRIL 1977 , WHICH , AFTER RECALLING THE CASE-LAW OF THE COURT , REFERS ON THE ONE HAND TO THE RIGHTS GUARANTEED BY THE CONSTITUTIONS OF THE MEMBER STATES AND ON THE OTHER HAND TO THE

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF 4 NOVEMBER 1950 (OFFICIAL JOURNAL C 103 , 1977 , P . 1).

16 IN THESE CIRCUMSTANCES , THE DOUBTS EVINCED BY THE VERWALTUNGSGERICHT AS TO THE COMPATIBILITY OF THE PROVISIONS OF REGULATION NO 1162/76 WITH THE RULES CONCERNING THE PROTECTION OF FUNDAMENTAL RIGHTS MUST BE UNDERSTOOD AS QUESTIONING THE VALIDITY OF THE REGULATION IN THE LIGHT OF COMMUNITY LAW . IN THIS REGARD , IT IS NECESSARY TO DISTINGUISH BETWEEN , ON THE ONE HAND , A POSSIBLE INFRINGEMENT OF THE RIGHT TO PROPERTY AND , ON THE OTHER HAND , A POSSIBLE LIMITATION UPON THE FREEDOM TO PURSUE A TRADE OR PROFESSION .

THE QUESTION OF THE RIGHT TO PROPERTY

17 THE RIGHT TO PROPERTY IS GUARANTEED IN THE COMMUNITY LEGAL ORDER IN ACCORDANCE WITH THE IDEAS COMMON TO THE CONSTITUTIONS OF THE MEMBER STATES , WHICH ARE ALSO REFLECTED IN THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS .

18 ARTICLE 1 OF THAT PROTOCOL PROVIDES AS FOLLOWS :

' ' EVERY NATURAL OR LEGAL PERSON IS ENTITLED TO THE PEACEFUL ENJOYMENT OF HIS POSSESSIONS . NO ONE SHALL BE DEPRIVED OF HIS POSSESSIONS EXCEPT IN THE PUBLIC INTEREST AND SUBJECT TO THE CONDITIONS PROVIDED FOR BY LAW AND BY THE GENERAL PRINCIPLES OF INTERNATIONAL LAW .

THE PRECEDING PROVISIONS SHALL NOT , HOWEVER , IN ANY WAY IMPAIR THE RIGHT OF A STATE TO ENFORCE SUCH LAWS AS IT DEEMS NECESSARY TO CONTROL THE USE OF PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST OR TO SECURE THE PAYMENT OF TAXES OR OTHER CONTRIBUTIONS OR PENALTIES . ' '

19 HAVING DECLARED THAT PERSONS ARE ENTITLED TO THE PEACEFUL ENJOYMENT OF THEIR PROPERTY , THAT PROVISION ENVISAGES TWO WAYS IN WHICH THE RIGHTS OF A PROPERTY OWNER MAY BE IMPAIRED , ACCORDING AS THE IMPAIRMENT IS INTENDED TO DEPRIVE THE OWNER OF HIS RIGHT OR TO RESTRICT THE EXERCISE THEREOF . IN THIS CASE IT IS INCONTESTABLE THAT THE PROHIBITION ON NEW PLANTING CANNOT BE CONSIDERED TO BE AN ACT DEPRIVING THE OWNER OF HIS PROPERTY , SINCE HE REMAINS FREE TO DISPOSE OF IT OR TO PUT IT TO OTHER USES WHICH ARE NOT PROHIBITED . ON THE OTHER HAND , THERE IS NO DOUBT THAT THAT PROHIBITION RESTRICTS THE USE OF THE PROPERTY . IN THIS REGARD , THE SECOND PARAGRAPH OF ARTICLE 1 OF THE PROTOCOL PROVIDES AN IMPORTANT INDICATION IN SO FAR AS IT RECOGNIZES THE RIGHT OF A STATE ' ' TO ENFORCE SUCH LAWS AS IT DEEMS NECESSARY TO CONTROL THE USE OF PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST ' ' . THUS THE PROTOCOL ACCEPTS IN PRINCIPLE THE LEGALITY OF RESTRICTIONS UPON THE USE OF PROPERTY , WHILST AT THE SAME TIME LIMITING THOSE RESTRICTIONS TO THE EXTENT TO WHICH THEY ARE DEEMED ' ' NECESSARY ' ' BY A STATE FOR THE PROTECTION OF THE ' ' GENERAL INTEREST ' ' . HOWEVER , THAT PROVISION DOES NOT , ENABLE A SUFFICIENTLY PRECISE ANSWER TO BE GIVEN TO THE QUESTION SUBMITTED BY THE VERWALTUNGSGERICHT .

20 THEREFORE , IN ORDER TO BE ABLE TO ANSWER THAT QUESTION , IT IS NECESSARY TO CONSIDER ALSO THE INDICATIONS PROVIDED BY THE CONSTITUTIONAL RULES AND PRACTICES OF THE NINE MEMBER STATES . ONE OF THE FIRST POINTS TO EMERGE IN THIS REGARD IS THAT THOSE RULES AND PRACTICES PERMIT THE LEGISLATURE TO CONTROL THE USE OF PRIVATE PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST . THUS SOME CONSTITUTIONS REFER TO THE OBLIGATIONS ARISING OUT OF THE OWNERSHIP OF PROPERTY (GERMAN GRUNDGESETZ , ARTICLE 14 (2), FIRST SENTENCE), TO ITS SOCIAL FUNCTION (ITALIAN CONSTITUTION , ARTICLE 42 (2)), TO THE SUBORDINATION OF ITS USE TO THE REQUIREMENTS OF THE COMMON GOOD (GERMAN GRUNDGESETZ , ARTICLE 14 (2), SECOND SENTENCE , AND THE IRISH CONSTITUTION , ARTICLE 43.2.2*), OR OF SOCIAL JUSTICE (IRISH CONSTITUTION , ARTICLE 43.2.1*). IN ALL THE MEMBER STATES , NUMEROUS LEGISLATIVE MEASURES HAVE GIVEN CONCRETE EXPRESSION TO THAT SOCIAL FUNCTION OF THE RIGHT TO PROPERTY . THUS IN ALL THE MEMBER STATES THERE IS LEGISLATION ON AGRICULTURE AND FORESTRY , THE WATER SUPPLY , THE PROTECTION OF THE ENVIRONMENT AND TOWN AND COUNTRY PLANNING , WHICH IMPOSES RESTRICTIONS , SOMETIMES APPRECIABLE , ON THE USE OF REAL PROPERTY .

21 MORE PARTICULARLY , ALL THE WINE-PRODUCING COUNTRIES OF THE COMMUNITY HAVE RESTRICTIVE LEGISLATION , ALBEIT OF DIFFERING SEVERITY , CONCERNING THE PLANTING OF VINES , THE SELECTION OF

VARIETIES AND THE METHODS OF CULTIVATION . IN NONE OF THE COUNTRIES CONCERNED ARE THOSE PROVISIONS CONSIDERED TO BE INCOMPATIBLE IN PRINCIPLE WITH THE REGARD DUE TO THE RIGHT TO PROPERTY .

22 THUS IT MAY BE STATED , TAKING INTO ACCOUNT THE CONSTITUTIONAL PRECEPTS COMMON TO THE MEMBER STATES AND CONSISTENT LEGISLATIVE PRACTICES , IN WIDELY VARYING SPHERES , THAT THE FACT THAT REGULATION NO 1162/76 IMPOSED RESTRICTIONS ON THE NEW PLANTING OF VINES CANNOT BE CHALLENGED IN PRINCIPLE . IT IS A TYPE OF RESTRICTION WHICH IS KNOWN AND ACCEPTED AS LAWFUL , IN IDENTICAL OR SIMILAR FORMS , IN THE CONSTITUTIONAL STRUCTURE OF ALL THE MEMBER STATES .

23 HOWEVER , THAT FINDING DOES NOT DEAL COMPLETELY WITH THE PROBLEM RAISED BY THE VERWALTUNGSGERICHT . EVEN IF IT IS NOT POSSIBLE TO DISPUTE IN PRINCIPLE THE COMMUNITY ' S ABILITY TO RESTRICT THE EXERCISE OF THE RIGHT TO PROPERTY IN THE CONTEXT OF A COMMON ORGANIZATION OF THE MARKET AND FOR THE PURPOSES OF A STRUCTURAL POLICY , IT IS STILL NECESSARY TO EXAMINE WHETHER THE RESTRICTIONS INTRODUCED BY THE PROVISIONS IN DISPUTE IN FACT CORRESPOND TO OBJECTIVES OF GENERAL INTEREST PURSUED BY THE COMMUNITY OR WHETHER , WITH REGARD TO THE AIM PURSUED , THEY CONSTITUTE A DISPROPORTIONATE AND INTOLERABLE INTERFERENCE WITH THE RIGHTS OF THE OWNER , IMPINGING UPON THE VERY SUBSTANCE OF THE RIGHT TO PROPERTY . SUCH IN FACT IS THE PLEA SUBMITTED BY THE PLAINTIFF IN THE MAIN ACTION , WHO CONSIDERS THAT ONLY THE PURSUIT OF A QUALITATIVE POLICY WOULD PERMIT THE LEGISLATURE TO RESTRICT THE USE OF WINE-GROWING PROPERTY , WITH THE RESULT THAT SHE POSSESSES AN UNASSAILABLE RIGHT FROM THE MOMENT THAT IT IS RECOGNIZED THAT HER LAND IS SUITABLE FOR WINE GROWING . IT IS THEREFORE NECESSARY TO IDENTIFY THE AIM PURSUED BY THE DISPUTED REGULATION AND TO DETERMINE WHETHER THERE EXISTS A REASONABLE RELATIONSHIP BETWEEN THE MEASURES PROVIDED FOR BY THE REGULATION AND THE AIM PURSUED BY THE COMMUNITY IN THIS CASE .

24 THE PROVISIONS OF REGULATION NO 1162/76 MUST BE CONSIDERED IN THE CONTEXT OF THE COMMON ORGANIZATION OF THE MARKET IN WINE WHICH IS CLOSELY LINKED TO THE STRUCTURAL POLICY ENVISAGED BY THE COMMUNITY IN THE AREA IN QUESTION . THE AIMS OF THAT POLICY ARE STATED IN REGULATION (EEC) NO 816/70 OF 28 APRIL 1970 LAYING DOWN ADDITIONAL PROVISIONS FOR THE COMMON ORGANIZATION OF THE MARKET IN WINE (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1970 (1), P . 234), WHICH PROVIDES THE BASIS FOR THE DISPUTED REGULATION , AND IN REGULATION NO 337/79 OF 5 FEBRUARY 1979 ON THE COMMON ORGANIZATION OF THE MARKET IN WINE (OFFICIAL JOURNAL L 54 , P . 1), WHICH CODIFIES ALL THE PROVISIONS GOVERNING THE COMMON ORGANIZATION OF THE MARKET . TITLE III OF THAT REGULATION , LAYING DOWN ' ' RULES CONCERNING PRODUCTION AND FOR CONTROLLING PLANTING ' ' , NOW FORMS THE LEGAL FRAMEWORK IN THAT SPHERE . ANOTHER FACTOR WHICH MAKES IT POSSIBLE TO PERCEIVE THE COMMUNITY POLICY PURSUED IN THAT FIELD IS THE COUNCIL RESOLUTION OF 21 APRIL 1975 CONCERNING NEW GUIDELINES TO BALANCE THE MARKET IN TABLE WINES (OFFICIAL JOURNAL C 90 , P . 1).

25 TAKEN AS A WHOLE , THOSE MEASURES SHOW THAT THE POLICY INITIATED AND PARTIALLY IMPLEMENTED BY THE COMMUNITY CONSISTS OF A COMMON ORGANIZATION OF THE MARKET IN CONJUNCTION WITH A STRUCTURAL IMPROVEMENT IN THE WINE-PRODUCING SECTOR . WITHIN THE FRAMEWORK OF THE GUIDELINES LAID DOWN BY ARTICLE 39 OF THE EEC TREATY THAT ACTION SEEKS TO ACHIEVE A DOUBLE OBJECTIVE , NAMELY , ON THE ONE HAND , TO ESTABLISH A LASTING BALANCE ON THE WINE MARKET AT A PRICE LEVEL WHICH IS PROFITABLE FOR PRODUCERS AND FAIR TO CONSUMERS AND , SECONDLY , TO OBTAIN AN IMPROVEMENT IN THE QUALITY OF WINES MARKETED . IN ORDER TO ATTAIN THAT DOUBLE OBJECTIVE OF QUANTITATIVE BALANCE AND QUALITATIVE IMPROVEMENT , THE COMMUNITY RULES RELATING TO THE MARKET IN WINE PROVIDE FOR AN EXTENSIVE RANGE OF MEASURES WHICH APPLY BOTH AT THE PRODUCTION STAGE AND AT THE MARKETING STAGE FOR WINE .

26 IN THIS REGARD , IT IS NECESSARY TO REFER IN PARTICULAR TO THE PROVISIONS OF ARTICLE 17 OF REGULATION NO 816/70 , RE-ENACTED IN AN EXTENDED FORM BY ARTICLE 31 OF REGULATION NO 337/79 , WHICH PROVIDE FOR THE ESTABLISHMENT BY THE MEMBER STATES OF FORECASTS OF PLANTING AND PRODUCTION , CO-ORDINATED WITHIN THE FRAMEWORK OF A COMPULSORY COMMUNITY PLAN . FOR THE PURPOSE OF IMPLEMENTING THAT PLAN MEASURES MAY BE ADOPTED CONCERNING THE PLANTING , RE-PLANTING , GRUBBING-UP OR CESSATION OF CULTIVATION OF VINEYARDS .

27 IT IS IN THIS CONTEXT THAT REGULATION NO 1162/76 WAS ADOPTED . IT IS APPARENT FROM THE

PREAMBLE TO THAT REGULATION AND FROM THE ECONOMIC CIRCUMSTANCES IN WHICH IT WAS ADOPTED , A FEATURE OF WHICH WAS THE FORMATION AS FROM THE 1974 HARVEST OF PERMANENT PRODUCTION SURPLUSES , THAT THAT REGULATION FULFILS A DOUBLE FUNCTION : ON THE ONE HAND , IT MUST ENABLE AN IMMEDIATE BRAKE TO BE PUT ON THE CONTINUED INCREASE IN THE SURPLUSES ; ON THE OTHER HAND , IT MUST WIN FOR THE COMMUNITY INSTITUTIONS THE TIME NECESSARY FOR THE IMPLEMENTATION OF A STRUCTURAL POLICY DESIGNED TO ENCOURAGE HIGH-QUALITY PRODUCTION , WHILST RESPECTING THE INDIVIDUAL CHARACTERISTICS AND NEEDS OF THE DIFFERENT WINE-PRODUCING REGIONS OF THE COMMUNITY , THROUGH THE SELECTION OF LAND FOR GRAPE GROWING AND THE SELECTION OF GRAPE VARIETIES , AND THROUGH THE REGULATION OF PRODUCTION METHODS .

28 IT WAS IN ORDER TO FULFIL THAT TWOFOLD PURPOSE THAT THE COUNCIL INTRODUCED BY REGULATION NO 1162/76 A GENERAL PROHIBITION ON NEW PLANTINGS , WITHOUT MAKING ANY DISTINCTION , APART FROM CERTAIN NARROWLY DEFINED EXCEPTIONS , ACCORDING TO THE QUALITY OF THE LAND . IT SHOULD BE NOTED THAT , AS REGARDS ITS SWEEPING SCOPE , THE MEASURE INTRODUCED BY THE COUNCIL IS OF A TEMPORARY NATURE . IT IS DESIGNED TO DEAL IMMEDIATELY WITH A CONJUNCTURAL SITUATION CHARACTERIZED BY SURPLUSES , WHILST AT THE SAME TIME PREPARING PERMANENT STRUCTURAL MEASURES .

29 SEEN IN THIS LIGHT , THE MEASURE CRITICIZED DOES NOT ENTAIL ANY UNDUE LIMITATION UPON THE EXERCISE OF THE RIGHT TO PROPERTY . INDEED , THE CULTIVATION OF NEW VINEYARDS IN A SITUATION OF CONTINUOUS OVER-PRODUCTION WOULD NOT HAVE ANY EFFECT , FROM THE ECONOMIC POINT OF VIEW , APART FROM INCREASING THE VOLUME OF THE SURPLUSES ; FURTHER , SUCH AN EXTENSION AT THAT STAGE WOULD ENTAIL THE RISK OF MAKING MORE DIFFICULT THE IMPLEMENTATION OF A STRUCTURAL POLICY AT THE COMMUNITY LEVEL IN THE EVENT OF SUCH A POLICY RESTING ON THE APPLICATION OF CRITERIA MORE STRINGENT THAN THE CURRENT PROVISIONS OF NATIONAL LEGISLATION CONCERNING THE SELECTION OF LAND ACCEPTED FOR WINE-GROWING .

30 THEREFORE IT IS NECESSARY TO CONCLUDE THAT THE RESTRICTION IMPOSED UPON THE USE OF PROPERTY BY THE PROHIBITION ON THE NEW PLANTING OF VINES INTRODUCED FOR A LIMITED PERIOD BY REGULATION NO 1162/76 IS JUSTIFIED BY THE OBJECTIVES OF GENERAL INTEREST PURSUED BY THE COMMUNITY AND DOES NOT INFRINGE THE SUBSTANCE OF THE RIGHT TO PROPERTY IN THE FORM IN WHICH IT IS RECOGNIZED AND PROTECTED IN THE COMMUNITY LEGAL ORDER .

THE QUESTION OF THE FREEDOM TO PURSUE TRADE OR PROFESSIONAL ACTIVITIES

31 THE APPLICANT IN THE MAIN ACTION ALSO SUBMITS THAT THE PROHIBITION ON NEW PLANTINGS IMPOSED BY REGULATION NO 1162/76 INFRINGES HER FUNDAMENTAL RIGHTS IN SO FAR AS ITS EFFECT IS TO RESTRICT HER FREEDOM TO PURSUE HER OCCUPATION AS A WINE-GROWER .

32 AS THE COURT HAS ALREADY STATED IN ITS JUDGMENT OF 14 MAY 1974 , NOLD , REFERRED TO ABOVE , ALTHOUGH IT IS TRUE THAT GUARANTEES ARE GIVEN BY THE CONSTITUTIONAL LAW OF SEVERAL MEMBER STATES IN RESPECT OF THE FREEDOM TO PURSUE TRADE OR PROFESSIONAL ACTIVITIES , THE RIGHT THEREBY GUARANTEED , FAR FROM CONSTITUTING AN UNFETTERED PREROGATIVE , MUST LIKEWISE BE VIEWED IN THE LIGHT OF THE SOCIAL FUNCTION OF THE ACTIVITIES PROTECTED THEREUNDER . IN THIS CASE , IT MUST BE OBSERVED THAT THE DISPUTED COMMUNITY MEASURE DOES NOT IN ANY WAY AFFECT ACCESS TO THE OCCUPATION OF WINE-GROWING , OR THE FREEDOM TO PURSUE THAT OCCUPATION ON LAND AT PRESENT DEVOTED TO WINE-GROWING . TO THE EXTENT TO WHICH THE PROHIBITION ON NEW PLANTINGS AFFECTS THE FREE PURSUIT OF THE OCCUPATION OF WINE-GROWING , THAT LIMITATION IS NO MORE THAN THE CONSEQUENCE OF THE RESTRICTION UPON THE EXERCISE OF THE RIGHT TO PROPERTY , SO THAT THE TWO RESTRICTIONS MERGE . THUS THE RESTRICTION UPON THE FREE PURSUIT OF THE OCCUPATION OF WINE-GROWING , ASSUMING THAT IT EXISTS , IS JUSTIFIED BY THE SAME REASONS WHICH JUSTIFY THE RESTRICTION PLACED UPON THE USE OF PROPERTY .

33 THUS IT IS APPARENT FROM THE FOREGOING THAT CONSIDERATION OF REGULATION NO 1162/76 , IN THE LIGHT OF THE DOUBTS EXPRESSED BY THE VERWALTUNGSGERICHT , HAS DISCLOSED NO FACTOR OF SUCH A KIND AS TO AFFECT THE VALIDITY OF THAT REGULATION ON ACCOUNT OF ITS BEING CONTRARY TO THE REQUIREMENTS FLOWING FROM THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE COMMUNITY .

Decision on costs

COSTS

THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , BY THE COUNCIL AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE .

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE VERWALTUNGSGERICHT NEUSTADT AN DER WEINSTRASSE , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE VERWALTUNGSGERICHT NEUSTADT AN DER WEINSTRASSE BY ORDER OF 14 DECEMBER 1978 , HEREBY RULES :

1 . COUNCIL REGULATION (EEC) NO 1162/76 OF 17 MAY 1976 ON MEASURES DESIGNED TO ADJUST WINE-GROWING POTENTIAL TO MARKET REQUIREMENTS , AS AMENDED BY COUNCIL REGULATION (EEC) NO 2776/78 OF 23 NOVEMBER 1978 , AMENDING FOR THE SECOND TIME REGULATION NO 1162/76 , MUST BE INTERPRETED AS MEANING THAT ARTICLE 2 (1) THEREOF ALSO APPLIES TO APPLICATIONS FOR AUTHORIZATION OF NEW PLANTING OF VINES SUBMITTED BEFORE THE ENTRY INTO FORCE OF THAT REGULATION .

2 . ARTICLE 2 (1) OF REGULATION NO 1162/76 MUST BE INTERPRETED AS MEANING THAT THE PROHIBITION LAID DOWN THEREIN ON THE GRANTING OF AUTHORIZATIONS FOR NEW PLANTING - DISREGARDING THE EXCEPTIONS SPECIFIED IN ARTICLE 2 (2) OF THE REGULATION - IS OF INCLUSIVE APPLICATION , THAT IS TO SAY , IS IN PARTICULAR UNAFFECTED BY THE QUESTION OF THE SUITABILITY OR OTHERWISE OF A PLOT OF LAND FOR WINE-GROWING , AS DETERMINED BY THE PROVISIONS OF A NATIONAL LAW .

Case C-260/89.
ERT

Judgment of the Court of 18 June 1991.

Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others.

Reference for a preliminary ruling: Monomeles Protodikeio Thessalonikis - Greece.

Exclusive rights in the matter of radio and television broadcasting - Free movement of goods - Freedom to provide services - Rules on competition - Freedom of expression.

REFERENCE by the Monemeles Protodikeio Thessaloniki (Thessaloniki Regional Court) for a preliminary ruling in the proceedings pending before that court between
Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE)
Panellinia Omospondia Syllogon Prossopikou ERT, (intervener)
and
Dimotiki Étairia Pliroforissis (DEP)
Sotirios Kouvelas,
Nicolaos Avdellas and Others, (interveners)
on the interpretation of the EEC Treaty, in particular Articles 2, 3(f), 9, 30, 36, 85 and 86,

THE COURT,
composed of O. Due, President, T.F. O' Higgins, G.C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C.N. Kakouris, R. Joliet, F.A. Schockweiler and P.J.G. Kapteyn, Judges,
Advocate General: C.O. Lenz,
Registrar: H.A. Ruehl, Principal Administrator,
After considering the observations submitted on behalf of:
- Elliniki Radiophonia Tileorassi Anonimi Etairia, by V. Kostopoulos and K. Kalavros, of the Athens Bar,
- Dimotiki Etairias Pliorforissis and Sotirios Kouvelas, by A. Vamvakopoulos, A. Panagopoulos and P. Ladas, of the Thessaloniki Bar,
- The Government of the French Republic, by E. Belliard, Deputy Director in the Directorate for Legal Affairs of the Ministry for Foreign Affairs and G. de Bergues, Principal Deputy Secretary for Foreign Affairs in the same Ministry, acting as Agents,
- The Commission of the European Communities, by G. Marenco, Legal Adviser, B. Jansen and M. Condou-Durande, Members of its Legal Service, acting as Agents,
having regard to the Report for the Hearing,
after hearing oral argument from Elliniki Radiophonia Tileorassi Anonimi Etairia, Dimotiki Etairia Pliroforissis and the Commission at the hearing on 27 November 1990,
after hearing the Opinion of the Advocate General at the sitting on 23 January 1991,
gives the following

Judgment
Grounds

1 By judgment of 11 April 1989, which was received at the Court on 16 August 1989, the Monomeles Protodikeio Thessaloniki [Thessaloniki Regional Court], in proceedings for interim measures, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty, several questions on the interpretation of the EEC Treaty, in particular Articles 2, 3(f), 9, 30, 36, 85 and 86, and also of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms for November 1950 in order to determine the compatibility with those provisions of a national system of exclusive television rights.
2 Those questions were raised in proceedings between Elliniki Radiophonia Tileorassi Anonimi Etairia (hereinafter referred to as "ERT"), a Greek radio and television undertaking, to which the Greek State had granted exclusive rights for carrying out its activities, and Dimotiki Etairia Pliroforissis (hereinafter referred to as "DEP"), a municipal information company at

Thessaloniki, and S. Kouvelas, Mayor of Thessaloniki. Notwithstanding the exclusive rights enjoyed by ERT, DEP and the Mayor, in 1989, set up a television station which in that same year began to broadcast television programmes.

3 ERT was established by Law No 1730/1987 (Official Journal of the Hellenic Republic No 145 A of 18 August 1987, p. 144). According to Article 2(1) of that Law, ERT' s object is, without a view to profit, to organize, exploit and develop radio and television and to contribute to the information, culture and entertainment of the Hellenic people. Article 2(2) provides that the State grants to ERT an exclusive franchise, in respect of radio and television, for any activity which contributes to the performance of its task. The franchise includes in particular the broadcasting by radio or television of sounds and images of every kind from Hellenic territory for general reception or by special closed or cable circuit, or any other form of circuit, and the setting up of radio and stations. Under Article 2(3) ERT may produce and exploit by any means radio and television broadcasts. Article 16(1) of the same Law prohibits any person from undertaking, without authorization by ERT, activities for which ERT has an exclusive right.

4 Since it took the view that the activities of DEP and the Mayor of Thessaloniki fell within its exclusive rights, ERT brought summary proceedings before the Thessaloniki Regional Court in order to obtain, on the basis of Article 16 of Law No 1730/1987, an injunction prohibiting any kind of broadcasting and an order for the seizure and sequestration of the technical equipment. Before that court, DEP and Mr Kouvelas relied mainly on the provisions of Community law and the European Convention on Human Rights.

5 Since it took the view that the case raised important questions of Community law, the national court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"(1) Does a law which allows a single television broadcaster to have a television monopoly for the entire territory of a Member State and to make television broadcasts of any kind is consistent with the provisions of the EEC Treaty and of secondary law.

(2) If so, whether and to what extent the fundamental principle of free movement of goods laid down in Article 9 of the EEC Treaty is infringed in view of the fact that the enjoyment by a single broadcaster of an exclusive television franchise entails a prohibition for all other Community citizens on the export, leasing or distribution, by whatever means, to the Member State in question of materials, sound recordings, films, television documentaries or other products which may be used to make television broadcasts, except in order to serve the purposes of the broadcaster who has the exclusive television franchise, when, of course, that broadcaster also has the discretionary power to select and favour national materials and products in preference to those of other Member States of the Community.

(3) Whether and to what extent the grant of a television franchise to a single broadcaster constitutes a measure having equivalent effect to a quantitative restriction on imports, expressly prohibited under Article 30 of the EEC Treaty.

(4) If it is accepted that it is lawful to grant by law to a single broadcaster the exclusive right, for the entire national territory of a Member State, to make television broadcasts of any kind, on the ground that the grant falls within the provisions of Article 36 of the EEC Treaty as it has been interpreted by the European Court, and given that that grant satisfies a mandatory requirement and serves a purpose in the public interest - the organization of television as a service in the public interest - whether and to what extent that intended purpose is exceeded, that is to say whether that purpose, the protection of the public interest, is attained in the least onerous manner, in other words in the manner which offends least against the principle of the free movement of goods.

(5) Whether and to what extent the exclusive rights granted by a Member State to an undertaking (a broadcaster) in respect of television broadcasts, and the exercise of those rights, are compatible with the rules on competition in Article 85 in conjunction with Article 3(f) of the EEC Treaty when the performance by the undertaking of certain activities, in particular the exclusive (a) transmission of advertisements, (b) distribution of films, documentaries and other television material produced within the Community, (c) selection, in its own discretion, distribution and transmission of television broadcasts, films, documentaries and other material, prevents, restricts or distorts competition to the detriment of Community consumers in the sector in which it operates and throughout the national territory of the Member State, even though it is entitled by law to carry out those activities.

(6) Where the Member State uses the undertaking entrusted with the operation of the television service - even with regard to its commercial activities, particularly advertising - as an undertaking entrusted with the operation of services of general economic interest, whether and to what extent the rules on competition contained in Article 85 in conjunction with Article 3(f) are incompatible with the performance of the task assigned to the undertaking.

(7) Whether such an undertaking which has been granted under the law of the Member State a monopoly on television

broadcasting of any kind throughout the national territory of that State may be considered to occupy a dominant position in a substantial part of the Common Market, and,

(8) If so, whether and to what extent the imposition (owing to the absence of any other competition in the market) of monopoly prices for television advertisements and of such preferential treatment, at its discretion, to the detriment of Community consumers, and the performance by that undertaking of the activities mentioned above in question (5), pursued in the absence of competition in the field in which it operates, constitute an abuse of a dominant position.

(9) Whether and to what extent the grant by law to a single broadcaster of a television monopoly for the entire national territory of a Member State, with the right to make television broadcasts of any kind, is compatible today with the social objective of the EEC Treaty (preamble and Article 2), the constant improvement of the living conditions of the peoples of Europe and the rapid raising of their standard of living, and with the provisions of Article 10 of the European Convention for the Protection of Human Rights of 4 November 1950.

(10) Whether the freedom of expression secured by Article 10 of the European Convention for the Protection of Human Rights of 4 November 1950 and the abovementioned social objective of the EEC Treaty, set out in its preamble and in Article 2, impose per se obligations on the Member States, independently of the written provisions of Community law in force, and if so what those obligations are."

6 Reference is made to the report for the hearing for a fuller account of the legal background and facts of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 It emerges, in substance, from the judgment making the reference that by its first question the national court is seeking to ascertain whether a television monopoly held by a single company to which a Member State has granted exclusive rights for that purpose is permissible under Community law. The second, third and fourth questions relate to the point whether the rules on the free movement of goods, in particular Article 9 and Article 30 and 36 of the Treaty, preclude such a monopoly. Since these questions concern a monopoly in services, they are to be regarded as referring not only to the rules of the Treaty in relation to the free movement of goods but also to those relating to the freedom to provide services, in particular Article 59 of the Treaty.

8 The fifth, sixth, seventh and eighth questions relate to the interpretation of the rules on competition applicable to undertakings. In that respect the national court seeks to ascertain in the first place whether Article 3(f) and Article 85 of the Treaty preclude the grant by the State of exclusive rights in the field of television. Secondly, the national court inquires whether an undertaking which has an exclusive right in relation to television throughout the territory of a Member State holds, as a result, a dominant position in a substantial part of the market within the meaning of Article 86 of the Treaty and whether certain conduct constitutes an abuse of that dominant position. Thirdly, the national court asks whether the application of the rules on competition precludes the performance of the particular task entrusted to such an undertaking.

9 The ninth and tenth questions are concerned with an examination of the monopoly situation in the field of television in the light of Article 2 of the Treaty and Article 10 of the European Convention on Human Rights.

The television monopoly

10 In Case C-155/73 Sacchi [1974] ECR 409, paragraph 14, the Court held that nothing in the Treaty prevents Member States, for considerations of a non-economic nature relating to the public interest, from removing radio and television broadcasts from the field of competition by conferring on one or more establishments an exclusive right to carry them out.

11 Nevertheless, it follows from Article 90(1) and (2) of the Treaty that the manner in which the monopoly is organized or exercised may infringe the rules of the Treaty, in particular those relating to the free movement of goods, the freedom to provide services and the rules on competition.

12 The reply to the national court must therefore be that Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.

Free movement of goods

13 It should be observed in limine that it follows from the Sacchi judgment that television broadcasting falls within the rules of the Treaty relating to services and that since a television monopoly is a monopoly in the provision of services, it is not as such contrary to the principle of the free movement of goods.

14 However it follows from the same judgment that trade in material, sound recordings, films, and other products used for television broadcasting is subject to the rules on the free movement of goods.

15 In that respect, the grant to a single undertaking of exclusive rights in relation to television broadcasting and the grant for that purpose of an exclusive right to import, hire or distribute material and products necessary for that broadcasting does not as such constitute a measure having an effect equivalent to a quantitive restriction within the meaning of Article 30 of the Treaty.

16 It would be different if the grant of those rights resulted, directly or indirectly, in discrimination between domestic products and imported products to the detriment of the latter. It is for the national court, which alone has jurisdiction to determine the facts, to consider whether that is so in the present case.

17 As regards Article 9 of the Treaty it is sufficient to observe that that article contains a prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect. Since the documents before the Court contain nothing to show that the legislation in question involves the levying of a charge on import or export, Article 9 does not appear to be relevant for the purpose of appraising the monopoly in question from the point of view of the rules on the free movement of goods.

18 It is therefore necessary to reply that the articles of the EEC Treaty on the free movement of goods do not prevent the granting to a single undertaking of exclusive rights relating to television broadcasting and the granting for that purpose of exclusive authority to import, hire or distribute materials and products necessary for that broadcasting, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter.

Freedom to provide services

19 Article 59 of the Treaty provides that restrictions on freedom to provide services within the Community are to be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The requirements of that provision entail, in particular, the removal of any discrimination against a person providing services who is established in a Member State other than that in which the services are to be provided.

20 As has been indicated in paragraph 12 of this judgment, although the existence of a monopoly in the provision of services is not as such incompatible with Community law, the possibility cannot be excluded that the monopoly may be organized in such a way as to infringe the rules relating to the freedom to provide services. Such a case arises, in particular, where the monopoly leads to discrimination between national television broadcasts and those originating in other Member States, to the detriment of the latter.

21 As regards the monopoly in question in the main proceedings, it is apparent from Article 2(2) of Law No 1730/1987 and the case-law of the Hellenic Council of State that ERT' s exclusive franchise comprises both the right to broadcast its own programmes (hereinafter referred to as "broadcasts") and the right to receive and retransmit programmes from other Member States (hereinafter referred to as "retransmissions").

22 As the Commission has observed, the concentration of the monopolies to broadcast and retransmit in the hands of a single undertaking gives that undertaking the possibility both to broadcast its own programmes and to restrict the retransmissions of programmes from other Member States. That possibility, in the absence of any guarantee concerning the retransmission of programmes from other Member States, may lead the undertaking to favour its own programmes to the detriment of foreign programmes. Under such a system equality of opportunity as between broadcasts of its own programmes and the retransmission of programmes from other Member States is therefore liable to be seriously compromised.

23 The question whether the aggregation of the exclusive right to broadcast and the right to retransmit actually leads to discrimination to the detriment of programmes from other Member States is a matter of fact which only the national court has jurisdiction to determine.

24 It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.

25 It is apparent from the observations submitted to the Court that the sole objective of the rules in question was to avoid disturbances due to the restricted number of channels available. Such an objective cannot however constitute justification for

those rules for the purposes of Article 56 of the Treaty, where the undertaking in question uses only a limited number of the available channels.

26 Accordingly the reply to the national court must be that Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers.

The rules on competition

27 As a preliminary point, it should be observed that Article 3(f) of the Treaty states only one objective for the Community which is given specific expression in several provisions of the Treaty relating to the rules on competition, including in particular Articles 85, 86 and 90.

28 The independent conduct of an undertaking must be considered with regard to the provisions of the Treaty applicable to undertakings, such as, in particular, Articles 85, 86 and 90(2).

29 As regards Article 85, it is sufficient to observe that it applies, according to its own terms, to agreements "between undertakings". There is nothing in the judgment making the reference to suggest the existence of any agreement between undertakings. There is therefore no need to interpret that provision.

30 Article 86 declares that any abuse of a dominant position within the common market or in any substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

31 In that respect it should be borne in mind that an undertaking which has a statutory monopoly may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgment in Case C-311/84 CBEM, COT IPB [1985] ECR 3261, paragraph 16) and that the territory of a Member State over which the monopoly extends may constitute a substantial part of the common market (see the judgment in Case C-322/81 Michelin v Commission [1983] ECR 3461, paragraph 28).

32 Although Article 86 of the Treaty does not prohibit monopolies as such, it nevertheless prohibits their abuse. For that purpose Article 86 lists a number of abusive practices by way of example.

33 In that regard it should be observed that, according to Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition so long as it is not shown that the application of those rules is incompatible with the performance of their particular task (see in particular, the judgment in Sacchi, cited above, paragraph 15).

34 Accordingly it is for the national court to determine whether the practices of such an undertaking are compatible with Article 86 and to verify whether those practices, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted.

35 As regards State measures, and more specifically the grant of exclusive rights, it should be pointed out that while Articles 85 and 86 are directed exclusively to undertakings, the Treaty none the less requires the Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness (see the judgment in Case C-13/77 INNO v ATAB [1977] ECR 2115, paragraphs 31 and 32).

36 Article 90(1) thus provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty.

37 In that respect it should be observed that Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.

38 The reply to the national court must therefore be that Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it.

Article 2 of the Treaty

39 As the Court has consistently held (see, in particular, the judgment in Case C-339/89 Alsthom Atlantique v Compagnie de Construction Mécanique [1991] ECR I-107), Article 2 of the Treaty, referred to in the ninth and tenth preliminary questions, describes the task of the European Economic Community. The aims stated in that provision are concerned with the existence and functioning of the Community and are to be achieved through the establishment of a common market and the progressive approximation of the economic policies of Member States.

40 The reply to the national court must therefore be that no criteria for deciding whether a national television monopoly is in conformity with Community law can be derived from Article 2.

Article 10 of the European Convention on Human Rights

41 With regard to Article 10 of the European Convention on Human Rights, referred to in the ninth and tenth questions, it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case C-4/73 Nold v Commission [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 Wachauf v Federal Republic of Germany [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.

42 As the Court has held (see the judgment in Joined Cases C-60 and C-61/84 Cinéthèque v Fédération Nationale des Cinémas Français [1985] ECR 2605, paragraph 25, and the judgment in Case C-12/86 Demirel v Stadt Schwaebisch Gmund [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

43 In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

44 It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

45 The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

Decision on costs

Costs

46 The costs incurred by the French Government and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision as to costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Monomeles Protodikeio de Thessalonique by judgment of 11 April 1989,

hereby rules:

1. Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition;

2. The articles of the EEC Treaty on the free movement of goods do not prevent the granting to a single undertaking of exclusive rights relating to television broadcasting and the granting for that purpose of exclusive authority to import, hire or distribute materials and products necessary for that broadcasting, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter;

3. Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers;

4. Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it;

5. No criteria for deciding whether a national television monopoly is in conformity with Community law can be derived from Article 2 of the Treaty;

6. The limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

Case C-68/93
Shevill

Opinion of Mr Advocate General Darmon delivered on 14 July 1994.

Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA.
Reference for a preliminary ruling: House of Lords - United Kingdom.
Brussels Convention - Article 5 (3) - Place where the harmful event occurred - Libel by a newspaper article.

Mr President,
Members of the Court,

1. By order of 1 March 1993, the House of Lords seeks from the Court a preliminary ruling on the interpretation of Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (1) (hereinafter "the Convention"), in the context of the delicate problem of ascertaining the place where the harmful event occurred in the case of defamation by a newspaper article.

2. The facts of the main action, which it is not necessary to go into at length, may be summarized as follows. Miss Shevill, who is domiciled in Great Britain, and three companies established in different Contracting States consider that they have been defamed by an article in the newspaper "France-Soir" suggesting that they were involved in a drug-trafficking network. On 17 October 1989 they brought proceedings before the High Court of England and Wales against Presse Alliance SA, the publisher of "France-Soir", for damages for the harm allegedly suffered by them both in France and in other States, as well as in England and Wales. They pursued their claim despite the insertion in a later edition of a "rectification" intended to make good the harm done to their reputation. Presse Alliance contested the jurisdiction of the court applied to, alleging the absence of any harmful event. The plaintiffs in the main proceedings limited their claim in the course of the proceedings solely to damages for the harm occasioned in England and Wales.

3. Following the dismissal at first instance and on appeal of the application to strike out the action on the ground of lack of jurisdiction, the House of Lords, hearing the case on further appeal from the Court of Appeal, considered it necessary to seek a ruling from the Court of Justice.

4. Before the questions submitted for a preliminary ruling are discussed, it is necessary to establish whether an action for compensation for harm to a person' s reputation and/or honour occurring as a result of a newspaper article falls within the scope of tort or delict within the meaning of Article 5(3).

5. It should be borne in mind that that provision establishes, by way of derogation from the principle laid down in Article 2 of the Convention whereby jurisdiction is conferred on the courts of the State in which the defendant is domiciled, and as an alternative thereto, that "in matters relating to tort, delict or quasi-delict" special jurisdiction is to be conferred on the "courts for the place where the harmful event occurred".

6. With the notable exception of the judgment in Tessili v Dunlop, (2) in which it was held that the "place of performance of the obligation" within the meaning of Article 5(1) was to be determined in accordance with the national law governing the obligation in question, the Court has held that the concepts contained in the Convention should generally be given an independent interpretation.

7. In its judgment in Kalfelis, (3) the Court further defined the concept of "matters relating to tort, delict and quasi-delict" as covering

"... all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)". (4)

8. Although very broad, the Court has limited its scope to actions for damages other than those, such as the action paulienne in French law, the purpose of which is not

"to have the debtor ordered to make good the damage he has caused his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made". (5)

9. In so far as its purpose is to make good the damage resulting from an unlawful act, an action for defamation falls within the scope of Article 5(3). That is, at least, the prevailing view expressed by academic lawyers. (6)

10. Furthermore, defamation is formally proscribed by the Universal Declaration of Human Rights, Article 12 of which provides:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

11. Although protection against "such attacks" constitutes a recognized fundamental principle, there are striking differences between the laws of the Contracting States. Taking as an example the laws of France and England alone, the former requires, as a condition of the tort, that there must be an intention to cause harm, so that there is no tort if good faith is established, whereas under English law the tort (known as "libel") is committed where the writing is regarded as defamatory by the jury, without there being any requirement for the person harmed to show actual damage and without any consideration of the question of good faith. On the other hand, the reverse applies in relation to invasion of privacy, protection against which is particularly effective under French law. As Professor Badinter has written:

"... by virtue of the recognition of a subjective right to privacy, any prejudice thereto is ipso facto wrongful, without there being any need for the person concerned to prove that he has suffered special harm". (7)

12. This difference of approach in relation to the protection of the victim, who is confronted with a diversity of laws applicable depending on the rules on conflict applied by the forum where the proceedings are brought (a diversity due to the calling in question and, on occasion, the abandonment of the traditional rule requiring the application of the law of the place where a tort has been committed) shows, if proof were needed, that the assertion of jurisdiction in favour of one forum as against another is not a neutral matter. (8)

13. I now turn to an analysis of the seven questions submitted to the Court for a preliminary ruling, which may be reorganized under three headings relating respectively to the place where the harmful event occurred (Question 1), the possible limitation, where it is recognized that there is more than one competent forum, of the jurisdiction of each court within whose judicial district harm has occurred (Question 3) and the concept of damage, the standard of proof and the possible consequences of plurality of jurisdiction (Questions 2, 4, 5, 6 and 7).

I ° The place where the harmful event occurred

14. As Mrs Gaudemet-Tallon has written:

"The wording of Article 5(3) creates difficulties of interpretation in three types of situation: where the place of the event giving rise to the damage and the place where the damage occurs are not the same, where the applicant suffers 'ricochet' damage and, lastly, where it is difficult to ascertain the place in which the damage occurred". (9)

15. The first of those situations was examined by the Court in its judgment in Bier v Mines de Potasse d' Alsace, (10) the second was considered in the judgment in Dumez France and Tracoba (11) and the third forms the subject-matter of the present case. (12)

16. The Mines de Potasse de l' Alsace case concerned cross-border pollution, responsibility for which was thought to lie with an undertaking established in France, causing harm to a horticultural undertaking domiciled in the Netherlands. The Netherlands court hearing the dispute, before whom the defendant raised the objection of lack of competence, asked the Court whether "the place where the harmful event occurred" was to be understood as meaning the place where the damage occurred or the place where the event having the damage as its sequel occurred.

17. The Court, in its analysis of the basis of the special jurisdiction provided for in Article 5, held that

"this freedom of choice was introduced having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings". (13)

18. The Court held, therefore, without specifically taking into consideration the need to protect the victim, that the expression "the place where the harmful event occurred" encompassed both

"... the place where the damage occurred and the place of the event giving rise to it". (14)

19. The Court took the opportunity in the Dumez judgment (15) to point out that the jurisdictional rule contained in Article 5(3) supports the need for a close connecting factor between the dispute and the court hearing the case, that is to say, the need for the sound administration of justice.

20. Consequently, the Court considered that

"the rule on jurisdiction laid down in Article 5(3) of the Convention of 27 September 1968 ... cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets". (16)

21. The Court identified in those cases the independent concept of "the place where the harmful event occurred", thereby departing from the position adopted by it in its judgment in Tessili (17), involving the notion of the place of performance of an obligation; it again adopted that position in its recent decision in Custom Made Commercial, (18) in which it held, in the context of Article 5(1), that

"... the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised ...". (19)

22. In his Opinion in Mines de Potasse d' Alsace, Advocate General Capotorti stated, in terms still apposite today, that he favoured an independent definition of the concept of "the place where the harmful event occurred".

23. Furthermore, such a policy finds approval amongst the prevailing body of academic opinion, intended as it is to prevent positive or ° more worryingly ° negative conflicts of jurisdiction.

24. However, in the view of the United Kingdom and the German Government, the question of the uniqueness or plurality of harmful events falls within the scope of the national laws of each Contracting State. The Commission and the French and Spanish Governments, by contrast, suggest that there should be a Community definition both of the place where the damage occurred and of that of the event giving rise to it.

25. The latter solution would appear to reflect the purpose of the Convention, which is to allocate disputes consistently, and thus in accordance with an independent criterion, amongst the courts of the Contracting States, and which forms part of the logic underlying the Court' s judgments in Mines de Potasse d' Alsace and Dumez.

26. The first of those judgments resulted, in certain Contracting States, in the creation of a new class of jurisdiction. On the other hand, the second excluded any jurisdiction founded on damage suffered indirectly by a victim.

27. It would be paradoxical, at the very least, if the effectiveness of Article 5(3) were to be compromised in the event of variation, from one Contracting State to the next, in the location of the tortious act and thus of the competent forum.

28. Whilst it is certainly true that the diversity of the solutions offered by a comparative study of the laws of the Contracting States signally complicates the choice to be made, it must not bar the exercise altogether.

29. A brief comparative study is called for since, as the Court has pointed out, the interpretation of Article 5(3) in that context must also

"... [avoid] any upheaval in the solutions worked out in the various national systems of law, since it looks to unification, in conformity with Article 5(3) of the Convention, by way of a systematization of solutions which, as to their principle, have already been established in most of the States concerned." (20)

30. In German law, jurisdiction is vested both in the courts of the place of publication and in those of the place of distribution, provided, in the latter case, that the distribution was effected by the publisher or was foreseeable by him. (21) Under the national system, any court, whatever the basis of its jurisdiction, may order compensation for the whole of the damage. According to certain academic writers, that solution should also prevail in the international sphere, even though there has never, to my knowledge, been any decision to that effect.

31. Thus, according to Geimer and Schuetze, (22)

"Die konkurrierende Zustaendigkeit am Handlungs- wie am Erfolgsort eroeffnet eine Klagemoeglichkeit fuer den gesamten Schaden, wo immer er auch entstanden ist, nicht nur fuer den im Hoheitsgebiet des Gerichtsstaates entstandenen Schaden". (23)

32. That is also Mr Kropholler' s view: (24)

"So besteht bei der durch ein Druckerzeugnis veruebten unerlaubten Handlung eine internationale Zustaendigkeit nicht nur am Ort der Herstellung, sondern auch an den unter Umstaenden sehr zahlreichen Orten, an denen es bestimmungsgemaess verbreitet wird". (25)

33. In Belgian law, the national courts appear to accept jurisdiction where a constituent element of the tort (distribution, publication) has been committed in Belgium, but without any recognition of the conferment of cumulative jurisdiction on the

forums seised on the basis of those two elements. Academic writers generally consider that where any one of those forums is seised of the matter it must necessarily be competent, whatever the basis on which it is thus seised, to order compensation for the whole of the damage caused. (26)

34. In French law, solutions to the problem of cross-border torts committed in the press have emerged in the context of invasion of privacy. The second indent in Article 46 of the New Code of Civil Procedure allows the plaintiff to sue either in the courts of the defendant' s domicile or in those of the place of the causal event or, lastly, in those in whose judicial district the damage has been suffered. The choice between those two latter forums has been understood as relating, first, to the courts for the place in which publication occurred and, second, to those for the places where distribution was effected. Whilst the former are competent to hear and determine claims in respect of the whole of the damage, wherever it may have occurred, the latter can only order compensation in respect of the harm suffered within their judicial district. (27) As will be seen, certain academic writers have criticized the decisions given to that effect.

35. In Luxembourg law, Article 37 of the Code of Civil Procedure provides that "in cases involving compensation for damage caused by tort, delict or quasi-delict, the plaintiff may sue, at his option, either before the courts for the place where the defendant is domiciled or before those for the place where the harmful event occurred". The expression "the place where the harmful event occurred" has not been clarified by the courts, but the prevailing view amongst academic writers, relying on the decisions of the French courts, is that

" ... in cases involving invasion of privacy by the press, it is acknowledged that the courts of the country in which distribution took place are competent to hear and determine claims for compensation for the damage resulting therefrom, as well as the courts of the country in which publication occurred ...". (28)

36. The laws of Spain (29) and Italy (30) confer jurisdiction to award compensation for the whole of the damage solely on the courts for the place where the publication was printed and initially distributed, irrespective of where the damage occurred. Thus a central forum is designated in such matters.

37. The criterion applied in the United Kingdom and Ireland to determine the competent forum is the communication to a third party of material regarded by the victim as having harmed his reputation. However, although it has not proved possible to discover any decision by the English courts on the scope of jurisdiction where the damage has been suffered in more than one State, it appears from a judgment of the Supreme Court of Ireland that "the extent of publication" constitutes a relevant factor in calculating the amount of the compensation sought. (31)

38. In Portugal, the question of competence in cases of defamation in the press has been resolved principally in the context of the criminal law. Whilst in certain judgments it is the place of despatch of defamatory correspondence which has been held to be the decisive factor, (32) in others it has been held to be the place of receipt. (33)

39. Lastly, in the Netherlands, jurisdiction is conferred only on the courts for the place where the defendant is domiciled or, failing that, where he resides. If he is neither domiciled nor resident in the Netherlands, the forum actoris is adopted.

40. The diversity of the solutions adopted by the internal legal systems of the Contracting States reflects the difficulty in ascertaining the place where the damage arose in the event that such damage is non-material. Mrs Gaudemet-Tallon is accordingly quite correct in her observation that

"the Mines de Potasse d' Alsace decision is not easy to apply in the absence of agreement on the place where the event occurred and the place where the damage arose". (34)

41. Looking beyond those differences, however, it is possible to identify the twin criteria of publication or printing on the one hand and distribution or communication on the other, even though certain legal systems take only one of the two connecting factors into consideration, to the exclusion of the other, whereas other systems allow a choice to be made between the jurisdictions thus designated.

42. Some commentators have expressed doubt as to the relevance of those criteria, insisting, at least in the field of non-material damage, that the significant factor is the domicile of the victim, which is to be regarded as the place where the damage arose. Mrs Gaudemet-Tallon considers in that regard that the concept of distribution covers both the causal event and the harm itself, the result being that, even though publication may constitute the "primary" cause, the "secondary" cause is distribution. Consequently, for the purposes of the choice of jurisdiction, the place in which the victim is domiciled is to be regarded as that in which the damage arose. (35)

43. According to Mr Bourel,

"... that author' s classification of the fact of distribution as a 'generative act' stretches the bounds of reality somewhat". (36)

He continues:

"Furthermore, the expression 'causal event' , substituted for 'generative act' , is a good illustration of the difficulty in drawing a distinction here between the fact from which the damage originates and the damage itself. It shows, by means of the concept of causality thus introduced, the close link between the two elements making up civil liability and the difficulty in separating them from each other in terms of their spatial connection. If distribution is the final causal act, it must also be by such distribution that the damage is created and assumes concrete form". (37)

44. In the result, Mr Bourel states that he too is in favour of the attribution of jurisdiction to the courts of the victim' s domicile, "... in the sense of ... the place where the tort, taken as a whole, came into being"; in his view, neither publication nor distribution is of any relevance as regards jurisdiction, since they are "neutral, unclassifiable and thus of no practical application". (38)

45. However, to sanction that forum would be tantamount to conferring jurisdiction on the forum actoris, an attribution to which, as the Court has pointed out on numerous occasions, the Convention is hostile. Thus it observed in its judgment in Dumez that

"... the hostility of the Convention towards the attribution of jurisdiction to the courts of the plaintiff' s domicile was demonstrated by the fact that the second paragraph of Article 3 precluded the application of national provisions attributing jurisdiction to such courts for proceedings against defendants domiciled in the territory of a Contracting State". (39)

46. Furthermore, that forum does not appear particularly to meet the requirements of the sound administration of justice, to which the Court has drawn attention in several of its judgments, (40) even though it in fact allows the procedure to be centralized, as, after all, does the forum of the defendant' s domicile. The example given by the United Kingdom is particularly apposite, concerning an Italian actor domiciled in England, where he is totally unknown. (41) An Italian newspaper not circulated in England damages his reputation. Even if the courts of the plaintiff' s domicile were accepted as having jurisdiction, he could bring proceedings before the English courts without there being any justification for such forum from the standpoint of the sound administration of justice.

47. Finally, it will be noted that none of the legal systems of any of the Contracting States has sanctioned the attribution of jurisdiction to that forum.

48. It is appropriate at this point to concentrate on the spatial separation of the two criteria for jurisdiction as regards the place of damage, namely the place where it arises and the place where the event giving rise to it occurred.

49. In Mines de Potasse d' Alsace, the separation of those two elements was, from the outset, not in doubt. Furthermore, as the Court pointed out in its judgment in Dumez:

"... the judgment in Mines de Potasse d' Alsace related to a situation in which the damage ° to crops in the Netherlands ° occurred at some distance from the event giving rise to the damage ° the discharge of saline waste into the Rhine by an undertaking established in France ° but by the direct effect of the causal agent, namely the saline waste which had moved physically from one place to another". (42)

50. In the present case, the Commission and the Spanish and French Governments concur in their view that the event giving rise to the damage occurs in the place of publication of the periodical at issue, and that the damage arises in each of the Contracting States in which, as a result of the voluntary distribution of the text, a person' s reputation is harmed. The United Kingdom considers for its part that the place of communication to third parties constitutes that of both the event giving rise to the damage and the damage itself.

51. It will be noted from a simple reference to the judgment in Mines de Potasse d' Alsace that the Court emphasized the significance, as criteria governing jurisdiction, of the "place of the event giving rise to the damage" and the "place where the damage occurred" (43) in a case in which a causal event gave rise to a single instance of damage.

52. In the present case, the situation is more complex, involving as it does a causal event giving rise to more than one instance of damage. The harm occurs in the place of the final element making up the tort, that is to say, in the case of torts committed in a newspaper or in radio or television programmes, in each State where the newspaper is distributed or the broadcast programme is received. In objective terms, the place in which the causal event directly giving rise to such damage occurs is that in which the newspaper is published or the programme is broadcast.

53. Damage to a person' s reputation and/or honour arises in the various places where a defamatory remark is revealed to third parties. Consequently, the damage becomes apparent when that "information" is brought into public knowledge; the publication of the newspaper at issue constitutes the vehicle by which it is transmitted. Thus there is clearly a geographical

separation between the causal event and the damage.

54. The scheme imposed by the decision in Mines de Potasse d' Alsace presents the problem, in relation to cross-border torts committed in the form of newspaper articles, that it gives rise to a multiplicity of competent jurisdictions, with the result that some commentators have proposed the adoption of specific criteria.

55. Thus, according to Lasok and Stone, (44)

"... it is thought that the Bier decision does not preclude the eventual adoption of specific rules for particular torts; e.g. a rule that for the purposes of defamation by a single publication, the relevant place is that of the publication to the third person". (45)

56. Kaye, (46) for his part, states that

"... it is considered that in the context of Article 5(3), when a defamatory statement is uttered, written, broadcast or posted in State A, published in State B and causes damage to reputation in State C (to which news of the publication spread by natural processes), it is the defendant' s act in State A which should be held to be the event giving rise to the damage and consequently the harmful event for the purposes of Article 5(3) ...". (47)

57. It is certainly true that such an approach avoids the multiplication of competent forums, which is one of the purposes of the Convention. However, quite apart from the fact that the principle of proximity cannot justify preference being given either to the courts for the place where the causal event occurred or to those for the place where the damage arose, it is my view, as I stated in my Opinion in Dumez, that the exclusion of one of those connecting factors in certain cases and of the other factor in other cases could undermine the consistency of the Court' s case-law. (48)

58. Thus, the plaintiff could bring the proceedings, at his option, either before the courts of the defendant' s domicile, the courts of the place of the causal event or the courts of the place or places in which the damage arose.

59. The question immediately arises as to the scope of the jurisdiction of those courts, particularly those in whose judicial district an allegedly defamatory text has been distributed.

II ° Scope of jurisdiction of the courts for the place in which the damage arose

60. Apart, therefore, from the courts of the place where the defendant is domiciled, those of the place of the causal event are competent in respect of the whole of the damage which has arisen, since all such damage originates from the unlawful act. On the other hand, do the courts within whose judicial district damage has arisen have jurisdiction to order compensation for the whole of the damage, including that which has arisen in other States?

61. I have referred above to the position of Geimer and Schuetze, and also that of Mr Kropholler, all of whom consider that the courts of the place where the damage arose must necessarily be able to hear and determine claims in respect of the whole of the damage suffered, not only within their own judicial district but also in the territory of other Contracting States. (49) However, Mr Kropholler is at pains to point out the danger of "forum shopping" inherent in such an approach.

62. By contrast, Mr Lagarde, in an article much commented upon, (50) has expressed the view that

"where an act gives rise to damage in more than one country, the courts of the place where that act was committed (in this case the courts of the place of publication) should hear and determine claims in respect of the whole of the damage caused by that act, wherever it may have arisen, since each instance of such damage is connected in its entirety to that act. On the other hand, a court in one of the places where the damage arose can only be competent to hear and determine claims in respect of the harmful consequences of the act in the country in which it sits, since there exists no connection between the damage caused in another country and that court, by virtue of either the place where it arose or the place where the wrongful act was committed". (51)

63. Support for that view has been expressed by Mr Droz, (52) as well as Gothot and Holleaux. (53) Mr Huet has likewise taken the view, (54) in a note on the judgment in Mines de Potasse d' Alsace, that where an unlawful act causes multiple damage in different places,

"the applicant is consequently able to sue in any of the courts in whose judicial district any damage has arisen ...". (55)

64. That analysis is shared by most French courts, which do not regard themselves as competent to order compensation for any damage suffered in other Contracting States where the unlawful act has been committed in one of those other States. (56)

65. Whilst the solution advocated by the German authors has the undeniable merit of avoiding a multiplicity of competent

forums, it appears primarily to be prompted by a desire to protect the victim, who would thus not be obliged, in order to obtain compensation for the whole of the damage suffered, to sue in each of the courts of the Contracting States in whose judicial district damage had arisen.

66. However, I scarcely need to repeat that both the courts of the place of the causal event and those of the defendant' s domicile already constitute two central forums having unlimited jurisdiction.

67. Besides, particularly in cases such as this, where the victim would be able, in practice, to sue in any of the courts of any of the Contracting States, (57) such a solution would appear to conflict with the spirit of the Convention, which certainly does not favour "forum shopping" but seeks instead to ensure the proper organization of the attribution of special jurisdiction. It is obvious that the victim, confronted with such a system, would be bound to choose the forum in which he felt that he would be best compensated for the damage suffered by him.

68. First, it is clear from the Court' s case-law that

"... the 'special jurisdictions' enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively." (58)

69. Second, such a solution would encourage the proliferation of concurrent forums. It should be borne in mind, as the Court pointed out in its judgment in Effer v Kantner, (59) that

"... the Convention provides a collection of rules which are designed inter alia to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more Member States and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the national court territorially best qualified to determine a dispute". (60)

70. Above all, however, it does not appear to me to form any part of the principles established by the line of decisions commencing with the judgment in Mines de Potasse d' Alsace. The courts of the place of the causal event have jurisdiction in respect of the whole of the damage arising from the unlawful act. They therefore constitute, along with the courts of the defendant' s domicile, a firm basis of reference in respect of the whole of the damage. By contrast, in a situation such as that in the present case, the jurisdiction of the courts of the places where the damage arises is founded solely on the notion

"... of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings". (61)

71. Consequently, the courts of one of the places where damage arose cannot hear proceedings for compensation for damage arising in other Contracting States, inasmuch as there is no element of proximity connecting the forum with the dispute.

72. It cannot be denied that the main problem with such limitation of jurisdiction lies in the proliferation of competent forums and, consequently, in the danger of conflicting ° but not irreconcilable ° decisions delivered by the courts seised. (62) On the other hand, it is in conformity with many of the objectives of the Convention, as noted by the Court.

73. First, the courts of the place where the damage arises are best placed to assess the harm done to the victim' s reputation within their judicial district, and to determine the extent of the damage.

74. Second, the adoption of such a criterion avoids the occurrence of concurrent litigation in different forums. (63) Its effect is that the competence of each of them is restricted to the damage arising within their respective judicial districts.

75. Third, the aim of providing legal protection can only be satisfied if the rules governing jurisdiction are foreseeable, a requirement to which the Court referred in its judgments in Handte (64) and Custom Made Commercial. (65) The defendant will be in a position to know precisely, on the basis of the place in which the newspapers are distributed, before which court or courts it risks being sued and the pleas on which it may be able to rely in its defence, having regard to the applicable law.

76. Lastly, in this area more than in any other, the restrictive interpretation of the rules of special jurisdiction calls for the solution which I am proposing. It should in that regard be borne in mind, as the Court held in Kalfelis,

"... that a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based." (66)

77. It has previously been suggested by me that a claim founded simultaneously in tort, contract and unjust enrichment should be governed exclusively by the rules laid down for contractual matters by Article 5(1), having regard to the need to rationalize jurisdiction and to centralize the proceedings before a single forum. (67)

78. That conclusion results both from the grounds of such a claim, based as they are for the most part on the non-performance of contractual obligations, and on the fact that the court dealing with the contract is best placed to understand its context and its implications as regards legal proceedings. (68)

79. My view in this case does not in any way conflict with that to which I have just referred. In circumstances such as those in Kalfelis, the existence of a single court for the contract would allow an objective centralization, without any risk of "forum shopping". In the present case, on the other hand, that risk would be considerable if, in order to avoid the problem of multiple forums, one such forum could be chosen by the plaintiff with a view to obtaining ° for reasons of procedural and substantive legal strategy ° compensation for the harm allegedly suffered in the territory of several Contracting States. As I have stated above, it is already possible for proceedings to be centralized in the courts of the defendant' s domicile or in those of the causal event. Such centralization should not be additionally obtainable by virtue of any special ° and, let me repeat, restrictive ° jurisdiction.

80. Thus, to repeat the expression used by Mr Huet, there is certainly a "fragmentation of international jurisdiction". (69) He has therefore suggested in a recent article (70) that the Court' s decision in Shenavai (71) should be applied, by extension, to cross-border torts concerning invasion of privacy.

81. It will be recalled that the Court considered in that case that, where the dispute concerns a number of obligations arising under the same contract,

"... the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim accessorium sequitur principale; in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction". (72)

82. According to Mr Huet,

"If transposed to matters of tort or delict, and particularly to invasions of privacy resulting from media exposure in several countries, the principle accessorium sequitur principale would enable the victim of multiple damage (occurring in the various places where distribution took place) to bring a single action before the courts of the place where the main harm suffered by him arose (such 'main' damage not having necessarily arisen in the country where the magazine is published)". (73)

83. That author therefore seeks, without proposing the abandonment of the traditional criterion of the locus delicti commissi, to rectify its effects in situations where to apply it automatically might lead to a fragmentation of jurisdiction between several forums.

84. Attractive though that approach may be, and although the court must ascertain whether it has jurisdiction ratione materiae, (74) I do not think that the intention of the Convention was to bind the court' s jurisdiction to an assessment of the substance of the dispute; it is based upon an objective, impersonal view of the link of proximity, which cannot vary according to the specific nature of a given case. It may be very difficult, if not impossible, to determine the "main damage" in the case of international celebrities, particularly when they have no connection, in terms of nationality or residence, with the Community.

85. On the other hand, however, it is in the majority of cases a necessary, if sometimes delicate, task to determine objectively the place where the principal contractual obligation is to be performed.

86. Indeed, that approach was suggested by some of the interveners in Mines de Potasse d' Alsace and rejected by Advocate General Capotorti as follows:

"It would also be difficult to reconcile adoption of a criterion of the 'most significant connection' with the intention of the Convention to make it easy to determine the court having jurisdiction, on the basis of clear, precise and sufficiently objective criteria which could thus be applied uniformly in all the States adhering to the Convention. In this respect insufficient assurances are afforded by a criterion, such as that referred to above, which does not lend itself to abstract definition and which tends to rely upon the subjective appraisal of the court." (75)

87. Moreover, we appear here to be "on the fringes" of civil matters, so that it seems preferable to adhere, within certain limits, to the concept of territoriality.

88. Furthermore, it was that concept which prompted those drafting the Community Patent Convention to insert in it Article 69(2), worded as follows:

"Actions for infringement of a Community patent may also be heard before the courts of the Contracting State in which an act of infringement was committed. The court hearing the action shall have jurisdiction only in respect of acts of infringement

committed within the territory of that State".

III ° The concept of damage, the standard of proof and the consequences of allowing a plurality of forums

- A -

89. In asking the second, fourth and fifth questions, the national court seeks guidance as to the existence of damage where the law applicable to the tort or delict (English law in the present case) does not require the person claiming to be the victim of defamation to prove, first, that he or she was known to certain readers and, second, that he or she suffered actual harm, such harm being, as we have seen, presumed.

90. I have already drawn attention to the independent nature of the concept of "matters relating to tort, delict or quasi-delict", as identified by the Court in its judgment in Kalfelis. Since an attack on the reputation of another person constitutes a "harmful event" within the meaning of Article 5(3), and given the broad scope of that provision, any action which seeks compensation for damage resulting from the breach of a legal obligation other than one arising from the existence of contractual relations between the parties must be regarded as falling within its ambit. (76)

91. Is it necessary, however, to go beyond that somewhat general definition, and to specify the factors constituting the damage? That is the question to which the House of Lords seeks an answer.

92. Neither the Commission nor the interveners have sought to maintain that, for the purposes of the uniform application of the Convention, there was any need to unify the substantive law relating to tortious liability.

93. That is my view also, since the objective of the Convention is to allocate jurisdiction consistently amongst the courts of the Contracting States and not to unify the rules concerning the substantive law.

94. That is also the prevailing view amongst academic writers, particularly Mr Kaye, who states:

"... no effort should be made, as part of the attempt to develop a uniform Convention concept, to define whether particular facts are to be held to give rise to tortious liability or not, since it is not the function of the European Court, in drawing up such a definition, to stipulate whether tortious or any other form of liability ought to exist in a particular fact situation and reference must always be made to the applicable national law in order to determine the characteristics of the liability, if any, which is the subject of the national court proceedings ...". (77)

95. It is for the national court alone, therefore, to determine, in accordance with the law applicable to the tort or delict, the circumstances in which damage arises.

96. The same applies in relation to the applicable procedural rules. I would merely draw attention in that regard to the Court' s judgment in Kongress Agentur Hagen, (78) in which it stated:

"... the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments. It is therefore necessary to draw a clear distinction between jurisdiction and the conditions governing the admissibility of an action". (79)

- B -

97. In asking the sixth question, the House of Lords seeks to know whether its decision to accept jurisdiction must be subject to the absence of any risk that the courts of another Contracting State, which also have jurisdiction, may arrive at a different solution.

98. As I have already stated, the jurisdiction of the courts of a Contracting State in which damage arises is limited to that part of the damage which occurred within their judicial district; consequently, where two courts are called upon, following the occurrence of the same causal event, to hear a claim for compensation for the damage, they do not have concurrent jurisdiction.

99. Article 22, relating to cases where jurisdiction is declined on the grounds of connexity, stipulates jurisdiction of that type as a condition of its application, and is consequently inapplicable. Mrs Gaudemet-Tallon states in that regard, moreover:

"If it is accepted that the courts of the place where damage occurs do not have jurisdiction in respect of any other damage arising from the same causal event but occurring in another Contracting State, Article 22 does not fall to be applied". (80)

100. Does there not exist, however, the risk that irreconcilable decisions may be given, within the meaning of Article 27(3) of the Convention, where certain courts are prepared to uphold the compensation claim whilst others, by contrast, find against

the victim?

101. I do not think so, in so far as the condition of irreconcilability identified by the Court in its judgment in Hoffmann v Krieg (81) is not met. In that judgment, the Court held that

"in order to ascertain whether the two judgments are irreconcilable within the meaning of Article 27(3), it should be examined whether they entail legal consequences that are mutually exclusive". (82)

102. The Court found in that judgment that a decision ordering a husband to pay maintenance to his wife was irreconcilable with a decision given in another Contracting State pronouncing the divorce. The present case does not fall within that hypothesis, and even though the decisions given might be regarded as contradictory, they would not be irreconcilable.

103. The recognition of its jurisdiction by the court of the place where the damage arises cannot be compromised on the ground of a risk of conflict between the decision to be given by it and that of a court in another Contracting State which has jurisdiction to order compensation for the damage occurring within its judicial district.

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104. I now turn, lastly, to the seventh question, relating to the standard of proof required of the plaintiff in order to enable the national court to decide whether it has jurisdiction under Article 5(3).

105. The influence of the substance of a dispute on the determination of jurisdiction has previously been analysed by the Court in the case of Effer, (83) which concerned Article 5(1) and in which the defendant contested the existence of contractual relations.

106. In his Opinion, Advocate General Reischl considered that

"If it were to be accepted that the presence of a dispute over the existence of a contractual relationship ipso facto excludes an action under Article 5(1) of the Convention, then it would be possible by a simple denial on the part of the defendant to render that provision largely ineffective, as well as that in Article 5(3) ° jurisdiction in matters relating to tort ° where indeed the defendant' s defence as a rule consists of denying the existence of a tort". (84)

107. The Court held that

"... the national court' s jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction under the Convention"

and that

"... respect for the aims and spirit of the Convention demands that that provision should be construed as meaning that the court called upon to decide a dispute arising out of a contract may examine, of its own motion even, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the inexistence of the contract". (85)

108. Thus, a dispute as to the existence of a contract does not preclude jurisdiction under Article 5(1), even if the court is prompted, for the purposes of determining its own jurisdiction, to examine substantive issues.

109. What is involved here is the application of the hallowed rule that it is for each court to determine its own jurisdiction.

110. The outcome is necessarily the same where a court before which proceedings are brought pursuant to Article 5(3) has to give a ruling on an objection of lack of competence raised by a defendant denying the existence of the tort. In order to be able to rule on that objection, the court has to verify, on the basis of the evidence adduced by the plaintiff, whether the defendant did or did not commit an act which might render him liable and giving rise to damage within the judicial district of the court.

111. I am accordingly of the opinion that the questions referred to the Court should be answered as follows:

"In the case of defamation by a newspaper article circulated in more than one Contracting State, Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that the plaintiff may sue either in the courts of the place of publication, which have jurisdiction to order compensation for the whole of the damage arising from the unlawful act, or in the courts of the places where the newspaper is distributed, which have jurisdiction solely in respect of the damage arising, according to the law applicable to the tort or delict, within their judicial district.

The jurisdiction of any of the courts seised by reason of the damage suffered is not affected by the risk of conflicting decisions which may result from the multiplicity of courts having jurisdiction.

The fact that the defendant contests the existence of the factors constituting the tort or delict alleged by the plaintiff cannot in itself deprive the national court of its jurisdiction under Article 5(3)."

(*) Original language: French.
(1) ° As amended by the Accession Convention of 25 October 1982 (OJ 1982 L 388, p. 1).
(2) ° Case 12/76 [1976] ECR 1473.
(3) ° Case 189/87 [1988] ECR 5565.
(4) ° Paragraph 17.
(5) ° Case C-261/90 Reichert II [1992] ECR I-2149, paragraph 19.
(6) ° See H. Gaudemet-Tallon: Les conventions de Bruxelles et de Lugano, LGDJ, 1993 No 193; G. Droz: Compétence judiciaire et effets des jugements dans le marché commun, Dalloz, 1972, No 77; P. Bourel: Du rattachement de quelques délits spéciaux en droit international privé , Recueil des Cours, Académie de droit international de La Haye, 1989, II, Volume 214 of the collection, p. 251 et seq.; P. Kaye: Civil Jurisdiction and Enforcement of Foreign Judgments, Professional Books, 1987, p. 561; Lasok and Stone: Conflict of Laws in the European Community, Professional Books, 1987, p. 232.
(7) ° Le droit au respect de la vie privée , Semaine juridique, 1968, No 2136, paragraph 24. See also the judgment of the Paris Court of Appeal of 27 February 1967 (Brigitte Bardot), which contains no reference whatever to the concept of fault (Recueil Dalloz Sirey, 1967, p. 450).
(8) ° See, in that regard, the course of lectures given by Professor Bourel, op. cit., p. 324 et seq.
(9) ° Op. cit., No 189.
(10) ° Case 21/76 [1976] ECR 1735.
(11) ° Case C-220/88 [1990] ECR I-49.
(12) ° That question is also central to the case of Marinari (C-364/93), in which my Opinion is shortly to be delivered.
(13) ° Paragraph 11.
(14) ° Operative part.
(15) ° Case C-220/88, cited above.
(16) ° Operative part.
(17) ° Case 12/76, cited above.
(18) ° Judgment of 29 June 1994 in Case C-288/92, not yet published in the European Court Reports.
(19) ° Paragraph 29.
(20) ° Judgment in Case 21/76, cited above, paragraph 23.
(21) ° Bundesgerichtshof, 3 May 1977, Neue Juristische Wochenschrift, 1977, p. 1590; Oberlandesgericht Muenchen, 17 October 1986, Entscheidungen der Oberlandesgerichte in Zivilsachen, 1987, p. 216.
(22) ° Internationale Urteilsanerkennung, Band I, 1. Halbband, C.H. Beck' sche Verlagsbuchhandlung, Muenchen, 1983, p. 631.
(23) ° Free translation: The competing jurisdiction of the courts of the place where the event occurred and of those of the place where the damage arose is such that it is possible to sue in respect of the whole of the damage, irrespective of where it may have occurred, and not merely in respect of the damage occurring in the national territory of the court .
(24) ° Europaeisches Zivilprozessrecht, Verlag Recht und Wirtschaft GmbH, Heidelberg, 1991, p. 103, paragraph 45.
(25) ° Free translation: In the case of unlawful acts effected by publication in print, international competence in respect of the whole of the damage exists not only in the place of publication but also in each of the (frequently numerous) places where distribution has taken place .
(26) ° J. Erauw: De onrechtmatige daad in het internationaal privaatrecht, Antwerpen, Maarten Kluwer, 1982, p. 194 to 197.
(27) ° Judgments of the Paris Regional Court of 29 September 1982 (Romy Schneider), 27 April 1983 (Caroline of Monaco) and 20 February 1992 (Vincent Lindon); judgment of the Paris Court of Appeal of 19 March 1984 (Caroline of Monaco).
(28) ° F. Schockweiler: Les conflits de lois et les conflits de juridictions en droit international privé luxembourgeois, Ministry of Justice, Luxembourg, 1987, No 858.
(29) ° See the orders of the Tribunal Supremo of 20 November 1980 (Repertorio Aranzadi de Jurisprudencia (RAJ), 1980, No 4524), 7 July 1983 (RAJ, 1983, No 4112) and 28 September 1992 (RAJ, 1992, No 7385).
(30) ° See the judgment of the Corte di Cassazione of 28 July 1990, in Cassazione penale, 1992, p. 644.
(31) ° Barrett v Independent Newspapers [1986] ILRM 601.
(32) ° Judgments of the Supremo Tribunal de Justiça of 18 April 1990, in Actualidade Jurídica, No 8, p. 2, and of the Tribunal da Relação de Coimbra of 8 January 1963, in Castelo Branco Galvão, Direito e Processo Penal, Coimbra, 1982, p. 32.

(33) ° Judgments of the Tribunal da Relação de Lisboa of 11 February 1955 and 17 February 1965, in Castelo Branco Galvão, op. cit., p. 32.
(34) ° Paragraph 193.
(35) ° Revue critique de Droit International Privé, 1983, p. 674. See also J. Heinrichs: Die Bestimmung der Gerichtlichen Zustaendigkeit nach dem Begehungsort im nationalen und internationalen Zivilprozessrecht, 1984, p. 188 to 201; E. Schwiegel-Klein: Persoenlichkeitsrechtverletzungen durch Massenmedien im Internationalen Privatrecht, 1983, p. 68 to 82.
(36) ° Du rattachement de quelques délits spéciaux , op. cit., p. 356.
(37) ° Ibid.
(38) ° P. 357.
(39) ° Paragraph 16. See also paragraph 17 of the judgment in Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139.
(40) ° In particular, those in Tessili (paragraph 13), Mines de Potasse d' Alsace (paragraph 11), Case 266/85 Shenavai v Kreischer [1987] ECR 239 (paragraph 6) and Dumez (paragraph 17).
(41) ° Written observations, paragraph 20.
(42) ° Paragraph 12.
(43) ° Paragraph 15.
(44) ° Conflict of Laws in the European Community, op. cit.
(45) ° P. 232.
(46) ° Civil Jurisdiction and Enforcement of Foreign Judgments, op. cit.
(47) ° P. 580.
(48) ° Paragraph 11.
(49) ° See paragraphs 30 to 32, above.
(50) ° Revue critique de droit international privé, 1974, p. 700.
(51) ° P. 704.
(52) ° Recueil Dalloz Sirey, 1977, p. 614 to 615.
(53) ° La convention de Bruxelles du 27 septembre 1968 ° Compétence judiciaire et effets des jugements dans la CEE, Jupiter, 1985, paragraph 88, p. 49.
(54) ° Journal du droit international, 1977, p. 728.
(55) ° P. 733. In a more recent article, Mr Huet considers that, with a view to the concentration of actions, the decision in Shenavai could be extended to tortious matters, so that the courts of the place where the damage mainly arose would be competent to order compensation for the whole of the damage suffered in the various Contracting States (Journal du droit international, 1994, p. 169 to 170).
(56) ° See the various decisions cited above, footnote 27.
(57) ° It is undeniable that a newspaper published in one Contracting State is distributed in practically all the other States.
(58) ° Judgment in Kalfelis, cited above, paragraph 19. See also, to the same effect, Case C-26/91 Handte [1992] ECR I-3967, paragraph 14.
(59) ° Case 38/81, [1982] ECR 825.
(60) ° Paragraph 6.
(61) ° Case 21/76, cited above, paragraph 11.
(62) ° I will revert in paragraphs 97 et seq., below, to the question of the absence of irreconcilability between decisions, within the meaning of Article 27(3) of the Convention.
(63) ° See paragraph 6 of the judgment in Case 38/81, cited above.
(64) ° Case C-26/91 [1992] ECR I-3967.
(65) ° Case C-288/92, cited above.
(66) ° Paragraph 19.
(67) ° That analysis was maintained in my Opinions in Cases C-89/91 Shearson Lehman Hutton, cited above, and C-318/93 Brenner and Noller (presently in deliberation).
(68) ° See paragraphs 27 and 28 of my Opinion in Kalfelis.
(69) ° Journal du droit international, 1977, p. 728, 732.
(70) ° Journal du droit international, 1994, p. 169.
(71) ° Case 266/85 [1987] ECR 239.
(72) ° Paragraph 19.
(73) ° See the references in footnote 70 above, p. 171.
(74) ° See paragraphs 104 et seq., below.
(75) ° P. 1755.
(76) ° See also in this regard footnote 1 to the Opinion of Advocate General Jacobs in Handte.

(77) ° Op. cit., p. 564.
(78) ° Case C-365/88 [1990] ECR I-1845.
(79) ° Paragraph 17.
(80) ° Paragraph 197. See also, to the same effect, Gothot and Holleaux, op. cit., paragraph 226.
(81) ° Case 145/86 [1988] ECR 645.
(82) ° Paragraph 22.
(83) ° Case 38/81, cited above.
(84) ° P. 838.
(85) ° Paragraph 7.

Case C-68/93
Shevill

Judgment of the Court of 7 March 1995.

Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA.
Reference for a preliminary ruling: House of Lords - United Kingdom.
Brussels Convention - Article 5 (3) - Place where the harmful event occurred - Libel by a newspaper article.

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the House of Lords for a preliminary ruling in the proceedings pending before that court between
Fiona Shevill,
Ixora Trading Inc.,
Chequepoint SARL,
Chequepoint International Ltd

and

Presse Alliance SA
on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (Journal Officiel 1972, L 299, p. 32) as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and ° amended text ° p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,
composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn and C. Gulmann (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward,
J.-P. Puissochet and G. Hirsch, Judges,
Advocate General: M. Darmon, and subsequently P. Léger,
Registrar: Lynn Hewlett, Administrator,
after considering the written observations submitted on behalf of:
° Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, by H.M. Boggis-Rolfe, Barrister, instructed by P. Carter-Ruck & Partners, Solicitors,
° Presse Alliance SA, by M. Tugendhat QC, instructed by D.J. Freeman & Co., Solicitors,
° the United Kingdom, by J.D. Colahan, of the Treasury Solicitor' s Department, acting as Agent, and A. Briggs, Barrister,
° the Spanish Government, by A.J. Navarro González, Director General for Community Legal and Institutional Coordination at the Ministry of Foreign Affairs, and M. Bravo-Ferrer Delgado, State Attorney, acting as Agents,
° the French Government, by H. Renie, Deputy Principal Secretary of Foreign Affairs at the Ministry of Foreign Affairs, acting as Agent,
° the Commission of the European Communities, by N. Khan, of the Legal Service, acting as Agent,
having regard to the Report for the Hearing,
the Sixth Chamber of the Court having heard the oral observations of Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, represented by H.M. Boggis-Rolfe, Presse Alliance SA, represented by M. Tugendhat QC, the United Kingdom, represented by S. Braviner, of the Treasury Solicitor' s Department, acting as Agent, and A. Briggs, Barrister, the German Government, represented by J. Pirrung, Ministerialrat at the Federal Ministry of Justice, acting as Agent, the Spanish Government, represented by M. Bravo-Ferrer Delgado, and the Commission, represented by N. Khan, at the hearing on 21 April 1994,
the Sixth Chamber having heard the Opinion of Advocate General Darmon at the sitting on 14 July 1994,
the Sixth Chamber of 5 October 1994 having decided to refer the case back to the Court,
having regard to the order of 10 October 1994 reopening the oral procedure,
after hearing the oral observations of Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, represented by H.M. Boggis-Rolfe, Presse Alliance SA, represented by M. Tugendhat QC, the United Kingdom, represented by S. Braviner and A. Briggs, the German Government, represented by M Klippstein, Richter, acting as Agent,

the Spanish Government, represented by M. Bravo-Ferrer Delgado, and the Commission, represented by N. Khan, at the hearing on 22 November 1994,
after hearing the Opinion of Advocate General Léger at the sitting on 10 January 1995,
gives the following

Judgment

Grounds

1 By order of 1 March 1993, received at the Court on 15 March 1993, the House of Lords referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Journal Officiel 1972, L 299, p. 32), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and ° amended text ° p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), hereinafter "the Convention", seven questions on the interpretation of Article 5(3) of the Convention.

2 Those questions were raised in proceedings brought by Miss Fiona Shevill, a United Kingdom national residing in North Yorkshire, England, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Limited against Presse Alliance SA, a company incorporated under French law whose registered office is in Paris, and seek to establish which courts have jurisdiction to hear an action for damages for harm caused by the publication of a defamatory newspaper article.

3 According to the documents before the Court, on 23 September 1989 Presse Alliance SA, which publishes the newspaper France-Soir, published an article about an operation which drug squad officers of the French police had carried out at one of the bureaux de change operated in Paris by Chequepoint SARL. That article, based on information provided by the agency France Presse, mentioned the company "Chequepoint" and "a young woman by the name of Fiona Shevill-Avril".

4 Chequepoint SARL, a company incorporated under French law whose registered office is in Paris, has operated bureaux de change in France since 1988. It is not alleged to carry on business in England or Wales.

5 Fiona Shevill was temporarily employed for three months in the summer of 1989 by Chequepoint SARL in Paris. She returned to England on 26 September 1989.

6 Ixora Trading Inc., which is not a company incorporated under the law of England and Wales, has since 1974 operated bureaux de change in England under the name "Chequepoint".

7 Chequepoint International Ltd, a holding company incorporated under Belgian law whose registered office is in Brussels, controls Chequepoint SARL and Ixora Trading Inc.

8 Miss Shevill, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Ltd considered that the abovementioned article was defamatory in that it suggested that they were part of a drug-trafficking network for which they had laundered money. On 17 October 1989 they issued a writ in the High Court of England and Wales claiming damages for libel from Presse Alliance SA in respect of the copies of France-Soir distributed in France and the other European countries including those sold in England and Wales. The plaintiffs subsequently amended their pleadings, deleting all references to the copies sold outside England and Wales. Since under English law there is a presumption of damage in libel cases, the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question.

9 It is common ground that France-Soir is mainly distributed in France and that the newspaper has a very small circulation in the United Kingdom, effected through independent distributors. It is estimated that more than 237 000 copies of the issue of France-Soir in question were sold in France and approximately 15 500 copies distributed in the other European countries, of which 230 were sold in England and Wales (5 in Yorkshire).

10 On 23 November 1989 France-Soir published an apology stating that it had not intended to allege that either the owners of Chequepoint bureaux de change or Miss Shevill had been involved in drug trafficking or money laundering.

11 On 7 December 1989 Presse Alliance SA issued a summons disputing the jurisdiction of the High Court of England and Wales on the ground that no harmful event within the meaning of Article 5(3) of the Convention had occurred in England.

12 That application to strike out was dismissed by order of 10 April 1990. The appeal brought against that decision was dismissed by order of 14 May 1990.

13 On 12 March 1991 the Court of Appeal dismissed the appeal brought by Presse Alliance SA against that decision and stayed the action brought by Chequepoint International Limited.

14 Presse Alliance SA appealed against that decision to the House of Lords pursuant to leave to appeal granted by the latter.

15 Presse Alliance SA argued essentially that under Article 2 of the Convention the French courts had jurisdiction in this dispute and that the English courts did not have jurisdiction under Article 5(3) of the Convention since the "place where the harmful event occurred" within the meaning of that provision was in France and no harmful event had occurred in England.

16 Considering that the proceedings raised problems of interpretation of the Convention, the House of Lords by order of 1 March 1993 decided to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

"1. In a case of libel by a newspaper article, do the words 'the place where the harmful event occurred' in Article 5(3) of the Convention mean:

(a) the place where the newspaper was printed and put into circulation; or

(b) the place or places where the newspaper was read by particular individuals; or

(c) the place or places where the plaintiff has a significant reputation?

2. If and sofar as the answer to the first question is (b), is 'the harmful event' dependent upon there being a reader or readers who knew (or knew of) the plaintiff and understood those words to refer to him?

3. If and in so far as harm is suffered in more than one country (because copies of the newspaper were distributed in at least one Member State other than the Member State where it was printed and put into circulation), does a separate harmful event or harmful events take place in each Member State where the newspaper was distributed, in respect of which such Member State has separate jurisdiction under Article 5(3), and if so, how harmful must the event be, or what proportion of the total harm must it represent?

4. Does the phrase 'harmful event' include an event actionable under national law without proof of damage, where there is no evidence of actual damage or harm?

5. In deciding under Article 5(3) whether (or where) a 'harmful event' has occurred is the local court expected to answer the question otherwise than by reference to its own rules and, if so, by reference to which other rules or substantive law, procedure or evidence?

6. If, in a defamation case, the local court concludes that there has been an actionable publication (or communication) of material, as a result of which at least some damage to reputation would be presumed, is it relevant to the acceptance of jurisdiction that other Member States might come to a different conclusion in respect of similar material published within their respective jurisdictions?

7. In deciding whether it has jurisdiction under Article 5(3) of the Convention, what standard of proof should a court require of the plaintiff that the conditions of Article 5(3) are satisfied:

(a) generally; and

(b) in relation to matters which (if the court takes jurisdiction) will not be re-examined at the trial of the action?"

The first, second, third and sixth questions

17 The national court' s first, second, third and sixth questions, which should be considered together, essentially seek guidance from the Court as to the interpretation of the concept "the place where the harmful event occurred" used in Article 5(3) of the Convention, with a view to establishing which courts have jurisdiction to hear an action for damages for harm caused to the victim following distribution of a defamatory newspaper article in several Contracting States.

18 In order to answer those questions, reference should first be made to Article 5(3) of the Convention, which, by way of derogation from the general principle in the first paragraph of Article 2 of the Convention that the courts of the Contracting State of the defendant' s domicile have jurisdiction, provides:

"A person domiciled in a Contracting State may, in another Contracting State, be sued:

[...]

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

[...]"

19 It is settled case-law (see Case 21/76 Bier v Mines de Potasse d' Alsace [1976] ECR 1735, paragraph 11, and Case C-220/88 Dumez France and Tracoba v Hessische Landesbank (Helaba) and Others [1990] ECR I-49, paragraph 17) that that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant' s domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

20 It must also be emphasized that in Mines de Potasse d' Alsace the Court held (at paragraphs 24 and 25) that, where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.

21 In that judgment, the Court stated (at paragraphs 15 and 17) that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings.

22 The Court added (at paragraph 20) that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.

23 Those observations, made in relation to physical or pecuniary loss or damage, must equally apply, for the same reasons, in the case of loss or damage other than physical or pecuniary, in particular injury to the reputation and good name of a natural or legal person due to a defamatory publication.

24 In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.

25 The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.

26 However, that forum will generally coincide with the head of jurisdiction set out in the first paragraph of Article 2 of the Convention.

27 As the Court held in Mines de Potasse d' Alsace, the plaintiff must consequently have the option to bring proceedings also in the place where the damage occurred, since otherwise Article 5(3) of the Convention would be rendered meaningless.

28 The place where the damage occurred is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim.

29 In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

30 It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim' s reputation.

31 In accordance with the requirement of the sound administration of justice, the basis of the rule of special jurisdiction in Article 5(3), the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage.

32 Although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant' s domicile or of the place

where the publisher of the defamatory publication is established.

33 In light of the foregoing, the answer to the first, second, third and sixth questions referred by the House of Lords must be that, on a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

The fourth, fifth and seventh questions

34 The national court' s fourth, fifth and seventh questions, which should be considered together, essentially ask whether, in determining whether it has jurisdiction qua court of the place where the damage occurred pursuant to Article 5(3) of the Convention as interpreted by the Court, it is required to follow specific rules different from those laid down by its national law in relation to the criteria for assessing whether the event in question is harmful and in relation to the evidence required of the existence and extent of the harm alleged by the victim of the defamation.

35 In order to reply to those questions, it must first be noted that the object of the Convention is not to unify the rules of substantive law and of procedure of the different Contracting States, but to determine which court has jurisdiction in disputes relating to civil and commercial matters in relations between the Contracting States and to facilitate the enforcement of judgments (see Case C-365/88 Hagen v Zeehaghe [1990] ECR I-1845, paragraph 17).

36 Moreover, the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court, provided that the application of those rules does not impair the effectiveness of the Convention (paragraphs 19 and 20 of the same judgment).

37 In the area of non-contractual liability, the context in which the questions referred have arisen, the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute by reference to the place or places where an event considered harmful occurred.

38 It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seised to enable it to rule on the merits of the case.

39 Those questions must therefore be settled solely by the national court seised, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired.

40 The fact that under the national law applicable to the main proceedings damage is presumed in libel actions, so that the plaintiff does not have to adduce evidence of the existence and extent of that damage, does not therefore preclude the application of Article 5(3) of the Convention in determining which courts have territorial jurisdiction to hear the action for damages for harm caused by an international libel through the press.

41 The answer to the referring court must accordingly be that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired.

Decision on costs

Costs

42 The costs incurred by the United Kingdom, the German, Spanish and French Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords, by order of 1 March 1993, hereby rules:

1. On a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

2. The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired.

Case C-181/95
Biogen Inc

ORDER OF THE PRESIDENT OF THE COURT
26 February 1996 *

(Articles 20 and 37 of the Statute of the Court of Justice of the EC — Participation in proceedings under Article 177 of the EC Treaty)

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Commerce, Nivelles, Belgium, for a preliminary ruling in the proceedings pending before that court between

Biogen Inc.
and
Smithkline Beecham Biologicals SA

on the interpretation of Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ 1992 L 182, p. 1),

THE PRESIDENT OF THE COURT

after hearing the Advocate General, N. Fennelly,

makes the following

Order

1 By application lodged at the Court Registry on 12 December 1995, Research Corporation Technologies Inc., a company governed by United States law, sought leave to intervene in the present case to submit observations on the national court's second question.

2 In support of its application, it states that Article 37 of the EC Statute of the Court of Justice gives natural and legal persons the right to intervene in cases before the Court, including, it claims, preliminary ruling proceedings. Moreover, Article 20 of the EC Statute, which allows the parties, the Member States, the Commission and, where appropriate, the Council to submit statements of case or written observations, does not explicitly limit or preclude the right of natural and legal persons to intervene in preliminary ruling proceedings.

3 Such an application to intervene in preliminary ruling proceedings is inadmissible (see the order of the Court of 3 June 1964 in Case 6/64 *Costa* v *ENEL* [1964] ECR 614 and the judgment in Case 19/68 *De Cicco* v *Landesversicherungsanstalt Schwaben* [1968] ECR 473, at p. 479).

4 Article 37 of the EC Statute, on which the applicant relies, recognizes the right of natural and legal persons to intervene before the Court when they can establish an interest in the result of any case submitted to it. It further provides that the submissions made in an application to intervene must be limited to supporting the submissions of one of the parties. It applies, therefore, to contentious proceedings before the Court, designed to settle a dispute.

5 Article 177 of the EC Treaty does not envisage contentious proceedings designed to settle a dispute but prescribes a special *procedure whose aim is to ensure* a uniform interpretation of Community law by cooperation between the Court of Justice and the national courts and which enables the latter to seek the interpretation of Community provisions which they have to apply in disputes brought before them.

6 Participation in cases of the kind referred to in Article 177 of the Treaty is governed by the first two paragraphs of Article 20 of the EC Statute, which limits the right to submit statements of case or observations to the parties, the Member States, the Commission and, where appropriate, the Council, the European Parliament and the European Central Bank. By the term 'parties', that article refers solely to the parties to the action pending before the national court (see Case 62/72 *Bollmann* v *Hauptzollamt Hamburg-Waltershof* [1973] ECR 269, paragraph 4). Such a provision would be pointless if the right to participate in Article 177 proceedings were recognized to all parties having an interest within the meaning of Article 37 of the EC Statute. Consequently, a person who has not sought or been granted leave to intervene before the national court is not entitled to submit observations to this Court under that provision.

7 The application to intervene by Research Corporation Technologies Inc. should therefore be dismissed as inadmissible.

8 There is no need to rule on costs as none have been incurred.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The application to intervene by Research Corporation Technologies Inc. is dismissed as inadmissible.**
2. **There is no need to rule on costs.**

Luxembourg, 26 February 1996.

R. Grass G.C. Rodríguez Iglesias
Registrar President

Case C-173/99
BECTU

JUDGMENT OF THE COURT (Sixth Chamber)
26 June 2001
(Social policy - Protection of the health and safety of workers - Directive 93/104/EC - Entitlement to paid annual leave - Condition imposed by national legislation - Completion of a qualifying period of employment with the same employer)

REFERENCE to the Court under Article 234 EC by High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), for a preliminary ruling in the proceedings pending before that court between
The Queen
and
Secretary of State for Trade and Industry,
ex parte:
Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU),

on the interpretation of Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).
THE COURT (Sixth Chamber),
composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen (Rapporteur), N. Colneric and J.N. Cunha Rodrigues, Judges,
Advocate General: A. Tizzano,

Registrar: L. Hewlett, Administrator,
after considering the written observations submitted on behalf of:
- Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), by L. Cox QC and J. Coppel, Barrister, instructed by S. Cavalier, Solicitor,
- the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by E. Sharpston QC and P. Sales, Barrister,
- Commission of the European Communities, by D. Gouloussis and N. Yerrell, acting as Agents,
having regard to the Report for the Hearing,
after hearing the oral observations of Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), of the United Kingdom Government and the Commission at the hearing on 7 December 2000,
after hearing the Opinion of the Advocate General at the sitting on 8 February 2001,
gives the following

Judgment

1.

By order of 14 April 1999, received at the Court Registry on 10 May 1999, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office),referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2.

Those questions were raised in proceedings brought by Broadcasting, Entertainment, Cinematographic and Theatre Union ('BECTU') against the Secretary of State for Trade and Industry ('the Secretary of State') in relation to the transposition into the domestic law of the United Kingdom of Great Britain and Northern Ireland of the provision of Directive 93/104 governing paid annual leave.

Legislative background

3.

Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides:
'(1) Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of

conditions in this area, while maintaining the improvements made.
(2) In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.
Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
(3) The provisions adopted pursuant to this article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.'

4.

It was on the basis of Article 118a of the Treaty that a number of directives were adopted, in particular Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and Directive 93/104.

5.

Directive 89/391 is the framework directive which lays down general principles regarding the health and safety of workers. Those principles were subsequently developed in a series of individual directives, including Directive 93/104.

6.

Article 2 of Directive 89/391 defines its scope as follows:
'1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).
2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.
In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this directive.'

7.

Under the heading 'Definitions', Article 3 of Directive 89/391 provides:
'For the purposes of this directive, the following terms shall have the following meanings:
(a) worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants;
(b) employer: any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment;
...'.

8.

Article 1 of Directive 93/104 lays down minimum safety and health requirements for the organisation of working time and provides that the directive is to apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

9.

Section II of Directive 93/104 lays down the measures to be taken by the Member States to ensure that all workers are entitled to minimum daily and weekly rest periods and to paid annual leave; it also lays down rules on breaks and maximum weekly working time.

10.

Section III of that directive lays down a number of requirements concerning the length of and conditions for night work and shift work, and the pattern of work.

11.

As regards annual leave, Article 7 of Directive 93/104 provides:
'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

12.

Article 15 of Directive 93/104 provides:

'This directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

13.

Article 17 of the same directive provides for a number of derogations from the basic rules on account of the specific characteristics of certain activities and under certain conditions.

14.

However, it is common ground that those derogations do not apply to the paid annual leave provided for by Article 7 of that directive and both BECTU and the Secretary of State accept that none of those derogations is applicable to the present case.

15.

Article 18 of Directive 93/104, entitled 'Final provisions', provides, in paragraph (1)(a), that it is to be transposed into domestic law by 23 November 1996.

16.

However, under Article 18(1)(b)(ii), Member States are to have the 'option, as regards the application of Article 7, of making use of a transitional period of not more than three years from the date referred to in (a), provided that during that transitional period:

- every worker receives three weeks' paid annual leave in accordance with the conditions for the entitlement to, and granting of, such leave laid down by national legislation and/or practice, and
- the three-week period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

17.

It is common ground that the United Kingdom availed itself of the option granted by Article 18(1)(b)(ii) of Directive 93/104.

The national legislation

18.

In the United Kingdom Directive 93/104 was transposed into national law by the Working Time Regulations 1998 (S.I. 1998 No 1833, 'the Regulations'). The Regulations were drawn up by the Government on 30 July 1998, laid before Parliament on the same day and entered into force on 1 October 1998.

19.

Regulation 13 concerns the right to annual leave.

20.

Paragraphs (1) and (2) thereof provide as follows:

'(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is

(a) in any leave year beginning on or before 23 November 1998, three weeks;

(b) in any leave year beginning after 23 November 1998 but before 23 November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23 November 1998 which has elapsed at the start of that leave year, and

(c) in any leave year beginning after 23 November 1999, four weeks.'

21.

Regulation 13(3) defines the starting-point of the leave year for the purposes of that regulation.

22.

Where a worker's employment begins after the date on which the first leave year begins, regulation 13(5) provides that his leave entitlement is to be calculated proportionately.

23.

Under regulation 13(9), leave may be taken in instalments, but it may be taken only in the leave year in respect of which it is due and it may not be replaced by a payment in lieu except where the employment is terminated.

24.

Regulation 13(7) provides:

'The entitlement conferred by paragraph (1) does not arise until a worker has been continuously employed for 13 weeks.'

25.

Regulation 13(8) specifies that a worker has been continuously employed for 13 weeks, within the meaning of paragraph (9), 'if his relations with his employer have been governed by a contract during the whole or part of each of those weeks‘.

The main proceedings and the questions referred to the Court

26.

BECTU is a trade union with about 30 000 members working in the broadcasting, film, theatre, cinema and related sectors in jobs such as sound recordists, cameramen, special effects technicians, projectionists, editors, researchers, hairdressers and make-up artistes.

27.

BECTU claims that most of its members are engaged on short-term contracts - frequently for less than 13 weeks with the same employer - so that many of them do not satisfy the condition laid down by regulation 13(7) for entitlement to paid annual leave. Accordingly, the persons concerned are deprived of any entitlement to paid annual leave and of any right to an allowance in lieu merely because, although they work on a regular basis, they do so for successive employers.

28.

Taking the view that regulation 13(7) constituted an incorrect transposition of Article 7 of Directive 93/104, BECTU lodged an application for judicial review on 4 December 1998 seeking permission to challenge that provision of the Regulations. The High Court of Justice granted permission for judicial review on 18 January 1999.

29.

In those proceedings, BECTU argued that regulation 13(7) constituted an unlawful limitation of the right to paid annual leave conferred by Article 7 of Directive 93/104 because workers who have been continuously employed for less than 13 weeks by the same employer are, by virtue of that provision, deprived of the benefit of that right, whereas Directive 93/104 confers the right to such leave on 'every worker‘.

30.

Moreover, none of the derogations provided for in Article 17 of Directive 93/104 was applicable to the circumstances of the case and the minimum period of employment required by the Regulations was contrary both to the aim of protecting the health and safety of workers pursued by that directive and to the need to interpret restrictively any derogations from rights granted to workers by Community law. Furthermore, the provision at issue gave rise to a risk of abuse by unscrupulous employers.

31.

Whilst conceding that Article 7(1) of Directive 93/104, in stating that every worker is to be entitled to paid annual leave 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice‘, may indeed permit the Member States to provide for a framework within which that right is to be exercised, BECTU contends that that framework cannot have the effect of entirely depriving certain classes of workers of the protection conferred by the directive.

32.

In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), stayed proceedings pending a preliminary ruling from the Court on the following questions:

'(1) Is the expression "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice" in Article 7 of Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time to be interpreted as permitting a Member State to enact national legislation under which:

(a) a worker does not begin to accrue rights to the paid annual leave specified in Article 7 (or to derive any benefits consequent thereon) untilhe has completed a qualifying period of employment with the same employer; but

(b) once that qualifying period has been completed, his employment during the qualifying period is taken into account for the purposes of computing his leave entitlement?

(2) If the answer to question 1 is "yes", what are the factors that the national court should take into account in order to determine whether a particular qualifying period of employment with the same employer is lawful and proportionate? In particular, is it legitimate for a Member State to take into account the cost for employers of conferring those rights on workers who are employed for less than the qualifying period?‘

The first question

33.

By its first question the national court seeks essentially to ascertain whether Article 7(1) of Directive 93/104 allows a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer.

34.

Article 7(1) of Directive 93/104 imposes a clear and precise obligation on Member States to achieve a specific result by virtue of which they are to 'take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks‘.

35.

However, Article 7(1) provides that workers enjoy that individual right to paid annual leave of a minimum duration, conferred by Directive 93/104, 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice‘.

36.

The scope of that provision must therefore be determined having regard to its context. Accordingly, it is necessary to examine the purpose of Directive 93/104 and the system established by it, of which Article 7(1) forms part.

37.

As regards, first, the purpose of Directive 93/104, it is clear both from Article 118a of the Treaty, which is its legal basis, and from the first, fourth, seventh and eighth recitals in its preamble as well as the wording of Article 1(1) itself, that its purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time.

38.

According to those same provisions, such harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of thehealth and safety of workers by ensuring that they are entitled to minimum rest periods and adequate breaks.

39.

In that context, the fourth recital in the preamble to the directive refers to the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 which declared, in point 8 and the first subparagraph of point 19, that every worker in the European Community must enjoy satisfactory health and safety conditions in his working environment and that he is entitled, in particular, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices.

40.

As regards, second, the system established by Directive 93/104, whilst Article 15 allows in general terms the application or introduction of national provisions more favourable to the protection of the safety and health of workers, the directive makes it clear, on the other hand, in Article 17, that only certain of its provisions, which are exhaustively listed, may be the subject of derogations introduced by the Member States or the two sides of industry. Moreover, the implementation of such derogations is subject to the condition that the general principles of protection of the health and safety of workers are complied with or that the workers concerned are afforded equivalent periods of compensatory rest or else appropriate protection.

41.

Now it is clear that Article 7 is not one of the provisions from which Directive 93/104 expressly allows derogations.

42.

Directive 93/104, in Article 18(1)(b)(ii), provides only that Member States are to have the option, as regards the application of Article 7, of making use of a transitional period of not more than three years from 23 November 1996, provided that during that period every worker receives three weeks' paid annual leave, which may not be replaced by an allowance in lieu, except where the employment relationship is terminated. As stated in paragraph 17 of this judgment, the United Kingdom availed itself of that option.

43.

It follows that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104.

44.

It is significant in that connection that the directive also embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that Article 7(2) allows an allowance to be paid in lieu of paid annual leave.

45.

In addition, Directive 93/104 defines its scope broadly in that, as is clear from Article 1(3), it applies to all sectors of activity, whether private or public, within the meaning of Article 2 of Directive 89/391, with the exception of certain specific sectors which are expressly listed.

46.

Furthermore, Directive 93/104 draws no distinction between workers employed under a contract of indefinite duration and those employed under a fixed-term contract. On the contrary, as regards more specifically the provisions concerning minimum rest periods contained in Section II of that directive, they refer in most cases to 'every worker', as indeed does Article 7(1) in relation to entitlement to paid annual leave.

47.

It follows that, with regard to both the objective of Directive 93/104 and to its scheme, paid annual leave of a minimum duration of three weeks during the transitional period provided for in Article 18(1)(b)(ii) and four weeks after the expiry of that period constitutes a social right directly conferred by that directive on every worker as the minimum requirement necessary to ensure protection of his health and safety.

48.

Legislation of a Member State, such as that at issue in the main proceedings, which imposes a precondition for entitlement to paid annual leave which has the effect of preventing certain workers from any such entitlement not only negates an individual right expressly granted by Directive 93/104 but is also contrary to its objective.

49.

By applying such rules, workers whose employment relationship comes to an end before completion of the minimum period of 13 weeks' uninterrupted work for the same employer are deprived of any entitlement to paid annual leave and likewise receive no allowance in lieu even though they have in fact worked for a certain period and, under Directive 93/104, minimum rest periods are essential for the protection of their health and safety.

50.

National rules of that kind are also manifestly incompatible with the scheme of Directive 93/104 which, in contrast to its treatment of other matters, makes no provision for any possible derogation regarding entitlement to paid annual leave and therefore, *a fortiori*, prevents a Member State from unilaterally restricting that entitlement which is conferred on all workers by that directive. Article 17 makes the derogations for which it provides subject to an obligation on Member States to grant compensatory rest periods or other appropriate protection. Given that no such condition is laid down in relation to the right to paid annual leave, it is all the more clear that Directive 93/104 was not intended to authorise Member States to derogate from that right.

51.

Furthermore, rules of the kind at issue in the main proceedings are liable to give rise to abuse because employers might be tempted to evade the obligation to grant the paid annual leave to which every worker is entitled by more frequent resort to short-term employment relationships.

52.

Consequently, Directive 93/104 must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.

53.

The expression 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice' must therefore be construed as referring only to the arrangements for paid annual leave adopted in the various Member States. As the Advocate General observed in point 34 of his Opinion, although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever.

54.

Contesting the interpretation of Directive 93/104 given in paragraphs 52 and 53 of this judgment, the United Kingdom Government contends, first, that it is undermined by the fact that the arrangements for paid annual leave vary considerably from one Member State to another and that certain national rules do not provide for a right to such leave from the first day of employment.

55.

As to that, it must be borne in mind that Directive 93/104 merely lays down minimum requirements for harmonisation of the organisation of working time at Community level and leaves Member States to adopt the requisite arrangements for implementation and application of those requirements. Those measures may therefore display certain divergences as regards the conditions for exercising the right to paid annual leave but, as the Court has held in paragraphs 52 and 53 of this judgment, that directive does not allow Member States to exclude the very existence of a right expressly granted to all workers.

56\.

Moreover, even if other national rules contained a condition comparable to that appearing in the legislation at issue in the main proceedings, it need merely be pointed out that such a condition is manifestly contrary to Directive 93/104 and that, according to settled case-law, a Member State cannot justify its failure to fulfil obligations under Community law by relying on the fact that other Member States are also in breach of their obligations (see Case C-146/89 *Commission* v *United Kingdom* [1991] ECR I-3533, paragraph 47).

57\.

The United Kingdom Government contends, second, that the condition for entitlement to paid annual leave laid down in its regulations strikes a fair balance between the objective of Directive 93/104, which is to protect the health and safety of workers, and the need to avoid imposing excessive constraints on small and medium-sized undertakings, in accordance with the second paragraph of Article 118a(2) of the Treaty, which constitutes the legal basis of that directive. Apart from the cost of theleave itself, the administrative costs of organising annual leave for staff engaged for short periods would be particularly high and would weigh more heavily on small and medium-sized undertakings.

58\.

On that point, first, the regulations at issue in the main proceedings are of general application since the rule that entitlement to paid annual leave is conditional upon completion of a minimum uninterrupted period of 13 weeks' employment with the same employer applies to all workers and does not vary according to the category of undertaking in which they are employed.

59\.

Second, it is clear from the fifth recital in the preamble to Directive 93/104 that 'the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'. However, the United Kingdom's argument is incontestably based on such a consideration.

60\.

Finally, as the Court held in Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 44, the directive has already taken account of the effects which the organisation of working time for which it provides may have on small and medium-sized undertakings, given that one of the conditions to which measures based on Article 118a of the Treaty are subject is precisely that they must not hold back the creation and development of such undertakings. Moreover, Article 18(1)(b)(ii) of that directive allows the Member States to make use of a transitional period of three years during which workers must be entitled to receive three weeks' paid annual leave, an option which the United Kingdom has taken up.

61\.

Furthermore, the directive does not prevent the Member States from organising the way in which the right to paid annual leave may be exercised by regulating, for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment.

62\.

The United Kingdom Government contends, third, that Article 7 of Directive 93/104 must be interpreted in the light of the directive as a whole. By virtue of the other provisions of that directive, the availability of daily and weekly rest periods from the start of employment retards the accumulation of work-related fatigue so that it is unnecessary to grant workers the right to paid annual leave during the early weeks of their employment in order to protect their health and safety.

63\.

It need merely be pointed out that that argument is based on the assumption that a worker employed under short-term contracts has been able to take an adequate period of rest before entering into a new employment relationship. However, that assumption does not necessarily hold true in the case of workers employed under a succession of short-term contracts. On the contrary, such workers often find themselves in a more precarious situation than those employed under longer-term contracts, so that it is all the more important to ensure that their health and safety are protected in a manner consonant with the purpose of Directive 93/104.

64\.

It follows that the answer to the first question must be that Article 7(1) of Directive 93/104 does not allow a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer.

The second question

65\.

The second question is asked only in the event that Article 7(1) of Directive 93/104 allows a Member State to adopt

regulations of the kind at issue in the main proceedings. Since the first question has been answered in the negative, it is unnecessary to answer the second question.

Costs

66.

The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office) by order of 14 April 1999, hereby rules:

Article 7(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time does not allow a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer.

Case C-167/00
Henkel

JUDGMENT OF THE COURT (Sixth Chamber)
1 October 2002

(Brussels Convention - Article 5(3) - Jurisdiction in matters relating to tort, delict or quasi-delict - Preventive action by associations - Consumer protection organisation seeking an injunction to prevent a trader from using unfair terms in consumer contracts)

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Verein für Konsumenteninformation
and
Karl Heinz Henkel ,

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1),
THE COURT (Sixth Chamber),
composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and J.N. Cunha Rodrigues, Judges,
Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Administrator,
after considering the written observations submitted on behalf of:
- the Verein für Konsumenteninformation, by H. Kosesnik-Wehrle, Rechtsanwalt,
- Mr Henkel, by L.J. Kempf and J. Maier, Rechtsanwälte,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the German Government, by R. Wagner, acting as Agent,
- the French Government, by R. Abraham and R. Loosli-Surrans, acting as Agents,
- the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Robertson, barrister,
- the Commission of the European Communities, by J.L. Iglesias Buhigues and C. Ladenburger, acting as Agents,
having regard to the Report for the Hearing,
after hearing the oral observations of the Verein für Konsumenteninformation, represented by S. Langer, Rechtsanwalt; of the French Government, represented by R. Loosli-Surrans; of the United Kingdom Government, represented by A. Robertson, and of the Commission, represented by C. Ladenburger, at the hearing on 11 December 2001,
after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,
gives the following

Judgment
1.
By order of 13 April 2000, received at the Court on 8 May 2000, the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court for a preliminary ruling, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, a question on the interpretation of Article 5(3) of that Convention (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the

United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention їf 29 November 1996 on the Áccession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention').

2.

That question was raised in proceedings between the Verein für Konsumenteninformation ('the VKI'), an association constituted under Austrian law, established in Austria, and Mr Henkel, a German national domiciled in Germany, concerning Mr Henkel's use in contracts concluded with Austrian consumers of terms which the VKI considered to be unfair.

Legal background

The Brussels Convention

3.

The first paragraph of Article 1 of the Brussels Convention, which comprises Title I, entitled 'Scope', states:

'This convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

4.

The rules on jurisdiction laid down by the Brussels Convention are set out in Title II thereof, which consists of Articles 2 to 24.

5.

The first paragraph of Article 2, which forms part of Section 1, entitled 'General provisions', of Title II of the Brussels Convention, sets out the basic rule in the following terms:

'Subject to the provisions of this convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

6.

The first paragraph of Article 3 of the Brussels Convention, which appears in the same section, provides as follows:

'Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this title.'

7.

Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

8.

Under Article 5, which appears in Section 2, entitled 'Special jurisdiction', of Title II of the Brussels Convention:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question ...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'

Directive 93/13/EEC

9.

Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

'1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

The relevant provisions of national law

10.

In Austria, the Konsumentenschutzgesetz (Consumer Protection Law) of 8 March 1979 (BGBl. 1979/140; 'the KSchG') came into force on 1 October 1979.

11.

The KSchG has been amended on several occasions, *inter alia* by a law transposing Directive 93/13 (BGBl. 1997/6).

12.

Paragraph 28 of the KSchG, as amended, provides, with effect from 1 January 1997:

'(1) An injunction may be sought against anyone who in commercial dealings lays down, in general terms and conditions which he uses as a basis for contracts concluded by him or in forms used for contracts in that connection, conditions which are contrary to a statutory prohibition or are unconscionable, and against anyone who recommends such conditions for commercial dealings. This prohibition shall also include the prohibition on relying on such a condition in so far as it has been agreed to in an impermissible manner.

(2) There ceases to be any danger of the use and recommendation of such conditions where a trader gives, within a reasonable period, a declaration of discontinuance secured by an appropriate contractual penalty (Paragraph 1336 of the Allgemeines Bürgerliches Gesetzbuch) following a warning by a body entitled to bring an action under Paragraph 29.'

13.

The VKI is one of the bodies referred to in Paragraph 29 of the KSchG which are entitled to bring such an action.

The main proceedings and the question referred for a preliminary ruling

14.

It is clear from the documents relating to the case in the main proceedings that the VKI is a non-profit-making organisation whose object is the protection of consumers and their interests.

15.

Mr Henkel is a trader, domiciled in Munich (Germany), who organises sales-promotion trips, *inter alia* in Austria.

16.

In the context of his contractual dealings with consumers domiciled in Vienna (Austria), Mr Henkel used general terms and conditions that the VKI considers to be contrary to certain provisions of Austrian legislation.

17.

As an association, the VKI brought an action pursuant to Paragraph 28 of the KSchG before the Handelsgericht Wien (Commercial Court, Vienna), seeking an injunction against Mr Henkel to prevent him from using the contested terms in contracts concluded with Austrian clients.

18.

Mr Henkel claimed that the Austrian courts had no jurisdiction. In his submission, the action brought by the VKI cannot be regarded as relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention on the ground that there has been neither harmful behaviour nor damage suffered within the territorial jurisdiction of the court seized.

19.

The Handelsgericht Wien found that the VKI was not pleading any damage arising out of a tort or delict and hence declared that it had no jurisdiction.

20.

That decision was overturned on appeal by the Oberlandesgericht Wien (Higher Regional Court, Vienna) which considered that Article 5(3) of the Brussels Convention also covers preventive actions brought by an association such as the VKI without requiring it to have personally sustained any damage.

21.

An appeal on a point of law was brought before the Oberster Gerichtshof which is uncertain whether the action at issue in the main proceedings falls within the scope of Article 5(3) of the Brussels Convention or whether it is a matter relating to a contract within the meaning of Article 5(1) of that convention.

22.

According to that court it is not obvious that that action is a matter relating to tort or delict. The VKI does not plead any damage to its property. While it is true that its right to bring an action stems not from a contract, but from statute, and serves to avert future damage to consumers, such damage is none the less contractual in origin. The application of Article 5(1) of the Brussels Convention is therefore conceivable. However, it is also possible to consider that the unlawful act consists of the undermining of legal stability by a trader's use of unfair terms.

23.

Moreover, the question arises whether a preventive action, which is by its very nature brought before any damage occurs, is capable of coming within the scope of Article 5(3) of the Brussels Convention, given that that provision, which refers to the place where the harmful event occurred, appears to presuppose the existence of damage.

24.

The Oberster Gerichtshof took the view that, in those circumstances, the outcome of the case before it required an interpretation of the Brussels Convention and it therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the right to obtain an injunction to prohibit the use of unlawful or unconscionable general terms and conditions provided for in Paragraph 28 of the [KSchG], which is asserted by a consumer protection organisation pursuant to Paragraph 29 of the KSchG and in accordance with Article 7(2) of ... Directive 93/13/EEC ..., constitute a claim arising out of matters relating to tort, delict or quasi-delict which may be asserted in courts with the special jurisdiction provided for in Article 5(3) of the Brussels Convention ...?'

The national court's question

25.

The first point to be noted is that the United Kingdom Government submits that an action such as that brought by the VKI does not fall within the scope of the Brussels Convention. Pursuant to the first paragraph of Article 1 thereof, that convention applies only 'in civil and commercial matters', whereas a consumer protection organisation such as the VKI must be regarded as a public authority and its right to obtain an injunction to prevent the use of unfair terms in contracts, which is exercised in the main proceedings, constitutes a public law power. An organisation of that kind takes on the task, in the public interest, of ensuring the protection of the entire class of consumers, and its right to bring proceedings to obtain an injunction preventing unlawful behaviour by traders stems from statute, independent of any private law relationship arising out of a contract between a professional and a private individual.

26.

However, it is settled case-law that actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention only in so far as that authority is acting in the exercise of public powers (see, to that effect, Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, paragraph 4; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 8, and Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 20).

27.

That is the case in a dispute which concerns the recovery of charges payable by a person governed by private law to a national or international body governed by pubic law for the use of equipment and services provided by that body, in particular where such use is obligatory and exclusive (see *LTU*, cited above, paragraph 4).

28.

Similarly, the Court has held that the concept of 'civil and commercial matters' within the meaning of the first paragraph of Article 1 of the Brussels Convention does not include actions brought by the State responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of that administering agent in the exercise of its public authority (*Rüffer*, cited above, paragraphs 9 and 16).

29.

Although it thus follows from the case-law of the Court that certain types of dispute must be regarded as excluded from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see *LTU*, paragraph 4), the case-law arising from *LTU* and *Rüffer* cannot be applied to an action such as that at issue in the main proceedings.

30.

Not only is a consumer protection organisation such as the VKI a private body, but in addition, as the German Government correctly observed, the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerns the prohibition on traders' using unfair terms in their contracts with consumers and thus seeks to make relationships governed by private law subject to review by the courts. Hence, an action of that kind is a civil matter within the meaning of the first paragraph of Article 1 of the Brussels Convention.

31.

In those circumstances, the objection raised by the United Kingdom Government cannot be accepted.

32.

As to the question referred by the national court, it should be noted at the outset that Articles 13 to 15, which comprise Section 4, entitled 'Jurisdiction over consumer contracts', of Title II of the Brussels Convention, are not applicable in the main proceedings.

33.

As the Court held in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, a legal person which acts as

assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers.

34.

It follows that, in order to answer the question referred by the national court, it need only be determined whether a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention, or in fact a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

35.

In that regard, the Court has repeatedly held that the concepts of 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' in paragraphs 1 and 3 respectively of Article 5 of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of that convention, in order to ensure that it is both given full effect and applied uniformly in all the Contracting States (see, in particular, Case 34/82 *Peters* [1983] ECR 987, paragraphs 9 and 10; Case 189/87 *Kalfelis* [1988] ECR 5565, paragraphs 15 and 16, and Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 15).

36.

It is also settled case-law that the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and are not matters relating to a contract within the meaning of Article 5(1) of that convention (see, in particular, *Kalfelis*, cited above, paragraph 17; *Reichert and Kockler*, cited above, paragraph 16; Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 22, and Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 33).

37.

It is therefore necessary in the first instance to examine whether an action such as that at issue in the main proceedings is contractual in nature.

38.

In a situation such as that in the main proceedings, the consumer protection organisation and the trader are in no way linked by any contractual relationship.

39.

Admittedly, it is likely that the trader has already entered into contracts with a number of consumers. However, whether the court action is subsequent to a contract already concluded between the trader and a consumer or that action is purely preventive in nature and its sole aim is to prevent the occurrence of future damage, the consumer protection organisation which brought that action is never itself a party to the contract. The legal basis for its action is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer.

40.

In those circumstances, an action such as that brought in the main proceedings cannot be regarded as a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention.

41.

By contrast, such an action meets all the criteria established by the Court in the case-law referred to in paragraph 36 of this judgment inasmuch as, first, it does not concern matters relating to a contract within the meaning of Article 5(1) of the Brussels Convention and, second, it seeks to establish the liability of the defendant in tort, delict or quasi-delict, in the present case in respect of the trader's non-contractual obligation to refrain in his dealings with consumers from certain behaviour deemed unacceptable by the legislature.

42.

The concept of 'harmful event' within the meaning of Article 5(3) of the Brussels Convention is broad in scope (Case 21/76 *Bier ('Mines de Potasse d'Alsace')* [1976] ECR 1735, paragraph 18) so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations such as the VKI to prevent.

43.

Furthermore, that is the only interpretation consistent with the purpose of Article 7 of Directive 93/13. Accordingly, the efficacy of the actions under that provision to prevent the continued use of unlawful terms would be

considerably diminished if those actions could be brought only in the State where the trader is domiciled.

44.

Mr Henkel and the French Government have, however, submitted that Article 5(3) of the Brussels Convention refers to the place where the harmful event occurred and therefore presupposes, according to its actual terms, the existence of damage. They argue that the same conclusion is dictated by the Court's interpretation of that provision, according to which the expression ‘place where the harmful event occurred’ must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to that damage, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places (see, in particular, *Mines de Potasse d'Alsace*, cited above, paragraphs 24 and 25; Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 10; Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 20, and Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 11). In their submission, it follows that Article 5(3) of the Brussels Convention cannot be applied to purely preventive actions which are brought before any actual damage has occurred and are intended to prevent the occurrence of a future harmful event.

45.

That objection is not however well founded.

46.

The rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention is based on the existence of a particularly close connecting factor between a dispute and the courts for the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see to that effect, *inter alia*, *Mines de Potasse d'Alsace*, paragraphs 11 and 17; *Dumez France and Tracoba*, paragraph 17; *Shevill and Others*, paragraph 19, and *Marinari*, paragraph 10). The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. Those considerations are equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.

47.

That interpretation is moreover supported by the Report by Professor Schlosser on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, pp. 71, 111), which states that Article 5(3) of the Brussels Convention also covers actions whose aim is to prevent the imminent commission of a tort (or delict).

48.

It is therefore not possible to accept an interpretation of Article 5(3) of the Brussels Convention according to which application of that provision is conditional on the actual occurrence of damage. Furthermore, it would be inconsistent to require that an action to prevent behaviour considered to be unlawful, such as that brought in the main proceedings, whose principal aim is precisely to prevent damage, may be brought only after that damage has occurred.

49.

Finally, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), while not applicable *ratione temporis* to the main proceedings, is such as to confirm the interpretation that Article 5(3) of the Brussels Convention does not presuppose the existence of damage. That regulation clarified the wording of Article 5(3) of the Brussels Convention that the new version of that provision resulting from that regulation refers to ‘the place where the harmful event occurred or may occur’. In the absence of any reason for interpreting the two provisions in question differently, consistency requires that Article 5(3) of the Brussels Convention be given a scope identical to that of the equivalent provision of Regulation No 44/2001. This is all the more necessary given that that regulation is intended to replace the Brussels Convention in relations between Member States with the exception of the Kingdom of Denmark, with that convention continuing to apply between the Kingdom of Denmark and the Member States bound by that regulation.

50.

In the light of all the foregoing considerations, the answer to the question referred by the national court must be that the rules on jurisdiction laid down in the Brussels Convention must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

Costs

51.

The costs incurred by the Austrian, German, French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Oberster Gerichtshof by order of 13 April 2000, hereby rules:

The rules on jurisdiction laid down in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

Case C-336/00
Huber

JUDGMENT OF THE COURT (Fifth Chamber)
19 September 2002 (1)

(Agriculture - Part-financed aid - Repayment - Legal basis - Protection of legitimate expectations - Legal certainty - Procedural autonomy of Member States)

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Republik Österreich
and
Martin Huber,

on the validity and interpretation of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1),

THE COURT (Fifth Chamber),
composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,
Advocate General: S. Alber,

Registrar: M.-F. Contet, Administrator,
after considering the written observations submitted on behalf of:
- Republik Österreich, by U. Weiler, acting as Agent,
- M. Huber, by A. Klauser, Rechtsanwalt,
- Austrian Government, by H. Dossi, acting as Agent,
- Council of the European Union, by J.-P. Hix and F.P. Ruggeri Laderchi, acting as Agents,
- Commission of the European Communities, by G. Braun and G. Berscheid, acting as Agents,
having regard to the Report for the Hearing,
after hearing the oral observations of the Republik Österreich, represented by U. Weiler, of M. Huber, represented by B. Girsch, Rechtsanwalt, of the Austrian Government, represented by C. Pesendorfer, acting as Agent, of the Council, represented by J.-P. Hix and F.P. Ruggeri Laderchi, and of the Commission, represented by G. Braun and G. Berscheid, at the hearing on 24 January 2002,
after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,
gives the following

Judgment

1.

By order of 26 January 2000, received at the Court on 14 September 2000, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 234 EC six questions on the validity and interpretation of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1, hereinafter 'Regulation No 2078/92').

2.

Those questions were raised in proceedings between the Republik Österreich and M. Huber, a farmer, regarding a

claim for the repayment of aid granted to M. Huber by the Austrian authorities pursuant to Regulation No 2078/92.

Legal framework

Community legislation

3.

Regulation No 2078/92, which had as its legal basis Articles 42 of the EC Treaty (now Article 36 EC) and 43 of the EC Treaty (now, after amendment, Article 37 EC) and which was repealed as of 1 January 2000 by Article 55(1) of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80), instituted a series of measures with the objective, according to the first paragraph of Article 1, to:

'...

- accompany the changes to be introduced under the market organisation rules,
- contribute to the achievement of the Community's policy objectives regarding agriculture and the environment,
- contribute to providing an appropriate income for farmers'.

4.

The Council intended, in particular, to encourage the use of less polluting and less intensive agricultural production methods and to contribute to balancing the market (see the first, second, fifth, sixth and twelfth recitals in the preamble to Regulation No 2078/92).

5.

For that purpose, Regulation No 2078/92 instituted, as expressed in Article 1, a 'Community aid scheme part-financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF)'.

6.

Article 2(1) of Regulation No 2078/92 provided:

'Subject to positive effects on the environment and the countryside, the scheme may include aid for farmers who undertake:

(a) to reduce substantially their use of fertilizers and/or plant protection products, or to keep to the reductions already made, or to introduce or continue with organic farming methods;

...'.

7.

Article 3(1) of Regulation No 2078/92 provided that Member States were to implement the aid scheme provided for in Article 2 by means of 'multiannual zonal programmes' in order to attain the objectives referred to in Article 1 of the regulation. In accordance with Article 3(3)(d) and (f) of the regulation, those programmes, to be drawn up for a minimum period of five years, were to contain, respectively, 'the conditions for the grant of aid, taking into account the problems encountered' and 'the arrangements made to provide appropriate information for agricultural and rural operators'.

8.

Article 4(1) of the same regulation stated:

'An annual premium per hectare or livestock unit removed from a herd shall be granted to farmers who give one or more of the undertakings referred to in Article 2 for at least five years, in accordance with the programme applicable in the zone concerned. ...'

9.

Article 4(2) set the maximum eligible amount of the premium, while under Article 5(1) of the regulation, Member States were obliged to determine, in order to achieve its objectives:

'(a) the conditions for granting aid;

(b) the amount of aid to be paid, on the basis of the undertaking given by the beneficiary and of the loss of income and of the need to provide an incentive;

(c) the terms on which the aid for the upkeep of abandoned land as referred to in Article 2(1)(e) may be granted to persons other than farmers, where no farmers are available;

(d) the conditions to be met by the beneficiary to ensure that compliance with the undertakings may be verified and monitored;

(e) the terms on which the aid may be granted where the farmer personally is unable to give an undertaking for the minimum period required.'

10.

In accordance with Article 7 of Regulation No 2078/92, national aid programmes were to be communicated for approval to the Commission, which was to determine their compliance with the regulation, 'the nature of the measures eligible for part-financing' and 'the total amount of expenditure eligible for part-financing'.

11.

Article 10 of Regulation No 2078/92 provided that Member States might impose additional aid measures, provided that those measures complied with the objectives of the regulation and with Article 92 of the EC Treaty (now, after amendment, Article 87 EC), as well as Articles 93 and 94 of the EC Treaty (now Articles 88 EC and 89 EC).

12.

Furthermore, under Article 8 of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218), which was repealed by Article 16(1) of Council Regulation (EC) No 1258/99 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103), Member States were to take the measures necessary to, *inter alia*, recover sums lost as a result of irregularities or negligence. According to the first subparagraph of paragraph 2 of that provision, in the absence of recovery, the Community should in principle bear the financial consequences, unless the irregularities or negligence in question might be attributed to administrative authorities or other bodies of the Member States.

National legislation

13.

In order to implement Regulation No 2078/92, the Austrian Federal Ministry of Agriculture and Forestry adopted a special directive concerning the Austrian programme of aid for extensive agriculture compatible with the requirements of the protection of the environment and the maintenance of the countryside (ÖPUL) (hereinafter, 'the ÖPUL directive'). The Commission approved that programme by decision of 7 June 1995.

14.

The ÖPUL directive was published only in the form of a brief note in the *Amtsblatt zur Wiener Zeitung* (official gazette published with the *Wiener Zeitung*) of 1 December 1995, a bulletin in which it was mentioned that the directive could be consulted at the Federal Ministry of Agriculture and Forestry.

15.

The ÖPUL directive, to which several annexes are attached, comprises a general part relating, *inter alia*, to the conditions for the grant of aid which are common to different branches of the programme, to the clearing of claims for aid and to the repayment in case of failure to comply with the conditions under which the aid is granted, as well as a part devoted to the specific conditions governing the award of aid.

16.

Directives such as the ÖPUL directive do not, in Austrian law, have the status of abstract and general rules, but they are taken into consideration, when a contract is concluded, as clauses with contractual effect.

The main proceedings and the questions referred for a preliminary ruling

17.

On 21 April 1995, Mr Huber applied for aid under the ÖPUL directive. That aid was granted to him on 12 December 1995 by Agrarmarkt Austria - a public-law corporation set up by the Federal Ministry for Agriculture and Forestry to clear aid under the ÖPUL directive - on behalf of the Republik Österreich, amounting to ATS 79 521. The ÖPUL directive had not been communicated to the beneficiary.

18.

When Mr Huber received a letter from Agrarmarkt Austria seeking repayment of the aid he had received, he assumed that he had made a mistake and proposed to repay that aid by monthly instalments of ATS 5 000.

19.

On 13 May 1998, the Finanzprokurator (Representative of the Federal Finance Ministry), duly authorised by Agrarmarkt Austria, ordered Mr Huber to repay the total aid which he had received, together with interest - namely, a sum of ATS 90 273.

20.

Subsequently, in legal proceedings, the Republik Österreich, represented by the Finanzprokurator, claimed the repayment of ATS 79 521, increased by the amount of interest due since 12 December 1995. It based its claim on the fact that Mr Huber had, in disregard of the ÖPUL directive, used prohibited plant protection products - namely, the fungicides Euparen, Orthophaldan, Delan and Folit. Mr Huber was also said to have admitted that the claim for repayment was well founded.

21.

Mr Huber contested that claim, contending, primarily, that he had not infringed the directive, even though he had acknowledged using the products mentioned in the preceding paragraph, or admitted that he was obliged to refund the aid paid to him. More specifically, he contended that the Austrian authorities had merely informed him, when the contract was concluded, that he could not use herbicides in fruit and wine growing, with the result that he had not given up the use of the abovementioned fungicides.

22.

Moreover, according to Mr Huber, the ÖPUL directive had not been annexed to the application form and had not been made known to him. He also claimed that the wording of the application was imprecise and that the Austrian authorities paid the aid even though they were aware of his use of the abovementioned fungicides. In those circumstances Mr Huber's conduct was, he claimed, attributable to an error made by the national authorities themselves.

23.

The Bezirksgericht Innere Stadt Wien (Central Vienna District Court, Austria) dismissed the application on the ground that the directives could not be pleaded as against Mr Huber and that there had been no admission on his part.

24.

The Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) upheld the appeal brought against the judgment at first instance, on the basis of a ground of appeal raised in the alternative, and referred the case back to the Bezirksgericht.

25.

However, the Landesgericht did not find that there had been an admission and considered that it had not been clearly established either that the products used by Mr Huber fell within the category of herbicides or what was the precise content of the documents which had been made available to him. According to that court, the directives adopted by the Republik Österreich did not form part of the contract since they had not been made public, apart from a brief note in the *Amtsblatt zur Wiener Zeitung*. In addition, the description of Mr Huber's obligations was not sufficiently clear, and he could have learned of the aid programme defined in the ÖPUL directive only through costly and difficult enquiries.

26.

The Oberster Gerichtshof, hearing an appeal for which leave had been granted by the Berufungsgericht, found, as a preliminary point, that admission does not constitute a valid legal basis for the recovery of aid. It went on to raise questions as to the appropriateness of the legal basis used for the adoption of Regulation No 2078/92, as to the scope of certain of its provisions and as to the conditions governing the recovery of aid wrongly paid under the regulation.

27.

In those circumstances, the Oberster Gerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Was Council Regulation No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside ... validly adopted?

(2) Does a decision on the approval of a programme under Article 7 of Council Regulation No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside also encompass the content of the programmes submitted by the Member States for approval?

(3) Are farmers who apply for aid under that programme also to be regarded as persons to whom the decision is addressed and is the form of the notification chosen in that regard, in particular the obligation on the Member States to provide farmers with appropriate information, sufficient to make the decision binding on those farmers and any conflicting contracts granting aid ineffective?

(4) May a farmer in this instance, irrespective of the content of the programme within the meaning of Regulation No 2078/92 approved by the Commission, rely on the statements of the administrative bodies of the Member States so that a claim for recovery is precluded?

(5) Is it open to the Member States under Regulation No 2078/92 to implement programmes within the meaning of that regulation either by private-sector measures (contracts) or by forms of State action?

(6) In assessing whether restrictions on the possibilities of claiming recovery on grounds of the protection of legitimate expectations and legal certainty accord with the interests of Community law, is only the specific form of action to be taken into account or also the possibilities of claiming recovery which exist in other forms of action and particularly favour the Community interests?'

28.

By order of 18 April 2002, Mr Huber was granted legal aid limited to specific amounts.

The questions referred for a preliminary ruling

First question

29.

By its first question, the referring court is asking, essentially, whether Regulation No 2078/92 is valid even though it was adopted on the basis of Articles 42 and 43 of the Treaty and not on the basis of Article 130s of the EC Treaty (now, after amendment, Article 175 EC).

30.

In that regard, it should be borne in mind that, according to the settled case-law of the Court, the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see, *inter alia*, Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, known as '*Titanium dioxide*', paragraph 10, and Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43).

31.

If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component (see Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraphs 19 and 21, Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraphs 39 and 40, and Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 59). Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases (see, to that effect, the *Titanium dioxide* judgment, paragraphs 13 and 17, and *Parliament* v *Council*, cited above, paragraph 38, as well as Opinion 2/00 [2001] ECR I-9713, paragraph 23).

32.

In this case, the parties agree that Regulation No 2078/92 simultaneously pursued objectives of agricultural policy and environmental protection.

33.

The Court has held that Articles 130r of the EC Treaty (now, after amendment, Article 174 EC) and 130s of the Treaty are intended to confer powers on the Community to undertake specific action on environmental matters, while leaving intact its powers under other provisions of the Treaty, even if the measures in question pursue at the same time one of the objectives of environmental protection (see Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraph 26). The third sentence of the first subparagraph of Article 130r(2) of the Treaty, in its version prior to the entry into force of the Treaty of Amsterdam, the substance of which was repeated in Article 6 EC, provides, in that respect, that environmental protection requirements are to be a component of the Community's other policies, so that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements (see, to that effect, the abovementioned *Titanium dioxide* judgment, paragraph 22, and *Mondiet*, paragraph 27).

34.

As regards Article 43 of the Treaty, it is settled case-law that that article is the appropriate legal basis for any legislation concerning the production and marketing of the agricultural products listed in Annex II to the EC Treaty which contributes to the attainment of one or more of the objectives of the common agricultural policy set out in Article 39 of the EC Treaty (now Article 33 EC) (Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 14, Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 133 and *Commission* v *Council*, cited above, paragraph 47). Moreover, Article 42 of the Treaty authorises the Council to provide for the grant of aid for production of and trade in agricultural products, account being taken of the objectives set out in Article 39, notwithstanding the provisions of the chapter of the Treaty which concern rules on competition.

35.

As pointed out by the Commission and the Council, as well as by the Advocate General at point 35 of his Opinion, it is clear from the recitals and Article 1 of Regulation No 2078/92 that the main purpose of the support measures for which that regulation provided was to regulate the production of agricultural products within the meaning of Annex II to the Treaty, in order to promote the transition from intensive cultivation to a more extensive cultivation, of better quality, with farmers being compensated for the financial consequences of this by the granting of aid.

36.

The fact that Regulation No 2078/92 was of a nature such as to promote more environmentally-friendly forms of production - which is certainly a genuine objective, but an ancillary one, of the common agricultural policy - cannot in itself justify the legal basis of that regulation being constituted not only by Articles 42 and 43 but also by Article 130s of the Treaty.

37.

Accordingly, consideration of the first question has not disclosed any factor of such a kind as to affect the validity of

Regulation No 2078/92.

The second question

38.

By its second question, the referring court is asking, essentially, whether Article 7(2) of Regulation No 2078/92 is to be interpreted as meaning that a decision approving a national programme of aid also encompasses its content, so that, once approved, the programme must be considered to be an act of Community law.

39.

As is clear from Article 7(2) and (3) of Regulation No 2078/92, the Commission approves the programmes referred to in Article 3(1) of the regulation after satisfying itself as to their compliance with the regulation and after determining the nature of the measures 'eligible for part-financing' and the total amount of expenditure linked to their financing. It follows that the Commission's examination necessarily covers the content of those programmes.

40.

None the less, Commission approval of a national aid programme does not in any way have the effect of conferring on that programme the nature of an act of Community law. In those circumstances, where an aid contract is incompatible with the programme approved by the Commission, it is for the national courts to draw the appropriate inferences from this in regard to national law, by taking account of the relevant Community law in applying national law.

41.

The answer to the second question must therefore be that Article 7(2) of Regulation No 2078/92 must be interpreted as meaning that a Commission decision approving a national aid programme also encompasses its content, without, however, conferring on that programme the nature of an act of Community law.

The third question

42.

By its third question, the referring court is asking, essentially, first, whether farmers who applied for aid under Regulation No 2078/92 are to be regarded as persons to whom the Commission's decision approving the national aid programme referred to in Article 7(2) of the regulation is addressed and, second, whether the publication in an official bulletin of a mere information note mentioning that the programme is available to the public at the Ministry of Agriculture and Forestry is sufficient to make that decision binding on the farmers concerned and to render invalid any aid contracts incompatible with it.

43.

It must be observed, in that regard, that the decision by which the Commission approves a national aid programme, thereby acknowledging its compliance with Regulation No 2078/92 in the light of the assessment criteria set out in Article 7(2) of the regulation, is addressed exclusively to the Member State in point.

44.

That being the case, it is for the national court, where relevant, to review the legality of an individual support measure adopted in pursuance of the national aid programme in the light both of that programme, as approved by the Commission, and of Regulation No 2078/92.

45.

Similarly, the question whether the publicity given to the ÖPUL directive was such as to render it binding on Austrian farmers is primarily a question governed by national law.

46.

None the less, without laying down specific methods by which national aid programmes must be publicised, Article 3(3)(f) of Regulation No 2078/92 provides, in a general manner, that those programmes are to contain arrangements made to provide 'appropriate information for agricultural and rural operators'.

47.

In that regard, it is not clear that the Austrian authorities fully complied, in the case in the main proceedings, with their obligation to provide appropriate information to the beneficiary of the aid, pursuant to Article 3(3)(f) of Regulation No 2078/92 and, in particular, that they effectively brought to his knowledge the provisions of the ÖPUL directive when the aid was granted or, further, that they took the necessary measures to enable him to learn of the directive under satisfactory circumstances. It is for the referring court to decide that point, taking account of the fact that, at the time Mr Huber submitted his application, the definitive version of the national aid programme, which was to serve as the basis for granting aid, did not exist, since the Commission had not yet approved it.

48.

In the light of the foregoing considerations, the answer to the third question must be that a Commission decision approving a national aid programme as referred to in Article 7 of Regulation No 2078/92 is addressed only to the

Member State concerned. It is for the national courts to decide, in the light of national law, whether the publicity given to that programme enabled it to become binding on agricultural and rural operators, in particular by ensuring compliance with the requirement of appropriate information laid down in Article 3(3)(f) of that regulation.

The fourth question

49.

By its fourth question, the referring court is asking, essentially, whether, and to what extent, a farmer who was granted aid under a national aid programme pursuant to Article 3(1) of Regulation No 2078/92 may rely on the principles of the protection of legitimate expectations and legal certainty for the purpose of resisting recovery of that aid.

50.

The referring court finds, first, that Mr Huber submitted an application for support in April 1995, that is, before the national aid programme was approved by the Commission in June 1995 and before its publication by way of a brief note in the *Amtsblatt zur Wiener Zeitung* in December 1995, and, second, that that application was accepted without reservations by the Austrian authorities.

51.

The Republik Österreich and the Austrian Government maintain that it was Mr Huber's responsibility to acquaint himself with the national aid programme and with the scope of his contractual obligations before the conclusion of the contract. They refer to 'notices' sent to any farmer intending to apply for aid, which included the relevant information, in particular as regards the existence and content of the ÖPUL directive.

52.

The Austrian Government adds that the draft of the ÖPUL directive at the time when Mr Huber submitted his application did not differ from the version which was finally approved by the Commission.

53.

By contrast, Mr Huber maintains that, owing to inadequate publication of the national aid programme, which was made available to the public only in the offices of the relevant ministry in Vienna, he could have learned of its precise content, following approval of the ÖPUL directive, only through disproportionate efforts. In those circumstances, the principle of the protection of legitimate expectations precludes repayment of the aid, which had been received in good faith.

54.

In that regard, it should be recalled that, under Article 8(1) of Regulation No 729/70, the Member States, in accordance with national provisions laid down by law, regulation or administrative action, were to take the measures necessary to recover sums lost as a result of irregularities or negligence. This was the case as regards amounts paid under a national aid programme approved by the Commission in accordance with a Council regulation and part-financed by the Community.

55.

It also follows from the case-law of the Court that, in the absence of provisions of Community law, disputes concerning the recovery of amounts wrongly paid under Community law must be decided by national courts in application of their own domestic law, subject to the limits imposed by Community law, on the basis that the rules and procedures laid down by domestic law must not have the effect of making it practically impossible or excessively difficult to recover the aid not due and that the national legislation must be applied in a manner which is not discriminatory as compared to procedures for deciding similar national disputes (see, to that effect, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 19, Case C-366/95 *Landbrugsministeriet* v *Steff-Houlberg Export and Others* [1998] ECR I-2661, paragraph 15 and Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraph 24).

56.

Accordingly, it cannot be regarded as contrary to Community law for national law, as far as the cancellation of administrative measures and the recovery of sums wrongly paid by public authorities are concerned, to take into account, in addition to the principle of legality, the principles of the protection of legitimate expectations and legal certainty, since those principles form part of the legal order of the Community (see, to that effect, *Deutsche Milchkontor*, cited above, paragraph 30, Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 33 and Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 60).

57.

However, the Community's interest in recovering aid which has been received in breach of the conditions under which it was granted must be taken fully into consideration in assessing the interests in question (*Deutsche Milchkontor*, paragraph 32, *Oelmühle and Schmidt Söhne*, paragraph 24 and *Flemmer and Others*, paragraph 61).

58.

Moreover, it is settled case-law that the beneficiary of aid may challenge a demand for recovery only if he acted in good faith when applying for it (see, to that effect, *Oelmühle and Schmidt Söhne*, paragraph 29). In that regard, it is for the national court to consider:
- whether the ÖPUL directive was sufficiently clear in prohibiting the use of the plant protection products mentioned in paragraph 20 of the present judgment, taking into account the observations set out by the Advocate General at point 127 of his Opinion;
- whether specific obligations relating to the use of plant protection products were clearly evident from the aid application form or the notices annexed to it, taking into account the observations set out by the Advocate General at point 121 of his Opinion;
- whether the ÖPUL directive had been incorporated, in whole or in part, in the aid contract;
- whether the draft of the ÖPUL directive or its final text had in fact been made known to Mr Huber;
- or, if this was not the case, whether Mr Huber had been negligent, as a farmer exercising ordinary care would not have been, in not seeking to obtain precise knowledge of the content of the ÖPUL directive by travelling to the Federal Ministry of Agriculture and Forestry in Vienna in order to consult the text of the directive and, specifically, whether the need for such an on-the-spot consultation in order to learn the full extent of their obligations did not place an excessive burden on the farmers concerned.

59.

In the light of the above, the answer to the fourth question must be that Community law does not preclude the application of the principles of the protection of legitimate expectations and legal certainty in order to prevent the recovery of aid part-financed by the Community which has been wrongly paid, provided that the interest of the Community is also taken into consideration. The application of the principle of the protection of legitimate expectations assumes that the good faith of the beneficiary of the aid in question is established.

The fifth and sixth questions

60.

By its fifth and sixth questions, which it is appropriate to consider together, the referring court asks, first, whether it is open to Member States to implement national aid programmes within the meaning of Article 3(1) of Regulation No 2078/92 either by private-sector measures or by forms of State action and, second, whether, when considering a claim for the recovery of aid wrongly paid under that regulation, a comparison should be made between the conditions governing repayment, under national law, of sums not due according to whether they were paid pursuant to private-sector measures or administrative measures.

61.

In that regard, in so far as Community law, including its general principles, does not contain common rules, it is settled case-law that the national authorities, when implementing Community legislation, must act in accordance with the rules as to procedure and form laid down by the law of the Member State concerned. However, as the Court has already held, recourse to rules of national law is possible only in so far as it is necessary for the implementation of provisions of Community law and in so far as the application of those rules of national law does not jeopardise the scope and effectiveness of that Community law, including its general principles (see, *inter alia*, *Flemmer and Others*, cited above, paragraph 55).

62.

Since Regulation No 2078/92 did not lay down any common rule in that regard, in principle nothing prevented the Republic of Austria from implementing the national aid programmes referred to in Article 3(1) of the regulation through private-sector measures such as contracts.

63.

It is for the referring court to decide whether recourse to such measures does not affect the scope and effectiveness of Community law, bearing in mind in particular that recourse to those measures must enable wrongly paid part-financed aid to be recovered under the same conditions as purely national aid of the same type.

64.

Consequently, the answer to the fifth and sixth questions must be that it is open to Member States to implement national aid programmes within the meaning of Article 3(1) of Regulation No 2078/92 by private-sector measures or by forms of State action, in so far as the national measures in question do not affect the scope and effectiveness of Community law.

Costs

65.

The costs incurred by the Austrian Government, as well as by the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,
THE COURT (Fifth Chamber),
in answer to the questions referred to it by the Oberster Gerichtshof by order of 26 January 2000, hereby rules:

1. Consideration of the first question has not disclosed any factor of such a kind as to affect the validity of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded.

2. Article 7(2) of Regulation No 2078/92, as amended by the abovementioned Act of Accession, must be interpreted as meaning that a Commission decision approving a national aid programme also encompasses its content, without, however, conferring on that programme the nature of an act of Community law.

3. A Commission decision approving a national aid programme as referred to in Article 7 of Regulation No 2078/92, as amended by the Act of Accession, is addressed only to the Member State concerned. It is for the national courts to decide, in the light of national law, whether the publicity given to that programme enabled it to become binding on agricultural and rural operators, in particular by ensuring compliance with the requirement of appropriate information laid down in Article 3(3)(f) of Regulation No 2078/92.

4. Community law does not preclude the application of the principles of the protection of legitimate expectations and legal certainty in order to prevent the recovery of aid part-financed by the Community which has been wrongly paid, provided that the interest of the Community is also taken into consideration. The application of the principle of the protection of legitimate expectations assumes that the good faith of the beneficiary of the aid in question is established.

5. It is open to Member States to implement national aid programmes within the meaning of Article 3(1) of Regulation No 2078/92, as amended by the Act of Accession, by private-sector measures or by forms of State action, in so far as the national measures in question do not affect the scope and effectiveness of Community law.

Joined Cases C-465/00, C-138/01 and C-139/01
Österreichischer Rundfunk

JUDGMENT OF THE COURT

20 May 2003 (1)

(Protection of individuals with regard to the processing of personal data - Directive 95/46/EC - Protection of private life - Disclosure of data on the income of employees of bodies subject to control by the Rechnungshof),

REFERENCES to the Court under Article 234 EC by the Verfassungsgerichtshof (C-465/00) and the Oberster Gerichtshof (C-138/01 and C-139/01) (Austria) for preliminary rulings in the proceedings pending before those courts between

Rechnungshof (C-465/00)

and

Österreichischer Rundfunk,

Wirtschaftskammer Steiermark,

Marktgemeinde Kaltenleutgeben,

Land Niederösterreich,

Österreichische Nationalbank,

Stadt Wiener Neustadt,

Austrian Airlines, Österreichische Luftverkehrs-AG,

and between

Christa Neukomm (C-138/01),

Joseph Lauermann (C-139/01)

and

Österreichischer Rundfunk,

on the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,
Advocate General: A. Tizzano,

Registrar: M.-F. Contet, Principal Administrator,
after considering the written observations submitted on behalf of:
- the Rechnungshof, by F. Fiedler, acting as Agent (C-465/00),
- Österreichischer Rundfunk, by P. Zöchbauer, Rechtsanwalt (C-465/00),
- Wirtschaftskammer Steiermark, by P. Mühlbacher and B. Rupp, acting as Agents (C-465/00),
- Marktgemeinde Kaltenleutgeben, by F. Nistelberger, Rechtsanwalt (C-465/00),
- Land Niederösterreich, by E. Pröll, C. Kleiser and L. Staudigl, acting as Agents (C-465/00),
- Österreichische Nationalbank, by K. Liebscher and G. Tumpel-Gugerell, acting as Agents (C-465/00),
- Stadt Wiener Neustadt, by H. Linhart, acting as Agent (C-465/00),
- Austrian Airlines, Österreichische Luftverkehrs-AG, by H. Jarolim, Rechtsanwalt (C-465/00),
- the Austrian Government, by H. Dossi, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the Danish Government, by J. Molde, acting as Agent (C-465/00),
- the Italian Government, by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato (C-465/00) and O.

Fiumara, avvocato generale dello Stato (C-138/01 and C-139/01),
- the Netherlands Government, by H.G. Sevenster, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the Finnish Government, by E. Bygglin, acting as Agent (C-465/00),
- the Swedish Government, by A. Kruse, acting as Agent (C-465/00, C-138/01 and C-139/01),
- the United Kingdom Government, by R. Magrill, acting as Agent, and J. Coppel, Barrister (C-465/00, C-138/01 and C-139/01),
- the Commission of the European Communities, by U. Wölker and X. Lewis, acting as Agents (C-465/00, C-138/01 and C-139/01),
having regard to the Report for the Hearing,
after hearing the oral observations of Marktgemeinde Kaltenleutgeben, represented by F. Nistelberger; Land Niederösterreich, represented by C. Kleiser; Österreichische Nationalbank, represented by B. Gruber, Rechtsanwalt; Austrian Airlines, Österreichische Luftverkehrs-AG, represented by H. Jarolim; the Austrian Government, represented by W. Okresek, acting as Agent; the Italian Government, represented by M. Fiorilli, avvocato dello Stato; the Netherlands Government, represented by J. van Bakel, acting as Agent; the Finnish Government, represented by T. Pynnä, acting as Agent; the Swedish Government, represented by A. Kruse and B. Hernqvist, acting as Agent; and the Commission, represented by U. Wölker and C. Docksey, acting as Agent, at the hearing on 18 June 2002,
after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,
gives the following

Judgment

1.

By orders of 12 December 2000 and 28 and 14 February 2001, the first of which was received at the Court on 28 December 2000 and the other two on 27 March 2001, the Verfassungsgerichtshof (Constitutional Court) (C-465/00) and the Oberster Gerichtshof (Supreme Court) (C-138/01 and C-139/01) each referred to the Court under Article 234 EC two questions, formulated in substantially the same way, on the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2.

Those questions were raised in proceedings between, first, the Rechnungshof (Court of Audit) and a large number of bodies subject to its control and, second, Ms Neukomm and Mr Lauermann and their employer Österreichischer Rundfunk ('ÖRF'), a broadcasting organisation governed by public law, concerning the obligation of public bodies subject to control by the Rechnungshof to communicate to it the salaries and pensions exceeding a certain level paid by them to their employees and pensioners together with the names of the recipients, for the purpose of drawing up an annual report to be transmitted to the Nationalrat, the Bundesrat and the Landtage (the lower and upper chambers of the Federal Parliament and the provincial assemblies) and made available to the general public ('the Report').

Legal context

National provisions

3.

Under Paragraph 8 of the Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre (Federal constitutional law on the limitation of salaries of public officials, BGBl. I 1997/64, as amended, 'the BezBegrBVG'):

'1. Bodies subject to control by the Rechnungshof must, within the first three months of each second calendar year, inform the Rechnungshof of the salaries or pensions of persons who in at least one of the two previous calendar years drew salaries or pensions greater annually than 14 times 80% of the monthly reference amount under Paragraph 1 [for 2000, 14 times EUR 5 887.87]. The bodies must also state the salaries and pensions of persons who draw an additional salary or pension from a body subject to audit by the Rechnungshof. Persons who draw a salary or pension from two or more bodies subject to control by the Rechnungshof must inform the bodies of this. If this duty of disclosure is not complied with by the body, the Rechnungshof must inspect the relevant documents and draw up its report on the basis thereof.
2. In the application of subparagraph 1, social benefits and benefits in kind are also to be taken into account, unless they are benefits from sickness or accident insurance or on the basis of comparable provisions of *Land* law. Where several salaries or pensions are paid by bodies subject to control by the Rechnungshof, they are to be aggregated.
3. The Rechnungshof shall summarise that information - for each year separately - in a report. The report shall include all persons whose total yearly salaries and pensions from bodies subject to control by the Rechnungshof

exceed the amount stated in subparagraph 1. The report shall be transmitted to the Nationalrat, the Bundesrat and the Landtage.'

4.

It appears from the orders of reference that, in the light of the *travaux préparatoires* of the BezBegrBVG, legal commentators deduce from the latter provision that the Report must give the names of the persons concerned and against each name the amount of annual remuneration received.

5.

The Verfassungsgerichtshof states that, in accordance with the legislature's intention, the Report must be made available to the general public, so as to provide them with 'comprehensive information'. It states that through this information pressure is brought to bear on the bodies concerned to keep salaries at a low level, so that public funds are used thriftily, economically and efficiently.

6.

The bodies subject to audit by the Rechnungshof are the Federation, the *Länder* (Federal provinces), large municipalities and - where a reasoned request has been made by the government of a *Land* - municipalities with fewer than 20 000 inhabitants, associations of municipalities, social security institutions, statutory professional bodies, Österreichischer Rundfunk, institutions, funds and foundations managed by organs of the Federation or the *Länder* or by persons appointed by them for that purpose, and undertakings managed by the Federation, a *Land* or a municipality or (alone or jointly with other bodies subject to control by the Rechnungshof) controlled through a company-law holding of not less than 50% or otherwise.

Community legislation

7.

Recitals 5 to 9 in the preamble to Directive 95/46 show that it was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC) to encourage the free movement of personal data through the harmonisation of the laws, regulations and administrative provisions of the Member States on the protection of individuals with regard to the processing of such data.

8.

According to Article 1 of Directive 95/46:

'1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.'

9.

In this connection, recitals 2 and 3 of Directive 95/46 read as follows:

'(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

(3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded'.

10.

Recital 10 of Directive 95/46 adds:

'(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; ...'

11.

Under Article 6(1) of Directive 95/46, personal data (that is, in accordance with Article 2(a), 'any information relating to an identified or identifiable natural person') must be:

'(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes ...

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

...'

12.

Article 2(b) of Directive 95/46 defines 'processing of personal data' as:
'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

13.

Under Article 7 of Directive 95/46, personal data may be processed only if one of the six conditions it sets out is satisfied, and in particular if:
'(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
...
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller ... to whom the data are disclosed'.

14.

According to recital 72 of Directive 95/46, the directive allows for the principle of public access to official documents to be taken into account when implementing the principles set out in the directive.

15.

As regards the scope of Directive 95/46, Article 3(1) provides that it is to apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. However, under Article 3(2), the directive 'shall not apply to the processing of personal data:
- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law;
- by a natural person in the course of a purely personal or household activity'.

16.

In addition, Article 13 of Directive 95/46 authorises Member States to derogate from certain of its provisions, in particular Article 6(1), where this is necessary to safeguard *inter alia* 'an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters' (Article 13(1)(e)) or 'a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority' in certain cases referred to, including that in subparagraph (e) (Article 13(1)(f)).

The main proceedings and the questions referred for preliminary rulings

Case C-465/00

17.

Differences of opinion as to the interpretation of Paragraph 8 of the BezBegrBVG arose between the Rechnungshof and a large number of bodies under its control with respect to salaries and pensions paid in 1998 and 1999.

18.

The defendants in the main proceedings, which include local and regional authorities (a *Land* and two municipalities), public undertakings, some of which are in competition with other Austrian or foreign undertakings not subject to control by the Rechnungshof, and a statutory professional body (Wirtschaftskammer Steiermark), did not communicate the data on the income of the employees in question, or communicated the data, to a greater or lesser extent, in anonymised form. They refused access to the relevant documents or made access subject to conditions which the Rechnungshof did not accept. The Rechnungshof therefore brought proceedings before the Verfassungsgerichtshof pursuant to Article 126a of the Bundes-Verfassungsgesetz (Federal Constitutional Law), which gives that court jurisdiction to rule on 'differences of opinion concerning the interpretation of the statutory provisions governing the jurisdiction of the Rechnungshof'.

19.

The Rechnungshof infers from Paragraph 8 of the BezBegrBVG an obligation to list in the Report the names of the persons concerned and show their annual income. The defendants in the main proceedings take a different view and consider that they are not obliged to communicate personal data relating to that income, such as the names or positions of the persons concerned, with an indication of the emoluments received by them. They rely principally on Directive 95/46, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the Convention'), which guarantees respect for private life, and on the argument that the obligation of publicity creates a barrier to the movement of workers, contrary to Article 39

EC.

20.

The Verfassungsgerichtshof wishes essentially to know whether Paragraph 8 of the BezBegrBVG, as interpreted by the Rechnungshof, is compatible with Community law, so that it can interpret it consistently with Community law or declare it (partly) inapplicable, as the case may be.

21.

It points out, in this connection, that the provisions of Directive 95/46, in particular Articles 6(1)(b) and (c) and 7(c) and (e), must be interpreted in the light of Article 8 of the Convention. It considers that comprehensive information for the public, as intended by the national legislature with respect to the income of employees of bodies subject to control by the Rechnungshof whose annual remuneration exceeds a certain threshold (ATS 1 127 486 in 1999 and ATS 1 120 000 in 1998), has to be regarded as an interference with private life, which can be justified under Article 8(2) of the Convention only if that information contributes to the economic well-being of the country. An interference with fundamental rights cannot be justified by the existence of a mere 'public interest in information'. The court doubts that the disclosure, by means of the Report, of data on personal income promotes the 'economic well-being of the country'. In any event, it constitutes a disproportionate interference with private life. The audit carried out by the Rechnungshof is indubitably sufficient to ensure the proper use of public funds.

22.

The national court is also uncertain as to whether the scope of Community law varies according to the nature of the body which is required to contribute to the disclosure of the individual income of some of its employees.

23.

In those circumstances, the Verfassungsgerichtshof decided to stay proceedings and refer the following two questions to the Court for a preliminary ruling:

'1. Are the provisions of Community law, in particular those on data protection, to be interpreted as precluding national legislation which requires a State body to collect and transmit data on income for the purpose of publishing the names and income of employees of:

(a) a regional or local authority,

(b) a broadcasting organisation governed by public law,

(c) a national central bank,

(d) a statutory representative body,

(e) a partially State-controlled undertaking which is operated for profit?

2. If the answer to at least part of the above question is in the affirmative:

Are the provisions precluding such national legislation directly applicable, in the sense that the persons obliged to make disclosure may rely on them to prevent the application of contrary national provisions?'

Cases C-138/01 and C-139/01

24.

Ms Neukomm and Mr Lauermann, who are employees of ÖRF, a body subject to control by the Rechnungshof, brought proceedings in the Austrian courts for interim orders to prevent ÖRF from acceding to the Rechnungshof's request to communicate data.

25.

The applications for interim orders were dismissed at first instance. The Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna) (Austria) (C-138/01), distinguishing between the transmission of the data to the Rechnungshof and its inclusion in the Report, considered that the Report had to be anonymous, while the mere transmission of the data to the Rechnungshof, even including names, did not infringe Article 8 of the Convention or Directive 95/46. The Landesgericht St Pölten (Regional Court, St Pölten) (Austria) (C-139/01), on the other hand, held that the inclusion of data with names in the Report was lawful, since an anonymised report would not enable the Rechnungshof to exercise adequate control.

26.

The Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria) upheld on appeal the dismissal of the applications for interim orders by the courts at first instance. While stating, in connection with Case C-138/01, that in communicating the data in question the employer is merely performing a task imposed on him by law and that the subsequent processing of the data by the Rechnungshof is not carried out under the control of the employer, the Oberlandesgericht held, in the context of Case C-139/01, that Paragraph 8 of the BezBegrBVG was consistent with fundamental rights and with Directive 95/46, even in the case of a list by name of the persons concerned.

27.

Ms Neukomm and Mr Lauermann appealed on a point of law (*Revision*) to the Oberster Gerichtshof.

28\.

The Oberster Gerichtshof, referring to the reference for a preliminary ruling in Case C-465/00 and adopting the points of law raised by the Verfassungsgerichtshof, decided to stay proceedings and refer the following two questions to the Court, using the same wording in Cases C-138/01 and C-139/01:

‘1. Are the provisions of Community law, in particular those on data protection (Articles 1, 2, 6, 7 and 22 of Directive 95/46/EC in conjunction with Article 6 (formerly Article F) of the Treaty on European Union and Article 8 of the Convention), to be interpreted as precluding national legislation which requires a public broadcasting organisation, as a legal body, to communicate, and a State body to collect and transmit, data on income for the purpose of publishing the names and income of employees of a broadcasting organisation governed by public law?

2\. If the Court of Justice of the European Communities answers the above question in the affirmative:

Are the provisions precluding national legislation of the kind described above directly applicable, in the sense that an organisation obliged to make disclosure may rely on them to prevent the application of contrary national legislation, and may not therefore rely on an obligation under national law against the employees concerned by the disclosure?’

29\.

By order of the President of the Court of 17 May 2001, Cases C-138/01 and C-139/01 were joined for the purposes of the written procedure, the oral procedure and judgment. Case C-465/00 and Cases C-138/01 and C-139/01 should also be joined for the purposes of judgment.

30\.

The questions put by the Verfassungsgerichtshof and the Oberster Gerichtshof are essentially the same, and should therefore be examined together.

Applicability of Directive 95/46

31\.

To answer the questions as put would presuppose that Directive 95/46 is applicable in the main proceedings. That applicability is, however, disputed before the Court. This point must be decided as a preliminary issue.

Observations submitted to the Court

32\.

The defendants in the main proceedings in Case C-465/00 consider essentially that the control activity exercised by the Rechnungshof falls within the scope of Community law and hence of Directive 95/46. In particular, in that it relates to the remuneration received by the employees of the bodies concerned, that activity touches aspects covered by Community provisions in social matters, such as Articles 136 EC, 137 EC and 141 EC, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), and Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

33\.

They further submit that the control exercised by the Rechnungshof, first, affects the possibility for employees of the bodies concerned to seek employment in another Member State, because of the publicity attaching to their salaries which limits their power of negotiation with foreign companies, and, second, deters nationals of other Member States from seeking employment with the bodies subject to that control.

34\.

Austrian Airlines, Österreichische Luftverkehrs-AG states that the interference with the freedom of movement of workers is particularly serious in its case because it competes with companies of other Member States which are not subject to such control.

35\.

The Rechnungshof and the Austrian and Italian Governments, and to a certain extent the Commission, on the other hand, consider that Directive 95/46 is not applicable in the main proceedings.

36\.

According to the Rechnungshof and the Austrian and Italian Governments, the control activity referred to in Paragraph 8 of the BezBegrBVG, which pursues objectives in the public interest in the field of public accounts, does not fall within the scope of Community law.

37\.

After observing that the directive, which was adopted on the basis of Article 100a of the Treaty, has the objective of

establishing the internal market, an aspect of which is the protection of the right to privacy, the Rechnungshof and the Austrian and Italian Governments submit that the control in question is not such as to obstruct the freedom of movement of workers, since it does not in any way prevent the employees of the bodies concerned from going to work in another Member State or those of other Member States from working for those bodies. In any event, the link between the control activity and the freedom of movement of workers, even supposing that workers do seek to avoid working for a body subject to control by the Rechnungshof because of the publicity attaching to the salaries received, is too uncertain and indirect to constitute an infringement of freedom of movement and thereby to allow a link to be made with Community law.

38.

The Commission adopts a similar position. At the hearing, it nevertheless submitted that the collection of data by the bodies subject to control by the Rechnungshof with a view to communication to the latter and inclusion in the report is itself within the scope of Directive 95/46. Collection serves not only the function of auditing but also, primarily, the payment of remuneration, which constitutes an activity covered by Community law, having regard to the existence of various relevant social provisions in the Treaty, such as Article 141 EC, and to the possible effect of that activity on the freedom of movement of workers.

Findings of the Court

39.

Directive 95/46, adopted on the basis of Article 100a of the Treaty, is intended to ensure the free movement of personal data between Member States through the harmonisation of national provisions on the protection of individuals with regard to the processing of such data. Article 1, which defines the object of the directive, provides in paragraph 2 that Member States may neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection of the fundamental rights and freedoms of natural persons, in particular their private life, with respect to the processing of that data.

40.

Since any personal data can move between Member States, Directive 95/46 requires in principle compliance with the rules for protection of such data with respect to any processing of data as defined by Article 3.

41.

It may be added that recourse to Article 100a of the Treaty as legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis. As the Court has previously held (see Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 85, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60), to justify recourse to Article 100a of the Treaty as the legal basis, what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market. In the present case, that fundamental attribute was never in dispute before the Court with respect to the provisions of Directive 95/46, in particular those in the light of which the national court raises the question of the compatibility of the national legislation in question with Community law.

42.

In those circumstances, the applicability of Directive 95/46 cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular, in those cases, the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations.

43.

Moreover, the applicability of Directive 95/46 to situations where there is no direct link with the exercise of the fundamental freedoms of movement guaranteed by the Treaty is confirmed by the wording of Article 3(1) of the directive, which defines its scope in very broad terms, not making the application of the rules on protection depend on whether the processing has an actual connection with freedom of movement between Member States. That is also confirmed by the exceptions in Article 3(2), in particular those concerning the processing of personal data 'in the course of an activity ... provided for by Titles V and VI of the Treaty on European Union' or 'in the course of a purely personal or household activity'. Those exceptions would not, at the very least, be worded in that way if the directive were applicable exclusively to situations where there is a sufficient link with the exercise of freedoms of movement.

44.

The same observation may be made with regard to the exceptions in Article 8(2) of Directive 95/46, which concern the processing of specific categories of data, in particular those in Article 8(2)(d), which refers to processing carried out 'by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim'.

45.

Finally, the processing of personal data at issue in the main proceedings does not fall within the exception in the first indent of Article 3(2) of Directive 95/46. That processing does not concern the exercise of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union. Nor is it a processing operation concerning public security, defence, State security or the activities of the State in areas of criminal law.

46.

The purposes set out in Articles 7(c) and (e) and 13(e) and (f) of Directive 95/46 show, moreover, that it is intended to cover instances of data processing such as those at issue in the main proceedings.

47.

It must therefore be considered that Directive 95/46 is applicable to the processing of personal data provided for by legislation such as that at issue in the main proceedings.

The first question

48.

By their first question, the national courts essentially ask whether Directive 95/46 is to be interpreted as precluding national legislation such as that at issue in the main proceedings which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold.

Observations submitted to the Court

49.

The Danish Government considers that Directive 95/46 does not, strictly speaking, govern the right of third parties to obtain access to documents on request. In particular, Article 12 of the directive refers only to the right of any person to obtain data concerning him. According to the Government, the protection of personal data which appear not to be sensitive must give way to the principle of transparency, which holds an essential place in the Community legal order. The Danish Government, with the Swedish Government, observes in this respect that, according to recital 72 of the directive, the principle of public access to official documents may be taken into account when implementing the directive.

50.

The Rechnungshof, the Austrian, Italian, Netherlands, Finnish and Swedish Governments and the Commission consider that the national provisions at issue in the main proceedings are compatible with Directive 95/46, by reason, generally, of the wide discretion the Member States have in implementing it, in particular where a task in the public interest provided for by law is to be carried out, under Articles 6(b) and (c) and 7(c) or (e) of the directive. Both the principles of transparency and of the proper management of public funds and the prevention of abuses are relied on in this respect.

51.

Those objectives in the public interest can justify an interference with private life, protected by Article 8(2) of the Convention, if it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued.

52.

The Austrian Government notes in particular that, when reviewing proportionality, the extent to which the data affect private life must be taken into account. Data relating to personal intimacy, health, family life or sexuality must therefore be protected more strongly than data relating to income and taxes, which, while also personal, concern personal identity to a lesser extent and are thereby less sensitive (see, to that effect, *Fressoz and Roire v. France* [GC], no. 29183/95, § 65, ECHR 1999-I).

53.

The Finnish Government likewise considers that protection of private life is not absolute. Data relating to a person acting in the course of a public office or public functions relating thereto do not fall within the protection of private life.

54.

The Italian Government submits that data such as that at issue in the main proceedings are already by their nature public in most Member States, since they are visible from salary scales or remuneration brackets laid down by

statute, regulation or collective agreements. In those circumstances, it is not contrary to the principle of proportionality to provide for diffusion of that data with the identities of the various people in receipt of the salaries in question. That diffusion, being thus intended to clarify a situation that is already apparent from data available to the public, constitutes the minimum measure which would ensure realisation of the objectives of transparency and sound administration.

55.

The Netherlands Government adds, however, that the national courts must ascertain, for each public body concerned, whether the objective of public interest can be attained by processing the personal data in a way that interferes less with the private lives of the persons concerned.

56.

The United Kingdom Government submits that, in answering the first question, the provisions of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 18 December 2000 (OJ 2000 C 364, p. 1), to which the Verfassungsgericht briefly refers, are of no relevance.

57.

In Cases C-138/01 and C-139/01, the Commission questions whether, in the context of examining proportionality under Article 6(1)(b) of Directive 95/46, it might not suffice for attaining the objective pursued by the BezBegrBVG to transmit the data in an anonymised form, for example by indicating the function of the person concerned rather than his name. Even if it is admitted that the Rechnungshof needs details of names in order to carry out a more exact check, it is questionable whether the inclusion of that data in the Report, giving the name of the person concerned, is really necessary for performing that check, especially as the Report is not only submitted to the parliamentary assemblies but must also be widely published.

58.

Moreover, the Commission observes that under Article 13 of Directive 95/46 the Member States may *inter alia* derogate from Article 6(1)(b) of the directive in order to safeguard a number of objectives in the public interest, in particular ‘an important economic or financial interest of a Member State’ (Article 13(1)(e)). However, in the Commission's view, the derogating measures must also comply with the principle of proportionality, which calls for the same considerations as those stated in the preceding paragraph with reference to Article 6(1)(b) of the directive.

59.

The defendants in the main proceedings in Case C-465/00 consider that the national legislation at issue is incompatible with Article 6(1)(b) and (c) of Directive 95/46 and cannot be justified under Article 7(c) or (e) of the directive, since it constitutes an interference which is not justified under Article 8(2) of the Convention, and is in any event disproportionate. The audit performed by the Rechnungshof is sufficient to guarantee the thrifty use of public funds.

60.

More particularly, it has not been shown that publication of the names and the amount of the income of all persons employed by public bodies where that amount exceeds a certain level constitutes a measure aimed at the economic well-being of the country. The aim of the legislature was to exert pressure on the bodies in question to maintain salaries at a low level. The defendants also submit that that measure is aimed, in the present case, at persons who for the most part are not public figures.

61.

Moreover, even if the drawing up by the Rechnungshof of a report containing personal data on income intended for public debate were to be regarded as an interference with private life justified under Article 8(2) of the Convention, Land Niederösterreich and ÖRF consider that that measure also violates Article 14 of the Convention. Persons receiving the same income are treated unequally, depending on whether or not they are employed by a body subject to control by the Rechnungshof.

62.

ÖRF points out a further example of unequal treatment that cannot be justified under Article 14 of the Convention. Among the employees of bodies subject to control by the Rechnungshof, only those whose income exceeds the threshold fixed in Paragraph 8 of the BezBegrBVG have to suffer an interference with their private life. If the legislature attaches real importance to the reasonableness of the remuneration received by the employees of certain bodies, it is then necessary to publish the income of all employees, regardless of its amount.

63.

Finally, ÖRF, Marktgemeinde Kaltenleutgeben and Austrian Airlines, Österreichische Luftverkehrs-AG submit that the wording of Paragraph 8 of the BezBegrBVG lends itself to an interpretation consistent with Community law,

under which the salaries in question are required to be communicated to the Rechnungshof and included in the Report only in anonymised form. That interpretation should prevail, as it resolves the contradiction between that provision and Directive 95/46.

Findings of the Court

64.

It should be noted, to begin with, that the data at issue in the main proceedings, which relate both to the monies paid by certain bodies and the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46, being 'information relating to an identified or identifiable natural person'. Their recording and use by the body concerned, and their transmission to the Rechnungshof and inclusion by the latter in a report intended to be communicated to various political institutions and widely diffused, constitute processing of personal data within the meaning of Article 2(b) of the directive.

65.

Under Directive 95/46, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the 'principles relating to data quality' set out in Article 6 of the directive and, second, with one of the 'criteria for making data processing legitimate' listed in Article 7.

66.

More specifically, the data must be 'collected for specified, explicit and legitimate purposes' (Article 6(1)(b) of Directive 95/46) and must be 'adequate, relevant and not excessive' in relation to those purposes (Article 6(1)(c)). In addition, under Article 7(c) and (e) of the directive respectively, the processing of personal data is permissible only if it 'is necessary for compliance with a legal obligation to which the controller is subject' or 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller ... to whom the data are disclosed'.

67.

However, under Article 13(e) and (f) of the directive, the Member States may derogate *inter alia* from Article 6(1) where this is necessary to safeguard respectively 'an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters' or 'a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority' in particular cases including that referred to in subparagraph (e).

68.

It should also be noted that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures (see, *inter alia*, Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37).

69.

Those principles have been expressly restated in Article 6(2) EU, which states that '[t]he Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

70.

Directive 95/46 itself, while having as its principal aim to ensure the free movement of personal data, provides in Article 1(1) that 'Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'. Several recitals in its preamble, in particular recitals 10 and 11, also express that requirement.

71.

In this respect, it is to be noted that Article 8 of the Convention, while stating in paragraph 1 the principle that the public authorities must not interfere with the right to respect for private life, accepts in paragraph 2 that such an interference is possible where it is 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

72.

So, for the purpose of applying Directive 95/46, in particular Articles 6(1)(c), 7(c) and (e) and 13, it must be ascertained, first, whether legislation such as that at issue in the main proceedings provides for an interference with private life, and if so, whether that interference is justified from the point of view of Article 8 of the Convention.

Existence of an interference with private life

73.

First of all, the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 of the Convention. The European Court of Human Rights has held in this respect that the expression 'private life' must not be interpreted restrictively and that 'there is no reason of principle to justify excluding activities of a professional ... nature from the notion of "private life"' (see, *inter alia*, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000-V).

74.

It necessarily follows that, while the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the Convention.

75.

To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way (see, to that effect, *Amann v. Switzerland*, § 70). It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party.

Justification of the interference

76.

An interference such as that mentioned in paragraph 74 above violates Article 8 of the Convention unless it is 'in accordance with the law', pursues one or more of the legitimate aims specified in Article 8(2), and is 'necessary in a democratic society' for achieving that aim or aims.

77.

It is common ground that the interference at issue in the main proceedings is in accordance with Paragraph 8 of the BezBegrBVG. However, the question arises whether that paragraph is formulated with sufficient precision to enable the citizen to adjust his conduct accordingly, and so complies with the requirement of foreseeability laid down in the case-law of the European Court of Human Rights (see, *inter alia*, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

78.

In this respect, Paragraph 8(3) of the BezBegrBVG states that the report drawn up by the Rechnungshof is to 'include all persons whose total yearly salaries and pensions from bodies ... exceed the amount stated in subparagraph 1', without expressly requiring the names of the persons concerned to be disclosed in relation to the income they receive. According to the orders for reference, it is legal commentators who, on the basis of the *travaux préparatoires*, interpret the constitutional law in that way.

79.

It is for the national courts to ascertain whether the interpretation to the effect that Paragraph 8(3) of the BezBegrBVG requires disclosure of the names of the persons concerned in relation to the income received complies with the requirement of foreseeability referred to in paragraph 77 above.

80.

However, that question need not arise until it has been determined whether such an interpretation of the national provision at issue is consistent with Article 8 of the Convention, as regards its required proportionality to the aims pursued. That question will be examined below.

81.

It appears from the order for reference in Case C-465/00 that the objective of Paragraph 8 of the BezBegrBVG is to exert pressure on the public bodies concerned to keep salaries within reasonable limits. The Austrian Government observes, more generally, that the interference provided for by that provision is intended to guarantee the thrifty and appropriate use of public funds by the administration. Such an objective constitutes a legitimate aim within the meaning both of Article 8(2) of the Convention, which mentions the 'economic well-being of the country', and Article 6(1)(b) of Directive 95/46, which refers to 'specified, explicit and legitimate purposes'.

82.

It must next be ascertained whether the interference in question is necessary in a democratic society to achieve the legitimate aim pursued.

83.

According to the European Court of Human Rights, the adjective 'necessary' in Article 8(2) of the Convention implies that a 'pressing social need' is involved and that the measure employed is 'proportionate to the legitimate

aim pursued' (see, *inter alia*, the Gillow v. the United Kingdom judgment of 24 November 1986, Series A no. 109, § 55). The national authorities also enjoy a margin of appreciation, 'the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved' (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, § 59).

84.

The interest of the Republic of Austria in ensuring the best use of public funds, and in particular keeping salaries within reasonable limits, must be balanced against the seriousness of the interference with the right of the persons concerned to respect for their private life.

85.

On the one hand, in order to monitor the proper use of public funds, the Rechnungshof and the various parliamentary bodies undoubtedly need to know the amount of expenditure on human resources in the various public bodies. In addition, in a democratic society, taxpayers and public opinion generally have the right to be kept informed of the use of public revenues, in particular as regards expenditure on staff. Such information, put together in the Report, may make a contribution to the public debate on a question of general interest, and thus serves the public interest.

86.

The question nevertheless arises whether stating the names of the persons concerned in relation to the income received is proportionate to the legitimate aim pursued and whether the reasons relied on before the Court to justify such disclosure appear relevant and sufficient.

87.

It is plain that, according to the interpretation adopted by the national courts, Paragraph 8 of the BezBegrBVG requires disclosure of the names of the persons concerned, in relation to income above a certain level, with respect not only to persons filling posts remunerated by salaries on a published scale, but to all persons remunerated by bodies subject to control by the Rechnungshof. Moreover, such information is not only communicated to the Rechnungshof and via the latter to the various parliamentary bodies, but is also made widely available to the public.

88.

It is for the national courts to ascertain whether such publicity is both necessary and proportionate to the aim of keeping salaries within reasonable limits, and in particular to examine whether such an objective could not have been attained equally effectively by transmitting the information as to names to the monitoring bodies alone. Similarly, the question arises whether it would not have been sufficient to inform the general public only of the remuneration and other financial benefits to which persons employed by the public bodies concerned have a contractual or statutory right, but not of the sums which each of them actually received during the year in question, which may depend to a varying extent on their personal and family situation.

89.

With respect, on the other hand, to the seriousness of the interference with the right of the persons concerned to respect for their private life, it is not impossible that they may suffer harm as a result of the negative effects of the publicity attached to their income from employment, in particular on their prospects of being given employment by other undertakings, whether in Austria or elsewhere, which are not subject to control by the Rechnungshof.

90.

It must be concluded that the interference resulting from the application of national legislation such as that at issue in the main proceedings may be justified under Article 8(2) of the Convention only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

Consequences with respect to the provisions of Directive 95/46

91.

If the national courts conclude that the national legislation at issue is incompatible with Article 8 of the Convention, that legislation is also incapable of satisfying the requirement of proportionality in Articles 6(1)(c) and 7(c) or (e) of Directive 95/46. Nor could it be covered by any of the exceptions referred to in Article 13 of that directive, which likewise requires compliance with the requirement of proportionality with respect to the public interest objective being pursued. In any event, that provision cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life contrary to Article 8 of the Convention.

92.

If, on the other hand, the national courts were to consider that Paragraph 8 of the BezBegrBVG is both necessary

for and appropriate to the public interest objective being pursued, they would then, as appears from paragraphs 77 to 79 above, still have to ascertain whether, by not expressly providing for disclosure of the names of the persons concerned in relation to the income received, Paragraph 8 of the BezBegrBVG complies with the requirement of foreseeability.

93.

Finally, it should be noted, in the light of the above considerations, that the national court must also interpret any provision of national law, as far as possible, in the light of the wording and the purpose of the applicable directive, in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).

94.

In the light of all the above considerations, the answer to the first question must be that Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 do not preclude national legislation such as that at issue in the main proceedings, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

The second question

95.

By their second question, the national courts ask whether the provisions of Directive 95/46 which preclude national legislation such as that at issue in the main proceedings are directly applicable, in that they may be relied on by individuals before the national courts to oust the application of that legislation.

96.

The defendants in the main proceedings in Case C-465/00 and the Netherlands Government consider that Articles 6(1) and 7 of Directive 95/46 fulfil the criteria stated in the Court's case-law for having such direct effect. They are sufficiently precise and unconditional for the bodies required to disclose the data relating to the income of the persons concerned to be able to rely on them to prevent application of the national provisions contrary to those provisions.

97.

The Austrian Government submits, on the other hand, that the relevant provisions of Directive 95/46 are not directly applicable. In particular, Articles 6(1) and 7 are not unconditional, since their implementation requires the Member States, which have a wide discretion, to adopt special measures to that effect.

98.

On this point, it should be noted that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State (see, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51).

99.

In the light of the answer to the first question, the second question seeks to know whether such a character may be attributed to Article 6(1)(c) of Directive 95/46, under which 'personal data must be ... adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', and to Article 7(c) or (e), under which personal data may be processed only if *inter alia* 'processing is necessary for compliance with a legal obligation to which the controller is subject' or 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller ... to whom the data are disclosed'.

100.

Those provisions are sufficiently precise to be relied on by individuals and applied by the national courts. Moreover, while Directive 95/46 undoubtedly confers on the Member States a greater or lesser discretion in the implementation of some of its provisions, Articles 6(1)(c) and 7(c) or (e) for their part state unconditional obligations.

101.

The answer to the second question must therefore be that Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.

Costs

102.

The costs incurred by the Austrian, Danish, Italian, Netherlands, Finnish, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decisions on costs are a matter for those courts.
On those grounds,

THE COURT,
in answer to the questions referred to it by the Verfassungsgerichtshof by order of 12 December 2000 and by the Oberster Gerichtshof by orders of 14 and 28 February 2001, hereby rules:

1. Articles 6(1)(c) and 7(c) and (e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not preclude national legislation such as that at issue in the main proceedings, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the Rechnungshof but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the legislature, that being for the national courts to ascertain.

2. Articles 6(1)(c) and 7(c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.

Delivered in open court in Luxembourg on 20 May 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

Case C-540/03
European Parliament v Council of the European Union

ACTION for annulment under Article 230 EC, brought on 22 December 2003,

European Parliament, represented by H. Duintjer Tebbens and A. Caiola, acting as Agents, with an address for service in Luxembourg,
applicant,
v
Council of the European Union, represented by O. Petersen and M. Simm, acting as Agents,
defendant,
supported by
Commission of the European Communities, represented by C. O'Reilly and C. Ladenburger, acting as Agents, with an address for service in Luxembourg,
intervener,
and by
Federal Republic of Germany, represented by A. Tiemann, W.-D. Plessing and M. Lumma, acting as Agents,
intervener,
THE COURT (Grand Chamber),
composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur) and K. Schiemann, Presidents of Chambers, J.-P. Puissochet, K. Lenaerts, P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,
Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,
having regard to the written procedure and further to the hearing on 28 June 2005,
after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,
gives the following
Judgment

Grounds

1. By its application, the European Parliament seeks the annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12; 'the Directive').
2. By order of the President of the Court of 5 May 2004, the Commission of the European Communities and the Federal Republic of Germany were granted leave to intervene in support of the form of order sought by the Council of the European Union.

The Directive

3. The Directive, founded on the EC Treaty and in particular Article 63(3)(a) thereof, determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

4. The second recital in the preamble to the Directive is worded as follows:

'Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union [OJ 2000 C 364, p. 1; 'the Charter'].'

5. The 12th recital states:

'The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.'

6. Article 3 provides that the Directive is to apply where the sponsor is holding a residence permit issued by a Member State

for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

7. Article 3(4) of the Directive states:

'This Directive is without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;

(b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.'

8. Article 4(1) of the Directive provides that the Member States are to authorise the entry and residence, pursuant to the Directive, of, in particular, the minor children, including adopted children, of the sponsor and his or her spouse, and those of the sponsor or of the sponsor's spouse where that parent has custody of the children and they are dependent on him or her. In accordance with the penultimate subparagraph of Article 4(1), the minor children referred to in this article must be below the age of majority set by the law of the Member State concerned and must not be married. The final subparagraph of Article 4(1) provides:

'By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.'

9. Article 4(6) of the Directive is worded as follows:

'By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.'

10. Article 5(5) of the Directive requires the Member States to have due regard to the best interests of minor children when examining an application.

11. Article 8 of the Directive provides:

'Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.'

12. Article 16 of the Directive lists some circumstances in which Member States may reject an application for entry and residence for the purpose of family reunification or, if appropriate, withdraw or refuse to renew a family member's residence permit.

13. Article 17 of the Directive is worded as follows:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

14. Under Article 18 of the Directive, where an application for family reunification is rejected or a residence permit is either withdrawn or not renewed, the right must exist to mount a legal challenge in accordance with the procedure and the jurisdiction established by the Member States concerned.

Admissibility of the action

The plea alleging that the action does not actually concern an act of the institutions

15. The provisions whose annulment is sought are derogations from the obligations imposed by the Directive on the Member States, permitting them to apply national legislation which, according to the Parliament, does not respect fundamental rights.

The Parliament submits, however, that, inasmuch as the Directive authorises such national legislation, it is the Directive itself which infringes fundamental rights. It cites in this connection the judgment in Case C-101/01 Lindqvist [2003] ECR I-12971, paragraph 84.

16. The Council, on the other hand, emphasises that the Directive gives the Member States leeway enabling them to retain or adopt national provisions compatible with respect for fundamental rights. In the Council's submission, the Parliament does not show how provisions adopted and applied by Member States which might be contrary to fundamental rights would constitute action of the institutions within the meaning of Article 46(d) EU that is subject to review by the Court so far as concerns respect for fundamental rights.

17. In any event, the Council wonders how the Court could review in purely abstract terms the legality of provisions of Community law which merely refer to national law whose content, and the manner in which it will be applied, are unknown. The need to take the specific circumstances into account is apparent from the judgments in Case C-60/00 Carpenter [2002] ECR I-6279 and in Lindqvist .

18. The Commission submits that review by the Court of compliance with fundamental rights that are among the general principles of Community law cannot be limited solely to the situation where a provision of a directive obliges the Member States to adopt specified measures infringing those fundamental rights, but must also extend to the case where the directive expressly permits such measures. Member States should not be expected to realise by themselves that a given measure permitted by a Community directive is contrary to fundamental rights. The Commission concludes that review by the Court cannot be precluded on the ground that the contested provisions of the Directive merely refer to national law.

19. The Commission observes, however, that the Court should annul provisions such as those the subject of the present action only if it were impossible for it to interpret them in a manner consistent with fundamental rights. If, in light of the customary rules of interpretation, the provision at issue leaves a margin of appreciation, the Court should rather set out the interpretation thereof that respects fundamental rights.

20. The Parliament responds that to interpret the Directive in the abstract, as suggested by the Commission, would have the effect of establishing a preventive remedy which would encroach upon the powers of the Community legislature.

Findings of the Court

21. It is appropriate, as the Advocate General has done in points 43 to 45 of her Opinion, to address this issue from the point of view of the admissibility of the action. In essence, the Council denies that the action concerns an act of the institutions, pleading that only the application of national provisions retained or adopted in accordance with the Directive could, according to the circumstances, infringe fundamental rights.

22. As to that argument, the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC.

23. Furthermore, a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.

24. It follows that the plea of inadmissibility alleging that the action does not actually concern an act of the institutions must be dismissed.

Severability of the provisions whose annulment is sought

25. The Federal Republic of Germany stresses, first of all, the importance to it of the final subparagraph of Article 4(1) of the Directive, which contains one of the main points of the compromise allowing adoption of the Directive, for which a unanimous vote was required. It observes that partial annulment of an act can be envisaged only where the act comprises several elements which are severable from each other and only one of those elements is unlawful because it infringes Community law. In the present case, it is not possible to sever the rule relating to family reunification laid down in the final subparagraph of Article 4(1) of the Directive from the remainder of the Directive. Any judgment annulling the Directive in part would encroach upon the powers of the Community legislature, so that only annulment of the Directive in its entirety would be possible.

26. The Parliament contests the argument that the final subparagraph of Article 4(1) of the Directive is not an element severable from the Directive simply because its wording is the result of a political compromise which enabled the Directive to be adopted. In the Parliament's submission, what matters is simply whether severance of an element of a directive is legally

possible. Inasmuch as the provisions referred to in the application constitute derogations from the general rules laid down by the Directive, their annulment would not undermine the scheme or the effectiveness of the Directive as a whole, whose importance for implementing the right to family reunification the Parliament recognises.

Findings of the Court

27. As follows from settled case-law, partial annulment of a Community act is possible only if the elements whose annulment is sought may be severed from the remainder of the act (see, inter alia, Case C-29/99 Commission v Council [2002] ECR I-11221, paragraphs 45 and 46; Case C-378/00 Commission v Parliament and Council [2003] ECR I-937, paragraph 29; Case C-239/01 Germany v Commission [2003] ECR I-10333, paragraph 33; Case C-244/03 France v Parliament and Council [2005] ECR I-4021, paragraph 12; and Case C-36/04 Spain v Council [2006] ECR I-0000, paragraph 9).

28. The Court has also repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraph 257; Commission v Council , paragraph 46; Germany v Commission , paragraph 34; France v Parliament and Council , paragraph 13; and Spain v Council , paragraph 13).

29. In the present case, review of whether the provisions whose annulment is sought are severable requires consideration of the substance of the case, that is to say of the scope of those provisions, in order to be able to assess whether their annulment would alter the Directive's spirit and substance.

The action

The rules of law in whose light the Directive's legality may be reviewed

30. The Parliament contends that the contested provisions do not respect fundamental rights – in particular the right to family life and the right to non-discrimination – as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and as they result from the constitutional traditions common to the Member States of the European Union, as general principles of Community law; the Union has a duty to respect them pursuant to Article 6(2) EU, to which Article 46(d) EU refers with regard to action of the institutions.

31. The Parliament invokes, first, the right to respect for family life, set out in Article 8 of the ECHR, which the Court has interpreted as also covering the right to family reunification (Carpenter , paragraph 42, and Case C-109/01 Akrich [2003] ECR I-9607, paragraph 59). This principle has been repeated in Article 7 of the Charter which, the Parliament observes, is relevant to interpretation of the ECHR in so far as it draws up a list of existing fundamental rights even though it does not have binding legal effect. The Parliament also cites Article 24 of the Charter, devoted to rights of the child, which provides, in paragraph 2, that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration' and, in paragraph 3, that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

32. The Parliament invokes, second, the principle of non-discrimination on grounds of age which, it submits, is taken into account by Article 14 of the ECHR and is expressly covered by Article 21(1) of the Charter.

33. The Parliament also cites a number of provisions of international Conventions signed under the aegis of the United Nations: Article 24 of the International Covenant on Civil and Political Rights, adopted on 19 December 1966, which entered into force on 23 March 1976; the Convention on the Rights of the Child, adopted on 20 November 1989, which entered into force on 2 September 1990; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted on 18 December 1990, which entered into force on 1 July 2003; and the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations Organisation on 20 November 1959 (Resolution 1386(XIV)). The Parliament draws attention in addition to Recommendation No R (94) 14 of the Committee of Ministers of the Council of Europe to Member States of 22 November 1994 on coherent and integrated family policies and Recommendation No R (99) 23 of the Committee of Ministers to Member States of 15 December 1999 on family reunion for refugees and other persons in need of international protection. The Parliament invokes, finally, constitutions of several Member States of the European Union.

34. The Council observes that the Community is not a party to the various instruments of public international law invoked by the Parliament. In any event, those norms require merely that the children's interests be respected and taken into account, and do not establish any absolute right regarding family reunification. Nor should the application be examined in light of the Charter given that the Charter does not constitute a source of Community law.

Findings of the Court

35. Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Opinion 2/94 [1996] ECR I-1759, paragraph 33; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71; and Case C-36/02 Omega [2004] ECR I-9609, paragraph 33).

36. In addition, Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

37. The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law (see, inter alia, Case 374/87 Orkem v Commission [1989] ECR 3283, paragraph 31; Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763, paragraph 68; and Case C-249/96 Grant [1998] ECR I-621, paragraph 44). That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States.

38. The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'.

39. Subject to the European Social Charter which will be mentioned in paragraph 107 of this judgment, the remaining international instruments invoked by the Parliament do not in any event appear to contain provisions affording greater protection of rights of the child than those contained in the instruments already referred to.

The final subparagraph of Article 4(1) of the Directive

40. The Parliament contends that the reasoning for the final subparagraph of Article 4(1) of the Directive, set out in the 12th recital in the preamble, is not convincing and that the Community legislature has confused the concepts 'condition for integration' and 'objective of integration'. Since one of the most important means of successfully integrating a minor child is reunification with his or her family, it is incongruous to impose a condition for integration before the child, a member of the sponsor's family, joins the sponsor. That renders family reunification unachievable and negates this right.

41. The Parliament further submits that, since the concept of integration is not defined in the Directive, the Member States are authorised to restrict appreciably the right to family reunification.

42. It states that this right is protected by Article 8 of the ECHR, as interpreted by the European Court of Human Rights, and a condition for integration laid down by national legislation does not fall within one of the legitimate objectives capable of justifying interference, as referred to in Article 8(2) of the ECHR, namely national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. Any interference must, in any event, be justified and proportionate. However, the final subparagraph of Article 4(1) of the Directive does not require any weighing of the respective interests at issue.

43. The Directive is, moreover, contradictory since it does not provide for any limitation founded on a condition for integration so far as concerns the sponsor's spouse.

44. Furthermore, the Directive establishes discrimination founded exclusively on the child's age which is not objectively justified and is contrary to Article 14 of the ECHR. The objective of encouraging parents to have their children come before they are 12 years old does not take account of the economic and social constraints which prevent a family from receiving a child for a short or long period of time. Also, the objective of integration was achievable by less radical means, such as measures for the minors' integration after they have been allowed to enter the host Member State.

45. Finally, the Parliament observes that the standstill clause is less strict than customary standstill clauses, since the national legislation needs to exist only on the date of implementation of the Directive. The leeway which the Member States are allowed runs counter to the Directive's objective, which is to lay down common criteria for exercise of the right to family

reunification.

46. The Council, supported by the German Government and the Commission, submits that the right to respect for family life is not equivalent, in itself, to a right to family reunification. According to the case-law of the European Court of Human Rights, it is sufficient that family life be possible, for example, in the State of origin.

47. The Council also observes that, in its case-law, the European Court of Human Rights has recognised that refusals, in implementation of immigration policy, to allow family reunification have been justified by at least one of the aims listed in Article 8(2) of the ECHR. In the Council's submission, such a refusal may be founded on the objective of the final subparagraph of Article 4(1) of the Directive, namely the effective integration of migrants who are minors by encouraging migrant families which are separated to have their minor children come to the host Member State before they are 12 years of age.

48. The choice of the age of 12 years is not arbitrary, but was based on the fact that, before that age, children are in a phase of their development which is important for their capacity to integrate into society. That is what the 12th recital in the preamble to the Directive expresses. The Council observes in this connection that the European Court of Human Rights has found there to be no breach of Article 8 of the ECHR in reunification cases concerning minors below 12 years of age.

49. It is justified to apply a condition for integration to children over 12 years of age and not to the sponsor's spouse because children will, as a general rule, spend a greater proportion of their lives in the host Member State than their parents.

50. The Council observes that the Directive does not prejudge the outcome of the weighing of the individual and collective interests present in individual cases and that Articles 17 and 5(5) of the Directive oblige the Member States to have regard to the interests protected by the ECHR and the Convention on the Rights of the Child.

51. It also maintains that the standstill clause in the final subparagraph of Article 4(1) of the Directive does not call into question the legality of that provision. The reference which is made to the 'date of implementation' of the Directive constitutes a legitimate political choice on the part of the Community legislature, the reason for which was the fact that the Member State which wished to rely on that derogation had not completed the legislative process for adoption of the national rules in question. It was preferable to opt for the criterion ultimately selected than to await completion of that process before adopting the Directive.

Findings of the Court

52. The right to respect for family life within the meaning of Article 8 of the ECHR is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (Carpenter , paragraph 41, and Akrich , paragraphs 58 and 59). This right to live with one's close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory.

53. Thus, the Court has held that, even though the ECHR does not guarantee as a fundamental right the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the ECHR (Carpenter , paragraph 42, and Akrich , paragraph 59).

54. In addition, as the European Court of Human Rights held in Sen v. the Netherlands , no. 31465/96, § 31, 21 December 2001, 'Article 8 [of the ECHR] may create positive obligations inherent in effective "respect" for family life. The principles applicable to such obligations are comparable to those which govern negative obligations. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation (Gül [v. Switzerland , judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I], p. 174, § 38, and Ahmut [v. the Netherlands , judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030], § 63)'.

55. In paragraph 36 of Sen v. the Netherlands , the European Court of Human Rights set out in the following manner the principles applicable to family reunification as laid down in Gül v. Switzerland , § 38, and Ahmut v. the Netherlands , § 67:

'(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.

(b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.

(c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.'

56. The European Court of Human Rights has stated that, in its analysis, it takes account of the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives (Sen v. the Netherlands , § 37; see also Rodrigues da Silva and Hoogkamer v. the Netherlands , no. 50435/99, § 39, 31 January 2006).

57. The Convention on the Rights of the Child also recognises the principle of respect for family life. The Convention is founded on the recognition, expressed in the sixth recital in its preamble, that children, for the full and harmonious development of their personality, should grow up in a family environment. Article 9(1) of the Convention thus provides that States Parties are to ensure that a child shall not be separated from his or her parents against their will and, in accordance with Article 10(1), it follows from that obligation that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification are to be dealt with by States Parties in a positive, humane and expeditious manner.

58. The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

59. These various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.

60. Going beyond those provisions, Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.

61. The final subparagraph of Article 4(1) of the Directive has the effect, in strictly defined circumstances, namely where a child aged over 12 years arrives independently from the rest of the family, of partially preserving the margin of appreciation of the Member States by permitting them, before authorising entry and residence of the child under the Directive, to verify whether he or she meets a condition for integration provided for by the national legislation in force on the date of implementation of the Directive.

62. In so doing, the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests.

63. Furthermore, as required by Article 5(5) of the Directive, the Member States must when weighing those interests have due regard to the best interests of minor children.

64. Note should also be taken of Article 17 of the Directive which requires Member States to take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his country of origin. As is apparent from paragraph 56 of the present judgment, such criteria correspond to those taken into consideration by the European Court of Human Rights when it reviews whether a State which has refused an application for family reunification has correctly weighed the competing interests.

65. Finally, a child's age and the fact that a child arrives independently from his or her family are also factors taken into consideration by the European Court of Human Rights, which has regard to the ties which a child has with family members in his or her country of origin, and also to the child's links with the cultural and linguistic environment of that country (see, inter alia, Ahmut v. the Netherlands , § 69, and Gül v. Switzerland , § 42).

66. As regards conditions for integration, it does not appear that such a condition is, in itself, contrary to the right to respect for family life set out in Article 8 of the ECHR. As has been noted, this right is not to be interpreted as necessarily obliging a Memb er State to authorise family reunification in its territory, and the final subparagraph of Article 4(1) of the Directive merely preserves the margin of appreciation of the Member States while restricting that freedom, to be exercised by them in observance, in particular, of the principles set out in Articles 5(5) and 17 of the Directive, to examination of a condition defined by national legislation. In any event the necessity for integration may fall within a number of the legitimate objectives referred to in Article 8(2) of the ECHR.

67. Contrary to the Parliament's submissions, the Community legislature has not confused conditions for integration referred to in the final subparagraph of Article 4(1) of the Directive and the objective of integration of minors which could, according to the Parliament, be achieved by means such as measures facilitating their integration after they have been allowed to enter. Two different matters are indeed involved. As follows from the 12th recital in the preamble to the Directive, the possibility of limiting the right to family reunification of children over the age of 12 whose primary residence is not with the sponsor is intended to reflect the children's capacity for integration at early ages and is to ensure that they acquire the necessary education and language skills in school.

68. The Community legislature thus considered that, beyond 12 years of age, the objective of integration cannot be achieved as easily and, consequently, provided that a Member State has the right to have regard to a minimum level of capacity for integration when deciding whether to authorise entry and residence under the Directive.

69. A condition for integration within the meaning of the final subparagraph of Article 4(1) of the Directive may therefore be taken into account when considering an application for family reunification and the Community legislature did not contradict itself by authorising Member States, in the specific circumstances envisaged by that provision, to consider applications in the light of such a condition in the context of a directive which, as is apparent from the fourth recital in its preamble, has the general objective of facilitating the integration of third country nationals in Member States by making family life possible through reunification.

70. The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family.

71. Consequently, the final subparagraph of Article 4(1) of the Directive cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life.

72. The Parliament has not shown how the standstill clause in the final subparagraph of Article 4(1) of the Directive is contrary to a superior rule of law. Since the Community legislature did not infringe the right to respect for family life by authorising the Member States, in certain circumstances, to have regard to a condition for integration, it was lawful for it to set limits on that authorisation. Consequently, it does not matter that the national legislation specifying the condition for integration that can be taken into account had to exist only on the date of implementation of the Directive and not on the date on which it entered into force or was adopted.

73. Nor does it appear that the Community legislature failed to pay sufficient attention to children's interests. The content of Article 4(1) of the Directive attests that the child's best interests were a consideration of prime importance when that provision was being adopted and it does not appear that its final subparagraph fails to have sufficient regard to those interests or authorises Member States which choose to take account of a condition for integration not to have regard to them. On the contrary, as recalled in paragraph 63 of the present judgment, Article 5(5) of the Directive requires the Member States to have due regard to the best interests of minor children.

74. In this context, the choice of the age of 12 years does not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties.

75. Likewise, the fact that a spouse and a child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents. It was therefore justifiable for the Community legislature to take account of those different situations, and it adopted different rules concerning them without contradicting itself.

76. It follows from all of the foregoing that the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

Article 4(6) of the Directive

77. For reasons similar to those relied upon when the final subparagraph of Article 4(1) of the Directive was being examined,

the Parliament submits that Article 4(6) of the Directive, which permits the Member States to require applications for family reunification of minor children to be submitted before the age of 15, also infringes the right to respect for family life and the prohibition on discrimination on grounds of age. It also observes that the Member States remain free to adopt new, restrictive, derogating provisions until the date of implementation of the Directive. Finally, the obligation on Member States which apply this derogation to examine applications for entry and residence submitted by minor children over 15 years of age on the basis of 'grounds other than' family reunification which are not defined leaves much to the discretion of the national authorities and creates legal uncertainty.

78. Just as in the case of the final subparagraph of Article 4(1) of the Directive, the Parliament states that the objective of integration was achievable by means less radical than discrimination on grounds of age, which is not objectively justified and is consequently arbitrary.

79. The Council maintains that Article 4(6) of the Directive is open to use, at national level, that is compatible with fundamental rights and, in particular, proportionate to the objective pursued. The objective is to encourage immigrant families to have their minor children come at a very young age, in order to facilitate their integration. This is a legitimate objective, forming part of immigration policy and falling within the scope of Article 8(2) of the ECHR.

80. The broad wording of 'grounds other than' family reunification should not be criticised as a source of legal uncertainty, since it is designed to favour a positive decision on the majority of the applications concerned.

81. The age of 15 years was chosen in order to cover the greatest number of cases while not precluding the minor's attending school in the host Member State. There is thus no arbitrary discrimination. The Council maintains that such a choice falls within its margin of appreciation as legislator.

82. The Commission submits that Article 4(6) of the Directive does not infringe Article 8 of the ECHR because the rights which the persons concerned could derive from the Convention remain entirely preserved. Article 4(6) of the Directive requires Member States to consider every other possible legal basis for an application by the child concerned to be admitted to their territory, and to grant such entry if the legal conditions are met. This must include a right founded directly on Article 8 of the ECHR and thus allow consideration on a case-by-case basis of applications for entry submitted by children who are 15 or older.

83. The age limit set at 15 years is not unreasonable and can be explained by the link that exists between Article 4(6) of the Directive and the waiting period of three years in Article 8 of the Directive. The point is not to issue residence permits to persons who in the meantime have reached the age of majority.

Findings of the Court

84. In the present action, the review conducted by the Court concerns whether the contested provision, in itself, respects fundamental rights and, in particular, the right to respect for family life, the obligation to have regard to the best interests of children and the principle of non-discrimination on grounds of age. It must be determined in particular whether Article 4(6) of the Directive expressly or impliedly authorises the Member States not to observe those fundamental principles in that it allows them, in derogation from the other provisions of Article 4 of the Directive, to formulate a requirement by reference to the age of a minor child for whom application is made for entry into, and residence in, national territory in the context of family reunification.

85. It does not appear that the contested provision infringes the right to respect for family life set out in Article 8 of the ECHR as interpreted by the European Court of Human Rights. Article 4(6) of the Directive does give the Member States the option of applying the conditions for family reunification which are prescribed by the Directive only to applications submitted before children have reached 15 years of age. This provision cannot, however, be interpreted as prohibiting the Member States from taking account of an application relating to a child over 15 years of age or as authorising them not to do so.

86. It does not matter that the final sentence of the contested provision provides that the Member States which decide to apply the derogation are to authorise the entry and residence of children in respect of whom an application is submitted after they have reached 15 years of age 'on grounds other than family reunification'. The term 'family reunification' must be interpreted in the context of the Directive as referring to family reunification in the cases where family reunification is required by the Directive. It cannot be interpreted as prohibiting a Member State which has applied the derogation from authorising the entry and residence of a child in order to enable the child to join his or her parents.

87. Article 4(6) of the Directive must, moreover, be read in the light of the principles set out in Article 5(5) thereof, which requires the Member States to have due regard to the best interests of minor children, and in Article 17, which requires them to take account of a number of factors, one of which is the person's family relationships.

88. It follows that, while Article 4(6) of the Directive has the effect of authorising a Member State not to apply the general conditions of Article 4(1) of the Directive to applications submitted by minor children over 15 years of age, the Member State is still obliged to examine the application in the interests of the child and with a view to promoting family life.

89. For the reason set out in paragraph 74 of the present judgment, it does not appear, a fortiori, that the choice of the age of 15 years constitutes a criterion contrary to the principle of non-discrimination on grounds of age. Nor, for the reason set out in paragraph 72 of the present judgment, does it appear that the standstill clause, as formulated, infringes any superior rule of law.

90. It follows from all of the foregoing that Article 4(6) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

Article 8 of the Directive

91. The Parliament observes that the periods of two and three years provided for in Article 8 of the Directive significantly restrict the right to family reunification. This article, which does not require applications to be considered on a case-by-case basis, authorises the Member States to retain measures which are disproportionate in relation to the balance that should exist between the competing interests.

92. The Parliament further submits that the derogation authorised in the second paragraph of Article 8 of the Directive could well give rise to different treatment in similar cases, depending on whether or not the Member State concerned has legislation which takes its reception capacity into account. Finally, a criterion founded on the Member State's reception capacity is equivalent to a quota system, which is incompatible with Article 8 of the ECHR. The Parliament notes in this regard that the restrictive annual quota system applied by the Republic of Austria was held by the Verfassungsgerichtshof (Constitutional Court, Austria) to be contrary to the Austrian Constitution (judgment of 8 October 2003, Case G 119, 120/03-13).

93. The Council observes that Article 8 of the Directive does not in itself require a waiting period and that a waiting period is not equivalent to a refusal of family reunification. The Council also submits that a waiting period is a classical element of immigration policy which exists in most Member States and has not been held unlawful by the competent courts. It pursues a legitimate objective of immigration policy, namely the effective integration of the members of the family in the host community, by ensuring that family reunification does not take place until the sponsor has found in the host State a solid base, both economic and domestic, for settling a family there.

94. The Council states that the difference in treatment among Member States is only the consequence of the process of gradual harmonisation of laws and that, contrary to the Parliament's assertions, Article 8 of the Directive harmonises Member State laws substantially, given the strict nature of the standstill clause that it contains.

95. It disputes that the reference in the second paragraph of Article 8 of the Directive to a Member State's reception capacity is the equivalent of a quota system. That criterion serves solely to identify the Member States which may extend the waiting period to three years. Moreover, the Parliament's submissions on how that provision is implemented in the Member States are speculative.

96. According to the Commission, the waiting period introduced by Article 8 of the Directive is in the nature of a rule of administrative procedure which does not have the effect of excluding the right to reunification. Such a rule pursues a legitimate objective, and does so proportionately. The Commission states in this regard that the length of the period for which the sponsor has resided in the host Member State is an important factor taken into consideration in the case-law of the European Court of Human Rights in the weighing of the interests, as is the country's reception capacity. National legislation must in any event, as the Verfassungsgerichtshof has acknowledged, allow the possibility of submission of applications for reunification that are founded directly on Article 8 of the ECHR before the waiting period has expired.

Findings of the Court

97. Like the other provisions contested in the present action, Article 8 of the Directive authorises the Member States to derogate from the rules governing family reunification laid down by the Directive. The first paragraph of Article 8 authorises the Member States to require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members. The second paragraph of Article 8 authorises Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members.

98. That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.

99. It should, however, be remembered that, as is apparent from Article 17 of the Directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors.

100. The same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article 17 of the Directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application.

101. When carrying out that analysis, the Member States must, as is pointed out in paragraph 63 of the present judgment, also have due regard to the best interests of minor children.

102. The coexistence of different situations, according to whether or not Member States choose to make use of the possibility of imposing a waiting period of two years, or of three years where their legislation in force on the date of adoption of the Directive takes their reception capacity into account, merely reflects the difficulty of harmonising laws in a field which hitherto fell within the competence of the Member States alone. As the Parliament itself acknowledges, the Directive as a whole is important for applying the right to family reunification in a harmonised fashion. In the present instance, it does not appear that the Community legislature exceeded the limits imposed by fundamental rights in permitting Member States which had, or wished to adopt, specific legislation to adjust certain aspects of the right to reunification.

103. Consequently, Article 8 of the Directive cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

104. In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (see, to this effect, Case 5/88 Wachauf [1989] ECR 2609, paragraph 22).

105. It should be remembered that, in accordance with settled case-law, the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-2/92 Bostock [1994] ECR I-955, paragraph 16; Case C-107/97 Rombi and Arkopharma [2000] ECR I-3367, paragraph 65; and, to this effect, ERT , paragraph 43).

106. Implementation of the Directive is subject to review by the national courts since, as provided in Article 18 thereof, 'the Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered'. If those courts encounter difficulties relating to the interpretation or validity of the Directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC.

107. So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987, the European Convention on the legal status of migrant workers of 24 November 1977 and bilateral and multilateral agreements between the Community or the Community and the Member States, on the one hand, and third countries, on the other.

108. Since the action is not well founded, there is no need to consider whether the contested provisions are severable from the rest of the Directive.

109. Consequently, the action must be dismissed.

Costs

110. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Parliament has been unsuccessful, the Parliament must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany and the Commission, which have intervened in the proceedings, are to bear their own costs.

Operative part

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

1. Dismisses the action;

2. Orders the European Parliament to pay the costs;

3. Orders the Federal Republic of Germany and the Commission of the European Communities to bear their own costs.

Case C-66/04
United Kingdom of Great Britain and Northern Ireland
v
European Parliament and Council of the European Union (Re: Smoke Flavourings)

JUDGMENT OF THE COURT (Grand Chamber)
6 December 2005 (*)

(Foods – Regulation (EC) No 2065/2003 – Smoke flavourings – Choice of legal basis)
ACTION for annulment under Article 230 EC, brought on 11 February 2004,

United Kingdom of Great Britain and Northern Ireland, represented by R. Caudwell and M. Bethell, acting as Agents, and Lord Goldsmith QC, N. Paines QC and T. Ward, Barrister, with an address for service in Luxembourg,
applicant,
v
European Parliament, represented by K. Bradley and M. Moore, acting as Agents, with an address for service in Luxembourg,
Council of the European Union, represented by M. Sims, E. Karlsson and F. Ruggeri Laderchi, acting as Agents,
defendants,
supported by:
Commission of the European Communities, represented by J.-P. Keppenne and N. Yerrel, acting as Agents, with an address for service in Luxembourg,
intervener,

THE COURT (Grand Chamber),
composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Schiemann, Presidents of Chambers, S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta (Rapporteur), K. Lenaerts, P. Kūris, E. Juhász, A. Borg Barthet and M. Ilešič, Judges,
Advocate General: J. Kokott,
Registrar: K. Sztranc, Administrator,
having regard to the written procedure and further to the hearing on 3 May 2005,
after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,
gives the following

Judgment

1 By its application the United Kingdom of Great Britain and Northern Ireland seeks the annulment of Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods (OJ 2003 L 309, p. 1, 'the contested regulation').

2 By order of the President of the Court of 24 June 2004, the Commission of the European Communities was granted leave to intervene in support of the form of order sought by the European Parliament and the Council of the European Union.

Legal context

3 Article 3 of Council Directive 88/388/EEC of 22 June 1988 on the approximation of the laws of the Member States relating to flavourings for use in foodstuffs and to source materials for their production (OJ 1988 L 184, p. 61, 'the Directive') provides that Member States are to take the necessary measures to ensure that flavourings may not be marketed or used if they do not comply with the rules laid down in the Directive.

4 Article 1 of the contested regulation, which was adopted on the basis of Article 95 EC, provides:

'1. The purpose of this Regulation is to ensure the effective functioning of the internal market in relation to smoke flavourings used or intended for use in or on foods, whilst providing the basis for securing a high level of protection for human health and the interests of consumers.

2. To this end, this Regulation lays down:

(a) a Community procedure for the evaluation and authorisation of primary smoke condensates and primary tar fractions for use as such in or on foods or in the production of derived smoke flavourings for use in or on foods;

(b) a Community procedure for the establishment of a list of primary smoke condensates and primary tar fractions authorised to the exclusion of all others in the Community and their conditions of use in or on foods.'

5 Under Article 2 of the contested regulation, it applies to smoke flavourings used or intended for use in or on foods, source materials for the production of smoke flavourings, the conditions under which smoke flavourings are prepared, and foods in or on which smoke flavourings are present.

6 Article 4 of the contested regulation, 'General use and safety requirements', reads as follows:

'1. The use of smoke flavourings in or on foods shall only be authorised if it is sufficiently demonstrated that

– it does not present risks to human health,

– it does not mislead consumers.

Each authorisation may be subject to specific conditions of use.

2. No person shall place on the market a smoke flavouring or any food in or on which such a smoke flavouring is present if the smoke flavouring is not a primary product authorised in accordance with Article 6, or i[t] is not derived therefrom, and if the conditions of use laid down in the authorisation in accordance with this Regulation are not adhered to.'

7 Article 5 of the contested regulation, which sets out a number of conditions of protection relating to the wood used for the production of primary products, provides:

'1. The wood used for the production of primary products shall not have been treated, whether intentionally or unintentionally, with chemical substances during the six months immediately preceding felling or subsequent thereto, unless it can be demonstrated that the substance used for the treatment does not give rise to potentially toxic substances during combustion.

The person who places on the market primary products must be able to demonstrate by appropriate certification or documentation that the requirements laid down in the first subparagraph have been met.

2. The conditions for the production of primary products are laid down in Annex I. The water-insoluble oily phase which is a by-product of the process shall not be used for the production of smoke flavourings.

3. Without prejudice to other Community legislation, primary products may be further processed by appropriate physical processes for the production of derived smoke flavourings. Where opinions differ as to whether a particular physical process is appropriate, a decision may be reached in accordance with the procedure referred to in Article 19(2).'

8 That procedure, known as the 'regulatory procedure', is defined in Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

9 Under Article 6(1) of the contested regulation, the Commission, acting in accordance with the regulatory procedure, is to establish a list of the primary products authorised to the exclusion of all others in the Community for use as such in or on foods and/or for the production of derived smoke flavourings ('the positive list').

10 Under Article 7 of the contested regulation, to obtain the inclusion of a primary product in the positive list, the person concerned must apply to the competent authority of a Member State. The application must be accompanied inter alia by a reasoned statement affirming that the product complies with the first indent of Article 4(1) of the regulation.

11 Article 8(1) of the contested regulation provides that, within six months of the receipt of a valid application, the European Food Safety Authority ('the Authority') is to give an opinion as to whether the product and its intended use comply with Article 4(1) of the regulation. Under Article 8(4), in the event of an opinion in favour of authorising the evaluated product, the opinion may include conditions or restrictions attached to the use of the primary product evaluated. Under Article 8(5), the opinion must be forwarded to the Commission, the Member States and the applicant.

12 The grant of Community authorisation and the establishment of the positive list are governed by Articles 9 and 10 of the contested regulation.

13 Under Article 9(1), within three months of receiving the opinion of the Authority, the Commission is to prepare a 'draft of the measure' to be taken in respect of the application for inclusion of a substance in the positive list, taking into account

the requirements of Article 4(1) of the regulation, Community law and other legitimate factors relevant to the matter under consideration.

14 That measure is either a draft regulation establishing or modifying the initial list of authorised primary products or a draft decision refusing to authorise the inclusion of the product in the positive list.

15 Where authorisation is granted, it is valid throughout the Community for 10 years. Under Article 11 of the contested regulation, an authorisation may be modified on application by the authorisation holder to the competent authority of the Member State. Under Article 12 of the regulation, an authorisation may also be renewed on application by the authorisation holder to the Commission.

The action

16 By its action the United Kingdom seeks the annulment of the contested regulation and that the Parliament and the Council be ordered to pay the costs, arguing that Article 95 EC is not an appropriate legal basis for the adoption of the regulation.

17 The Parliament and the Council, supported by the Commission, contend that the application should be dismissed as unfounded and the United Kingdom ordered to pay the costs.

Arguments of the parties

18 The United Kingdom submits that Article 95 EC does not provide a correct legal basis for the adoption of the contested regulation, as the regulation does not harmonise national laws but sets up a centralised procedure at Community level for the authorisation of smoke flavourings for foods. The legislative power conferred by Article 95 EC is a power to harmonise national laws, not a power to establish Community bodies or to confer tasks on such bodies, or to establish procedures for the approval of lists of authorised products.

19 It accepts that a measure adopted under Article 95 EC may contain provisions which do not themselves harmonise national laws, where those provisions merely contain elements incidental to or constitute the implementation of the harmonising provisions.

20 The United Kingdom further asserts that, while it is indeed permissible to harmonise national laws by a Community regulation, such a regulation must lead to a result which could have been achieved by the simultaneous enactment of identical legislation in each Member State. However, the system of evaluation of smoke flavourings laid down by the contested regulation is a Community mechanism which no Member State considered individually had the power to establish. Consequently, such a system cannot itself be regarded as a harmonisation measure.

21 The United Kingdom considers that, even if the measures provided for by the contested regulation are 'harmonisation measures' within the meaning of Article 95 EC, they do not harmonise the 'essential aspects' or 'standards' for the use and marketing of smoke flavourings. The provisions of the regulation leave entirely open the question of which smoke flavourings are authorised and how they are to be evaluated. Thus, on the basis of the provisions of the regulation, neither a producer nor a national authority can determine whether or not a particular smoke flavouring is authorised.

22 As regards the tasks conferred on the Commission in the regulatory procedure, the United Kingdom submits that under Article 202 EC the Commission may indeed play a part in the implementation of measures adopted under Article 95 EC, but only on condition that such action can be described as 'implementation' of those measures.

23 The United Kingdom concedes that Articles 4 and 5 of the contested regulation, read together with Annex I to the regulation, contain some uniform conditions which smoke flavourings have to meet. However, those conditions do not amount to a set of standards for those substances, in the context of which the evaluation procedure consists solely of checking products against a list of conditions laid down by the regulation. The requirement in Article 4(1) of the regulation that the products must not present risks to human health is an important requirement but is not sufficiently precise. Similarly, the production methods listed in Annex I to the regulation are far from constituting an exhaustive list.

24 The United Kingdom submits that the Authority, when forming its opinion on whether a particular product is safe for human consumption, and the Commission, when taking a decision on this point, must not confine themselves to examining whether the production methods set out in Annex I to the contested regulation have been followed. In its view, it is necessary to provide information going well beyond a mere demonstration that that annex has been complied with, for example details of the chemical composition of the primary product and toxicological data.

25 It observes in this respect that compliance with the methods of production laid down in that annex does not guarantee

that the product is safe for human consumption. The Authority's assessment of its safety and the Commission's 'risk management' require a detailed analysis by experts in the field.

26 The United Kingdom concludes that the only appropriate legal basis for the adoption of the contested regulation is Article 308 EC.

27 The Parliament submits that the contested regulation harmonises the national provisions on smoke flavourings used in foods and that Article 95 EC constitutes a proper and sufficient legal basis for the establishment of the authorisation procedure laid down by the regulation.

28 The Parliament observes that Article 95 EC does not require that the measures adopted themselves harmonise the relevant national provisions. A legal approximation of those provisions may be carried out by the legislation itself or by measures adopted under the legislation or both. Article 95 EC does not require the Community legislature to lay down all the details of measures 'approximating' the laws of the Member States, and leaves the legislature a discretion as to the legislative technique to be followed, in particular in the case of the establishment of a harmonised list of authorised products, provided that the essential elements of the matter to be regulated are contained in the basic act.

29 It also observes that the Community legislature is not obliged to lay down exhaustively, in the primary legislation, a set of criteria which are precise enough to be able to be applied themselves.

30 The Parliament points out that the contested regulation carries out an approximation of national legislation with regard to the most fundamental aspects of the use and marketing of smoke flavourings, namely the definition of the conditions under which those flavourings may be used in or on foods and the prohibition of the marketing of smoke flavourings which are not authorised or do not comply with those conditions.

31 The Parliament submits that the absence of a common approach to evaluating the safety of smoke flavourings means that the Community legislature was unable, for objective scientific reasons, to draw up an exhaustive list of approved products in the text of the contested regulation itself. In those circumstances, and to ensure a high level of protection of human health and at the same time guarantee the free movement of products containing smoke flavourings, the Community legislature was forced to provide that the list of authorised products would be drawn up on the basis of a toxicological evaluation of each of the products concerned, and to entrust the Commission with that task.

32 The Parliament considers that nothing in the contested regulation supports the view that the evaluation procedure is anything other a means to an end, namely the establishment of a harmonised list of authorised primary products, valid throughout the Community, with the aim of improving the functioning of the internal market.

33 The Council submits that the contested regulation falls within the scope of Article 95 EC, as it lays down harmonised substantive provisions on the content of smoke flavourings, by prescribing the type of primary products from which the smoke must be obtained. The regulation also lays down other harmonised rules concerning the identification of primary products, the harmonised substantive conditions governing the scientific evidence needed in order to apply for authorisation to add to the positive list primary products intended to be used in smoke flavourings, the effects of authorisations, and public access to the relevant data, confidentiality and data protection.

34 The Council observes that the contested regulation does not therefore derogate from the principle governing Community law relating to food that there must be a separation between the provision of independent scientific expertise (risk assessment) and the making of decisions (risk management).

35 The Council submits that authorisation for the entire Community of products such as smoke flavourings requires complex scientific evaluations. It would be practically impossible to draw up a legislative instrument in which all the technical parameters were described in such detail that all discretion could be ruled out in the making of those evaluations.

36 The Council admits that, when implementing powers are delegated, it must be ensured that the conditions set out in Article 202 EC and in Decision 1999/468 are complied with. That applies in particular to the obligation to establish the 'essential elements' of the matter to be regulated. As regards technically complex issues, the legislature is entitled to confer extensive implementing powers on the Commission and, consequently, the concept of 'essential elements' should not be interpreted restrictively. In the present case, the authorisation procedure is no more than a procedure aimed at including in the positive list, by means of implementing measures, the substances which satisfy the substantive requirements laid down by the contested regulation.

37 The Commission observes that Article 95 EC refers generally to 'measures for the approximation' of national provisions, rather than to 'measures which approximate'. While the latter expression corresponds to provisions which directly

carry out the approximation of national laws, the wording of the provision is much wider and leaves open the question of the legislative technique to be chosen to achieve that result. The only condition to which recourse to Article 95 EC is subject is that the measures adopted must be 'for' the approximation of national provisions, in that they must lead to an approximation, but as long as that criterion is complied with the Community legislature may choose the mechanism that is most appropriate to the specific circumstances.

38 In the Commission's view, it follows that a measure adopted on the basis of Article 95 EC may perfectly well include a two-stage process such as that introduced by the contested regulation, in which an authorisation procedure is set up only in order to create a harmonised list of authorised primary products as its end result, since this is a measure leading directly to an approximation of the national rules relating to those products.

39 The Commission emphasises that this two-stage process constitutes in the present case a proportionate and scientifically founded approach, since it is necessary to draw up a list which is both detailed and open-ended and capable of being amended in the light of scientific and technical developments. It would have been impossible – and nonsensical – to include in the actual text of the contested regulation a list of all the authorised primary products.

40 The Commission concludes that, having regard to the many technical constraints of the necessary toxicological evaluations, the Community legislature was obliged to provide for a system incorporating a case-by-case evaluation of the safety of primary products and the progressive establishment of a harmonised list, on the basis of the substantive criteria set out in the contested regulation.

Findings of the Court

The scope of Article 95 EC

41 To begin with, it should be recalled that, according to the Court's case-law, where there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products which bring about different levels of protection and thereby prevent the product or products from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance both with Article 95(3) EC and with the legal principles mentioned in the EC Treaty or identified in the case-law (Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 34; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 33; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-0000, paragraph 32).

42 In the present case, according to the statements in the fifth recital in the preamble to the regulation which have not been disputed by the United Kingdom, at the time when the regulation was adopted there were differences between national laws, regulations and administrative provisions concerning the evaluation and authorisation of smoke flavourings which could hinder their free movement, creating conditions of unequal and unfair competition.

43 In those circumstances, action by the Community legislature on the basis of Article 95 EC was justified with respect to smoke flavourings used or intended for use in or on foods.

44 It must also be emphasised that, as the Advocate General observes in point 18 of her Opinion, that provision is used as legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions of the establishment and functioning of the internal market.

45 Next, it should be observed that by the expression 'measures for the approximation' in Article 95 EC the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result, in particular in fields which are characterised by complex technical features.

46 That discretion may be used in particular to choose the most appropriate harmonisation technique where the proposed approximation requires physical, chemical or biological analyses to be made and scientific developments in the field concerned to be taken into account. Such evaluations relating to the safety of products correspond to the objective imposed on the Community legislature by Article 95(3) EC of ensuring a high level of protection of health.

47 Finally, it should be added that where the Community legislature provides for a harmonisation which comprises several stages, for instance the fixing of a number of essential criteria set out in a basic regulation followed by scientific evaluation of the substances concerned and the adoption of a positive list of substances authorised throughout the Community, two conditions must be satisfied.

48 First, the Community legislature must determine in the basic act the essential elements of the harmonising measure in

question.

49 Second, the mechanism for implementing those elements must be designed in such a way that it leads to a harmonisation within the meaning of Article 95 EC. That is the case where the Community legislature establishes the detailed rules for making decisions at each stage of such an authorisation procedure, and determines and circumscribes precisely the powers of the Commission as the body which has to take the final decision. That applies in particular where the harmonisation in question consists in drawing up a list of products authorised throughout the Community to the exclusion of all other products.

50 Such an interpretation of Article 95 EC is also borne out by the fact that, according to their very wording, paragraphs 4 and 5 of that article recognise that the Commission has power to adopt harmonisation measures. The reference to that power of the Commission in those paragraphs, read in conjunction with paragraph 1 of that article, indicates that an act adopted by the Community legislature on the basis of Article 95 EC, in accordance with the codecision procedure referred to in Article 251 EC, may be limited to defining the provisions which are essential for the achievement of objectives in connection with the establishment and functioning of the internal market in the field concerned, while conferring power on the Commission to adopt the harmonisation measures needed for the implementation of the legislative act in question.

Classification of the contested regulation as a harmonisation measure within the meaning of Article 95 EC

51 In the light of the above considerations, it must be determined whether the contested regulation satisfies the two conditions recalled in paragraphs 48 and 49 above, so as to be regarded as a harmonisation measure within the meaning of Article 95 EC.

52 It must be stated, first of all, that the matter harmonised by the contested regulation has the features referred to in paragraph 46 above. The sixth to ninth recitals in the preamble to the regulation refer to special features of smoke flavourings used for foods, in particular the complexity of the chemical composition of the smoke, the possible toxic properties of those substances, and the methods of production concerned.

53 As to the first condition stated in paragraph 48 above, it must be examined whether that regulation contains the essential elements concerning the approximation of the laws, regulations and administrative provisions of the Member States that regulate the characteristics of smoke flavourings used or intended for use in or on foods.

54 It should be recalled here that, as its Article 1(2) states, the contested regulation defines the parameters for the evaluation and authorisation of primary smoke condensates and primary tar fractions used or intended for use as such in or on foods or in the production of derived smoke flavourings used or intended for use in or on foods.

55 Moreover, as is apparent from Article 4(1) of the regulation, the two fundamental safety rules set out in that provision must be observed before smoke flavourings can be the subject of an authorisation valid throughout the Community. Their use in or on foods can be authorised only if it has been demonstrated that there are no risks to human health. In addition, authorisation is granted only if the use of those substances does not mislead consumers.

56 It should also be noted that Article 5(1) of the contested regulation lays down a large number of conditions which must be satisfied by the wood used for the production of the primary products. As to the conditions for the production of primary products, Article 5(2) states that they are laid down in Annex I to the regulation, which defines the type of products from which the smoke must be obtained, the ingredients allowed in the combustion process, the combustion technique, the environment required, the maximum combustion temperature, the way in which the smoke is condensed, the chemical composition of the condensates, the maximum content of certain substances, and other factors which influence the production process.

57 The information relating to the scientific evaluation of primary products must, moreover, be included in the application for authorisation made under Article 7 of the regulation read together with its Annex II. In addition, Articles 9(4) to (6) and 13 to 16 of the contested regulation lay down harmonised rules concerning the effects of authorisations granted, the consequent rights and obligations, the identification and traceability of primary products, as well as public access, the confidentiality of certain information and data protection.

58 It follows from all those factors that the contested regulation contains the essential elements typifying a harmonisation measure.

59 It also follows that, contrary to the United Kingdom's submissions, the regulation does not have the incidental effect of harmonising the conditions of the internal market (see on this point Case C-209/97 *Commission* v *Council* [1999] ECR I-8067, paragraph 35), but is intended to approximate the laws, regulations and administrative provisions of the Member

States in the field of smoke flavourings.

60 As to the second condition stated in paragraph 49 above, it must be recalled that the Community authorisation procedure provided for in the contested regulation is defined in Article 19(2) of the regulation, referring to Articles 5 and 7 of Decision 1999/468, as a ‘regulatory procedure’.

61 Under Articles 7 to 9 of the contested regulation, after an application has been made for a primary product to be included in the positive list and the application has been transmitted to the Authority by the competent national authority, it is for the Authority and the Commission to apply to that product the evaluation criteria set out in Articles 4 and 5 of the regulation in conjunction with Annexes I and II to the regulation.

62 It follows from such a legal framework that not only are the tasks conferred on the Authority and the Commission clearly defined by the provisions of the contested regulation, the procedure provided for therein also leads to the adoption of the positive list of substances authorised throughout the Community.

63 The procedure provided for by the regulation thus constitutes an appropriate means for achieving the desired approximation, namely the establishment of a positive list of substances authorised throughout the Community.

64 Having regard to all the foregoing considerations, the conclusion must be that the contested regulation was rightly based on Article 95 EC. The action must therefore be dismissed.

Costs

65 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Parliament and the Council have applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 69(4), the Commission must bear its own costs.

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

1. **Dismisses the action;**
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
3. **Orders the Commission of the European Communities to bear its own costs.**

[Signatures]

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* Language of the case: English.

Case C-275/06
Productores de Música de España (Promusicae)
v
Telefónica de España SAU

OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 18 July 2007 (1)

(Reference for a preliminary ruling from the Juzgado de lo Mercantil Nº 5 de Madrid (Spain))
(Information society – Copyright and related rights – Data protection – Communication of traffic data)

I – Introduction

1. This case illustrates that the storage of data for specified purposes creates the desire to use those data more extensively. In Spain, providers of access to the Internet are required to store certain data of individual users so that those data can be used, where appropriate, in criminal investigations or for the protection of public security and for national defence. Now an association of holders of copyrights is seeking to identify, with the aid of those data, users who have infringed copyrights by the exchange of files.

2. The referring court would therefore like to know whether Community law allows or even requires the communication of personal traffic data on the use of the Internet to the holders of intellectual property. It assumes that various directives on the protection of intellectual property and the information society grant the holders of corresponding legal positions a claim against the providers of electronic services to the communication of such data if those data can prove an infringement of property rights.

3. However, I shall show below that the provisions of Community law on data protection in the electronic communications sector allow the communication of personal traffic data only to the competent State authorities, but not direct communication to holders of copyrights wishing to bring civil-law actions against the infringement of their rights.

II – Legal framework

A – *Community law*

4. In the present case, provisions on the protection of intellectual property and on electronic commerce as well as, in particular, the provisions on data protection are of interest.

1. The protection of intellectual property in the information society

5. With regard to the protection of intellectual property in the information society, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (2) must be mentioned first.

6. Article 1(5) of Directive 2000/31 delimits its scope. Under Article 1(5)(b), the Directive does not apply to 'questions relating to information society services covered by Directives 95/46/EC and 97/66/EC'. (3)

7. Article 15(2) of Directive 2000/31 states:

'Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

8. Article 18(1) of Directive 2000/31 is worded as follows:

'Member States shall ensure that court actions available under national law concerning information society services'

activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

9. Special provisions on the protection of intellectual property in electronic commerce are contained in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. (4) Article 8 in particular, headed 'Sanctions and remedies', is of interest:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. …'

10. Article 9 of Directive 2001/29 restricts its application as follows:

'This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.'

11. Article 8 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (5) provides for a special right of information for holders of intellectual property:

'1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

…

(c) was found to be providing on a commercial scale services used in infringing activities;

…

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) …

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) – (d) …

or

(e) govern the protection of confidentiality of information sources or the processing of personal data.'

12. At the same time, according to Article 2(3), Directive 2004/48 does not affect:

‘(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) ...’

2. The provisions on data protection

13. With regard to data protection, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (6) is relevant.

14. It ‘harmonises [according to Article 1(1)] the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.’

15. Under Article 1(2), the provisions of that directive particularise and complement Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (7) for the purposes mentioned in paragraph 1.

16. Article 2(b) of Directive 2002/58 defines the term ‘traffic data’ as ‘any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof.’

17. The processing of traffic data is regulated by Article 6:

‘1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. – 5. …

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.’

18. The reservation in Article 15(1), mentioned in Article 6(1) of Directive 2002/58, reads as follows:

‘Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.’

19. It is explained in recital 11 in the preamble:

‘(11) Like Directive 95/46/EC, this Directive does not address issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law. Therefore it does not alter the existing balance between the individual’s right to privacy and the possibility for Member States to take the measures referred to in Article 15(1) of this Directive, necessary for the protection of public security, defence, State security (including the economic well-being of the

State when the activities relate to State security matters) and the enforcement of criminal law. Consequently, this Directive does not affect the ability of Member States to carry out lawful interception of electronic communications, or take other measures, if necessary for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the rulings of the European Court of Human Rights. Such measures must be appropriate, strictly proportionate to the intended purpose and necessary within a democratic society and should be subject to adequate safeguards in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

20. Article 19 of Directive 2002/58 regulates that directive's relationship to its predecessor, Directive 97/66:

'Directive 97/66/EC is hereby repealed with effect from the date referred to in Article 17(1).

References made to the repealed Directive shall be construed as being made to this Directive.'

21. Article 13(1) of Directive 95/46, referred to in Article 15(1) of Directive 2002/58, is worded as follows:

'1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.'

22. In addition, it should be pointed out that an independent working party composed of representatives of the data protection supervisory authorities of the Member States ('the Data Protection Working Party) (8) was set up under Article 29 of Directive 95/46. Its task is to give opinions on questions covering data protection legislation. A similar function is assigned to the Data Protection Supervisor established under Article 286 EC and Regulation No 45/2001. (9)

23. Finally, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (10) is also of interest for the purposes of this case.

24. Directive 2006/24 requires Member States to retain inter alia traffic data relating to Internet traffic. Under Article 15, it must be transposed by 15 September 2007 but allows retention in relation to Internet traffic to be postponed by a further 18 months. Spain has not made use of that possibility.

25. Article 11 of Directive 2006/24 inserts a new paragraph 1a in Article 15 of Directive 2002/58:

'Paragraph 1 shall not apply to data specifically required by Directive 2006/24/EC … to be retained for the purposes referred to in Article 1(1) of that Directive.'

26. The communication of data retained under Directive 2006/24 is regulated in Article 4:

'Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.'

B – *Spanish law*

27. The referring court confines itself essentially, in setting out the legal framework under national law, to Article 12(1) to (3) of Ley 34/2002, de 11 de Julio 2002, de Servicios de la Sociedad de la Información y de Comercio Electrónico (Law 34/2002 of 11 July 2002 on information society services and electronic commerce):

'Article 12. Duty to retain traffic data relating to electronic communications

1. Operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services must retain for a maximum of 12 months the connection and traffic data generated by the communications established during the supply of an information society service, under the conditions established in this article and the regulations implementing it.

2. ... The operators of electronic communications networks and services and the service providers to which this article refers may not use the data retained for purposes other than those indicated in the paragraph below or other purposes permitted by the Law and must adopt appropriate security measures to avoid the loss or alteration of the data and unauthorised access to the data.

3. The data shall be retained for use in the context of a criminal investigation or to safeguard public security and national defence, and shall be made available to the courts or the public prosecutor at their request. Communication of the data to the forces of order shall be effected in accordance with the provisions of the rules on personal data protection.'

28. The referring court also states that the infringement of copyright is a criminal offence in Spain only if the act is committed with the intention to make a profit. (11)

III – **Technical background, facts and main proceedings**

29. The applicant in the main proceedings (Productores de Música de España, 'Promusicae') is a non-profit-making association of producers and publishers of musical recordings and audiovisual presentations which are essentially musical. It lodged an application against a Spanish provider of Internet access, Telefónica de España SAU, requesting that the company be ordered to disclose the names and addresses of certain Internet users. Promusicae identified those persons by IP addresses and by the date and time of their use.

30. The IP address is a numerical address format, comparable to a telephone number, which enables networked devices such as webservers, e-mail servers or private computers to communicate with one another on the Internet. Thus, the server via which Court of Justice pages are retrieved has the IP address 147.67.243.28. (12) When a page is retrieved, the address of the retrieving computer is communicated to the computer on which the page is stored, so that the data can be routed from one computer to the other via the Internet.

31. Static IP addresses may be assigned in order to connect private users to the Internet, in similar fashion to connection to the telephone network. However, that is rather rare, since the Internet is at present still organised in such a way that each access provider has only a limited number of addresses available to it. (13) Consequently, in most cases, including this one, dynamic IP addresses are used, which means that the access provider assigns its customers an address, on an ad hoc basis, from its quota of addresses every time they access the Internet. That address may naturally change each time a customer dials up.

32. Promusicae claims that it identified a number of IP addresses which were used at certain times for the purpose of 'file sharing' in respect of music files to which the its members hold the exploitation rights.

33. File sharing is a form of exchange of files containing, for example, pieces of music or films. Users first copy the files onto their computers and then offer them to anyone who is in contact with them via the Internet and a particular program, in this case Kazaa. Normally, in such cases, (14) the IP address of the person offering the file to others for retrieval is used, and can thus be detected.

34. In order to take action against such users, Promusicae claims that the access provider concerned, Telefónica, should inform it which users were assigned the IP addresses identified by it at the times specified by it. Telefónica is able to find out which connection was used in each case, since it retains, after the connection has ended, the details concerning to whom and when it assigned a particular IP address.

35. The referring court first gave a ruling requiring Telefónica to provide the desired information. However, Telefónica objected that, pursuant to Article 12 of the Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico, it could in no circumstances provide the court with the information. The electronic communications operator or service provider is allowed to supply the information which he is required by law to retain only in connection with a criminal investigation, or if it is necessary in order to protect public safety, or if national security is involved.

36. The referring court considers it possible that that view is correct under Spanish law, but takes the view that the provision in question is then incompatible with Community law. It therefore refers the following question to the Court of Justice for a preliminary ruling:

Does Community law, specifically Articles 15(2) and 18 of Directive 2000/31, Article 8(1) and (2) of Directive 2001/29, Article 8 of Directive 2004/48, and Articles 17(2) and 47 of the Charter, permit Member States to limit to the context of a criminal investigation or to safeguard public security and national defence, thus excluding civil proceedings, the duty of operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services to retain and make available connection and traffic data generated by the communications established during the supply of an information society service?

37. Promusicae, Telefónica, Finland, Italy, Slovenia, the United Kingdom und the Commission took part in the proceedings. The Data Protection Working Party (15) and the European Data Protection Supervisor were not involved, in particular because Article 23 of the Statute of the Court of Justice does not provide for their participation. However, since they are able to make an important contribution to the discussion of legal issues concerning data protection, I have devoted particular attention at least to their published opinions on the questions raised here.

IV – **Legal assessment**

38. The Court is required to clarify whether it is compatible with the directives mentioned by the referring court to restrict the obligation to communicate connection data to criminal prosecutions and similar proceedings, but to exclude from it civil proceedings.

39. The referring court thus takes the view that there is a contradiction between Spanish law and Community law. However, in so doing, it fails to take into account the fact that the provision of Spanish law referred to is based on Article 15 of Directive 2002/58 and largely incorporates its wording. That directive contains provisions on data protection in the electronic communications sector and in that respect supplements Directive 95/46 containing general provisions on data protection.

40. It must therefore be examined whether it is compatible with the provisions mentioned by the referring court, having regard to the provisions on data protection, to prohibit providers of Internet access from identifying the holders of subscriber lines in order to enable civil proceedings for copyright infringements.

A – *Admissibility of the request*

41. There could be doubts as to the admissibility of the request for a preliminary ruling in terms of its relevance to a decision. (16) A directive cannot of itself impose obligations on an individual. (17) If Spanish law unquestionably precluded communication of the data at issue, even the interpretation of directives requested by the referring court could not lead to Telefónica's being obliged to communicate them. On the basis of the available information, however, it is conceivable that

Spanish law could be interpreted in conformity with the directives. As long as that possibility exists, a request for a preliminary ruling such as this one cannot be regarded as irrelevant. (18)

B – *The relationship of the various directives to each other*

42. Certain parties concentrate – almost exclusively – on the interpretation of the directives mentioned by the referring court. In so doing, they invariably emphasise the necessity of effective legal protection against infringements of copyright. The Commission, on the other hand, rightly points out that none of the three directives affects the law on data protection.

43. Under Article 1(5)(b) of Directive 2000/31 on electronic commerce, the Directive does not apply to questions relating to information society services covered by Directive 95/46 on data protection and Directive 97/66 concerning the processing of personal data and the protection of privacy in the telecommunications sector. The last-mentioned directive has since been replaced by Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

44. In the same way, Article 9 of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society expressly states that the directive is without prejudice to, inter alia, provisions concerning data protection and privacy.

45. The relationship of Directive 2004/48 on the enforcement of intellectual property rights to data protection is somewhat less clear. Article 2(3)(a) provides that that directive does not affect Directive 95/46. Promusicae infers from this that Directive 2002/58, which is not mentioned in that provision, is not applicable within the field of application of Directive 2004/48.

46. That argument could be intended to mean that, under the principle *lex posterior derogat legi priori*, Directive 2004/48 takes precedence over Directive 2002/58, but not over Directive 95/46 which is expressly made an exception. However, that argument must be answered by pointing out that, according to Article 1(2), Directive 2002/58 is intended to particularise and complement Directive 95/46. Directive 2004/48 does not lay claim to that function. Rather, according to the second recital in the preamble, the protection of intellectual property which it brings about should not hamper the protection of personal data, including on the Internet. However, it would be inconsistent to allow particularising and complementing provisions which relate, in particular, to the protection of data on the Internet, which expressly must not be impaired, to be overridden without being replaced, but to continue to accord respect to the general provisions. Instead, it is more logical to extend the reservation in favour of Directive 95/46 to Directive 2002/58.

47. A further point in favour of that conclusion, as regards the right of information under Article 8(1) and (2) to be considered here, is that, according to Article 8(3)(e), those paragraphs apply without prejudice to other statutory provisions which govern the processing of personal data. That additional express emphasis on data protection was not yet reflected in the Commission's Proposal, but was incorporated in the Directive during the discussions in the Council and in the Parliament. (19) Directive 2002/58 contains precisely such provisions and is therefore not infringed, at least not by the right of information under Article 8 of Directive 2004/48 at issue here.

48. It should additionally be pointed out that even the TRIPS Agreement (20) does not require data protection to be overridden by Directive 2004/48. Promusicae rightly submits that Articles 41 and 42 of TRIPS require effective protection for intellectual property and in particular that access to the courts for legal protection must be possible. However, a right of information is only provided for directly vis-à-vis infringers in Article 47 of TRIPS. (21) The Contracting States may introduce such a right, but according to the wording of Article 47 of TRIPS, are not required to do so. (22) The extension by Article 8 of Directive 2004/48 of the duty to provide information to include third parties goes even beyond that option. It can therefore be restricted by data protection without any conflict with the TRIPS Agreement.

49. All three directives mentioned by the referring court thus cede precedence to the Data Protection Directives, 95/46 and 2002/58. Contrary to what has been submitted by some parties, that does not mean that data protection enjoys priority over the aims of those directives. Rather, a reasonable balance between data protection and those aims must be struck in the context of the Data Protection Directives.

C – *Data protection*

50. The secondary legislation relevant to the present case is Directive 2002/58 containing provisions on data protection in the electronic communications sector, together with Directive 95/46 which regulates data protection in general. The Court, however, derives important criteria for the interpretation of those provisions of secondary legislation from the foundations of data protection, which lie in fundamental rights.

1. The link between data protection and fundamental rights

51. Data protection is based on the fundamental right to private life, as it results in particular from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR'). (23) The Charter of fundamental rights of the European Union, proclaimed at Nice on 7 December 2000 (24) ('the Charter'), confirmed that fundamental right in Article 7, and in Article 8 specifically emphasised the fundamental right to the protection of personal data, including important fundamental principles of data protection.

52. The communication of personal data to a third party, whatever the subsequent use of the information thus communicated, therefore constitutes an infringement of the right of the person concerned to respect for private life and consequently an interference within the meaning of Article 8 of the ECHR. (25)

53. Such an interference violates Article 8 of the ECHR unless it is 'in accordance with the law'. (26) It must therefore, in accordance with the requirement of foreseeability, be formulated with sufficient precision to enable the citizen to adjust his conduct accordingly. (27) The requirement of foreseeability has found particular expression in data protection law in the criterion – expressly mentioned in Article 8(2) of the Charter – of purpose limitation. Pursuant to the specific embodiment of the purpose limitation criterion in Article 6(1)(b) of Directive 95/46, personal data may be collected only for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.

54. In addition, any interference with private life – the processing of personal data – must be proportionate to the aims pursued. (28) There must therefore be a pressing social need and the measure must be in reasonable proportion to the legitimate aim pursued. (29)

55. In the context of legitimate aims, the relevant fundamental rights of the holders of copyrights, in particular the protection of property and the right to effective judicial protection, will have to be taken into account in the present case. According to settled case-law, both those rights form part of the general principles of Community law, (30) as confirmed by Article 17 and Article 47 of the Charter. Article 17(2) of the Charter emphasises in this connection that intellectual property also falls within the protective scope of the fundamental right to property. (31)

56. The balance between the relevant fundamental rights must first be struck by the Community legislature and, in the interpretation of Community law, by the Court. However, the Member States are also obliged to observe it when using up any remaining margin for regulation in the implementation of directives. Moreover, the authorities and courts of the Member States are not only required to interpret their national law in conformity with the Data Protection Directives, but also to ensure that they do not act on the basis of an interpretation of those directives which conflicts with the fundamental rights protected by the Community legal order or the other general principles of Community law. (32)

2. Applicability of the Data Protection Directives

57. The secondary legislation gives concrete expression to the requirements as regards fundamental rights for data protection and extends them in a respect which is one of the decisive factors in this case. The directives not only provide for a binding obligation for governmental authorities to protect data, but also extend it to individuals except in so far as, pursuant to the second indent of Article 3(2) of Directive 95/46, the activity concerned is carried out by a natural person in the course of a purely personal or household activity. (33) The Community thereby fulfils and gives concrete expression to an objective of protection resulting from the fundamental right to data protection. (34)

58. The bringing of civil proceedings against copyright infringements by Promusicae and the processing of connection data by Telefónica are not to be categorised as personal or household activities. That is also apparent, with regard to the processing of connection data, from the existence of Directive 2002/58, which does not include the exemption for personal and household activities, but assumes that the processing of personal data by providers of electronic communications services is in principle subject to data protection. Transmission of such data between private undertakings is therefore not

excluded from the scope of data protection. Consequently, it must be examined whether the other conditions for the application of data protection law are fulfilled in this case.

59. Directive 2002/58, as provided in Article 3(1), applies to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community. Under Article 2 of Directive 2002/58, those concepts are defined in Directive 95/46 and Directive 2002/21. (35)

60. The provision of access to the Internet is a publicly available electronic communications service within the meaning of Article 2(c) of Directive 2002/21, that is, a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks.

61. The indication of which users were assigned particular IP addresses at particular times consists of personal data under Article 2(a) of Directive 95/46, namely information relating to identified or identifiable (36) natural persons. With the aid of those data, the actions performed using the IP address concerned are linked to the subscriber.

62. In Article 2(b) of Directive 95/46, the disclosure of such data is expressly listed as an example of processing, that is, an operation performed by or without automatic means.

63. At the same time, at least the temporarily assigned IP addresses of users are traffic data according to the definition in Article 2(b) of Directive 2002/58, namely data which are processed for the purpose of the conveyance of a communication on an electronic communications network.

3. The applicable prohibitions on processing

64. Under Article 5(1) of Directive 2002/58, the confidentiality of communications also applies to the traffic data arising during the communications. In particular, the Member States must prohibit the storage and other kinds of interception or surveillance of traffic data by persons other than the users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1).

65. Article 6(1) of Directive 2002/58 makes it clear, with regard to any storage of traffic data during the operation of communications networks, that such data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of that article and Article 15(1).

66. Both the storage and the communication of personal traffic data on Internet use must therefore be prohibited in principle.

4. The exceptions to the prohibitions on processing

67. However, there are also exceptions to those prohibitions on processing. They are set out in Article 6 and Article 15 of Directive 2002/58.

a) The exceptions under Article 2002/58

68. Article 6(2), (3) and (5) of Directive 2002/58, expressly mentioned as exceptions in Article 6(1), are not an appropriate basis for overriding the prohibition on processing under Article 6(1) by communication to Promusicae.

69. Article 6(2) of Directive 2002/58 allows as an exception the processing of such traffic data where and in so far as they are necessary for the purposes of subscriber billing and interconnection payments. It is already doubtful whether that exception allows any storage at all of particulars concerning the persons to whom and times when a dynamic IP address was assigned. That information is not normally needed for the purpose of billing the access provider’s charges. The standard billing methods are based on the duration of the dial-up connection to the access provider or on the volume of the data traffic generated by the user, if, that is, unrestricted use of access in return for a flat-rate amount has not been agreed. However, if processing of the IP address is not necessary for billing, it must not be stored for that purpose either. (37)

70. Irrespective of that, Article 6(2) is in any event not an appropriate basis for the communication of traffic data to third parties wishing to take action against the user for acts committed using that IP address. Such proceedings have no connection with subscriber billing or interconnection payments.

71. The exemption under Article 6(3) of Directive of 2002/58 is equally irrelevant. It allows processing by the access provider for the purpose of marketing electronic communications services or for the provision of value added services only after users have given their consent.

72. Finally, Promusicae may not rely on Article 6(5) of Directive 2002/58 either. Under that provision, third parties may process traffic data under the authority of the access provider for specific purposes, in particular that of combating fraud. The 29th recital in the preamble makes it clear in this respect that fraud means unpaid use of the electronic communications service. Promusicae does not act under the authority of Telefónica and the infringement of copyrights cannot be regarded as fraud in that sense.

b) Article 6(6) of Directive 2002/58

73. In the view of Promusicae, the communication and use of traffic data for the enforcement of copyright claims in the civil courts is however permissible under Article 6(6) of Directive 2002/58. Under that provision, it is possible for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.

74. However, that provision cannot justify the communication of traffic data to Promusicae, simply because Promusicae is not a competent body for the settlement of disputes. Nor is there, in the main proceedings between Promusicae and Telefónica, any apparent necessity for communication of the connection data at issue to the court. Determination of the dispute as to whether Telefónica is entitled and obliged to disclose those data to Promusicae does not require the court to be acquainted with them.

75. The fact that Promusicae demands the traffic data in order to be able to start contentious proceedings against the individual users concerned likewise does not result in communication under Article 6(6) of Directive 2002/58.

76. To interpret Article 6(6) of Directive 2002/58 to the effect that the mere purpose of using traffic data in contentious proceedings allows their communication to the potential opponent would, in the absence of adequate indications in the wording, be incompatible with the foreseeability which must be observed in the statutory justification of interferences with private life and data protection. In addition to the exceptions under Article 6(2), (3) and (5) and under Article 15(1), which are expressly mentioned in Article 6(1) and relatively clearly defined, a new, almost limitless exception would be introduced. (38) According to the wording of Article 6, the user of electronic communications services does not have to reckon with that exception.

77. At the same time, such an exception would be very extensive and could therefore not be accepted as proportionate to the aims pursued. The user would in principle have to reckon continually – not only in the case of copyright infringements – with the fact that his traffic data were being disclosed to third parties who, for some reason, wanted to start contentious proceedings against him. It is inconceivable that such disputes could in any event be based on a pressing social need as referred to in the case-law on Article 8 of the ECHR. (39)

78. A look at the purposes of storage of traffic data under Article 6 of Directive 2002/58 points even more in favour of the restriction of communication. Only the purposes of the storage can justify the communication of the data, as provided for in Article 6(1)(b) of Directive 95/46. Those purposes are, in the case of traffic data under Article 6 of Directive 2002/58, the operation of the communications network, subscriber billing, marketing and value added services with the consent of the user and – over and above those – processing under authority for customer enquiries and fraud detection in the abovementioned (40) sense. Dispute settlement is not an intrinsic purpose of storing traffic data, but only allows the competent authorities to be informed. It can therefore refer only to disputes which are connected with the purposes of the storage. (41) However, the provision of evidence for contentious proceedings with third parties is not an identifiable purpose of storage.

79. Communication of the desired traffic data to Promusicae can therefore not be based on Article 6(6) of Directive

2002/58.

c) Article 15(1) of Directive 2002/58

80. Furthermore, Article 15(1) of Directive 2002/58 allows the restriction of the rights under Article 6(1). Such a restriction must be necessary, appropriate and proportionate within a democratic society to safeguard national security (that is, State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC.

81. Spain has made use of that derogation and in Article 12(1) of Ley 34/2002 has imposed on access providers the duty to retain traffic and connection data. Communication is however expressly restricted to criminal investigations, safeguarding public security and defence. The stored data must expressly not be communicated for other purposes.

82. It may be doubted whether the storage of traffic data of all users without any concrete suspicions (42) – laying in a stock, as it were – is compatible with fundamental rights, (43) but the Spanish rules are in any case compatible with the wording of Article 15(1) of Directive 2002/58. Such an interference with fundamental rights would be beyond the scope of these proceedings, since they do not concern the validity of Article 15(1). (44) This question may have to be examined one day in connection with Directive 2006/24, which introduces a duty of retention under Community law. (45) However, if the Court wished to examine the permissibility of retention in the present case as a preliminary question, it would certainly be necessary to re-open the oral procedure in order to give the parties entitled under Article 23 of the Statute to make submissions the opportunity to do so.

83. In essence, the question which arises here, however, is whether Article 15(1) of Directive 2002/58 permits the communication of the desired – retained – data to Promusicae. If communication were permissible under data protection law, it would need to be examined whether the directives mentioned by the referring court – and the property of the holders of copyrights protected under them – require that that possibility also be used. In that case, the Spanish courts would be obliged to use any available margin of interpretation in order to facilitate such communication. (46)

84. Under Article 15(1) of Directive 2002/58, two types of bases for exceptions are expressly mentioned, namely, on the one hand, in the first four alternatives, national security (that is, State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences and, on the other, in the fifth alternative, unauthorised use of the electronic communication system. In addition, Article 15(1) of Directive 2002/58 refers to Article 13(1) of Directive 95/46, which contains further grounds of exception.

Article 15(1) of Directive 2002/58 in conjunction with Article 13(1)(g) of Directive 95/46

85. A first basis for communication could result from Article 15(1) of Directive 2002/58 in conjunction with Article 13(1)(g) of Directive 95/46. Article 13(1)(g) of Directive 95/46 allows the communication of personal data for the protection of the rights and freedoms of others. Unlike the grounds of exception in Article 13(1) of Directive 95/46, this ground is admittedly not expressly listed in Article 15(1) of Directive 2002/58, although Article 15(1) of Directive 2002/58, in the German version, does allow restrictions 'in accordance with Article 13(1) of Directive 95/46'.

86. Viewed in isolation, that could be understood as a reference to *all* the grounds of exception under Article 13(1) of Directive 95/46. (47) However, that is contradicted simply by the fact that Article 15(1) of Directive 2002/58 itself mentions grounds of exception which are intended to allow a restriction 'in accordance with Article 13(1) of Directive 95/46'. Those grounds correspond only in part to the grounds in Article 13(1) of Directive 95/46 and do not include the exception for the rights of others, mentioned under (g). Consequently, the grounds mentioned in Article 13(1) of Directive 95/46 are applicable in the electronic communications sector only in so far as they are expressly included in Article 15(1) of Directive 2002/58.

87. That rule is more clearly apparent from other language versions than from the German version. Instead of the ambiguous 'gemäß' ('in accordance with'), the reference is made in the form 'as referred to in Article 13(1) of Directive 95/46'. (48) That is based on a deliberate decision during the legislative procedure. As the Commission points out, when it first adopted that rule in Directive 97/66, the Council refrained from incorporating the grounds of exception in Article 13(1) of Directive 95/46 in their entirety and instead chose the present, differentiated rule. (49)

88. That conclusion is also supported by the speciality of Article 15(1) of Directive 2002/58 as compared with Article 13(1) of Directive 95/46. (50) The latter applies to all personal data irrespective of the context in which they arise. It is thus relatively general since it has to be applied to a large number of very different situations. (51) The former, on the other hand, relates specifically to the personal data which arise in the context of electronic communications and is therefore based on a comparatively precise assessment of the extent to which communication of personal traffic data interferes with the fundamental right to data protection.

89. Consequently, the protection of the rights and freedoms of others under Article 13(1)(g) of Directive 95/46 cannot justify the communication of personal traffic data.

Unauthorised use of the electronic communication system

90. A further possible basis for communication could be unauthorised use of the electronic communication system, which is the fifth alternative in Article 15(1) of Directive 2002/58.

91. The concept of unauthorised use of the electronic communication system essentially allows two interpretations with regard to the conduct in question, namely use for unauthorised purposes and use contrary to the system. Infringement of copyright would certainly be an unauthorised purpose. When such an infringement is committed, the communication system may nevertheless be used as intended, namely for loading data from other computers which are connected to the Internet. The communication system does not need to be manipulated – in ways contrary to the system – by, for example, obtaining passwords for other persons' computers or simulating a false identity to the external computer. (52)

92. In the Commission's view, the meaning intended in Article 15(1) of Directive 2002/58 is use contrary to the system, jeopardising the integrity or security of the communication system. That, it says, also follows from the drafting history, since the concept was introduced in Directive 97/66 for ensuring correct frequency use.

93. That narrow interpretation of the concept of unauthorised use accords with the secrecy of communications, protected under Article 5 of Directive 2002/58. Use for unauthorised purposes can normally be established only by monitoring the content of the communication.

94. While Article 15(1) does also justify exceptions to the confidentiality of communications, the other grounds of exception expressly mentioned would, on a wide interpretation of the concept of unauthorised use, be superfluous and largely deprived of their practical effectiveness, since acts endangering national security, public security or defence and criminal offences committed by the use of electronic communications systems are normally accompanied by an unauthorised purpose.

95. At the same time, a broadly worded exception for communications for unauthorised purposes would hardly be foreseeable in its application and would largely render meaningless the right to protection of personal traffic data.

96. The range of unauthorised communication operations under criminal law is already relatively wide. Moreover, communication may also come into conflict with duties not subject to criminal sanctions, arising from specific legal relationships, such as, for example, with employment relationships or duties towards the family. There would even be the possibility that the provider of the electronic communication service could object to access to certain content or its dissemination. It would therefore be virtually impossible to define which of those legal relationships could allow storage and communication of traffic data or perhaps even of communication content. As a result, this ground of restriction would not, on a wide interpretation, be reconcilable with the requirement of foreseeability.

97. In addition, a wide interpretation would render largely meaningless not only the protection of personal traffic data, but also the protection of confidentiality of communications. In order to be able effectively to verify whether electronic communication systems were being used for unauthorised purposes, it would be necessary to store the entire communication and process it intensively with regard to the content. The citizen 'under the eye of Big Brother' would thus be a reality.

98. The Commission's interpretation must therefore be favoured. Consequently, unauthorised use of the electronic communication system covers only use contrary to the system, but not use for unauthorised purposes.

The grounds of exception in the first four alternatives in Article 15(1) of Directive 2002/58

99. Consequently, only the first four alternatives in Article 15(1) of Directive 2002/58, in particular the prevention, investigation, detection and prosecution of criminal offences, and public security now remain as a basis for communication of the connection data.

100. Recital 11 in the preamble to Directive 2002/58 explains the first four alternatives in Article 15(1). According to that recital, the Directive does not apply to activities which are not governed by Community law. Therefore it does not alter the existing balance between the individual's right to privacy and the possibility for Member States to take the measures referred to in Article 15(1), necessary for the protection of public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the enforcement of criminal law.

101. As the Court has already held, those are activities of the State or of State authorities. (53) It is true that State authorities may oblige private individuals to assist them, (54) but autonomous action by private individuals against infringements of rights no longer falls under those exceptions. For that reason alone, the first four alternatives of Article 15(1) of Directive 2002/58 can permit only communication to State authorities, but not the direct communication of traffic data to Promusicae. (55)

102. Whether communication to State authorities would be possible in the present case under the fourth alternative in Article 15(1) of Directive 2002/58, that is to say, for the prevention, investigation, detection and prosecution of criminal offences, is also doubtful. As the Commission rightly submits, that presupposes that the copyright infringements alleged by Promusicae must also be regarded as criminal offences.

103. Under Community law, criminal liability is not excluded since – as is also apparent in Article 8(1) of Directive 2001/29 and Article 16 of Directive 2004/48 – the national legislature must decide whether and in what form infringements of copyright are penalised. The legislature can therefore make infringement of copyright by file sharing a criminal offence. According to the referring court, however, criminal liability for such acts in Spain presupposes the intention to make a profit. (56) No indications of that have been put forward up to now.

104. In addition, among the exceptions in Article 15(1) of Directive 2002/58, the third alternative, namely public security, is a further possible legal basis. According to the case-law in the sphere of the fundamental freedoms, public policy and security may only be invoked if a genuine and sufficiently serious threat exists, affecting one of the fundamental interests of society. (57)

105. The protection of copyright is an interest of society, the importance of which has been repeatedly emphasised by the Community. Consequently, even though the interest of rightholders is primarily not of a public, but of a private nature, this aim can be recognised as a fundamental interest of society. Illegal file sharing also genuinely threatens the protection of copyright.

106. It is however not certain that private file sharing, in particular when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously to justify recourse to this exception. To what extent private file sharing causes genuine damage is in fact disputed. (58)

107. That assessment should – subject to review by the Court – be left to the legislature. In particular when Member States make the infringement of copyright by file sharing a criminal offence, they undertake a corresponding assessment, but in that case the fourth alternative in Article 15(1) of Directive 2002/58 already applies, so that there is no need for recourse to public security.

108. Criminal liability would admittedly be weighty evidence of a sufficiently serious threat to the protection of copyright, but criminal law is not necessarily the only form in which the legislature can give expression to an appropriate condemnation. Rather, the legislature can also enforce that assessment by first providing only for communication of personal traffic data in order to enable civil proceedings to be brought. However, the condition for such legislation remains that data protection should not be restricted on account of the possible infringement of copyrights in trivial cases.

109. Such provisions must, under the principle of foreseeability and purpose limitation in data protection law, state

sufficiently clearly that the storage and communication of personal data by the providers of Internet access will also take place for the protection of copyright. Since such provisions are based on the third alternative in Article 15(1) of Directive 2002/58, account would also have be taken of the fact that the protection of public security is a task of State authorities and therefore traffic data may not be surrendered to private rightholders without the involvement of such authorities (for example, the courts or the data protection supervisory authorities).

110. The *Community legislature* has in any case not as yet taken any such decision on breaching data protection for the purpose of acting against copyright infringements. In particular, the directives mentioned by the referring court are not relevant since they, as already stated, (59) do not affect data protection. That applies in particular to the right of information under Article 8 of Directive 2004/48, the wording of which could also be construed as covering disclosure of the identity of Internet users. According to paragraph 3(e), that provision is to apply without prejudice to other statutory provisions which govern the processing of personal data.

111. It would therefore not be foreseeable to infer from those directives a purpose of traffic data storage which is not expressly laid down in them, as is necessary under the requirement of foreseeability and Article 6(1)(b) of Directive 95/46. (60) Nor is there any reference in them to involvement of State authorities in the communication of personal traffic data to private rightholders.

112. However, as Community law stands at present, under the third and fourth alternatives in Article 15(1) of Directive 2002/58, *Member States* may provide for personal traffic data to be communicated to State authorities in order to facilitate both criminal and civil proceedings against copyright infringements by file sharing. However, they are not obliged to do so.

113. Compared with the direct communication of personal traffic data to the holders of infringed rights, that is a more lenient method in the present situation, and at the same time ensures that communication remains appropriate in relation to the protected legal positions.

114. Involving State authorities is more lenient because, unlike private individuals, they are directly bound by fundamental rights. In particular, they must respect procedural safeguards. Moreover, they invariably also take into consideration circumstances which exonerate the user accused of an infringement of copyright.

115. Accordingly, it does not follow conclusively from the fact that copyrights were infringed under an IP address at a particular time that those acts were also carried out by the subscriber to whom that address was assigned at that time. Rather, it is also possible that other people used his connection or computer. This may even have occurred without his knowledge if, for example, he operates an inadequately protected local wireless network in order to avoid cable connections, (61) or if his computer was 'taken over' by third parties via the Internet.

116. The holders of copyrights will – unlike State authorities – have no interest in allowing for or clarifying such circumstances.

117. The appropriateness of communication of personal traffic data will also be more effectively ensured if State authorities are involved.

118. The legislature will provide for their intervention only where there is adequate suspicion of an infringement of rights. A wide discretion exists in that regard. It is true that the sanctions under Article 8(1) of Directive 2001/29 and Article 16 of Directive 2004/48 must be appropriate, effective, proportionate and dissuasive, but the seriousness of the particular infringement of copyrights must also be taken into account in that regard.

119. Consequently, the possibility of communication of personal traffic data may be restricted to particularly serious cases such as, for example, offences committed with a view to making a profit, that is, an illegal use of protected works which substantially impairs their economic exploitation by the holder of the right. The intention that the enforcement of copyrights in the face of infringements on the Internet should be geared specifically to serious impairments is also apparent from the ninth recital in the preamble to Directive 2004/48. The United Kingdom rightly points out that the recital refers to the distribution of pirated copies on the Internet, but such distribution is mentioned in connection with organised crime.

120. The fundamental rights to property and to effective judicial protection do not call that assessment of appropriateness

into question. It is certainly necessary, in terms of fundamental rights, to establish the possibility for the holders of copyrights to defend themselves against infringements of those rights. The present case, however, unlike the case of *Moldovan and Others* v *Romania* (62) cited by Promusicae, is not concerned with whether access to the courts is actually available, but with the means made available to rightholders in order to establish the infringement.

121. In that respect, the State's duties of protection are not so far-reaching that unlimited means should be made available to the rightholder for the purpose of detecting infringements of rights. Rather, it is not objectionable for certain rights of detection to remain reserved for State authorities or not to be available at all.

5. Directive 2006/24

122. Directive 2006/24 does not lead to a different conclusion so far as the present case is concerned. Although, under that directive, Article 15(1) of Directive 2002/58 does not apply to data retained in accordance with Directive 2006/24, the data at issue here were not stored pursuant to the new directive. As Promusicae also submits, the Directive is therefore, *ratione temporis*, not applicable.

123. Even if Directive 2006/24 were applicable, it would not allow direct communication of personal traffic data to Promusicae. Under Article 1, retention is solely for the purpose of the investigation, detection and prosecution of serious crime. Accordingly, pursuant to Article 4, those data may be provided only to the competent authorities.

124. If anything at all can be inferred from Directive 2006/24 with respect to the present case, it is the value judgment of the Community legislature that up to now only serious crime has necessitated Community-wide retention of traffic data and their use.

6. Conclusion with regard to data protection

125. Consequently, in the light of Directive 2002/58, it is compatible with Community law, in particular Directive 2000/31, Directive 2001/29 and Directive 2004/48, for Member States to exclude the communication of personal traffic data for the purpose of bringing civil proceedings against copyright infringements.

126. Should the Community consider that more far-reaching protection of the holders of copyrights is necessary, that would require an amendment of the provisions on data protection. Up to now, however, the legislature has not yet taken that step. On the contrary, in adopting Directives 2000/31, 2001/29 and 2004/48, it provided for the unaltered continued applicability of data protection and saw no reason, when adopting the sector-specific Directives 2002/58 and 2006/24, to introduce restrictions of data protection in favour of the protection of intellectual property.

127. Directive 2006/24 could, on the contrary, lead to a strengthening of data protection under Community law with regard to disputes concerning infringements of copyright. The question then arises, even in criminal investigations, as to the extent to which it is compatible with the fundamental right to data protection under Community law to grant aggrieved rightholders access to the results of the investigation if the latter are based on the evaluation of retained traffic data within the meaning of Directive 2006/24. Up to now that question is not affected by Community law since the Data Protection Directives do not apply to the prosecution of criminal offences. (63)

V – **Conclusion**

128. I therefore propose that the Court should reply to the request for a preliminary ruling as follows:

It is compatible with Community law for Member States to exclude the communication of personal traffic data for the purpose of bringing civil proceedings against copyright infringements.

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1 – Original language: German.

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2 – OJ 2000 L 178, p. 1.

3 – The directives referred to are Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1).

4 – OJ 2001 L 167, p. 10.

5 – OJ 2004 L 157, p. 45; the corrected version published in OJ 2004 L 195, p. 16, has been used.

6 – OJ 2002 L 201, p. 37.

7 – OJ 1995 L 281, p. 31.

8 – The documents of the Data Protection Working Party are available at http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm.

9 – Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

10 – OJ 2006 L 105, p. 54.

11 – It refers in this connection to Circular 1/2006, 5 de mayo de 2006, sobre los delitos contra la propiedad intelectual e industrial tras la reforma de la Ley Orgánica 15/2003, http://www.fiscal.es/csblob/CIRCULAR%201-2006.doc?blobcol=urldata&blobheader=application%2Fmsword&blobkey=id&blobtable=MungoBlobs&blobwhere=1109248064092&ssbinary=true, p. 37 et seq., issued by the Fiscalía General del Estado.

12 – According to www.dnsstuff.com.

13 – See, in that regard, Communication from the Commission to the Council and the European Parliament – Next Generation Internet – priorities for action in migrating to the new Internet protocol IPv6, COM (2002) 96.

14 – Technically it also appears to be possible to conceal one's own IP address. However, such services involve a cost and/or are slow. See the Wikipedia entry Anonymous P2P, http://en.wikipedia.org/wiki/Anonymous_p2p, and Working Document WP 37 of the Data Protection Working Party of 21 November 2000, Privacy on the Internet, p. 86 et seq., which does not yet take file sharing into account.

15 – See point 22 above.

16 – See Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraph 14, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 17, both with further references.

17 – Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108, and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 75.

18 – See Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 31 et seq., in particular paragraph 48.

19 – Compare Article 9(3)(e) of the Commission's Proposal (COM/2003/46) with the same provision of the Council's consolidated draft of 19 December 2003 (Council document 16289/03) and with Article 8(3)(e) of the draft revised by the Parliament (OJ 2004 C 102 E, p. 242 et seq.), which was adopted unchanged by the Council.

20 – Agreement on Trade-Related Aspects of Intellectual Property Rights, which is to be found in Annex 1 C to the Agreement establishing the World Trade Organisation, which was approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

21 – The fourth sentence of Article 42 of TRIPS could, admittedly, in its German version, be (mis)construed as meaning that effective legal protection must provide for the discovery of confidential information, yet, on the contrary, that provision is intended to protect confidential information in judicial proceedings, if that is permissible. This is more clearly apparent in the authentic language versions (English, French and Spanish). As here, also Daniel Gervais, *The TRIPS Agreement, Drafting History and Analysis*, London 2003, p. 291.

22 – That is also the view of the Council and the Commission in the context of the procedure for the adoption of Directive 2004/48 (Council document 6052/04 of 9 February 2004, p. 6 et seq.).

23 – Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 73 et seq.

24 – OJ 2000 C 364, p. 1.

25 – *Österreichischer Rundfunk and Others*, cited in footnote 23, paragraph 74.

26 – *Österreichischer Rundfunk and Others*, cited in footnote 23, paragraph 76.

27 – *Österreichischer Rundfunk and Others*, cited in footnote 23, paragraph 77, invoking the case-law of the European Court of Human Rights.

28 – *Österreichischer Rundfunk and Others*, cited in footnote 23, paragraph 80.

29 – *Österreichischer Rundfunk and Others*, cited in footnote 23, paragraph 83, invoking the case-law of the European Court of Human Rights.

30 – See, with regard to property, for instance, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15; Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 21; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 87, and, with regard to effective judicial protection, Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37.

31 – See *Metronome Musik*, cited in footnote 30, paragraphs 21 and 26, and, most recently, Eur. Court HR, *Anheuser-Busch Inc.* v. *Portugal* judgment of 11 January 2007 (Application No 73049/01, § 72).

32 – See Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87.

33 – See *Lindqvist*, cited in footnote 32, paragraph 46, et seq.

34 – With regard to the secrecy of telecommunications, the German Bundesverfassungsgericht (Federal Constitutional Court), in its orders of 9 October 2002 (1 BvR 1611/96 and 1 BvR 805/98, BVerfGE 106, 28 [37], paragraph 21 of the version on www.bundesverfassungsgericht.de) and 27 October 2006 (1 BvR 1811/99, *Multimedia und Recht* 2007, 308, paragraph 13 of the version on www.bundesverfassungsgericht.de), even assumes a corresponding State duty of protection. However, the question whether private individuals' duties as regards data protection under Community law are also based on a mandatory Community duty of protection does not need to be determined in this case.

35 – Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33).

36 – In so far as the respective holders of the IP addresses are identifiable due to the storage of the assignments by the provider of Internet access, this involves, as soon as the IP addresses are intercepted by Promusicae, the processing of personal data, which must comply with the requirements of data protection; see the judgment of the Rechtbank Utrecht of 12 July 2005, *Brein* (194741/KGZA 05-462, Annex 5 to the written observations submitted by Promusicae, point 4.24 et

seq.), Working Document WP 104 of the Data Protection Working Party of 18 January 2005 on data protection issues related to intellectual property rights, p. 4, and, under French law, the decisions (Délibérations) of the Commission nationale de l'informatique et des libertés (CNIL) 2005-235 of 18 October 2005 and 2006-294 of 21 December 2006 (available at http://www.legifrance.gouv.fr/WAspad/RechercheExperteCnil.jsp). The register of processing operations of the Agencia Española de Protección de Datos, https://www.agpd.es/index.php?idSeccion=100, contains a corresponding registration for Promusicae.

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37 – See, to that effect, point 2.8. of Opinion 1/2003 of the Data Protection Working Party on the storage of traffic data for billing purposes (WP 69 of 29 January 2003).

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38 – See my Opinion in Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, point 71, on the interpretation of Article 6(4) of Directive 97/66.

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39 – See point 54 above.

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40 – See point 72 above.

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41 – In that respect, my view on 'the diversity of disputes', stated in a different context in the Opinion in *Commission* v *Netherlands*, cited in footnote 38, point 81, should not be over-interpreted.

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42 – The German Bundesverfassungsgericht attributes a high intensity of interference to such interferences since the individual gives no cause for the interference but may be intimidated in his lawful conduct because of the risks of abuse and the feeling of being under surveillance; see the order of 4 April 2006 on the pinpointing of criminal suspects by the computerised analysis of data on many people (1 BvR 518/02, *Neue Juristische Wochenschrift2006*, 1939 [1944], paragraph 117 of the version on www.bundesverfassungsgericht.de).

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43 – See the Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005) 438 final), OJ 2005 C 298, p. 1, and the Opinions of the Data Protection Working Party of 21 October 2005, 4/2005 on the Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005) 438 final of 21 September 2005) and of 25 March 2006, 3/2006 on Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

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44 – See Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 33 et seq.

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45 – The action in Case C-301/06 *Ireland* v *Council and Parliament* (Notice in OJ 2006 C 237, p. 5) is currently pending. Ireland claims that Directive 2006/24 should be annulled on the ground that the wrong legal basis was chosen. However, the action does not cover the question whether retention is compatible with fundamental rights.

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46 – See *Lindqvist*, cited in footnote 32, paragraph 87.

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47 – Thus, for example, Christian Cychowski in 'Auskunftsansprüche gegenüber Internetzugangsprovidern "vor" dem 2. Korb und "nach" der Enforcement-Richtlinie der EU', *Multimedia und Recht 2004*, p. 514 (p. 517 et seq.), takes the view that the German transposition of this exception allows the communication of the traffic data of copyright infringers to the rightholders.

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48 – Thus the French version has 'comme le prévoit l'article 13, paragraphe 1, de la directive 95/46/CE', the English version 'as referred to in Article 13(1) of Directive 95/46/EC' and the Spanish version 'a que se hace referencia en el apartado 1 del artículo 13 de la Directiva 95/46/CE', in each case following a list of the various permissible grounds of justification.

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49 – See footnote 6 to the Commission's written observations.

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50 – Ulrich Sieber/Frank Michael Höfiger, 'Drittauskunftsansprüche nach § 101a UrhG gegen Internetprovider zur Verfolgung

von Urheberrechtsverletzungen', *Multimedia und Recht* 2004, 575 (582), and Gerald Spindler/Joachim Dorschel, 'Auskunftsansprüche gegen Internet-Service-Provider', *Computer und Recht* 2005, 38 (45 et seq.).

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51 – See to that effect *Lindqvist*, cited in footnote 32, paragraph 83.

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52 – Use contrary to the system would normally also cover acts punishable under Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ 2005 L 69, p. 67).

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53 – *Lindqvist*, cited in footnote 32, paragraph 43.

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54 – Joined Cases C-317/04 and C-318/04 *Parliament* v *Council* and *Parliament* v *Commission* [2006] ECR I-4721, paragraph 58.

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55 – According to Promusicae, the conclusion thus reached on the third and fourth alternatives in Article 15(1) of Directive 2002/58 corresponds to the legal position in France, Italy and Belgium, where, it claims, the legislation provides that the competent State authorities may require the surrender of personal traffic data. The Data Protection Working Party, in Working Document WP 104 (cited in footnote 36, p. 8), even goes a step further and restricts communication to the prosecuting authorities: 'On the basis of the compatibility principle as well as in compliance with the confidentiality principle included in Directives 2002/58 and 95/46, data detained by ISPs processed for specific purposes including mainly the performance of a telecommunication service cannot be transferred to third parties such as right holders, except, in defined circumstances provided by law, to public law enforcement authorities.'

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56 – See point 28 above.

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57 – See, for example, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66, on freedom of movement and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 15, on the free movement of capital.

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58 – See the report DSTI/ICCP/IE(2004)12/FINAL of 13 December 2005 (http://www.oecd.org/dataoecd/13/2/34995041.pdf, S. 76 ff.) to the Working Party on the Information Economy of the Organisation for Economic Cooperation and Development (OECD).

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59 – See point 42 et seq. above.

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60 – See point 53 above.

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61 – See the Working Paper of the International Working Group on Data Protection in Telecommunications of 15 April 2004 on potential privacy risks associated with wireless networks, available in English and German at http://www.datenschutz-berlin.de/doc/int/iwgdpt/index.htm. According to Stefan Dörhöfer, *Empirische Untersuchungen zur WLAN-Sicherheit mittels Wardriving*, https://pi1-old.informatik.uni-mannheim.de:8443/pub/research/theses/diplomarbeit-2006-doerhoefer.pdf, p. 98, on the survey date in Germany, approximately 23% of all wireless networks were not protected at all and approximately 60% were inadequately protected. With regard to the methods of attack, see Erik Tews, Ralf-Philipp Weinmann and Andrei Pyshkin, *Breaking 104 bit WEP in less than 60 seconds,* http://eprint.iacr.org/2007/120.pdf.

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62 – Eur Court HR judgment of 12 July 2005 (Applications nos. 41138/98 and 64320/01, § 118 et seq.).

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63 – See *Parliament* v *Council* and *Parliament* v *Commission*, cited in footnote 54, paragraph 58.

Case C-275/06

Productores de Música de España (Promusicae)
v
Telefónica de España SAU,

JUDGMENT OF THE COURT (Grand Chamber)
29 January 2008 (*)
(Information society – Obligations of providers of services – Retention and disclosure of certain traffic data – Obligation of disclosure – Limits – Protection of the confidentiality of electronic communications – Compatibility with the protection of copyright and related rights – Right to effective protection of intellectual property)

REFERENCE for a preliminary ruling under Article 234 EC by the Juzgado de lo Mercantil Nº 5 de Madrid (Spain), made by decision of 13 June 2006, received at the Court on 26 June 2006, in the proceedings

THE COURT (Grand Chamber),
composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský (Rapporteur), J. Klučka, E. Levits, A. Arabadjiev and C. Toader, Judges,
Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,
having regard to the written procedure and further to the hearing on 5 June 2007,
after considering the observations submitted on behalf of:
– Productores de Música de España (Promusicae), by R. Bercovitz Rodríguez Cano, A. González Gozalo and J. de Torres Fueyo, abogados,
– Telefónica de España SAU, by M. Cornejo Barranco, procuradora, R. García Boto and P. Cerdán López, abogados,
– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,
– the Slovenian Government, by M. Remic and U. Steblovnik, acting as Agents,
– the Finnish Government, by J. Heliskoski and A. Guimaraes-Purokoski, acting as Agents,
– the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and S. Malynicz, Barrister,
– the Commission of the European Communities, by R. Vidal Puig and C. Docksey, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 18 July 2007,
gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum, OJ 2004 L 195, p. 16), and Articles 17(2) and 47 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter').

2 The reference was made in the course of proceedings between Productores de Música de España (Promusicae) ('Promusicae'), a non-profit-making organisation, and Telefónica de España SAU ('Telefónica') concerning Telefónica's refusal to disclose to Promusicae, acting on behalf of its members who are holders of intellectual property rights, personal data relating to use of the internet by means of connections provided by Telefónica.

Legal context

International law

3 Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), which constitutes Annex 1C to the Agreement establishing the World Trade Organisation ('the WTO'), signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the

European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), is headed 'Enforcement of intellectual property rights'. That part includes Article 41(1) and (2), according to which:

'1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.'

4 In Section 2 of Part III, 'Civil and administrative procedures and remedies', Article 42, headed 'Fair and Equitable Procedures', provides:

'Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement …'

5 Article 47 of the TRIPs Agreement, headed 'Right of Information', provides:

'Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.'

Community law

Provisions relating to the information society and the protection of intellectual property, especially copyright

– Directive 2000/31

6 Article 1 of Directive 2000/31 states:

'1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

…

5. This Directive shall not apply to:

…

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

…'

7 According to Article 15 of Directive 2000/31:

'1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

8 Article 18 of Directive 2000/31 provides:

'1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

…'

– Directive 2001/29

9 According to Article 1(1) of Directive 2001/29, the directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

10 Under Article 8 of Directive 2001/29:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

11 Article 9 of Directive 2001/29 reads:

'This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.'

– Directive 2004/48

12 Article 1 of Directive 2004/48 states:

'This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights …'

13 According to Article 2(3) of Directive 2004/48:

'3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.'

14 Article 3 of Directive 2004/48 provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

15 Article 8 of Directive 2004/48 provides:

'1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right

be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities;

or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his/her own participation or that of his/her close relatives in an infringement of an intellectual property right;

or

(e) govern the protection of confidentiality of information sources or the processing of personal data.'

Provisions on the protection of personal data

– Directive 95/46/EC

16 Article 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) states:

'For the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…'

17 According to Article 3 of Directive 95/46:

'1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

…'

18 Article 7 of Directive 95/46 reads as follows:

‘Member States shall provide that personal data may be processed only if:

…

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).’

19 Article 8 of Directive 95/46 provides:

‘1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

…

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent …

…’

20 According to Article 13 of Directive 95/46:

‘1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

…’

– Directive 2002/58/EC

21 Article 1 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) states:

‘1. This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

2. The provisions of this Directive particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1 …

3. This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.’

22 Under Article 2 of Directive 2002/58:

‘Save as otherwise provided, the definitions in Directive 95/46/EC and in Directive 2002/21/EC of the European Parliament

and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) … shall apply.

The following definitions shall also apply:

…

(b) "traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

…

(d) "communication" means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

…'

23 Article 3 of Directive 2002/58 provides:

'1. This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community.

…'

24 Article 5 of Directive 2002/58 provides:

'1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

…'

25 Article 6 of Directive 2002/58 provides:

'1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his/her consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

…

5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

6. Paragraphs 1, 2, 3 and 5 shall apply without prejudice to the possibility for competent bodies to be informed of traffic data in conformity with applicable legislation with a view to settling disputes, in particular interconnection or billing disputes.'

26 Under Article 15 of Directive 2002/58:

‘1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

…’

27 Article 19 of Directive 2002/58 provides:

‘Directive 97/66/EC is hereby repealed with effect from the date referred to in Article 17(1).

References made to the repealed Directive shall be construed as being made to this Directive.’

National law

28 Under Article 12 of Law 34/2002 on information society services and electronic commerce (Ley 34/2002 de servicios de la sociedad de la información y de comercio electrónico) of 11 July 2002 (BOE No 166 of 12 July 2002, p. 25388, ‘the LSSI’), headed ‘Duty to retain traffic data relating to electronic communications’:

‘1. Operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services must retain for a maximum of 12 months the connection and traffic data generated by the communications established during the supply of an information society service, under the conditions established in this article and the regulations implementing it.

2. … The operators of electronic communications networks and services and the service providers to which this article refers may not use the data retained for purposes other than those indicated in the paragraph below or other purposes permitted by the Law and must adopt appropriate security measures to avoid the loss or alteration of the data and unauthorised access to the data.

3. The data shall be retained for use in the context of a criminal investigation or to safeguard public security and national defence, and shall be made available to the courts or the public prosecutor at their request. Communication of the data to the forces of order shall be effected in accordance with the provisions of the rules on personal data protection.

…’

The main proceedings and the order for reference

29 Promusicae is a non-profit-making organisation of producers and publishers of musical and audiovisual recordings. By letter of 28 November 2005 it made an application to the Juzgado de lo Mercantil Nº 5 de Madrid (Commercial Court No 5, Madrid) for preliminary measures against Telefónica, a commercial company whose activities include the provision of internet access services.

30 Promusicae asked for Telefónica to be ordered to disclose the identities and physical addresses of certain persons whom it provided with internet access services, whose IP address and date and time of connection were known. According to Promusicae, those persons used the KaZaA file exchange program (peer-to-peer or P2P) and provided access in shared files of personal computers to phonograms in which the members of Promusicae held the exploitation rights.

31 Promusicae claimed before the national court that the users of KaZaA were engaging in unfair competition and infringing intellectual property rights. It therefore sought disclosure of the above information in order to be able to bring civil proceedings against the persons concerned.

32 By order of 21 December 2005 the Juzgado de lo Mercantil Nº 5 de Madrid ordered the preliminary measures requested by Promusicae.

33 Telefónica appealed against that order, contending that under the LSSI the communication of the data sought by Promusicae is authorised only in a criminal investigation or for the purpose of safeguarding public security and national defence, not in civil proceedings or as a preliminary measure relating to civil proceedings. Promusicae submitted for its part that Article 12 of the LSSI must be interpreted in accordance with various provisions of Directives 2000/31, 2001/29 and 2004/48 and with Articles 17(2) and 47 of the Charter, provisions which do not allow Member States to limit solely to the

purposes expressly mentioned in that law the obligation to communicate the data in question.

34 In those circumstances the Juzgado de lo Mercantil Nº 5 de Madrid decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does Community law, specifically Articles 15(2) and 18 of Directive [2000/31], Article 8(1) and (2) of Directive [2001/29], Article 8 of Directive [2004/48] and Articles 17(2) and 47 of the Charter … permit Member States to limit to the context of a criminal investigation or to safeguard public security and national defence, thus excluding civil proceedings, the duty of operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services to retain and make available connection and traffic data generated by the communications established during the supply of an information society service?'

Admissibility of the question referred

35 In its written observations the Italian Government submits that the statements in point 11 of the order for reference indicate that the question referred would be justified only in the event that the national legislation at issue in the main proceedings were interpreted as limiting the duty to disclose personal data to the field of criminal investigations or the protection of public safety and national defence. Since the national court does not exclude the possibility of that legislation being interpreted as not containing such a limitation, the question thus appears, according to the Italian Government, to be hypothetical, so that it is inadmissible.

36 In this respect, it should be recalled that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 16 and the case-law cited).

37 Where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is thus bound, in principle, to give a ruling unless it is obvious that the request for a preliminary ruling is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 17).

38 Moreover, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is admittedly a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules of law with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of national rules with Community law (see, to that effect, Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 34 and 35, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36).

39 However, in the case of the present reference for a preliminary ruling, it is perfectly clear from the grounds of the order for reference as a whole that the national court considers that the interpretation of Article 12 of the LSSI depends on the compatibility of that provision with the relevant provisions of Community law, and hence on the interpretation of those provisions which it asks the Court to provide. Since the outcome of the main proceedings is thus linked to that interpretation, the question referred clearly does not appear hypothetical, so that the ground of inadmissibility put forward by the Italian Government cannot be accepted.

40 The reference for a preliminary ruling is therefore admissible.

The question referred for a preliminary ruling

41 By its question the national court asks essentially whether Community law, in particular Directives 2000/31, 2001/29 and 2004/48, read also in the light of Articles 17 and 47 of the Charter, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

Preliminary observations

42 Even if, formally, the national court has limited its question to the interpretation of Directives 2000/31, 2001/29 and

2004/48 and the Charter, that circumstance does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of use for deciding the case before it, whether or not that court has referred to them in the wording of its question (see Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited).

43 It should be observed to begin with that the intention of the provisions of Community law thus referred to in the question is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright, which Promusicae claims in the main proceedings. The national court proceeds, however, from the premiss that the Community law obligations required by that protection may be blocked, in national law, by the provisions of Article 12 of the LSSI.

44 While that law, in 2002, transposed the provisions of Directive 2000/31 into domestic law, it is common ground that Article 12 of the law is intended to implement the rules for the protection of private life, which is also required by Community law under Directives 95/46 and 2002/58, the latter of which concerns the processing of personal data and the protection of privacy in the electronic communications sector, which is the sector at issue in the main proceedings.

45 It is not disputed that the communication sought by Promusicae of the names and addresses of certain users of KaZaA involves the making available of personal data, that is, information relating to identified or identifiable natural persons, in accordance with the definition in Article 2(a) of Directive 95/46 (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 24). That communication of information which, as Promusicae submits and Telefónica does not contest, is stored by Telefónica constitutes the processing of personal data within the meaning of the first paragraph of Article 2 of Directive 2002/58, read in conjunction with Article 2(b) of Directive 95/46. It must therefore be accepted that that communication falls within the scope of Directive 2002/58, although the compliance of the data storage itself with the requirements of that directive is not at issue in the main proceedings.

46 In those circumstances, it should first be ascertained whether Directive 2002/58 precludes the Member States from laying down, with a view to ensuring effective protection of copyright, an obligation to communicate personal data which will enable the copyright holder to bring civil proceedings based on the existence of that right. If that is not the case, it will then have to be ascertained whether it follows directly from the three directives expressly mentioned by the national court that the Member States are required to lay down such an obligation. Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter, whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

Directive 2002/58

47 Article 5(1) of Directive 2002/58 provides that Member States must ensure the confidentiality of communications by means of a public communications network and publicly available electronic communications services, and of the related traffic data, and must inter alia prohibit, in principle, the storage of that data by persons other than users, without the consent of the users concerned. The only exceptions relate to persons lawfully authorised in accordance with Article 15(1) of that directive and the technical storage necessary for conveyance of a communication. In addition, as regards traffic data, Article 6(1) of Directive 2002/58 provides that stored traffic data must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of that article and Article 15(1) of the directive.

48 With respect, first, to paragraphs 2, 3 and 5 of Article 6, which relate to the processing of traffic data in accordance with the requirements of billing and marketing services and the provision of value added services, those provisions do not concern the communication of that data to persons other than those acting under the authority of the providers of public communications networks and publicly available electronic communications services. As to the provisions of Article 6(6) of Directive 2002/58, they do not relate to disputes other than those between suppliers and users concerning the grounds for storing data in connection with the activities referred to in the other provisions of that article. Since Article 6(6) thus clearly does not concern a situation such as that of Promusicae in the main proceedings, it cannot be taken into account in assessing that situation.

49 With respect, second, to Article 15(1) of Directive 2002/58, it should be recalled that under that provision the Member States may adopt legislative measures to restrict the scope inter alia of the obligation to ensure the confidentiality of traffic data, where such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, as referred to in Article

13(1) of Directive 95/46.

50 Article 15(1) of Directive 2002/58 thus gives Member States the possibility of providing for exceptions to the obligation of principle, imposed on them by Article 5 of that directive, to ensure the confidentiality of personal data.

51 However, none of these exceptions appears to relate to situations that call for the bringing of civil proceedings. They concern, first, national security, defence and public security, which constitute activities of the State or of State authorities unrelated to the fields of activity of individuals (see, to that effect, *Lindqvist*, paragraph 43), and, second, the prosecution of criminal offences.

52 As regards the exception relating to unauthorised use of the electronic communications system, this appears to concern use which calls into question the actual integrity or security of the system, such as the cases referred to in Article 5(1) of Directive 2002/58 of the interception or surveillance of communications without the consent of the users concerned. Such use, which, under that article, makes it necessary for the Member States to intervene, also does not relate to situations that may give rise to civil proceedings.

53 It is clear, however, that Article 15(1) of Directive 2002/58 ends the list of the above exceptions with an express reference to Article 13(1) of Directive 95/46. That provision also authorises the Member States to adopt legislative measures to restrict the obligation of confidentiality of personal data where that restriction is necessary inter alia for the protection of the rights and freedoms of others. As they do not specify the rights and freedoms concerned, those provisions of Article 15(1) of Directive 2002/58 must be interpreted as expressing the Community legislature's intention not to exclude from their scope the protection of the right to property or situations in which authors seek to obtain that protection in civil proceedings.

54 The conclusion must therefore be that Directive 2002/58 does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings.

55 However, the wording of Article 15(1) of that directive cannot be interpreted as compelling the Member States, in the situations it sets out, to lay down such an obligation.

56 It must therefore be ascertained whether the three directives mentioned by the national court require those States to lay down that obligation in order to ensure the effective protection of copyright.

The three directives mentioned by the national court

57 It should first be noted that, as pointed out in paragraph 43 above, the purpose of the directives mentioned by the national court is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright. However, it follows from Article 1(5)(b) of Directive 2000/31, Article 9 of Directive 2001/29 and Article 8(3)(e) of Directive 2004/48 that such protection cannot affect the requirements of the protection of personal data.

58 Article 8(1) of Directive 2004/48 admittedly requires Member States to ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided. However, it does not follow from those provisions, which must be read in conjunction with those of paragraph 3(e) of that article, that they require the Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

59 Nor does the wording of Articles 15(2) and 18 of Directive 2000/31 or that of Article 8(1) and (2) of Directive 2001/29 require the Member States to lay down such an obligation.

60 As to Articles 41, 42 and 47 of the TRIPs Agreement, relied on by Promusicae, in the light of which Community law must as far as possible be interpreted where – as in the case of the provisions relied on in the context of the present reference for a preliminary ruling – it regulates a field to which that agreement applies (see, to that effect, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 47, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-0000, paragraph 35), while they require the effective protection of intellectual property rights and the institution of judicial remedies for their enforcement, they do not contain provisions which require those directives to be interpreted as compelling the Member States to lay down an obligation to communicate personal data in the context of civil proceedings.

Fundamental rights

61 The national court refers in its order for reference to Articles 17 and 47 of the Charter, the first of which concerns the protection of the right to property, including intellectual property, and the second of which concerns the right to an effective remedy. By so doing, that court must be regarded as seeking to know whether an interpretation of those directives to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection.

62 It should be recalled that the fundamental right to property, which includes intellectual property rights such as copyright (see, to that effect, Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraph 65), and the fundamental right to effective judicial protection constitute general principles of Community law (see respectively, to that effect, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 126 and the case-law cited, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and the case-law cited).

63 However, the situation in respect of which the national court puts that question involves, in addition to those two rights, a further fundamental right, namely the right that guarantees protection of personal data and hence of private life.

64 According to recital 2 in the preamble to Directive 2002/58, the directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter. In particular, the directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter. Article 7 substantially reproduces Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, which guarantees the right to respect for private life, and Article 8 of the Charter expressly proclaims the right to protection of personal data.

65 The present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.

66 The mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 2002/58 itself, in that it provides for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for, and in the three directives mentioned by the national court, which reserve the cases in which the measures adopted to protect the rights they regulate affect the protection of personal data. Second, they result from the adoption by the Member States of national provisions transposing those directives and their application by the national authorities (see, to that effect, with reference to Directive 95/46, *Lindqvist*, paragraph 82).

67 As to those directives, their provisions are relatively general, since they have to be applied to a large number of different situations which may arise in any of the Member States. They therefore logically include rules which leave the Member States with the necessary discretion to define transposition measures which may be adapted to the various situations possible (see, to that effect, *Lindqvist*, paragraph 84).

68 That being so, the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, *Lindqvist*, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-0000, paragraph 28).

69 Moreover, it should be recalled here that the Community legislature expressly required, in accordance with Article 15(1) of Directive 2002/58, that the measures referred to in that paragraph be adopted by the Member States in compliance with the general principles of Community law, including those mentioned in Article 6(1) and (2) EU.

70 In the light of all the foregoing, the answer to the national court's question must be that Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

Costs

71 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:

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

[Signatures]

Case C-185/07
Allianz SpA

JUDGMENT OF THE COURT (Grand Chamber)
10 February 2009 *

(Recognition and enforcement of foreign arbitral awards – Regulation (EC) No 44/2001 – Scope of application – Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement – New York Convention)

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the House of Lords (United Kingdom), made by decision of 28 March 2007, received at the Court on 2 April 2007, in the proceedings

Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA,
Generali Assicurazioni Generali SpA,
v
West Tankers Inc.,

THE COURT (Grand Chamber),
composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Ó Caoimh, Presidents of Chambers, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet, J. Klučka (Rapporteur), E. Levits and L. Bay Larsen, Judges,
Advocate General: J. Kokott,
Registrar: K. Sztranc-Sławiczek, Administrator,
having regard to the written procedure and further to the hearing on 10 June 2008,
after considering the observations submitted on behalf of:
– Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, and Generali Assicurazioni Generali SpA, by S. Males QC and S. Masters, Barrister,
– West Tankers Inc., by I. Chetwood, Solicitor, and T. Brenton and D. Bailey, Barristers,
– the United Kingdom Government, by V. Jackson and S. Behzadi-Spencer, acting as Agents, and V. Veeder and A. Layton QC,
– the French Government, by G. de Bergues and A.-L. During, acting as Agents,
– the Commission of the European Communities, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,
gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference was made in the context of proceedings between, on the one hand, Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, and Generali Assicurazioni Generali SpA ('Allianz and Generali') and, on the other, West Tankers Inc. ('West Tankers') concerning West Tankers' liability in tort.

Legal context

International law

3 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (*United Nations Treaty Series*, Vol. 330, p. 3) ('the New York Convention'), provides as follows in Article II(3):

‘The court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’

Community law

4 According to recital 25 in the preamble to Regulation No 44/2001:

‘Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.’

5 Article 1(1) and (2) of that regulation provides:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

…

(d) arbitration.’

6 Article 5 of that regulation provides:

‘A person domiciled in a Member State may, in another Member State, be sued:

…

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…’.

National law

7 Section 37(1) of the Supreme Court Act 1981 provides:

‘The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so.’

8 Section 44 of the Arbitration Act 1996, entitled ‘Court powers exercisable in support of arbitral proceedings’, provides:

‘(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are:

…

(e) the granting of an interim injunction …’.

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

9 In August 2000 the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA (‘Erg’), collided in Syracuse (Italy) with a jetty owned by Erg and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London (United Kingdom).

10 Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision.

11 Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on 30 July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg’s claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

12 In parallel, West Tankers brought proceedings, on 10 September 2004, before the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa ('the anti-suit injunction').

13 By judgment of 21 March 2005, the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), upheld West Tankers' claims and granted the anti-suit injunction sought against Allianz and Generali. The latter appealed against that judgment to the House of Lords. They argued that the grant of such an injunction is contrary to Regulation No 44/2001.

14 The House of Lords first referred to the judgments in Case C-116/02 *Gasser* [2003] ECR I-14693 and Case C-159/02 *Turner* [2004] ECR I-3565, which decided in substance that an injunction restraining a party from commencing or continuing proceedings in a court of a Member State cannot be compatible with the system established by Regulation No 44/2001, even where it is granted by the court having jurisdiction under that regulation. That is because the regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States which must trust each other to apply those rules correctly.

15 However, that principle cannot, in the view of the House of Lords, be extended to arbitration, which is completely excluded from the scope of Regulation No 44/2001 by virtue of Article 1(2)(d) thereof. In that field, there is no set of uniform Community rules, which is a necessary condition in order that mutual trust between the courts of the Member States may be established and applied. Moreover, it is clear from the judgment in Case C-190/89 *Rich* [1991] ECR I-3855 that the exclusion in Article 1(2)(d) of Regulation No 44/2001 applies not only to arbitration proceedings as such, but also to legal proceedings the subject-matter of which is arbitration. The judgment in Case C-391/95 *Van Uden* [1998] ECR I-7091 stated that arbitration is the subject-matter of proceedings where they serve to protect the right to determine the dispute by arbitration, which is the case in the main proceedings.

16 The House of Lords adds that since all arbitration matters fall outside the scope of Regulation No 44/2001, an injunction addressed to Allianz and Generali restraining them from having recourse to proceedings other than arbitration and from continuing proceedings before the Tribunale di Siracusa cannot infringe the regulation.

17 Finally, the House of Lords points out that the courts of the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore.

18 In those circumstances, the House of Lords decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?'

The question referred for a preliminary ruling

19 By its question, the House of Lords asks, essentially, whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof.

20 An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.

21 Both West Tankers and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No 44/2001 because Article 1(2)(d) thereof excludes arbitration from its scope of application.

22 In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (*Rich*, paragraph 26). More

specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (*Van Uden*, paragraph 33).

23 Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.

24 However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

25 It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

26 In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

27 It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

28 Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

29 It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, *Gasser*, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 24, and *Turner*, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (*Overseas Union Insurance and Others*, paragraph 23, and *Gasser*, paragraph 48).

30 Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, *Turner*, paragraph 24).

31 Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

32 Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.

33 This finding is supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

34 In the light of the foregoing considerations, the answer to the question referred is that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

Costs

35 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:

It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

[Signatures]

Case C-189/08
Zuid-Chemie BV

JUDGMENT OF THE COURT (First Chamber)
16 July 2009 *
(Judicial cooperation in civil and commercial matters – Jurisdiction and enforcement of judgments – Regulation (EC) No 44/2001– Definition of the 'place where the harmful event occurred')

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 4 April 2008, received at the Court on 8 May 2008, in the proceedings
Zuid-Chemie BV
v
Philippo's Mineralenfabriek NV/SA,

THE COURT (First Chamber),
composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, E. Levits (Rapporteur) and J.-J. Kasel, Judges,
Advocate General: J. Mazák,
Registrar: R. Șereş, Administrator,
having regard to the written procedure and further to the hearing on 23 April 2009,
after considering the observations submitted on behalf of:
– Zuid-Chemie BV, by P. Knijp, advocaat,
– Philippo's Mineralenfabriek NV/SA, by M. Polak, advocaat,
– the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,
– the Commission of the European Communities, by A.-M. Rouchaud-Joët and P. van Nuffel, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference has been made in the course of a dispute between Zuid-Chemie BV ('Zuid-Chemie'), an undertaking manufacturing fertiliser and having its registered office in Sas van Gent (Netherlands), and Philippo's Mineralenfabriek NV/SA ('Philippo's'), established in Essen (Belgium), concerning the delivery by the latter to Zuid-Chemie of a contaminated product used for the manufacture of fertiliser.

Legal background

3 Article 2(1) of Regulation No 44/2001, which features in Section 1 ('General provisions') of Chapter II thereof, provides as follows:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

4 Article 3(1) of Regulation No 44/2001 provides:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

5 Article 5 of Regulation No 44/2001, which features in Section 2 ('Special jurisdiction') of Chapter II, provides:

'A person domiciled in a Member State may, in another Member State, be sued:

…

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…'

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

6 Zuid-Chemie is an undertaking manufacturing fertiliser which, in July 2000, purchased two consignments of a product called 'micromix' from HCI Chemicals Benelux BV ('HCI'), an undertaking established in Rotterdam (Netherlands).

7 HCI, which is itself unable to manufacture micromix, ordered it from Philippo's and provided the latter with all the raw materials – except for one – necessary for the manufacture of that product. In consultation with HCI, Philippo's purchased the outstanding raw material, namely zinc sulphate, from G.J. de Poorter, trading under the name Poortershaven, in Rotterdam.

8 Philippo's manufactured the micromix in its factory in Belgium, to which Zuid-Chemie came to take delivery of that product.

9 Zuid-Chemie processed the micromix in its factory in the Netherlands in order to produce various consignments of fertiliser. It sold and dispatched a number of those consignments to its customers.

10 It subsequently transpired that the cadmium content of the zinc sulphate purchased from Poortershaven was too high, with the result that the fertiliser was rendered unusable or of limited utility. Zuid-Chemie claims that this has caused it to suffer loss.

11 On 17 January 2003, Zuid-Chemie instituted proceedings against Philippo's before the Rechtbank (Local Court) Middleburg (Netherlands) in which it sought a declaration that Philippo's was liable for the damage which Zuid-Chemie had sustained and an order requiring that undertaking to pay it various sums in respect of the loss which it claimed to have suffered, in addition to payment of compensation plus interest and costs.

12 By decision of 10 December 2003, the Rechbank Middelburg declined jurisdiction to deal with the dispute before it on the ground that, for the purposes of the application of Article 5(3) of Regulation No 44/2001, the concept of the 'place where the harmful event occurred' covers both the place of the event giving rise to the damage ('Handlungsort') and the place where the initial damage occurred ('Erfolgsort'). As regards the place where the damage occurred, that court held that the initial damage suffered by Zuid-Chemie occurred in Essen, since that is the place where Zuid-Chemie took delivery of the contaminated product.

13 Before the Gerechtshof te 's-Gravenhage (Court of Appeal, The Hague) none of the parties challenged the fact that Essen was the place of the event giving rise to the damage, as the contaminated micromix had been manufactured there. As regards the place where the damage had occurred, the Gerechtshof upheld the judgment at first instance. In that connection, it found that the crucial factor was the allegedly wrongful conduct on the part of Philippo's, and not the fact that the contaminated micromix resulted in contamination of the fertiliser manufactured by Zuid-Chemie in the Netherlands. Thus, the (initial) damage sustained by Zuid-Chemie occurred in Essen, inasmuch as the contaminated product had been delivered 'ex factory'.

14 Zuid-Chemie appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the judgment of the Gerechtshof te 's-Gravenhage. In the view of the Hoge Raad, the argument revolved around the concept of 'the place where the harmful event occurred' within the meaning of Article 5(3) of Regulation No 44/2001, and that an interpretation of that concept was necessary in order to make possible a resolution of the dispute before it.

15 Against that background, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Which damage is, in the case of unlawful conduct such as that which forms the basis for Zuid-Chemie's claim, to be treated as the initial damage resulting from that conduct: the damage which arises by virtue of the delivery of the defective product or the damage which arises when normal use is made of the product for the purpose for which it was intended?

2. If the latter is the case, can then the place where that damage occurred be treated as "the place where the harmful event occurred" within the meaning of Article 5(3) of … Regulation … No 44/2001 … only if that damage consists of physical damage to persons or goods, or is this also possible if (initially) only financial damage has been incurred?'

The questions referred for a preliminary ruling

The first question

16 By its first question, the referring court seeks essentially to ascertain whether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the defective product was delivered to the purchaser or whether they refer to the place where the initial damage occurred following normal use of the product for the purpose for which it was intended.

17 In order to answer that question, it should be borne in mind, first, that, according to settled case-law, the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose (see, inter alia, Case C-372/07 *Hassett and Doherty* [2008] ECR I-0000, paragraph 17, and Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-0000, paragraph 19).

18 Second, in so far as Regulation No 44/2001 now replaces, in the relations between Member States, the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the successive conventions relating to the accession of new Member States to that convention ('the Brussels Convention'), the interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of Regulation No 44/2001 whenever the provisions of those Community instruments may be regarded as equivalent.

19 The provisions of Regulation No 44/2001 relevant to this case reflect the same system as those of the Brussels Convention and are, moreover, drafted in almost identical terms. In the light of such similarity, it is necessary to ensure, in accordance with Recital 19 in the preamble to Regulation No 44/2001, continuity in the interpretation of those two instruments (see *Draka NK Cables and Others*, paragraph 20, and Case C-180/06 *Ilsinger* [2009] ECR I-0000, paragraph 58).

20 Thus, it is necessary to bear in mind that the Court has already held, when interpreting Article 5(3) of the Brussels Convention, that the system of common rules of conferment of jurisdiction laid down in Title II of that convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective of the nationality of the parties (Case C-168/02 *Kronhofer* [2004] ECR I-6009, paragraph 12).

21 It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that Section 2 of Title II of the Brussels Convention makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of the Convention (*Kronhofer*, paragraph 13).

22 The Court has also held that those rules of special jurisdiction must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that convention (see Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 19; Case C-433/01 *Blijdenstein* [2004] ECR I-981, paragraph 25; and *Kronhofer*, paragraph 14).

23 Nevertheless, it is settled case-law that, where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5(3) of the Brussels Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the claimant, in the courts for either of those places (see, inter alia, Case 21/76 *Bier* ('*Mines de potasse d'Alsace)*' [1976] ECR 1735, paragraphs 24 and 25; Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 44; Case C-18/02 *DFDS Torline* [2004] ECR I-1417, paragraph 40; and *Kronhofer*, paragraph 16).

24 In that connection, the Court has stated that the rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see to that effect, inter alia, *Mines de Potasse d'Alsace*, paragraph 11; Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 17; Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 19; and Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 10). The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence (see *Henkel*, paragraph 46).

25 Although it is common ground between the parties to the main proceedings, as stated in paragraph 13 of the present judgment, that Essen is the place of the event giving rise to the damage ('Handlungsort'), they disagree as regards the determination of the place where the damage occurred ('Erfolgsort').

26 The place where the damage occurred is, according to the case-law cited in paragraph 23 of the present judgment, the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage.

27 The place where the damage occurred must not, however, be confused with the place where the event which damaged the product itself occurred, the latter being the place of the event giving rise to the damage. By contrast, the 'place where the damage occurred' (see *Mines de potasse d'Alsace*, paragraph 15, and *Shevill and Others*, paragraph 21) is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself.

28 It must be recalled that the case-law distinguishes clearly between the damage and the event which is the cause of that damage, stating, in that connection, that liability in tort, delict or quasi-delict can arise only on condition that a causal connection can be established between those two elements (see *Mines de potasse d'Alsace*, paragraph 16).

29 Regard being had to the foregoing, the place where the damage occurred cannot be any other than Zuid-Chemie's factory in the Netherlands where the micromix, which is the defective product, was processed into fertiliser, causing substantial damage to that fertiliser which was suffered by Zuid-Chemie and which went beyond the damage to the micromix itself.

30 It must also be observed that the choice of the Netherlands courts which is thereby available to Zuid-Chemie makes it possible, in particular for the reasons laid down in paragraph 24 of the present judgment, for the court which is most appropriate to deal with the case and, therefore, enables the rule of special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 to have practical effect.

31 In that connection, it is worth pointing out that the Court has held, by its interpretation of Article 5(3) of the Brussels Convention to the effect that that provision covers not only the place of the event giving rise to the damage, but also the place where the damage occurred, and that to decide in favour only of the place of the event giving rise to the damage would, in a significant number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of that convention, with the result that the latter provision would, to that extent, lose its effectiveness (see *Mines de potasse d'Alsace*, paragraphs 15 and 20, and *Shevill and Others*, paragraph 22). Such a consideration relating to confusion between the heads of jurisdiction is likely to apply in the same way with regard to the failure to take account, where appropriate, of a place where damage occurred which differs from the place of the event which gave rise to that damage.

32 It follows from the foregoing that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.

The second question

33 In the event that the answer to the first question should be that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that the words 'place where the harmful event occurred' refer to the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended, the referring court asks, further, whether that damage must consist of physical damage to persons or goods, or whether it may consist (at that stage) of purely financial damage.

34 In that connection, it must be recalled, as stated in paragraphs 9 and 10 of the present judgment, that the processing by Zuid-Chemie of the contaminated micromix into fertiliser caused that fertiliser to be of limited utility or even rendered it unusable, which, according to Zuid-Chemie, caused it to suffer loss.

35 As the initial damage suffered by Zuid-Chemie consisted therefore in physical damage to goods, the necessary conclusion is that the question whether purely financial damage would, at that stage, have been sufficient to lead to the interpretation set out in paragraph 32 of the present judgment is hypothetical.

36 Taking account of that finding, and in the light of the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (Case C-62/06 *ZF Zefeser* [2007] ECR I-11995, paragraph 15), there is no need to reply to the second question.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the nation 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 (First Chamber) hereby rules:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.

[Signatures]

Joined Cases C-403/08 and C-429/08,
Football Association Premier League Ltd v QC Leisure

16 December 2009 (*)

(References for a preliminary ruling – Application to participate in the proceedings – Rejection)

In REFERENCES for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Chancery Division, and the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decisions of 11 July and 28 July 2008, received at the Court on 17 September and 29 September 2008 respectively, in the proceedings
The Football Association Premier League Ltd,
NetMed Hellas SA,
Multichoice Hellas SA
v
QC Leisure,
David Richardson,
AV Station plc,
Malcolm Chamberlain,
Michael Madden,
SR Leisure Ltd,
Philip George Charles Houghton,
Derek Owen (C-403/08)**,**
and
Karen Murphy
v
Media Protection Services Ltd (C-429/08),

THE PRESIDENT OF THE COURT,
after hearing the Advocate General, Mrs J. Kokott,
makes the following

Order

1 These references for a preliminary ruling concern the validity and interpretation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (OJ 1998 L 320, p. 54) and the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15) and Articles 12 EC, 28 EC to 30 EC, 49 EC and 81 EC.

2 The references were made in the course of (i) proceedings brought by The Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA against QC Leisure, Mr Richardson, AV Station plc, Mr Chamberlain, Mr Madden, SR Leisure Ltd, Mr Houghton and Mr Owen and (ii) proceedings brought by Ms Murphy against Media Protection Services Ltd. In both cases, the proceedings concern the use in the United Kingdom of decoder cards intended for other Member States to gain access to satellite retransmissions of live English Premier League football matches.

3 By separate order of 25 November 2008, which was sent to the Court on 23 December 2008, the High Court of Justice of England and Wales, Chancery Division, accepted the Union of European Football Associations ('UEFA'), British Sky Broadcasting Ltd ('Sky'), Setanta Sports Sàrl ('Setanta'), Group Canal Plus SA and The Motion Picture Association as parties to the proceedings which gave rise to the reference for a preliminary ruling in Case C-403/08, but stated that their participation would be confined to the submission of observations and, where appropriate, to the oral procedure before the Court in connection with the present references for a preliminary ruling.

4 By applications of 2, 3, 9 and 26 February 2009 respectively, Sky, Setanta, The Motion Picture Association and UEFA ('the applicants') sought leave to submit to the Court observations on the questions referred by the national courts.

5 In that regard, it should be borne in mind that participation in cases of the kind referred to in Article 267 TFEU is governed by Article 23 of the Statute of the Court of Justice of the European Union, which limits the right to submit statements of case or observations to the Court to: (i) the parties; (ii) the Member States; (iii) the European Commission and, where appropriate, the institution, body, office or agency of the European Union which adopted the act the validity or interpretation of which is in dispute; (iv) the States, other than the Member States, which are parties to the Agreement on the European Economic Area; (v) the EFTA Surveillance Authority; and (vi) the non-member States concerned. Article 23 of the Statute of the Court does not leave the Court with any discretion to extend that right to natural or legal persons in respect of whom express provision has not been made. By the term 'parties', Article 23 of the Statute of the Court refers only to the parties to the action before the national court (see, to that effect, Case 62/72 *Bollmann* [1973] ECR 269, paragraph 4).

6 Subsequent to its reference for a preliminary ruling and in accordance with its own rules of procedure, the High Court of Justice of England and Wales, Chancery Division, accepted the five legal persons referred to in paragraph 3 above as interveners in the proceedings. The Court has stated in that regard that a person who has not sought and been granted leave to intervene before the national court is not entitled to submit observations to the Court under Article 23 of the Statute of the Court (see, to that effect, the order of the President of the Court of 26 February 1996 in Case C-181/95 *Biogen* [1996] ECR I-717, paragraph 6), under which, *a contrario*, any person who has been granted leave to intervene before the national court is entitled to submit observations to this Court.

7 While the spirit of cooperation which must prevail in the exercise of the functions assigned by Article 267 TFEU to the national courts, on the one hand, and the Community judicature, on the other, requires the Court of Justice to have regard to the particular responsibilities of the national court, it implies at the same time that the national court, in the use which it makes of the possibilities offered by that provision, must have regard to the particular function entrusted to the Court in this field (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 20).

8 Article 267 TFEU entrusts to the Court the duty of assisting in the administration of justice in the Member States by meeting objective requirements inherent in the resolution of genuine disputes. In exercising its jurisdiction, the Court must have regard to the proper working of the procedure laid down in that provision (see, to that effect, *Foglia*, paragraphs 18 and 19).

9 In the present case, it is obvious that the five legal persons in question were not parties to the action at the time when the High Court of Justice of England and Wales, Chancery Division, made its order for reference which, under the first paragraph of Article 23 of the Statute of the Court, stays proceedings before it. Furthermore, it is apparent from the separate order of that court of 25 November 2008 that the applications have been made only with a view to participating in the proceedings before the Court and that the applicants do not intend to play an active part in the proceedings before the national court after delivery of the judgment giving a preliminary ruling.

10 Although the five legal persons in question have a definite interest in the answers to be given by the Court to the questions referred by the national court, that does not mean that they are to be accorded the status of parties for the purposes of Article 23 of the Statute of the Court. Such a provision would moreover be pointless if any party having an interest were recognised as having the right to participate in the proceedings provided for under Article 267 TFEU (see, to that effect, the order in *Biogen*, paragraph 6).

11 Consequently, the applications to participate in the proceedings, submitted respectively by UEFA, Sky, Setanta and The Motion Picture Association, must be rejected.

Costs

12 There is no need to rule on costs as none have been incurred. On those grounds, the President of the Court hereby orders:

1. **The applications to participate in the proceedings, submitted respectively by the Union of European Football Associations (UEFA), British Sky Broadcasting Ltd, Setanta Sports Sàrl and The Motion Picture Association, are rejected.**

2. **There is no need to rule on costs.**

Note for guidance on references by national courts for preliminary rulings issued by the European Court of Justice

[The following guidance notes were issued in 1996 by the Court of Justice]

The development of the Community legal order is largely the result of cooperation between the Court of Justice of the European Communities and national courts and tribunals through the preliminary ruling procedure under Article 177 of the EC Treaty and the corresponding provisions of the ECSC and Euratom Treaties.[1]

In order to make this cooperation more effective, and so enable the Court of Justice better to meet the requirements of national courts by providing helpful answers to preliminary questions, this Note for Guidance is addressed to all interested parties, in particular to all national courts and tribunals.

It must be emphasised that the Note is for guidance only and has no binding or interpretative effect in relation to the provisions governing the preliminary ruling procedure. It merely contains practical information which, in the light of experience in applying the preliminary ruling procedure, may help to prevent the kind of difficulties which the Court has sometimes encountered.

1. Any court or tribunal of a Member State may ask the Court of Justice to interpret a rule of Community law, whether contained in the Treaties or in acts of secondary law, if it considers that this is necessary for it to give judgment in a case pending before it.

Courts or tribunals against whose decisions there is no judicial remedy under national law must refer questions of interpretation arising before them to the Court of Justice, unless the Court has already ruled on the point or unless the correct application of the rule of Community law is obvious.[2]

2. The Court of Justice has jurisdiction to rule on the validity of acts of the Community institutions. National courts or tribunals may reject a plea challenging the validity of such an act. But where a national court (even one whose decision is still subject to appeal) intends to question the validity of a Community act, it must refer that question to the Court of Justice.[3]

Where, however, a national court or tribunal has serious doubts about the validity of a Community act on which a national measure is based, it may, in exceptional cases, temporarily suspend application of the latter measure or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers that the Community act is not valid.[4]

3. Questions referred for a preliminary ruling must be limited to the interpretation or validity of a provision of Community law, since the Court of Justice does not have jurisdiction to interpret national law or assess its validity. It is for the referring court or tribunal to apply the relevant rule of Community law in the specific case pending before it.

4. The order of the national court or tribunal referring a question to the Court of Justice for a preliminary ruling may be in any form allowed by national procedural law. Reference of a question or questions to the Court of Justice generally involves stay of the national proceedings until the Court has given its ruling, but the decision to stay proceedings is one which it is for the natibnal court alone to take in accordance with its own national law.

5. The order for reference containing the question or questions referred to the Court will have to be translated by the Court's translators into the other official languages of the Community. Questions concerning the interpretation or validity of Community law are frequently of general interest and the Member States and Community institutions are entitled to submit observations. It is therefore desirable that the reference should be drafted as clearly and precisely as possible.

6. The order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court, and those to whom it must be notified (the Member States, the Commission and in certain cases the Council and the European Parliament), a clear understanding of the factual and legal context of the main proceedings.[5] In particular, it should include:

— a statement of the facts which are essential to a full understanding of the legal significance of the main proceedings;

— an exposition of the national law which may be applicable;

— a statement of the reasons which have prompted the national court to refer the question or questions to the Court of

[1] A preliminary ruling procedure is also provided for by protocols to several conventions concluded by the Member States, in particular the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[2] Judgment in Case 283/81 *CILFITv Ministry of Health* [1982] ECR 3415.
[3] Judgment in Case *314/85 Foto-Frost* v *Hauptzollamt Lubeck-Ost* [1987] ECR 4199.
[4] Judgments in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Suderdithrnarschen and Zuckerfabrik Soest* [1991] ECR 1-415 and in Case C-465/93 *Atlanta Fruchthandelsgcsselschaft* [1995] ECR 1-3761.
[5] Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR 1-393

Justice; and

— where appropriate, a summary of the arguments of the parties.

The aim should be to put the Court of Justice in a position to give the national court an answer which will be of assistance to it.

The order for reference should also be accompanied by copies of any documents needed for a proper understanding of the case, especially the text of the applicable national provisions. However, as the case-file or documents annexed to the order for reference are not always translated in full into the other official languages of the Community, the national court should ensure that the order for reference itself includes all the relevant information.

7. A national court or tribunal may refer a question to the Court of Justice as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment. It must be stressed, however, that it is not for the Court of Justice to decide issues of fact or to resolve disputes as to the interpretation or application of rules of national law. It is therefore desirable that a decision to refer should not be taken until the national proceedings have reached a stage where the national court is able to define, if only as a working hypothesis, the factual and legal context of the question; on any view, the administration of justice is likely to be best served if the reference is not made until both sides have been heard.[6]

8. The order for reference and the relevant documents should be sent by the national court directly to the Court of Justice, by registered post, addressed to:

The Registry
Court of Justice of the European Communities
L-2925 Luxembourg
Telephone (352) 43031

The Court Registry will remain in contact with the national court until judgment is given, and will send copies of the various documents (written observations, Report for the Hearing, Opinion of the Advocate General). The Court will also send its judgment to the national court. The Court would appreciate being informed about the application of its judgment in the national proceedings and being sent a copy of the national court's final decision.

9. Proceedings for a preliminary ruling before the Court of Justice are free of charge. The Court does not rule on costs.

[6] Jugdment on Case 70/77 *Simmenthal v Administrazione delle Finanze dello Statto* [1978] ECR 1453.

Cases and Materials on EU Law (8th Edition)
Stephen Weatherill
OUP 2007

(Extracts) The Direct Effect of Directives

SECTION 1: ESTABLISHING THE PRINCIPLE

The most difficult area relating to 'direct effect' arises in the application of the notion to EC *Directives.* Although the rest of this Chapter concentrates on this area, it is important not to develop an inflated notion of the importance of the problem of the direct effect of Directives. Directives are after all only one source of Community law. However, the issue deserves examination in some depth, not least because Directives play a major role in elaborating the detailed scope of Community policy-making in respect of which the Treaty provides a mere framework. Moreover, Directives are a rather peculiar type of act - Community law but implemented at national level through national legal procedures. An examination of this area, then, should reveal much about the general problem of the interrelation of national law with the Community legal order.

The starting point is Article 249 EC, formerly Article 189, set out at p.30. This suggests that a Directive, in contrast to a Regulation, would not be directly effective. Regulations are directly applicable, and if they meet the *Van Gend en Loos* (Case 26/62) test for direct effect they are directly effective too. They are law in the Member States (direct applicability) and they may confer legally enforceable rights on individuals (direct effect). Directives, in marked contrast, are clearly dependent on implementation by each State, according to Article 249. When made by the Community, they are not designed to be law in that form at national level. Nor are they designed directly to affect the individual. (The same is true of the European framework law, envisaged by Article 1-33 of the Treaty establishing a Constitution as the functional successor to the Directive, p.34 above.) Yet in *Van Duyn* (Case 41/74), at p.114 above, the Court held that a Directive might be relied on by an individual before a national court. In the next case, *Pubblico Ministero* v *Ratti* (Case 148/78), the European Court explains how, when and why Directives can produce direct effects (or, at least, effects analogous thereto) at national level.

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

Directive 73/173 required Member States to introduce into their domestic legal orders rules governing the packaging and labelling of solvents. This had to be done by December 1974. Italy had failed to implement the Directive and maintained in force a different national regime. Ratti produced his solvents in accordance with the Directive, not the Italian law. In 1978 he found himself the subject of criminal proceedings in Milan for non-compliance with Italian law. Could he rely on the Directive which Italy had left unimplemented?

[18] This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

[19] In this regard the settled case law of the Court, last reaffirmed by the judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* [1977] 1 ECR 126, lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.

[20] It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.

[21] Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.

[22] Consequently *a* Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

[23] It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise.

[24] Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law - even if it is provided with penal sanctions - which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.

NOTE: Directive 77/728 applied a similar regime to varnishes. But here Ratti had jumped the gun. The deadline for implementation was November 1979. Yet in 1978 his varnishes were already being made according to the Directive, not Italian law. In the criminal prosecution for breach of Italian law he sought to rely on this Directive too. He argued that he had a legitimate expectation that compliance with the Directive prior to its deadline for implementation would be permissible:

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

[43] It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive - and in particular Article 9 thereof - will be able to have the effects described in the answer to the first question.

[44] Until that date is reached the Member States remain free in that field.

[45] If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

[46] In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of 'legitimate expectation' before the expiry of the period prescribed for its implementation.

[47] Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

NOTE: A small indentation into the Court's insistence that the expiry of the period prescribed for a Directive's implementation is the vital trigger for its relevance in law before national courts was made in Case C-129/96 *Inter-Environnement Wallonie ASBL* v *Region Wallone* [1997] ECR I-7411. In advance of the deadline, Member States are obliged 'to refrain ... from adopting measures liable seriously to compromise the result prescribed' by the Directive. A violation was established in Case C-14/02 *ATRAL* [2003] ECR 1-4431. In normal circumstances, however, it is the expiry of the prescribed deadline which converts an unimplemented (and sufficiently unconditional) Directive into a provision on which an individual may rely before a national court.

• QUESTION

Why did the European Court decide to uphold Ratti's ability to rely on the unimplemented 1973 solvents Directive in the face of the apparently conflicting wording of the Treaty (Article 189, now 249)? One may return to Judge Mancini for one explanation:

F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595

(Footnotes omitted.)

3. Costa v *Enel* may be therefore regarded as a sequel of *Van Gend en Loos.* It is not the only sequel, however. Eleven years after Von *Gend en Loos,* the Court took in *Van Duyn* v *Home Office* a further step forward by attributing direct effect to provisions of Directives not transposed into the laws of the Member States within the prescribed time limit, so long as they met the conditions laid down in *Van Gend en Loos.* In order to appreciate fully the scope of this development it should be borne in mind that while the principal subjects governed by Regulations are agriculture, transport, customs and the social security of migrant workers, Community authorities resort to Directives when they intend to harmonise national laws on such matters as taxes, banking, equality of the sexes, protection of the environment, employment contracts and organisation of companies. Plain cooking and haute cuisine, in other words. The hope of seeing Europe grow institutionally, in matters of social relationships and in terms of quality of life rests to a large extent on the adoption and the implementation of Directives.

Making Directives immediately enforceable poses, however, a formidable problem. Unlike Regulations and the Treaty provisions dealt with by *Van Gend en Loos,* Directives resemble international treaties, in so far as they are binding *only* on the States and *only* as to the result to be achieved. It is understandable therefore that, whereas the *Van Gend en Loos* doctrine established itself within a relatively short time, its extension to Directives met with bitter opposition in many quarters. For example, the French Conse/7 *d'Etat* and the German *Bundesfinanzhof* bluntly refused to abide by it and Professor Rasmussen, in a most un-Danish fit of temper, went so far as to condemn it as a case of 'revolting judicial behaviour'.

Understandable criticism is not necessarily justifiable. It is mistaken to believe that in attributing direct effect to Directives not yet complied with by the Member States, the Court was only guided by political considerations, such as the intention of by-passing the States in a strategic area of law-making. Non-compliance with Directives is the most typical and most frequent form of Member State infraction; moreover, the Community authorities often turn a blind eye to it and, even when the Commission institutes proceedings against the defaulting State under Article 169 of the Treaty, the Court cannot impose any penalty on that State. [See now Article 228 EC, a Maastricht innovation, p.110 above.] This gives the Directives a dangerously elastic quality: Italy, Greece or Belgium may agree to

accept the enactment of a Directive with which it is uncomfortable knowing that the price to pay for possible failure to transpose it is non-existent or minimal.

Given these circumstances, it is sometimes submitted that the *Van Duyn* doctrine was essentially concerned with assuring respect for the rule of law. The Court's main purpose, in other words, was 'to ensure that neither level of government can rely upon its malfeasance - the Member State's failure to comply, the Community's failure or even inability to enforce compliance', with a view to frustrating the legitimate expectation of the Community citizens on whom the Directive confers rights, indeed, 'if a Court is forced to condone wholesale violation of a norm, that norm can no longer be termed law'; nobody will deny that 'Directives are intended to have the force of law under the Treaty'.

Doubtless, in arriving at its judgment in *Van Duyn,* the Court may also have considered that by reducing the advantages Member States derived from non-compliance, its judgment would have strengthened the 'federal' reach of the Community power to legislate and it may even have welcomed such a consequence. But does that warrant the revolt staged by the *Conseil d'Etat* or the *Bundesfinanzhof?* The present author doubts it; and so did the German Constitutional Court, which sharply scolded the *Bundesfinanzhof* for its rejection of the *Van Duyn* doctrine. This went a long way towards restoring whatever legitimacy the Court of Justice had lost in the eyes of some observers following *Van Duyn.* The wound, one might say, is healed and the scars it has left are scarcely visible.

• QUESTION

Do you agree with Mancini that the Court's work in this area is 'essentially concerned with assuring respect for the rule of law'? See also N. Green, 'Directives, Equity and the Protection of Individual Rights' (1984) 9 EL Rev 295.

NOTE: Difficult constitutional questions arise at Community level and at national level in relation to the direct effect of Directives. You will quickly notice that many of the issues hav$_c$ arisen in the context of cases about sex discrimination. This has happened because equality between the sexes constitutes an area of Community competence which is given shape by ; string of important Directives, often inadequately implemented at national level.

SECTION 2: CURTAILING THE PRINCIPLE

The next case allowed the Court to refine its approach to the direct effect of Directives.

***Marshall* v *Southampton Area Health Authority* (Case 152/84)**

[1986] ECR723, [1986] 1 CMLR 688, Court of Justice of the European Communities

Ms Marshall was dismissed by her employers, the Health Authority, when she reached the age of 62. A man would not have been dismissed at that age. This ***was*** discrimination on grounds of sex. But was there a remedy in law? Apparently not under the UK's Sex Discrimination Act 1975, because of a provision excluding discrimination arising out of treatment in relation to retirement. Directive 76/207 requiring equal treatment between the sexes, *did* appear to envisage a legal remedy for such discrimination, but that Directive had not been implemented in the UK even though the deadline was past. So could Ms Marshall base a claim on the unimplemented Community Directive before an English court? The European Court was asked this question in a preliminary reference by the Court of Appeal

The European Court first held that Ms Marshall's situation was an instance of discrimination on grounds of sex contrary to the Directive. It continued:

[39] Since the first question has been answered in the affirmative, it is necessary to consider whether Article 5(1) of Directive No 76/207 may be relied upon by an individual before national courts and tribunals.

[40] The appellant and the Commission consider that that question must be answered in the affirmative. They contend in particular, with regard to Articles 2(1) and 5(1) of Directive No 76/207, that those provisions are sufficiently clear to enable national courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.

[41] In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a directive, in conjunction with Article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in Case 14/83 *von* Co/son *and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.

[42] The Commission is of the opinion that the provisions of Article 5(1) of Directive No 76/207 are sufficiently clear and

unconditional to be relied upon before a national court. They may therefore be set up against section 6(4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.

[43] The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State *qua* public authority and hot against a Member State qua employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.

[44] With regard to the legal position of the respondent's employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are Crown bodies and their employees are Crown servants, nevertheless the administration of the National Health Service by the health authorities is regarded as being separate from the government's central administration and its employees are not regarded as civil servants.

[45] Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of Article 5 is quite imprecise and requires the adoption of measures for its implementation.

[46] It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in Case 8/81 Becter v *Finanzamt Munster-Innenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

[47] That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

[48] With regard to the argument that a directive may not be relied upon against an individual, it must be emphasised that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

[49] In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[50] It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), is a public authority.

[51] The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent *qua* organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.

[52] Finally, with regard to the question whether the provision contained in Article 5(1) of Directive No 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.

[53] It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5(2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.

[54] With regard, in the first place, to the reservation contained in Article 1 (2) of Directive No 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *rations materiae,* it does not lay down any condition on the application of that principle in its field of operation and in particular in relation to Article 5 of the directive. Similarly, the exceptions to Directive No 76/207 provided for in Article 2 thereof are not relevant to this case.

[55] It follows that Article 5 of the Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5(1).

[56] Consequently, the answer to the second question must be that Article 5(1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).

NOTES

1. Ms Marshall was able to rely on the Directive because she was employed by the State. Her subsequent quest for compensation took her back to the European Court, where it was made clear that national limits on compensatory awards should not be applied in so far as they impede an effective remedy (Case C-271/91 [19931 ECR 1-4367). However, had she been employed by a private firm she would have been unable to rely on the direct effect of the Directive. So, as far as direct effect is concerned, there are requirements which always apply - those explained above in *Van Gend en Loos* (Case 26/62) (p. 114). But for Directives there are extra requirements: first, that the implementation date has passed; and, second, that the State is the party against which enforcement is claimed. Directives may be vertically directly effective, but not horizontally directly effective.

2. In rejecting the horizontal direct effect of Directives, the Court in fact made a choice between competing rationales for the direct effect of Directives. In its early decisions the Court laid emphasis on the need to extend direct effect in this area in order to secure the 'useful effect' of measures left unimplemented by defaulting States. Consider para 12 of *Van Duyn* (Case 41/74) (p.114 above); and, for example, in *Nederlandse Ondernemingen* (Case 51/76) [1977] ECR 113, the Court observed (at para 23) that:

where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.

This dictum came in the context of a case against the State, but this logic would lead a bold court to hold an unimplemented Directive enforceable against a private party too, in order to improve its useful effect. However, in *Ratti* (Case 148/78) (p.133 above) and in *Marshall* (Case 152/84) (p.136 above), the Court appears to switch its stance away from the idea of 'useful effect' to a type of 'estoppel' as the legal rationale for holding Directives capable of direct effect. See para 49 of the judgment in *Marshall* (Case 152/84).

3. The Court's curtailment of the impact of Directives before national courts may also be seen as a manifestation of judicial minimalism, mentioned at p.28 above. The realist would examine the awareness of the Court that in this area it risks assaulting national sensitivities if it insists on deepening the impact of Community law in the national legal order. The next case was mentioned in passing by Judge Mancini (p.135 above), but the decision deserves further attention.

Minister* of the *Interior* v *Cohn Bendit

[1980] 1 CMLR543, Conseil d'Etat

The matter concerned the exclusion from France of Cohn Bendit, a noted political radical (who subsequently became a Member of the European Parliament!). He relied on Community rules governing free movement to challenge the exclusion. The Conseil d'Etat, the highest court in France dealing with administrative law, addressed itself to the utility of a Directive in Cohn Bendit's action before the French courts.

According to Article 56 of the Treaty instituting the European Economic Community of 25 March 1957, no requirement of which empowers an organ of the European Communities to issue, in matters of *ordre public,* regulations which are directly applicable in the member-States, the co-ordination of statute and of subordinate legislation *(dispositions legislatives et reglementaires)* 'providing for special treatment for foreign nationals on grounds of public policy *(ordre public),* public security or public health' shall be the subject of Council directives, enacted on a proposal from the Commission and after consultation with the European Assembly. It follows clearly from Article 189 of the Treaty of 25 March 1957 that while these directives bind the

member-States 'as to the result to be achieved' and while, to attain the aims set out in them, the national authorities are required to adapt the statute law and subordinate legislation and administrative practice of the member-States to the directives which are addressed to them, those authorities alone retain the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law. Thus, whatever the detail that they contain for the eyes of the member-States, directives may not be invoked by the nationals of such States in support of an action brought against an individual administrative act. It follows that M. Cohn-Bendit could not effectively maintain, in requesting the Tribunal Administratif of Paris to annul the decision of the Minister of the Interior of 2 February 1976, that that decision infringed the provisions of the directive enacted on 25 February 1964 by the Council of the European Communities with a view to coordinating, in the circumstances laid down in Article 56 of the EEC Treaty, special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. Therefore, in the absence of any dispute on the legality of the administrative measures taken by the French Government to comply with the directives enacted by the Council of the European Communities, the solution to be given to the action brought by M. Cohn-Bendit may not in any case be made subject to the interpretation of the directive of 25 February 1964. Consequently, without it being necessary to examine the grounds of the appeal, the Minister of the Interior substantiates his argument that the Tribunal Administratif of Paris was wrong when in its judgment under appeal of 21 December 1977 it referred to the Court of Justice of the European Communities questions relating to the interpretation of that directive and stayed proceedings until the decision of the European Court. In the circumstances the case should be referred back to the Tribunal Administratif of Paris to decide as may be the action of M. Cohn-Bendit.

NOTE: See, similarly, the *Bundesftnanzhof* (German federal tax court) in *VAT Directives* [1982] 1 CMLR 527.

As D. Anderson observed in the wake of the Court's rejection in *Marshall* (Case 152/ 84) of the enforceability of unimplemented Directives against private parties, '[t]he present concern of the Court is to consolidate the advances of the 1970s rather than face the legal complexities and political risks of attempting to extend the doctrine [of direct effect] further' *(Boston College International & Comparative Law Review* (1988) XI 91, 100). This implies that the Court might have been expected to return to the matter. This proved correct. In 1993 and 1994 three Advocates-General pressed the Court to reconsider its rejection of the horizontal direct effect of Directives: Van Gerven in *'Marshall 2'* (Case C-271/91) [1993] ECR 1-4367; Jacobs in *Vaneetveld* v *SA Le Foyer* (Case C-316/93) [1994] ECR 1-763 and Lenz in *Paola Faccini Dori* v *Recreb Sri* (Case C-91/92) [1994] ECR 1-3325. Advocate-General Lenz insisted that the Citizen of the Union was entitled to expect equality before the law throughout the territory of the Union and observed that, in the absence of horizontal direct effect, such equality was compromised by State failure to implement Directives. Advocate-General Jacobs thought that the effectiveness principle militated against drawing distinctions based on the status of a defendant. All three believed that the pursuit of coherence in the Community legal order dictated acceptance of the horizontal direct effect of Directives. Only in the third of these cases, *Faccini Dori* v *Recreb,* was the European Court unable to avoid addressing the issue directly.

Paolo *Faccini Dori* v *Recreb Sri* (Case C-91/92)

[1994] ECR I-3325, Court of Justice of the European Communities

Ms Dori had concluded a contract at Milan Railway Station to buy an English language correspondence course. By virtue of Directive 85/577, which harmonizes laws governing the protection of consumers in respect of contracts negotiated away from business premises, the so-called 'Doorstep Selling Directive', she ought to have been entitled to a 'cooling-off period of at least seven days within which she could exercise a right to withdraw from the contract. However, she found herself unable to exercise that right under Italian law because Italy had not implemented the Directive. She therefore sought to rely on the Directive to defeat the claim brought against her by the private party with which she had contracted. The ruling in *Marshall* (Case 152/84) appeared to preclude reliance on the Directive and the Court, despite the promptings of Advocate-General Lenz, *refused* to overrule *Marshal].* It maintained that Directives are incapable of horizontal direct effect.

[23] It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations - or those of State entities - with individuals and to confer certain rights, on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives on conclusion of public works contracts and of directives on harmonisation of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker* v *Finarizamt Munster-Innenstadt* [1982] ECR 53).

[24] The effect of extending that case law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

[25] It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right

in a national court.

NOTE: Paragraph 48 of the ruling in *Marshall* expresses comparable sentiments to those expressed in para 24 of the *Dori* ruling, but the emphasis in the latter on the limits of Community competence (specifically under Article 189 - now 249 - EC) is noticeably firmer. Although the Court did not consider that Ms Dori was wholly barred from relying on the Directive (see p.156 below on 'indirect' effect and p.164 on a claim against the defaulting State), it nevertheless refused to allow a Directive to exert direct effect in relations between private individuals. In rulings subsequent to *Dori,* the Court has repeated its rejection of the horizontal direct effect of Directives: e.g., Case *C-192/94 El Corte Ingles v Cristma Blasquez Rivera* [1996] ECR 1-1281; Case C-97/96 *Verband Deutscher Daihatsu Handler eV v Daihatsu Deutschland GmbH* [1997] ECR 1-6843. The reader is invited to consider whether, just as the Conseil d'Etat's ruling in *Cohn Bendit* (p. 139 above) may have prompted the European Court's caution in *Marshall,* so too national judicial anxieties, expressed with particular force by the the *Bundesverfassungsgericht,* about Treaty amendment in the guise of judicial interpretation may have prompted the European Court in *Dori* to emblazon its fidelity to the text of the EC Treaty by declining to extend Community legislative competence to include the enactment of obligations for individuals with immediate effect. Chapter 21 will examine this material in depth.

SECTION 3: THE SCOPE OF THE PRINCIPLE: THE STATE

Whatever one's view of the Court's motivations in ruling against the horizontal direct effect of Directives in *Marshall* (Case 152/84), confirmed in *Don* (Case C-91/92) and subsequently, the decision left many questions unanswered. First, what is the 'State'? The more widely this is interpreted, the more impact the unimplemented Directive will have.

Foster v British Gas (Case C-188/89)

[1990] ECR 1-3133, Court of Justice of the European Communities

The applicant wished to rely on the Equal Treatment Directive 76/207 against her employer before English courts. She and other applicants had been compulsorily retired at an age earlier than male employees. This raised the familiar issue of the enforceability of Directives before national courts where national law is inadequate. The Court examined the nature of the defendant (the British Gas Corporation: BGC).

[3] By virtue of the Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly of the supply of gas.

[4] The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.

[5] The BGC was obliged to submit to the Secretary of State periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972 the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament.

[6] The BGC was required to run a balanced budget over two successive financial years. The Secretary of State could order it to pay certain funds over to him or to allocate funds to specified purposes.

It then proceeded to explain the legal approach to defining the 'State' for these purposes:

[13] Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.

[14] The question what effects measures adopted by Community institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the Community measure in issue.

[15] It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

The Court then disposed of the question referred:

[16] As the Court has consistently held (see the judgment of 19 January 1982 in Case 8/81, *Becker* v *Hauptzollamt Munster-Innenstadt,* [1982] ECR 53 at paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into

consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

[17] The Court further held in its judgment of 26 February 1986 in Case 152/84 *(Marshall,* at paragraph 49) that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[18] On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

[19] The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments of 19 January 1982 in Case 8/81, *Becker,* cited above, and of 22 February 1990 in Case C-22188, *ECSC* v *Acciaierie e Ferriere Busseni (in liquidation)),* local or regional authorities (judgment of 22 June 1989 in Case 103/88, *Fratelli Costanzo* v *Comune di Milano),* constitutionally independent authorities responsible for the maintenance of public order and safety (judgment of 15 May 1986 in Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651), and public authorities providing public health services (judgment of 26 February 1986 in Case 152/84, *Marshall,* cited above).

[20] It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

[21] With regard to Article 5(1) of Directive 76/207 it should be observed that in the judgment of 26 February 1986 in Case 152/84 *(Marshall,* cited above, at paragraph 52), the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.

[22] The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

NOTE: The case has been widely commented upon; see, e.g., N. Grief, (1991) 16 EL Rev 136; E. Szyszczak, (1990) 27 CML Rev 859. For a full examination of the policy issues, see D. Curtin, The Province of Government', (1990) 15 EL Rev 195. For another case discussing the reach of unimplemented Directives in this vein see Case C-157/02, *Rieser International Transport* (judgment of 5 February 2004).

• QUESTION

The case arose before British Gas was 'privatized' under the Gas Act 1986 (sold to the private sector). What difference would this sale make to the application of the Court's test?

NOTE: The notion of the 'State' embraces local authorities.

***Fratelli Costanzo* v *Milano* (Case 103/88)**

[1989] ECR 1839, Court of Justice of the European Communities

The case arose out of the alleged failure of the municipal authorities in Milan to respect *inter alia* a Community Directive in awarding contracts for the construction of a football stadium for the 1990 World Cup. Could a disappointed contractor rely on the unimplemented Directive before Italian courts against the municipal authorities? The matter reached the European Court by way of a preliminary reference.

[28] In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

[29] In its judgments of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Munster-lnnenstadt* [1982] ECR 53, at p.71 and 26 February 1986 in Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Area Health Authority* [1986] ECR 723, at p.748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be

unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

[30] It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

[31] It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

[32] With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

SECTION 4: 'INCIDENTAL EFFECT'

It has been shown that Directives are incapable of application against private individuals before national courts. It is only when the State has fulfilled its Treaty obligation of implementation pursuant to Articles 10 and 249 EC that the Directive, duly transformed, becomes 'live' for the purposes of imposing obligations on private parties.

But this is not to say that an unimplemented Directive will never exert an effect before a national court that is prejudicial to a private party. Without abandoning its stance against horizontal direct effect, the Court has nevertheless chosen to recognise circumstances in which the State's default may incidentally affect the position of a private individual.

Case C-201/94 *R* v *The Medicines Control Agency, ex. parte Smith & Nephew Pharmaceuticals Ltd* and *Primecrown Ltd* v *The Medicine Control Agency* [1996] ECR 1-5819 concerned Article 3 of Directive 65/65. This provided that no proprietary medicinal product could be placed on the market in a Member State unless a prior authorisation had been issued by the competent authority of that Member State - the Medicines Control Agency (MCA) in the UK. The UK's Medicines Control Agency (MCA) had issued to Primecrown a licence to import a proprietary medicinal product of Belgian origin bearing the same name, and manufactured under an agreement with the same (American) licensor, as a product for which Smith & Nephew already held a marketing authorisation in the United Kingdom. But the MCA decided it was in error and it withdrew the authorisation. Both Primecrown and Smith & Nephew initiated proceedings before the English courts and, in a preliminary reference, the European Court was asked to provide an interpretation of the Directive's rules governing authorisation. But it was also asked whether Smith & Nephew, as the holder of the original authorisation issued under the normal procedure referred to in Directive 65/65, could rely on the Directive in proceedings before a national court in which it contested the validity of a marketing authorisation granted by a competent public authority to one of its competitors. The Court decided that it could. The consequence is that Primecrown's position could be detrimentally affected by a competitor's reliance on a Directive in proceedings against the public authorities. True, Smith & Nephew did not rely on the Directive in an action against Primecrown. This is *not* horizontal direct effect of the type painstakingly excluded by the Court in Don (Case C-91/92, p.141 above). But it is a case in which the application of a Directive by a national court *incidentally* affected the legal position of a private party.

The Court has developed this case law further. Without any direct challenge to its dogged resistance to the horizontal direct effect of Directives, it has nevertheless extended the *incidental* effect of Directives on private parties in national proceedings.

Council Directive 83/189/EEC provided for Member States to give advance notice to the Commission and other Member States of plans to introduce new product specifications. The amendments were consolidated in Directive 98/34 [1998] OJ L204/37, itself amended by Directive 98/48 [1998] OJ L217/18. The purpose of this notification system is to avoid the introduction of new measures having equivalent effect to quantitative restrictions on trade (and to supply the Commission with a possible basis for developing its harmonisation programme). It is an 'early warning system' (see Chapter 9 more generally on 'market management').

In the next case the Court decided that non-notification of a draft technical regulation (as defined by the Directive) affected the enforceability of that measure before the courts of the defaulting Member State.

***CIA Security International SA* v *Signalson SA and Securitel Sprl* (Case C-194/94)**

[1996] ECR 1-2201, Court of Justice of the European Communities

Signalson and Securitel sought a court order from a Belgian court requiring that their competitor CIA Security cease marketing a burglar alarm. The alarm was not compatible with Belgian technical standards. But the Belgian technical standards had not been notified to the Commission, as was required by Directive 83/189. Did this State default have any effect in the national proceedings involving two private parties? The Directive did not address the matter. This did not deter the Court.

[42] It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in Case 8/81 *Becker* [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357).

[43] The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.

[44] That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts.

[45] It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.

[46] The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.

[47] The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.

[48] For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

[49] That interpretation of the directive is in accordance with the judgment given in Case 380/87 *Enichern Base and Others* v *Cornune di Cinisello Balsamo* [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p.39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission' s agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

[50] In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission' s agreement or lack of opposition.

NOTE: The *effectiveness* rationale contained in para 48 is remarkably far-reaching. It was also encountered in *Ratti* (Case 148/78 para 21, p.134 above)). But the reasoning in *Ratti* was treated more circumspectly by the Court subsequently in *Marshall* (Case 152/84, p. 136), and the approach taken in *CIA Security* has also been curtailed in the light of the salutary experience provided by litigation.

***Johannes Martinus Lemmens* (Case C-226/97)**

[1998] ECR 1-3711, Court of Justice of the European Communities

Lemmens was charged with driving while under the influence of alcohol. He argued that the breathalyser was made according to a technical standard that had not been notified to the Commission and that accordingly, following *CIA Security,* it was incompatible with Community law to rely on such evidence before national (criminal) courts. Para 12 of the judgment records Mr Lemmens' disingenuous but ingenious idea:

It is apparent from the order for reference that, in the course of the criminal proceedings instituted against him, Mr Lemmens said 1 understand from the press that there are difficulties regarding the breath-analysis apparatus. I maintain that this apparatus has not been notified to Brussels and wonder what the consequences of this could be for my case'.

The Court concluded that the Dutch Regulation governing breathalyser kits constituted a technical regulation which should, prior to its adoption, have been notified to the Commission in accordance with Article 8 of the Directive. But with what consequence?

[32] . . . it should be noted that, in paragraph 40 of its judgment in *CIA Security International,* cited above, the Court emphasised that the Directive is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the Directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest.

[33] In paragraphs 48 and 54 of that judgment, the Court pointed out that the obligation to notify is essential for achieving such Community control and went on to State that the effectiveness of such control will be that much greater if the Directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable, and thus unenforceable against individuals.

[34] In criminal proceedings such as those in the main action, the regulations applied to the accused are those which, on the one hand, prohibit and penalise driving while under the influence of alcohol and, on the other, require a driver to exhale his breath into an apparatus designed to measure the alcohol content, the result of that test constituting evidence in criminal proceedings. Such regulations differ from those which, not having been notified to the Commission in accordance with the Directive, are unenforceable against individuals.

[35] While failure to notify technical regulations, which constitutes a procedural defect in their adoption, renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified.

[36] The use of the product by the public authorities, in a case such as this, is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed.

[37] The answer to the first question must therefore be that the Directive is to be interpreted as meaning that breach of the obligation imposed by Article 8 thereof to notify a technical regulation on breath-analysis apparatus does not have the effect of making it impossible for evidence obtained by means of such apparatus, authorised in accordance with regulations which have not been notified, to be relied upon against an individual charged with driving while under the influence of alcohol.

Paragraph 35 of *Lemmens* provides a re-focusing of the test applied in *CIA Security.* Paragraph 36 constitutes a narrower reading of the *effectiveness* rationale. In the next case the Court explicitly adopts the reasoning advanced in *Lemmens* but accepts the application of the notification Directive in litigation between two contracting parties in which, at first glance, the State had no involvement.

***Unilever Italia SpA* v *Central Food SpA* (Case C-443/98)**

[2000] ECR I-7535, Court of Justice of the European Communities

Unilever had supplied Central Food with a quantity of virgin olive oil. Central Food rejected the goods on the basis that they were not labelled in accordance with a relevant Italian law. This law had been notified to the Commission but Italy had not observed the Directive's 'standstill' obligation, which required it to wait a defined period before bringing the law into force. The Court treated breach of the 'standstill' obligation as indistinguishable for these purposes from outright failure to notify (which was the nature of the default in both *CIA Security* and *Lemmens).* Unilever submitted that the law should not be applied and sued Central Food under the contract for the price of the goods.

[46] ... in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.

[47] That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.

[48] Next, it must be borne in mind that, in *CIA Security,* the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.

[49] Thus, it follows from the case law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the *CIA Security* case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.

[50] Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.

[51] In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.

[52] In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

NOTE: This is *not* horizontal direct effect. The Directive did not impose an obligation on Central Food. The contract with Unilever imposed the obligation. This seems to be the Court's point in para 51. But the invocation of the Directive completely changed the legal position that had appeared to prevail between the two parties under the contract. It transplanted the commercial risk.

Advocate-General Jacobs had argued vigorously in his Opinion in *Unilever that* legal certainty would be damaged by a finding that the notification Directive be relevant to the status of the contractual claim between private parties.

ADVOCATE-GENERAL JACOBS:

[99] . . . The fact that a Member State did not comply with the procedural requirements of the directive as such should not, in my view, entail detrimental effects for individuals.

[100] That is, first, because such effects would be difficult to justify in the light of the principle of legal certainty. For the day-to-day conduct of trade, technical regulations which apply to the sale of goods must be clearly and readily identifiable as enforceable or as unenforceable. Although the present dispute concerns a relatively small quantity of bottled olive oil of a value which may not affect the finances of either Unilever or Central Food to any drastic extent, it is easy to imagine an exactly comparable case involving highly perishable goods and sums of money which represent the difference between prosperity and ruin for one or other of the parties concerned. In order to avoid difficulties in his contractual relations, an individual trader would have to be aware of the existence of Directive 83/189, to know the judgment in *CIA Security,* to identify a technical regulation as such, and to establish with certainty whether or not the Member State in question had complied with all the procedural requirements of the directive. The last element in particular might prove to be extremely difficult because of the lack of publicity of the procedure under the directive. There is no obligation on the Commission to publish the fact that a Member State has notified or failed to notify a given draft technical regulation. In respect of the standstill periods under Article 9 of the directive, there is no way for individuals to know that other Member States have triggered the six-month standstill period by delivering detailed opinions to the Commission. Similarly, the Commission is also not required to publish the fact that it has informed a Member State of intended or pending Community legislation.

[101] The second problem is possible injustice. If failure to notify were to render a technical regulation unenforceable in private proceedings an individual would lose a case in which such a regulation was in issue, not because of his own failure to comply with an obligation deriving from Community law, but because of a Member State's behaviour. The economic survival of a firm might be threatened merely for the sake of the effectiveness of a mechanism designed to control Member States' regulatory activities. That would be so independently of whether the technical regulation in question constituted an obstacle to trade, a measure with neutral effects on trade, or even a rule furthering trade. The only redress for a trader in such a situation would be to bring ex post a hazardous and costly action for damages against a Member State. Nor is there any reason for the other party to the proceedings to profit, entirely fortuitously, from a Member State's failure to comply with the directive.

[102] It follows, in my view, that the correct solution in proceedings between individuals is a substantive solution. The applicability of a technical regulation in proceedings between individuals should depend only on its compatibility with Article 30 [now 28: Chapter 11 of this book] of the Treaty. If in the present case Italian Law No 313 complies with Article 30, I can see no reason why Central Food, which

understandably relied on the rules laid down in the Italian statute book, should lose the case before the national court. If, however, Italian Law No 313 infringes Article 30 then the national court should be obliged to set the Law aside on that ground.

[103] I accordingly conclude that as against an individual another individual should not be able to rely on a Member State's failure to comply with the requirements of Directive 83/189 in order to set aside a technical regulation.

NOTE: Plainly these anxieties did not move the Court in *Unilever.* It did not follow the Advocate-General and it did not limit the matter to resolution under Article 28 (ex 30) EC, concerning the free movement of goods. It accepted the incidental effect of the notification Directive on the contractual claim. This thrusts EC law of market integration deep into national contract law in so far as private compliance with technical standards is at stake. In the next case the Court nonetheless adopts an additional line of reasoning which may be capable of providing a basis for softening some of the harsh commercial uncertainty likely to flow from the principle that technical standards may be treated as unenforceable by national courts if the requirements of the notification Directive are not observed bv the State.

***Sapod Audic* v *Eco-Emballages SA* (Case C-159/00)**

[2002] ECR 1-5031, Court of Justice of the European Communities

[49] ... it should be observed, first, that according to settled case law Directive 83/189 must be interpreted as meaning that a failure to observe the obligation to notify laid down in Article 8 of that directive constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and thus unenforceable against individuals (see, in particular, *CIA Security International,* paragraphs 48 and 54, and *Lemmens,* paragraph 33).

[50] Second, it should be borne in mind that according to the case law of the Court the inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of Directive 83/189 may be-invoked in legal proceedings between individuals concerning, *inter alia,* contractual rights and duties (see *Unilever,* paragraph 49).

[51] Accordingly, if the national court were to interpret the second paragraph of Article 4 of Decree No 92-377 as establishing an obligation to apply a mark or label and, hence, as constituting a technical regulation within the meaning of Directive 83/189, it would be incumbent on that court to refuse to apply that provision in the main proceedings.

[52] It should, however, be observed that the question of the conclusions to be drawn in the main proceedings from the inapplicability of the second paragraph of Article 4 of Decree No 92-377 as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract between Sapod and Eco-Emballages, is a question governed by national law, in particular as regards the rules and principles of contract law which limit or adjust that sanction in order to render its severity proportionate to the particular defect found. However, those rules and principles may not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, *inter alia,* Case 33/76 *Rewe* v *Landwirtschaftskammer fur das Saarland* [1976] ECR 1989, paragraph 5, and Joined Cases C-52/99 and C-53/99 *Camorotto and Vignone* [2001] ECR 1-1395, paragraph 21).

NOTE: The principles of equivalence and effectiveness, mentioned in para 52, were examined above in Chapter 4, p.122 above. With reference to relevant national rules on remedies with which you are familiar, consider what they may mean in the context sketched by the Court in para 52 of *Sapod Audic.*

In conclusion, none of these decisions on 'incidental' effect overturns the Court's long-standing exclusion of the horizontal direct effect of Directives. After all in none of these cases did a Directive impose an obligation directly on a private party. However these decisions do demonstrate that the legal position of private parties may be prejudicially affected by the lurking presence of an unimplemented Directive of which they may be perfectly unaware.

• QUESTION

The Court's case law places a sharp distinction between the horizontal direct effect of Directives (which is not allowed) and the 'incidental' effect of Directives of private parties (which is allowed). Is this distinction fair?

SECTION 5: THE PRINCIPLE OF INDIRECT EFFECT, OR THE OBLIGATION OF 'CONFORM-INTERPRETATION'

The previous section questioned the extent to which the rejected notion that Directives may exert horizontal direct effect can be rationally sealed off from the phenomenon of incidental effect. But however one chooses to categorize the horizontal direct effect/incidental effect case law, and however one defines the 'State' for the purposes of fixing the outer limits of 'vertical' direct effect (Case 152/84 *Marshall,* p.136 above), an unavoidable anomaly taints the law governing the scope of the direct effect of Directives. Consider the sex discrimination Directives. If a State has failed to implement a Directive properly, then, provided that the standard *Van Gend en Loos* (Case 26/62) 'test' for direct effect is met by the provision in question, a State employee can rely

on the direct effect of the Directive (vertical direct effect). A private employee cannot (horizontal direct effect). So, in the UK, where Directive 76/207 on Equal Treatment of the Sexes was not properly implemented in time, Ms Marshall (above), a State employee, succeeded in relying on Community law, whereas Ms Duke *(Duke vGEC Reliance* [1988] 2WLR359, [1988] 1 All ER 626), who was making the same complaint, failed, for she happened to be a private sector employee.

The UK had made this point in *Marshall* (Case 152/84) as a reason for *withholding* direct effect, but its objections were swept aside by the Court in para 51 of the judgment (p.138 above). Yet the anomaly is real, even if the Court's refusal to permit a recalcitrant State to benefit from pointing it out is understandable. Submissions in Don (Case C-91/92, p.141 above) urged the Court to eliminate the anomaly by *extending* direct effect, but these were not successful.

The European Court's contribution to the resolution of this anomaly first began to take shape in *Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83) and *Harz* v*Deutsche Tradax* (Case 79/83). Mention is made of Case 14/83 in para 41 of the judgment in *Marshall* at p.137 above, but the Court's approach in the case deserves careful separate attention.

***Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83)**

[1984] ECR 1891, [1986] 2 CMLR 430, Court of Justice of the European Communities

The case was a preliminary reference from Germany, and concerned that fertile source of litigation, the Equal Treatment Directive 76/207. The issue was described by the Court as follows:

[2] Those questions were raised in the course of proceedings between two qualified social workers, Sabine von Colson and Elisabeth Kamann, and the Land Nordrhein-Westfalen. It appears from the grounds of the order for reference that Werl prison, which caters exclusively for male prisoners and which is administered by the Land Nordrhein-Westfalen, refused to engage the plaintiffs in the main proceedings for reasons relating to their sex. The officials responsible for recruitment justified their refusal to engage the plaintiffs by citing the problems and risks connected with the appointment of female candidates and for those reasons appointed instead male candidates who were however less well-qualified.

[3] The Arbeitsgehcht Hamm held that there had been discrimination and took the view that under German law the only sanction for discrimination in recruitment is compensation for 'Vertrauens-schaden', namely the loss incurred by candidates who are victims of discrimination as a result of their belief that there would be no discrimination in the establishment of the employment relationship. Such compensation is provided for under Paragraph 611 a(2) of the Burgerliches Gesetzbuch.

[4] Under that provision, in the event of discrimination regarding access to employment, the employer is liable for 'damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach [of the principle of equal treatment]'. That provision purports to implement Council Directive No 76/207.

[5] Consequently the Arbeitsgericht found that, under German law, it could order the reimbursement only of the travel expenses incurred by the plaintiff von Colson in pursuing her application for the post (DM 7.20) and that it could not allow the plaintiffs' other claims.

Von Colson's objection centred on Article 6 of the Directive:

[18] Article 6 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.

Was this adhered to in the German legal order? The Court's approach was markedly different from standard 'direct effect' analysis:

[22] It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.

[23] Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be

adequate in relation to the damage sustained.

[24] In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

[25] The nature of the sanctions provided for in the Federal Republic of Germany in respect of discrimination regarding access to employment and in particular the question whether the rule in Paragraph 611a (2) of the Burgerliches Gesetzbuch excludes the possibility of compensation on the basis of the general rules of law were the subject of lengthy discussion before the Court. The German Government maintained in the oral procedure that that provision did not necessarily exclude the application of the general rules of law regarding compensation. It is for the national court alone to rule on that question concerning the interpretation of its national law.

[26] However, the Member States' obligation arising from *a* directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.

[27] On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

[28] It should, however, be pointed out to the national court that although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

NOTE: J. Steiner, (1985) 101 LQR 491, observed that the decision marks 'a subtle but significant change of direction' in the European Court's approach to the enforceability of EEC Directives before national courts'. P. Morris, (1989) JBL 233, at p.241, suggested that 'if national judiciaries respond positively to this exhortation [in *Von Colson]* something approaching horizontal direct effect may be achieved by a circuitous route'. B. Fitzpatrick, (1989) 9 OJLS 336, at p.346, refers to *Von Colson* having established a principle of 'indirect effect' and suggests that 'it may effectively bridge the gap between vertical and horizontal direct effect'.

• QUESTION

To what extent do you think the *Von Colson* approach offers a route for resolving the anomalies of the horizontal/vertical direct effect distinction which emerges from the Court's ruling in *Marshall* (Case 152/84)?

NOTE: In the *Von Colson* (Case 14/83) judgment itself, one can pick out important contradictions in respect of the national court's task of 'conform-interpretation' (para 28). Compare the second sentence of para 26 with the more qualified statement in the concluding sentence of the Court's ruling in answer to the questions referred to above. The next two cases are both worthy of examination from the perspective of clarifying the ambit of *Von Colson* (Case 14/83).

Offic/er *van* Just/tie v *Kolpinghuis Nijmegen* (Case 80/86)

[1987] ECR 3969, Court of Justice of the European Communities

A criminal prosecution was brought against a cafe owner for stocking mineral water which was in fact simply fizzy tap water. The Dutch authorities sought to supplement the basis of the prosecution by relying on definitions of mineral water detrimental to the defendant which were contained in a Directive which had not been implemented in The Netherlands. A preliminary reference was made to the European Court.

The Court ruled that 'a national authority may not rely, as against an individual, upon a provision of a Directive whose necessary implementation in national law has not yet taken place'. It then turned to the third question referred to it:

[11] The third question is designed to ascertain how far the national court may or must take account of a directive as an aid to the interpretation of a rule of national law.

[12] As the Court stated in its judgment of 10 April 1984 in Case 14/83 *Von* Colson and *Kamann* v Land *Nordrhein-Westfalen* [1984] ECR 1891, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

[13] However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus the Court ruled in its judgment of 11 June 1987 in Case 14/86 Pretore *di* So/6 v X [1987] ECR 2545 that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

[14] The answer to the third question should therefore be that in applying its national legislation a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty, but a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

NOTE: The Court is anxious to emphasise the importance of preserving legal certainty and protecting reasonable expectations. See also Case C-168/95 *Luciano Arcaro* [1996] ECR 1-4705.

***Marleasing SA* v *La Comercial International de Alimentation SA* (Case C-106/89)**

[1990] ECR 1-4135, Court of Justice of the European Communities

The case arose out of a conflict between the Spanish Civil Code and Community Company Law Directive (68/151) which was unimplemented in Spain. The litigation was between private parties, which, following *Marshall* (Case 152/84), ruled out the direct effect of the Directive. The European Court explained the national court's duty of interpretation in the following terms:

[8]. . . [T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The obligation imposed on national courts in *Marleasing* (Case C-108/89) has a firmer feel than that in *Von Colson* (Case 14/83, p.152 above). See J. Stuyck and P. Wytinck, (1991) 28 CMLRev205.

The Court also confirmed the obligation of sympathetic interpretation that is cast on national courts by virtue of what was Article 5 and is now Article 10 EC post-Amsterdam in its ruling in *Paola Faccini Dori* (Case C-91/92). Even though Ms Dori was not able to rely directly on the unimplemented Directive in proceedings involving another private party (p.141 above), she was entitled to expect that the national court would not simply ignore the Directive in applying national law.

***Paola Faccini Dori* v *Recreb Sri* (Case C-91/92)**

[1994] ECR I-3325, Court of Justice of the European Communities

[26] It must also be borne in mind that, as the Court has consistently held since its judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. The judgments of the Court in Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8, and Case C-334/92 *Wagner Miret* v *Fonda de Garantia Salahal* [1993] ECR 1-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The logic of this reasoning leads to the conclusion that the Community law obligations pertaining to the absorption of a Directive into the national legal order are enduring, and do not come to an end on the Directive's transposition 'on paper' into national law. This is made clear in the next case.

***Marks and Spencer pic* v *Commissioners of Customs and Excise* (C-62/00)**

[2002] ECR 1-6325, Court of Justice of the European Communities

[24] ... it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, *inter alia,* Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 41). It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, in particular, Case C-106/89 *Marleasing* [1990] ECR 1-4135, paragraphs, and Case C-334/92 *Wagner Miret* [1993] ECR 1-6911, paragraph 20).

[25] Second, as the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, *inter alia,* Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 Prate/// *Costanzo* [1989] ECR 1839, paragraph 29; and Case C-319/97 *Kortas* [1999] ECR 1-3143, paragraph 21).

[26] Third, it has been consistently held that implementation of a directive must be such as to ensure its application in full (see to that effect, in particular, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31, and Case C-214/98 *Commission* v Greece [2000] ECR 1-9601, paragraph 49).

[27] Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.

[28] As the Advocate General noted in point 40 of his Opinion, it would be inconsistent with the Community legal order for individuals to be able to rely on a directive where it has been implemented incorrectly but not to be able to do so where the national authorities apply the national measures implementing the directive in a manner incompatible with it.

NOTE: The scope of the obligation to interpret national law in conformity with a Directive was taken a step further in the next case. However, the Court did not help to stabilize and clarify the State of the law by introducing textual anomalies into its ruling.

***Centrosteel Sri* v *Adipol GmbH* (Case C-456/98)**

[2000] ECR I-6007, Court of Justice of the European Communities

[15] It is true that, according to settled case law of the Court, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals (Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Health Authority* [1986] ECR 723, paragraph 48, and Case C-91/92 *Facdni Don* v *Recreb* [1994] ECR I-3325, paragraph 20).

[16] However, it is also apparent from the case law of the Court (Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8; Case C-334/92 *Wagner Miret* v Fondo de *Garantia Salarial* [1993] ECR 1-6911, paragraph 20; *Facdni* Dor/, paragraph 26; and Joined Cases C-240/98 to C-244/98 Oceano *Grupo Editorial* v *Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30) that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

[17] Where it is seised of a dispute falling within the scope of the Directive and arising from facts postdating the expiry of the period for transposing the Directive, the national court, in applying provisions of domestic law or settled domestic case law, as seems to be the case in the main proceedings, must therefore interpret that law in such a way that it is applied in conformity with the aims of the Directive...

The reference in para 17 to the application of 'settled domestic case law' in conformity with the aims of the Directive is striking. However, this phrase is missing from the formal ruling.

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes national legislation which makes the validity of an agency contract conditional upon the

commercial agent being entered in the appropriate register. The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

NOTE: In its subsequent ruling in *AXA Royal Beige* (Case C-386/00 [2002] ECR1-2209) the Court referred explicitly to its own ruling in *Centrosteel* (Case C-456/98), but cited only paragraphs 15 and 16, not 17!

This peculiarity was not addressed directly by the Court in the next case, but the Court did take the opportunity to refer to *Centrosteel* and to revisit its view of the nature of the obligation imposed on national judges.

***Bernhard Pfeiffer* v *Deutsches Rotes Kreuz* (Joined Cases C-397/01 to C-403/01)**

Judgment of 5 October 2004, Court of Justice of the European Communities

The litigation, originating before German labour courts, concerned matters falling within the scope of Directive 89/391 on health and safety at work and Directive 93/ 104 on the organization of working time. After confirming its long-standing refusal to accept that Directives are capable of application in litigation before national courts exclusively involving private parties - that is, no horizontal direct effect -the Court insisted:

[111] It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

[112] That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret[1*993] ECR 1-6911, paragraph 20).

[113] Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von* Co/son *and Kamann,* paragraph 26; /War/easing, paragraph 8, and *Faccini* Dor/, paragraph 26; see also Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Oceano Grupo Editorial and Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-OOOO, paragraph 21).

[114] The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR 1-4791, paragraph 34).

[115] Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari* [Case C-131/97], paragraphs 49 and 50).

[116] In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

[117] In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 Centrostee/[2000] ECR I-6007, paragraphs 16 and 17).

[118] In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, /War/easing, paragraphs 7 and 13).

[119] Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules

of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

The assertion in para 114 that the principle of conform-interpretation is 'inherent in the system of the Treaty' is strikingly bold. However, this cements a direct connection between this principle and the Court's finding in *Francovich* (Cases C-6/90 & C-9/90) that a State may be liable for damage caused to individuals as a result of breach of EC law. That judgment too locates the principle as 'inherent in the system of the Treaty' (para 35 of the judgment in *Francovich,* p.162 below).

If the obligation cast on national courts is inherent in the system of the Treaty it is not to be confined to the impact of Directives. A Regulation is directly applicable but may in some circumstances leave room for necessary national implementation (for example in fixing penalties in the event of infringement). In Case C-60/02 *Rolex* judgment of 7 January 2004 the Court transposed the principle of 'conform-interpretation' from the sphere of Directives to the context of a Regulation of this type. It stated that 'National courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question', referring to Case C-106/89 *Marleasing* [1990] ECR 1-4135 (para 59 of the ruling in *Rolex).* However, the Court accepted the relevance of principles of legal certainty and of non-retroactivity in criminal matters, which preclude an EC act from determining or aggravating the liability in criminal law of persons who act in contravention of its provisions, referring to Case C-168/95 *Arcaro* [1996] ECR 1-4705, mentioned at p. 155 above.

Cases and Materials on EU Law (8th Edition)

Stephen Weatherill

OUP 2007

Pps 59-66 (Extracts): Proportionality

The principle of proportionality is not spelled out in those terms in the EC Treaty. But Article 5(3) captures the concept.

ARTICLE 5(3) EC

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

This statement is amplified by the Protocol attached to the EC Treaty on the application of the principles of subsidiarity and proportionality, which, admittedly, is more concerned to elucidate the former principle than the latter.

NOTE: Article 5(3) is a relative newcomer to the EC Treaty. It was inserted by the Maastricht Treaty and therefore entered into force only in 1993 (p.9 above). The Court had long before already developed proportionality as a basis for checking the exercise of power in the Community. So Article 5(3) clearly establishes the shape of the principle, but it is the Court's case law that amplifies what is at stake in applying the principle of proportionality.

The following case arose before English courts. It reached the European Court *via* the Article 234 preliminary reference procedure which allows national courts to cooperate with the Community Court and is discussed in Chapter 7. It allows the European Court to answer questions about Community law referred to it by a national court. The European Court took the opportunity in this case to insist that Community legislation must conform to the principle of proportionality.

***R* v *Intervention Board,* exports *Man (Sugar) Ltd* (Case 181/84)**

[1985] ECR 2889, Court of Justice of the European Communities

The case involved the sugar market, which is regulated by Community legislation administered at national level. Man, a British sugar trader, submitted to the Intervention Board, the regulatory agency, tenders for the export of sugar to States outside the Community. It lodged securities with a bank. Under relevant Community legislation, Man ought to have applied for export licences by noon on 2 August 1983. It was nearly four hours late, because of its own internal staff difficulties. The Board, acting pursuant to Community Regulation 1880/83, declared the security forfeit. This amounted to £1,670,370 lost by Man. Man claimed that this penalty was disproportionate; a small error resulted in a severe sanction. It accordingly instituted judicial review proceedings before the English courts in respect of the Board's action and argued that the authorising Community legislation was invalid because of its disproportionate effect. The matter was referred to the European Court under the preliminary reference procedure. Man's submission was explained by the Court as follows:

[16] ... Man Sugar maintains that, even if it is accepted that the obligation to apply for an export licence is justifiable, the forfeiture of the entire security for failure to comply with that obligation infringes the principle of proportionality, in particular for the following reasons: the contested regulation unlawfully imposes the same penalty for failure to comply with a secondary obligation - namely, the obligation to apply for an export licence - as for failure to comply with the primary obligation to export the sugar. The obligation to apply for an export licence could be enforced by other, less drastic means than the forfeiture of the entire security and therefore the burden imposed is not necessary for the achievement of the aims of the legislation. The severity of the penalty bears no relation to the nature of the default, which may, as in the present case, be only minimal and purely technical.

The Court held:

[20] It should be noted that, as the Court held in its judgments of 20 February 1979 (Case 122/78, *Buitoni* v *FORMA,* [1979] ECR 677) and of 23 February 1983 (Case 66/82, Fromonco *SA* v *FORMA,* [1983] ECR 395), in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalize failure to comply with the secondary obligation as severely as failure to comply with the primary obligation.

[21] It is clear from the wording of the abovementioned Council and Commission regulations concerning standing invitations to tender for exports of white sugar, from an analysis of the preambles thereto and from the statements made by the Commission in the proceedings before the Court that the system of securities is intended above all to ensure that the undertaking, voluntarily

entered into by the trader, to export the quantities of sugar in respect of which tenders have been accepted is fulfilled. The trader's obligation to export is therefore undoubtedly a primary obligation, compliance with which is ensured by the initial lodging of a security of 9 ECU per 100 kilograms of sugar.

[22] The Commission considers, however, that the obligation to apply for an export licence within a short period, and to comply with that time-limit strictly, is also a primary obligation and as such is comparable to the obligation to export; indeed, it is that obligation alone which guarantees the proper management of the sugar market. In consequence, according to the Commission, failure to comply with that obligation, and in particular failure to comply with the time-limit, even where that failure is minimal and unintentional, justifies the forfeiture of the entire security, just as much as the total failure to comply with the primary obligation to export justifies such a penalty.

[23] In that respect the Commission contended, both during the written procedure and in the oral argument presented before the Court, that export licences fulfil four separate and important functions:

(i) They make it possible to control the release onto the market of sugar.

(ii) They serve to prevent speculation.

(iii) They provide information for the relevant Commission departments.

(iv) They establish the system of monetary compensatory amounts chosen by the exporter.

[24] As regards the use of export licences to control the release onto the world market of exported sugar, it must be noted that the traders concerned have a period of five months within which to export the sugar and no Community provision requires them to export it at regular, staggered intervals. They may therefore release all their sugar onto the market over a very short period. In those circumstances export licences cannot be said to have the controlling effect postulated by the Commission. That effect is guaranteed, though only in part, simply by staggering the invitations to tender.

[25] The Commission considers, secondly, that the forfeiture of the entire security for failure to comply with the time-limit for applying for an export licence makes it possible to prevent traders from engaging in speculation with regard to fluctuations in the price of sugar and in exchange rates and accordingly delaying the submission of their applications for export licences.

[26] Even if it is assumed that there is a real risk of such speculation, it must be noted that Article 12(c) of Regulation No 1880/83 requires the successful tenderer to pay the additional security provided for in Article 13(3) of the same regulation. The Commission itself recognised at the hearing that that additional security removes any risk of speculation by traders. It is true that at the hearing the Commission expressed doubts about the applicability of Article 13(3) before export licences have been issued. However, even if those doubts are well founded, the fact remains that a simple amendment of the rules regarding the payment of an additional security, requiring for example that, in an appropriate case, the additional security should be paid during the tendering procedure, in other words, even before the export licence has been issued, would make it possible to attain the objective sought by means which would be much less drastic for the traders concerned. The argument that the fight against speculation justifies the contested provision of Regulation No 1880/83 cannot therefore be accepted.

[27] With regard to the last two functions attributed by the Commission to export licences, it is true that those licences make it possible for the Commission to monitor accurately exports of Community sugar to non-member countries, although they do not provide it with important new information not contained in the tenders and do not, in themselves, guarantee that the export will actually take place. It is also true that the export licence makes it possible for the exporter to state whether he wishes the monetary compensatory amounts to be fixed in advance.

[28] However, although it is clear from the foregoing that the obligation to obtain export licences performs a useful administrative function from the Commission's point of view, it cannot be accepted that that obligation is as important as the obligation to export, which remains the essential aim of the Community legislation in question.

[29] It follows that the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered too drastic a penalty in relation to the export licence's function of ensuring the sound management of the market in question.

[30] Although the Commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure.

[31] The reply to the question submitted must therefore be that Article 6(3) of Regulation No 1880/83 is invalid inasmuch as it prescribes forfeiture of the entire security as the penalty for failure to comply with the time-limit imposed for the submission of applications for export licences.

NOTE: A key element in the practical expression of the principle of proportionality is the need to show a link between the nature and scope of the measures taken and the object in view. The next extract is taken from a case in which a firm sought to show that a measure affected it disproportionately and that it was accordingly invalid. The issue arose in the coal and steel sector, and therefore the provisions in question were found in the ECSC Treaty, which has now expired. However, the Court explained the nature of the principle of proportionality in terms of general application.

***Valsabbia* v *Commission* (Case 154/78)**

[1980] ECR 907, Court of Justice of the European Communities

[117] It is now necessary to examine whether in view of the omissions established the obligations imposed upon the undertakings cast disproportionate burdens upon the applicants which would constitute an infringement of the principle of proportionality. In reply to the applicants' allegations on this matter, the Commission states that the validity of a general decision cannot depend on the existence or absence of other formally independent decisions.

[118] That argument is not relevant in this case and the Court must inquire whether the defects established imposed disproportionate burdens upon the applicants, having regard to the objectives laid down by Decision No 962/77. But the Court has already recognised in its judgment of 24 October 1973 in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, that 'In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators'.

[119] It appears that, on the whole, the system established by Decision No 962/77 worked despite the omissions disclosed and in the end attained the objectives pursued by that decision. Although it is true that the burden of the sacrifices required of the applicants may have been aggravated by the omissions in the system, that does not alter the fact that that decision did not constitute a disproportionate and intolerable measure with regard to the aim pursued.

[120] In those circumstances, and taking into consideration the fact that the objective laid down by Decision No 962/77 is in accordance with the Commission's duty to act in the common interest, and that a necessary consequence of the very nature of Article 61 of the ECSC Treaty is that certain undertakings must, by virtue of European solidarity, accept greater sacrifices than others, the Commission cannot be accused of having imposed disproportionate burdens upon the applicants.

NOTE: The nature of the Court's scrutiny is influenced by the type of act subject to challenge. (See, for example, Hermann, G., 'Proportionality and Subsidiarity' Ch. 3 in Barnard, C. and Scott, J., *The Law of the Single European Market* (Oxford: Hart Publishing, 2002).) It was mentioned above (p.43) that the UK's submission that Directive 93/104 on Working Time violated the principle of proportionality was rejected. The Court explained its role in the following terms.

***United Kingdom* v *Council* (Case C-84/94)**

[1996] ECR I-5755, Court of Justice of the European Communities

[57] As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 42).

[58] As to judicial review of those conditions, however, the Council must be aiiowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.

There were no such flaws and consequently the plea failed. Notice that in Case 181/84 (p.59 above) Man Sugar was not complaining about a broad legislative choice. The matter was more specific to its circumstances. In Case C-84/94 the Court's concession that the legislature be allowed a 'wide discretion' in areas of policy choice means that the principle of proportionality, though flexible and therefore a tempting addition to any challenge to the validity of a Community act, is only infrequently held to have been violated where broad legislative choices are impugned. This is well illustrated by revisiting a ruling already considered above.

R v Secretary of State for *Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01)

[2002] ECR 1-11543, Court of Justice of the European Communities

The validity of Directive 2001/37, which amended and extended common rules governing tar yields and warnings on tobacco product packaging, was challenged in this case. As explained above (p.51), the Court was not persuaded that an incorrect legal base had been chosen. The applicant fared no better by alleging the measure violated the principle of proportionality.

[122] As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia,* Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Qlmuhlen* [1993] ECR I-6473, paragraph 15, and Case C-210/00 *Kaserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

[123] With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR 1-2211, paragraph 61).

[124] With regard to the Directive, the first, second and third recitals in the preamble thereto make it clear that its objective is, by approximating the rules applicable in this area, to eliminate the barriers raised by differences which, notwithstanding the harmonization measures already adopted, still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products and impede the functioning of the internal market. In addition, it is apparent from the fourth recital that, in the attaining of that objective, the Directive takes as a basis a high level of health protection, in accordance with Article 95(3) of the Treaty.

[125] During the procedure various arguments have been put forward in order to challenge the compatibility of the Directive with the principle of proportionality, particularly so far as Articles 3, 5 and 7 are concerned.

[126] It must first be stated that the prohibition laid down in Article 3 of the Directive on releasing for free circulation or marketing within the Community cigarettes that do not comply with the maximum levels of tar, nicotine and carbon monoxide, together with the obligation imposed on the Member States to authorise the import, sale and consumption of cigarettes which do comply with those levels, in accordance with Article 13(1) of the Directive, is a measure appropriate for the purpose of attaining the objective pursued by the Directive and one which, having regard to the duty of the Community legislature to ensure a high level of health protection, does not go beyond what is necessary to attain that objective.

[127] Secondly, as pointed out in paragraph 85 above, the purpose of the prohibition, also laid down in Article 3 of the Directive, on manufacturing cigarettes which do not comply with the maximum levels fixed by that provision is to avoid the undermining of the internal market provisions in the tobacco products sector which might be caused by illicit reimports into the Community or by deflections of trade within the Community affecting products which do not comply with the requirements of Article 3(1).

[128] The proportionality of that ban on manufacture has been called into question on the ground that it is not a measure for the purpose of attaining its objective and that it goes beyond what is necessary to attain it since, in particular, an alternative measure, such as reinforcing inspections of imports from non-member countries, would have been sufficient.

[129] It must here be stated that, while the prohibition at issue does not of itself make it possible to prevent the development of the illegal trade in cigarettes in the Community, having particular regard to the fact that cigarettes which do not comply with the requirements of Article 3(1) of the Directive may also be placed illegally on the Community market after being manufactured in non-member countries, the Community legislature did not overstep the bounds of its discretion when it considered that such a prohibition nevertheless constitutes a measure likely to make an effective contribution to limiting the risk of growth in the illegal trafficking of cigarettes and to preventing the consequent undermining of the internal market.

[130] Nor has it been established that reinforcing controls would in the circumstances be enough to attain the objective pursued by the contested provision. It must be observed that the prohibition on manufacture at issue is especially appropriate for preventing at source deflections in trade affecting cigarettes manufactured in the Community for export to non-member countries, deflections which amount to a form of fraud which, ex *hypothesi,* it is not possible to combat as efficiently by means of an alternative measure such as reinforcing controls on the Community's frontiers.

[131] As regards Article 5 of the Directive, the obligation to show information on cigarette packets as to the tar, nicotine and carbon monoxide levels and to print on the unit packets of tobacco products warnings concerning the risks to health posed by those products are appropriate measures for attaining a high level of health protection when the barriers raised by national laws on labelling are removed. Those obligations in fact constitute a recognised means of encouraging consumers to reduce their

consumption of tobacco products or of guiding them towards such of those products as pose less risk to health.

[132] Accordingly, by requiring in Article 5 of the Directive an increase in the percentage of the surface area on certain sides of the unit packet of tobacco products to be given over to those indications and warnings, in a proportion which leaves sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade marks, the Community legislature has not overstepped the bounds of the discretion which it enjoys in this area.

[133] Article 7 of the Directive calls for the following observations.

[134] The purpose of that provision is explained in the 27th recital in the preamble to the Directive, which makes it clear that the reason for the ban on the use on tobacco product packaging of certain texts, such as 'low-tar', light', 'ultra-light', 'mild', names, pictures and figurative or other signs is the fear that consumers may be misled into the belief that such products are less harmful, giving rise to changes in consumption. That recital states in this connection that the level of inhaled substances is determined not only by the quantities of certain substances contained in the product before consumption, but also by smoking behaviour and addiction, which fact is not reflected in the use of such terms and so may undermine the labelling requirements set out in the Directive.

[135] Read in the light of the 27th recital in the preamble, Article 7 of the Directive has the purpose therefore of ensuring that consumers are given objective information concerning the toxicity of tobacco products.

[136] Such a requirement to supply information is appropriate for attaining a high level of health protection on the harmonization of the provisions applicable to the description of tobacco products.

[137] It was possible for the Community legislature to take the view, without overstepping the bounds of its discretion, that stating those tar, nicotine and carbon monoxide levels in accordance with Article 5(1) of the Directive ensured that consumers would be given objective information concerning the toxicity of tobacco products connected to those substances, whereas the use of descriptors such as those referred to in Article 7 of the Directive did not ensure that consumers would be given objective information.

[138] As the Advocate-General has pointed out in paragraphs 241 to 248 of his Opinion, those descriptors are liable to mislead consumers. In the first place, they might, like the word 'mild', for example, indicate a sensation of taste, without any connection with the product's level of noxious substances. In the second place, terms such as 'low-tar', 'light', 'ultra-light', do not, in the absence of rules governing the use of those terms, refer to specific quantitative limits. In the third place, even if the product in question is lower in tar, nicotine and carbon monoxide than other products, the fact remains that the amount of those substances actually inhaled by consumers depends on their manner of smoking and that that product may contain other harmful substances. In the fourth place, the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco products, is liable to encourage smoking.

[139] Furthermore, it was possible for the Community legislature to take the view, without going beyond the bounds of the discretion which it enjoys in this area, that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that, specifically, there was no alternative measure which could have attained that objective as efficiently while being less restrictive of the rights of the manufacturers of tobacco products.

[140] It is not clear that merely regulating the use of the descriptions referred to in Article 7, as proposed by the claimants in the main proceedings and by the German, Greek and Luxembourg Governments, or saying on the tobacco products' packaging, as proposed by Japan Tobacco, that the amounts of noxious substances inhaled depend also on the user's smoking behaviour would have ensured that consumers received objective information, having regard to the fact that those descriptions are in any event likely, by their very nature, to encourage smoking.

[141] It follows from the preceding considerations concerning Question 1(c) that the Directive is not invalid by reason of infringement of the principle of proportionality.

R v Secretary *of State for Health, ex parte Swedish Match AB* (Case C-210/03)

Judgment of 14 December 2004, Court of Justice of the European Communities

This is the decision, encountered above *(p.52),* in which the Court found that Directive 2001/37's ban on the marketing of tobacco for oral use was validly based on Article 95 EC. Faced with the submission that the measure was nonetheless invalid for violation of the proportionality principle, the Court made an explicit connection with the direction in Article 95(3) that the Community legislature shall take as a base a high level of health protection in setting harmonized standards.

[56] To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of

the marketing of tobacco products for oral use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.

[57] As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.

[58] It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate.

NOTE: The principle of proportionality applies not only to Community legislation, but also arises in the application of substantive Treaty provisions.

Jurisdictional aspects of electronic torts, in the footsteps of Shevill v Presse Alliance SA
Youseph Farah

Computer and Telecommunications Law Review (2005) *C.T.L.R. 196

It is well established that Art.5 of the Brussels Regulation serves to allocate jurisdiction in certain specialised cases by way of derogation from the general principle in Art.2 of the Regulation. These instances will normally receive restrictive attention by the courts reiterating that the defendant's domicile is the overriding principle to finding jurisdiction. Indeed, this suggests that if one wishes to submit a case in a forum foreign to that of the defendant, it has to bear a special relation between the cause of action and the territory of the court on which jurisdiction is conferred. Article 5(3) is straightforward and confers jurisdiction: "in matters relating to tort, delict or quasi-delict, on the courts for the place where the harmful event occurred or there is a risk of it occurring".[1] In the context of electronic torts, careful analysis should be dedicated to two concepts. First, one must identify and define those matters which will be regarded as relating to "tort, delict or quasi delict" (henceforward the scope). Secondly, one must determine the place where the "harmful event occurred". As regards the first task, this will raise few constraints due to the interfaces between the different areas of law which fall largely under the laws of obligation. This distinction is crucial as it plays a principal role in determining under which provision of Art.5 the case falls. Is jurisdiction conferred on the courts of the place of performance of the principal obligation (Art.5(1))? Or is jurisdiction remitted based on Art.5(3) of the Regulation?

With regards to the second concept, the interpretation which the place "where the harmful event occurred" has received in the offline environment, may pose some difficulties when extended to electronic torts.

The scope of Art.5(3); what constitutes tort?

The jurisprudence of the European Court of Justice ("ECJ") is clear on the point that Art.5(3) cannot extend to matters relating to contract within the meaning of Art.5(1).[2] However, it is less clear on the extent of liability caught by the provision. In *Kalfelis,* [3] the ECJ applied an independent meaning, and in the opinion of the Advocate General in *Kalfelis,* the justification for this conclusion seems to be twofold. First, Art.5(3) is the counterpart to Art.5(1) in which has received an independent Community interpretation. Secondly, the diversity in national laws concerning the interpretation of "tort, delict and quasi delict" varies, and accordingly national interpretation will jeopardise the uniformity of laws, which the Regulation endeavours to achieve.

A literal interpretation of the wording of Art.5(3) suggests that it is constrained to those causes of action dealing with civil wrong. This contention is even more plausible if considering the general approach of the Regulation in confining Art.5(3) to cases which form a special relationship with the territory of the addressed Member State. However, this simplicity was struck down by the decision in *Kalfelis* where the court set a general test which clearly encompassed any other "liability not relating to contract". The court ruled:

"the term ?matters relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of the Convention must be regarded as an independent concept covering *all actions which seek to establish the liability* of a defendant and which are not related to a ?contract" within the meaning of Article 5(1)" (emphasis added).[4]

As a result of this overwhelmingly wide language by the court, it seems strange to argue that Art.5(3) is confined to tort in the strict sense. Professor Stone argues that:

"Article 5(3) needs to be read analogistically as referring to an event equivalent to or corresponding to a ?harmful event" and thus will confer jurisdiction on the place of the transfer (the movement of the benefit away from the plaintiff) or for the place of the enrichment (the receipt of the benefit by the defendant)".[5]

excluding, however, restitutionary claims where they are based on breach of contract or for example restitutionary claims which arise from voidable contracts, *i.e.* cases such as misrepresentation.[6]

Moreover, it was rightly argued by Stone that this disarray should be best answered by a reference to the ECJ rather than engaging in the skills of interpretation of *Kalfelis* to the detriment of the uniformity of rules of jurisdiction. This was done in *Kleinwort Benson v City of Glasgow Council* [7] where the English Court of Appeal said that Art.5(3) is confined to tort cases in the strict meaning of the concept. On appeal, the House of Lords rejected the plaintiff's argument that Art.5(3) applies in the cases of unjust enrichment. They reached this conclusion, most peculiarly, by arguing that this *C.T.L.R. 197 argument is based on a misreading of [2(a)] of the ruling of the ECJ in *Kalfelis* which is plainly inconsistent with [2(b)] of the same ruling.[8]

Until recently, the question of whether restitutionary claims fall under Art.5(3) was questionable, at least if considered in the light of *Kleinwort.* This, however, was amended by the ECJ in a recent ruling in the Italian case of *Tacconi v Wagner,* [9] where the ECJ reiterated that the concept of matters relating to tort within the meaning of Art.5(3) of the Brussels Regulation: "covers all actions which seek to establish the liability of a defendant and which are not ?related to a contract" within the meaning of Article 5(1) of the Convention".

Accordingly, as long as there is no obligation freely undertaken by one party towards another, the court found that breach of rule of law, the breach of the duty to negotiate in good faith in the pre-contractual relationship under Art.1337 of the Italian Civil Code, is a matter related to tort within the meaning of Art.5(3) of the Convention. By parity of reasoning, one could strongly argue that a claim for restitution, like in the case of *Kleinwort,* where the defendant sued claiming restitution of unjust enrichment by the defendant of sums paid by it under interest rate swap agreements, falls under the ambit of Art.5(3).

Notwithstanding this puzzlement perpetrated by AG Warner by describing the difficulties in reaching a definition to "tort, delict and quasi delict" by using the metaphor "like the proverbial elephant", the ECJ introduced a clear twofold test on the application of Art.5(3) in *Kalfelis.* It was then reiterated in several cases, the last of them *Tacconi v Wagner.* [10] This liberal approach was quite obvious in the later case of *VKI v Henkel,* [11] in which the ECJ ruled that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals, is a matter falling within the ambit of Art.5(3). The importance of this judgment lies in the fact that Art.5(3) is broad in scope and is not confined to situations where an individual has widely sustained damage, but also extends to preventative measures underlying the protection of consumers from unfair terms.

The place where the harmful event occurred

The leading authority dealing with the second concept of Art.5(3) is *Bier v Mines de Potasse D"Alsace,* [12] where the ECJ ruled that under Art.5(3), the claimant has the option to sue either at the place where the damage occurred or the place of the event giving rise to it. Although this case involved physical damage to the plaintiff's horticultural undertaking, it formed the basis of extending this ruling to other areas in tort where the damage had been pecuniary. Therefore, the ECJ was obliged to consider *Bier* in the context of particular torts. For example, in the case of *Shevill v Presse Alliance SA,* [13] the court, by parity of reasoning, extended *Bier* to libel cases. It ruled that the plaintiff could bring the action either in the place where the publisher is established (the place of issue of the newspaper) or in the place where he suffered damage to his reputation (the place where it is distributed).[14] The criteria by which the court assesses the existence of harm or its extent is governed by domestic law provided that the effectiveness of the Brussels Regulation is not hampered.[15]

Similar to *Shevill,* the European Court ruled in *Mecklermedia Corp v DC Congress GmbH* [16] that in cases involving the tort of "passing off" the claimant could bring an action in England for the harm done to the plaintiff's goodwill in England and its effect on its reputation in England.

Before moving on to electronic torts, three more cases deserve special attention. The first is *Dumez France v Hessische Landesbank (Helaba)* [17] which involved French contractors suing a German bank in tort accusing it of wrongly withdrawing its financial support from a building project in Germany. This behaviour on the part of the bank caused the plaintiff to suffer pure economic loss following the collapse of their subsidiaries in Germany. The court ruled that the concept of:

"?the place where the harmful event occurred" contained in Article 5(3) of the Brussels Convention may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortuous [sic], delictual or quasidelictual liability, directly produced its harmful effects upon the person who is the immediate victim of the event".[18]

In other words, the court refrained from extending *Bier* to consequential financial loss.[19] The underlying thread of the jurisprudence of the ECJ is its emphasis that Art.5(3) requires a significant connecting factor between the dispute and the addressed court based on the sound administration of justice.[20]

The second case is *Handte v TMCS* [21] where the ECJ observed that Art.5(3) must be interpreted to the effect of enabling a normally well-informed defendant to predict the courts, other than those of his domicile, before which he may be sued.[22] This requires that the ECJ at all times must apply a restrictive approach as to the extent of *Bier,* reiterating that suing at the defendant's domicile should be the overriding principle.

The third case is the recent ruling of the English courts in *Domicrest Ltd v Swiss Bank Corporation* [23] which involved a claimant (a seller) suing the branch of Swiss Bank in England after the latter declined to pay a sum owed under a credit as a result of a deficiency in the balance of a third party (the buyer). The claimant had acted to his detriment, upon the misrepresentation of the bank, and released the goods to the *C.T.L.R. 198 buyer when it would have declined otherwise if

it were not for the bank's assurance that the buyer can meet his financial obligations under the transaction. The claimant tried, *inter alia,* to bring the case under Art.5(3) by claiming that the bank acted in negligent misrepresentation under the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd.* [24] The significance of this case is the court's holding that the "harmful event" occurs where the misstatement was actually made, or at the place where goods were delivered or money paid in reliance on the misrepresentation rather than where it was merely received.[25]

Electronic torts

The rules of jurisdiction applicable to a tortious cause of action in the traditional sense must have equal weight in its new form of electronic torts. Failure to support this overriding principle may render the rules of jurisdiction obsolete once new technologies appear creating new tortious liabilities.

If one is to speculate on, or identify the predominant electronic torts claims that are likely to predominate in the 21st century, they will be categorised to causes of action which are "receipt-oriented"[26] ; tortious actions such as defamation, the tort of deceit, the tort of passing off, copyright and patent infringement, the tort of trespass to chattel,[27] and after trespass to chattel. The latter can be confined to breaches causing pure economic loss. It is conceivable for instance to commit an electronic tort of deceit, for example, an intentional misrepresentation, whether it is in the context of a business relationship or a simple exchange of electronic transactions between two private parties. However, it is virtually impossible to imagine an electronic tort based on the intentional interference with the person.

The Regulation does not create any new provisions for electronic torts. As a matter of fact, it just duplicates the provisions dealing with tort previously found under the Brussels Convention with slight amendments, namely Arts 2, 5(3), 5(5) and 24. Article 5(3) will occupy most of our attention, since the other provisions do not raise special particularities in the context of electronic torts.[28]

Article 5(3) of the Regulation stipulates that a person domiciled in a Member State may, in another Member State, be sued "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or there is a risk of it occurring". In fact, the Regulation adds a future tort as falling under Art.5(3), which is the only concrete amendment to Art.5(3).

It seems that the scope of Art.5(3), *i.e.* what falls under the definition of tort, is unlikely to cause any significant problems. On the other hand, "the place where the harmful event occurred" creates few problems due to the cross-border nature of the internet. A simple example which may appropriately illustrate its contentious nature is a defamatory statement published on a website accessible in different Member States, and available in different languages. The underlying question should be whether the courts must apply the principles in *Bier v Mines de Potasse* in its strict sense and later on the ruling in *Shevill v Presse Alliance SA,* or should electronic torts receive special treatment?

Certainly, for example, intentional libel can be circulated using other publishing mediums. A television programme can be as defamatory, as can a widely circulated newspaper, or for our purpose, materials published on a website. Requiring the court to provide special protection for online tortfeasors is intolerable. If a person should take advantage of doing business or using the wide reach of the internet, then it is reasonable for him to expect to litigate in different forums.

On the other side of the Atlantic, American courts rely on two basic principles to assert jurisdiction: a state's long-arm Statutes and the due process clause of the constitution. The former confers the right to a state to assert jurisdiction on foreign parties, and therefore each court will examine whether there is a statutory basis for allowing a plaintiff to sue the defendant in that forum. After examining the state's long-arm Statute, the court will pursue a constitutional canvass to determine whether this assertion of jurisdiction under the long-arm Statutes is consistent with the due process clause embodied in the fourteenth amendment.[29] In accordance with the constitutional analysis American courts can exercise personal jurisdiction over a non-resident defendant for forum-related activities where the relationship between the defendant and the forum falls within the "minimum contacts" framework of *International Shoe v Washington.* [30]

In *Calder v Jones* [31] the US Supreme Court applied the principle in *International Shoe* by examining whether the defendant's tortious actions were directed towards the forum state. Therefore US courts apply the "effects test" by which, if the defendant commits an intentional tort by directing his tortious activities at residents of the forum state, knowing that he will cause harm and that his harm will reach that state, then the targeted state can exercise jurisdiction.[32] Take, for example, the case in *Young v New Haven Advocate* [33] where the question on appeal was whether two Connecticut newspapers exposed themselves to personal jurisdiction in Virginia by posting on the internet news articles that allegedly defamed the plaintiff.

The US Court of Appeals for the Fourth Circuit reversed the decision of the federal circuit court and held that the plaintiff failed to show that the publications placed on the defendants' websites were sufficient to justify jurisdiction at the place

where the plaintiff is allegedly defamed. The mere publication of an article on the internet will not on its own subject the defendant to all jurisdictions wherever the website can be accessed. The latter conclusion is in line with the decision in *Worldwide Volkswagen Corp v Woodson,* where the US Supreme Court rejected the "stream of commerce" theory, attesting that in order to exercise proper personal jurisdiction, the defendant should have reached out or purposefully have availed himself of the protection of the forum *C.T.L.R. 199 state which requires something more than placing a defective product in the stream of commerce.[34] Consequently, the plaintiff must clearly show that the out-of-state internet activity was targeted towards the specific forum state causing an injury to the plaintiff which can give rise to a potential claim cognisable in that state. Hence, the focus of the analysis must be placed on the intention of the defendant by showing that he has purposefully directed, in a substantial way, his internet activities to the forum state. Upon detailed inquiry of the defendant's intentions, the court found that the centrality of the published articles were intended for the reach of Connecticut readers and not Virginia readers, and therefore, the newspapers could not have "reasonably anticipated being haled into court [in Virginia] to answer for the truth of the statements made in their articles".[35]

The US rules of jurisdiction seem to offer a less certain approach than that followed under the *Shevill v Presse Alliance SA* decision. Under the earlier paradigm, the existence of a tortious activity in the forum state will not on its own justify jurisdiction. The bulk of the inquiry will be placed on the substantiality of the activity, and great emphasis will be placed on the intention behind the activity and whether it targeted the forum state. On the other hand, under the system of the Brussels Regulation, a proper analysis will, indeed, require only a tortious assessment placing greater emphasis on the challenged tortious internet activity. It is true that a jurisdiction enquiry should not examine the case on its merits; however, there must be *prima facie* evidence of some damage which occurred in the Member State. For example, in England, the claimant must demonstrate a good arguable case that the matters come within Art.5(3) and that on the balance of probabilities there is a good case for the English tort to succeed. Therefore, the claimant must establish that there is a serious issue to be tried on the merits.[36]

Moreover, a close reading of *Young v New Haven and ALS Scan* [37] suggests that the harm which is felt in the forum state must be substantial. It is therefore doubtful whether a case such as *Shevill* will receive sympathy in US courts. In *Shevill,* the harm to the plaintiff's reputation which was caused in England was minimal given the small circulation of the defendant's magazine in England.[38] Moreover, the actions of the defendant in *Shevill* were not expressly aimed at England and Wales.[39]

In the footsteps of *Shevill*

A simple observance of the ECJ case law on its interpretation of the "place of harmful event" gives the reader a piecemeal proposition on how to extend the traditional law to electronic torts. The reasoning behind *Shevill* makes it clear that a website proprietor might find himself litigating in a place where the damage occurred or in the place giving rise to it. This is the general rule, and must be applied to all electronic torts. However, its manner of application will be highly dependent on the substantive national rules pertaining to the specific contested tort. National law will emphatically determine the place of injury. The English court in *"800 Flowers" Trade Mark* [2001] EWCA Civ 721 concluded that "it is unlikely that there will be one uniform rule specific to the internet" that can be applied in all cases of internet use. Moreover, it stated that it is trite law that the place of jurisdiction may depend highly on the finding of a tortious liability under domestic law. Inevitably, the application of *Shevill* must be examined on a tort-by-tort case analysis and therefore, the remaining discussion will endeavour to apply *Shevill* to different tortious causes of action.

In the case of defamatory materials, it should be either the place where the website is established (where the materials are uploaded and controlled, for our purposes it can be the place of establishment or through a branch) or it can be the place where the plaintiff's reputation is harmed. The High Court of Australia in the case of *Dow Johns & Company Inc v Gutnick* [40] introduced a thorough judgment answering much of the disarray pertaining to defamatory materials on the internet. The Australian court reasoned that there are no justifications to accord different analysis to defamatory materials published on the worldwide web than that applied to disseminating means of publication, *i.e.* newspapers, television, radio, and satellite, or digital television. The court found that the tort of defamation is committed in the jurisdiction where the material is available in a comprehensible form to the reader. It then concluded that it is available in a comprehensible form in the place where the defamatory material is downloaded and not the place where it is uploaded.

Consider a case involving the tort of trespass to chattel. Clearly, it is a liability which arises under common law. Its extent and examination must be left to the national courts. For example, where the defendant is engaged in incessant spamming directed at a university's intranet to the effect that it creates an obstacle and hampers the efficient functioning of the intranet, it is possible that, by parity of reasoning to *Shevill,* "the place where the harmful event occurred" would be either the place where the emails were sent from (possibly the tortfeasor's computer or website) or the place where the damage occurred (ideally the place where the university is located).[41] In other words, the "place of harmful event" can be assessed as the

place of damage. In an action brought under Art.5(3), the court in the place where the damage was sustained can exercise proper jurisdiction or alternatively the court where the damage resulted.[42] Concurrently, actions brought for damages sustained as a result of negligent electronic misrepresentation can be entertained either in the courts where the electronic misrepresentation was made or where the damage was directly sustained, in accordance with *Domicrest Ltd v Swiss Bank Corp.*

In the cases of the English tort of "passing off", it is possible for a German website owner to be hailed into a court in England for acts committed in Germany, but which has the effect of misleading the public in England which can damage the claimant's goodwill. In *Mecklermedia,* a case notoriously dealing with "passing off", a German company who used the alleged plaintiff's goodwill "Internet World" on their databases and registering their website under *www.internetworld. de,* was accused of misleading customers in the United *C.T.L.R. 200 Kingdom, causing damage to the plaintiff's goodwill. The defendant filed a strike-out application and contended that the circumstances did not fall within Art.5(3) of the Convention, and alternatively Arts 21 and 22 must apply. The court was convinced that Art.5(3) applied, and contended that as far as the English tort of "passing off" was concerned, the injury or damage to the plaintiff's goodwill occurred in England. Moreover, the court found that *Shevill* makes it clear that it does not exclude the possibility of actions in several Member States.

In criticism of the argument of "forum shopping"

Shevill is not an EC invention. Similar notions or application of norms of private international law are found under other jurisdictions. The US constitutional analysis in *International Shoe* blatantly leads more or less to similar results. Moreover, as discussed above, the High Court of Australia in *Gutnick v Johns* provides reassurance to the soundness of applying *Shevill* to electronic torts.

Moreover, its role and function is rather restricted to situations where one party is targeting another's forum, and to the existence of some damage resulting from the defendant's wrongful act. This suggests that *Shevill* has a rather limited effect. For example, the mere publication of defamatory materials on the web is not actionable *per se,* and the cause of action must be examined in accordance with the substantial rules of each Member State. The strength and extent of the latter argument can vary depending on the tort itself. For example, an examination on the merit of actions of trade mark infringement verifies that it is more tedious to establish it than establishing the tort of defamation. Take for example Jacob J.'s ruling in *Euromarket Designs Ltd v Peters Ltd.* [43] In his judgment, Jacob J. reiterates his finding in *"800 Flowers"* that the mere use of a trade mark on a website by itself does not constitute an infringing use of the trade mark. The claimant must show that the defendant targeted (negligently), or intended to attract customers from the place where the geographical protection extends. Jacob J. argued that the court should examine, *inter alia,* the intention of the website owner, the type of the top-level domain name,[44] currency chosen, language, and what the reader will understand if he accesses the website. This dilemma can be avoided by website proprietors explicitly indicating on their websites that the intended reach of the website is targeted to a specific geographical area. This reminds the reader of the analysis of Art.15 of the Brussels Regulation regarding the effect of the jurisdictional avoidance techniques, and the US analysis of the doctrine of minimum contacts. Nevertheless, the latter differs in conceptual terms. Whilst "jurisdictional avoidance" techniques remain accurate and workable in commercial transactions, it is conceptually wrong to refer to Jacob J.'s test employed in *"800 Flowers"* as jurisdictional avoidance. The sole purpose behind the non-exhaustive factors listed by Jacob J. is to determine whether the internet activity amounts to a civil wrong. On the other hand, jurisdictional avoidance serves to entirely expatriate the defendant from any potential jurisdiction that may attest their rights to exercise jurisdiction. If one considers the philosophy behind the law of tort, one may strongly argue that the *Shevill* approach motivates website owners to safeguard from inflicting harm on others, an activity which performs a social function and underpins the *raison d"etre* of the law of tort.

Finally, it is preferable to follow the ruling in *Gutnick v Jones* and to apply a technological neutrality approach rather than engaging in the pitfalls of justifying special treatment to electronic torts. Similarly, Stone argues that since Art.5(3) applies to all torts, "there seems no obvious reason why a website operator should be given jurisdictional privileges greater than a broadcaster of similar material".[45] It is trite to cite the words of Judge Gleeson in *Gutnick v Johns* [46] :

"However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction."

Conclusion

The rules applied in different jurisdictions when deciding whether or not a court has jurisdiction in an electronic tort context converge on the main premise that the traditional rules must be equally extended to electronic torts. In essence, under the

system of the Brussels Regulation, a website proprietor is likely to find himself litigating either in the place where the damage occurred or in the place giving rise to it. The decision in the *Shevill* case illustrates this neatly. It is also apparent from the decisions preceding *Shevill* on similar electronic tort matters that the merit of the dispute, whether a trade mark infringement, defamation, or trespass to the chattel must submit to the same analysis. It is now quite established that website owners will have to prepare themselves for the possibility of being subject to more than one jurisdiction unless they take sufficient precautionary measures in order to avoid committing tortious internet activities in remote jurisdictions. Moreover, unlike commercial activities, once website proprietors encroach on the rights of others, either in the form of trespassing, the tort of "passing off", copyright infringement, or defamatory statements, etc., any jurisdictional avoidance techniques become irrelevant. On the other hand, the "effect theory" in *Calder* makes it feasible for website proprietors to engage in jurisdictional avoidance techniques to minimise contact with specific jurisdictions and thus avail themselves of the constitutional protection as elaborated in *International Shoe.*

The decisions in *Gutnick* and *Calder* imply that website proprietors must envisage almost equal treatment, as far as rules of jurisdiction are concerned, whether the tort is felt within the European Community or somewhere in the United States or Australia.

Finally, it is important to resist any attempt to modify Art.5(3) of the Brussels Regulation, or attempt to offer an interpretation in favour of website operators. If this were to happen, one would risk imposing a regulatory framework which is clearly discriminatory, arbitrary and inherently unfair.

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1.Article 5(3) of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1.
2.Case 189/87 *Athanasios Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co* [1988] E.C.R. 5565 at [17].
3.Case 189/87 A.G. Darmon in *Kalfelis* at [16]-[22].
4.Above, n.2, at [18].
5.P. Stone, *Civil Jurisdictions and Judgments in Europe* (Longman, 1998), at p.63.
6.*ibid.*
7.[1996] Q.B. 678; [1996] 2 All E.R. 257 CA.
8.*Per* Lord Goff of Chieveley in [1997] 4 All E.R. 641 HL.
9.Case C-334/00, *Fonderie Officine Meccaniche Tacconi SPA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS),* September 17, 2002 at paras 21-22-23.
10.*ibid.* The court speaks of general liability rather than limiting Art.5(3) to tort in the strict sense.
11.Case C-167/00 *Verein fur Konsumenteninformation v Karl Heinz Henkel* [2003] All E.R. (E.C.) 311 at [50].
12.Case 21/76 *G. J. Bier BV v Mines de potasse d"Alsace SA* [1976] E.C.R. 1735.
13.Case C-68/93 *Fiona Shevill, Ixora Trading Inc, Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995] E.C.R. I-415.
14.J.H.C. Morris, *The Conflict of Laws* (5th ed., Stevens, 1984), at p.68.
15.*Shevill,* above, n.13.
16.[1998] Ch. 40.
17.Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank* [1990] E.C.R. I-49.
18.*ibid.* at [17]-[20].
19.See also Case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1996] E.C.R. I-2719. In this case and *Dumez,* both the causing factor and the initial damage occurred in the same Member State.
20.Akdentzy, Yaman, Walker, C. & Wall D., *The Internet, Law and Society* (Longman, 2000), at p.87.
21.Case C-26/91 *Jakob Handte & Co GmbH v Traitements Mecano-chimiques des Surfaces SA* [1992] E.C.R. I-3967; Stone, above, n.6, at pp.65-66.
22.Stone, above, n.5, at p.65.
23.[1998] 3 All E.R. 577.
24.[1963] 2 All E.R. 575; [1964] A.C. 465.
25.Above, n.23 at [15]. In this case, the court held, *obiter,* that the plaintiffs can bring proceeding in London for breach of contract.
26.G.B. Delta and J.H. Matsuura, *Law of the Internet* (2nd ed., Aspen Law and Business, 2003-1 supplement), at 3-36.
27.There are a series of US case law on the subject matter. It is quite established that any interference with either website, email system, computer or activities such as auction aggregators encroaching on an auctioneer website, activities significantly reducing its available

memory and processing power, or causing a physical damage, are actionable electronic torts: see *E-bay, Inc v Bidder's Edge, Inc* (N.D.Cal. 2000) 100 F. Supp. 2d 1058, 1060-106. This was lately confirmed in an unpublished case (*Intel Corp v Hamidi,* unreported, 2003, California Supreme Court), which considered a directed Spam by a former employee of Intel Corp.
28.Stone, "The internet of electronic Contracts and Torts in the Private International law under European Community Legislation" (2002) 11(2) ICTL 132.
29.Ahi Mitrani, "Regulating E-commerce, E-contracts and the controversy of Multiple Jursidiction" [2001] Int.T.L.R 50 at 56.
30.*International Shoe v Washington* 326 U.S. 310, 318 (1945).
31.465 U.S. 783 at 788-790.
32.See, above, n.26 at 3-36.
33.315 F.3d 256; 2002 U.S. App.
34.357 U.S. 235 (1958).
35.Above, n.33, *Young v New Haven Advocate,* at pp.262-264.
36.G. J. H. Smith, *Internet Law and Regulation* (3rd ed., Sweet and Maxwell, London, 2002), at 6-34.
37.293 F.3d at 713.
38.The defendant's magazine which contained the allegedly defamatory material was primarily sold in France (237,000 copies) and only sold 230 copies in England and Wales, among them only five in Yorkshire, the plaintiff's residential county. In *Calder* for example, the *National Enquirer* (the defendant newspaper) had its largest circulation (600,000) in the forum state (California).
39.*Calder,* at pp.789-790.
40.*Dow Johns & Company Inc* v *Gutnick* 194 A.L.R. 433, December 10, 2002, Canberra.
41.See above, n.27, *E-bay, Inc.*
42.A. Saggerson, "PI Litigation Across Jurisdictions: Summary Of Service Regimes", *PI News* 6.3(3) at p.7. Electronic copy world document format available on Lexis-Nexis.
43.[2000] E.T.M.R. 1025, at [21]-[25].
44.The choice of the top level domain name, i.e. if it is a generic or country code, can be a strong indication of whether the defendant made an infringing use of the trade mark. In *Euromarket Designs,* the defendant had *.ie* as her top level domain name, which worked to her benefit.
45.Above, n.28, at p.133.
46.Above, n.40, at [30]-[31].

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Here, there or everywhere? Cross-border liability on the internet
Graham Smith

Computer and Telecommunications Law Review (2007)
***C.T.L.R. 41**

Differing approaches to cross-border liability

The rise of the internet, an inherently cross-border medium, has turned the spotlight on the rules governing cross-border liability. What used to be a minority interest is, or should now be, the concern of everyone who publishes or trades on the internet.

This article reviews the current state of play in civil cross-border liability on the internet. It focuses particularly on the contrasting approaches of the English courts in trade mark infringement and defamation. It also looks at the rules governing consumer contracts, which are especially topical in the light of the European Commission's proposal for a Regulation to replace the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

A useful way of characterising a cross-border liability rule, whether in the context of traditional private international law rules or of a supranational regime such as the EC Treaty, is to consider where it sits in the spectrum between country of origin and country of destination.

A country of origin regime is one which favours the home law and jurisdiction of the actor--by permitting an unfettered choice of law and jurisdiction, by specifying the actor's home law and jurisdiction as the default, or both. In the context of the internet the actor is the proprietor of an internet site, the publisher of internet content, or the supplier of goods or services sold over the internet.

A country of receipt (or country of destination) regime favours the home law and jurisdiction of the alleged victim. In the context of the internet this means the reader of an internet site, the owner of reputation, goodwill, intellectual property or other rights alleged to be damaged by internet content, or the purchaser of goods or services sold over the internet.

The choice between country of origin, country of destination, or a formulation somewhere between the two, is politically highly charged. The country of origin clause in the proposed Services Directive sparked trade union demonstrations in Brussels during the European Parliament debates.

A country of origin approach is very difficult to achieve politically unless all participating countries have relatively uniform laws. The concern is that online businesses will move their operations to countries with least restrictive laws and the lightest regulatory burden, thereby nullifying the domestic laws of other countries. This is a concern for governments, keen to preserve the efficacy of their domestic laws. It is shared by the consumer protection community, which fears that a country of origin regime would strip consumers of the legal protection to which they are accustomed in their home countries when they purchase online from foreign e-businesses. Country of origin regimes are, however, the most encouraging to the free flow of trade and information.

Country of destination regimes are criticised, mainly for enabling over-restrictive governments unilaterally to export their domestic laws to more liberal and enlightened countries. This is particularly an issue when (as is often the case in such countries) domestic courts and authorities are keen to apply their local laws to foreign internet sites on the sole ground that they can be read in their country. Country of destination rules have the potential to create worldwide exposure to liability based on nothing more than the accessibility of a website, encouraging online actors to erect electronic walls around their sites and restrict information and services to their home countries.

The country of destination approach can manifest itself in many guises, ranging from an explicitly stated rule of applicable law or jurisdiction[1] through to being the consequence of some apparently innocuous substantive legal principle.[2]

So there is an impasse. Country of destination rules are seen as protecting the interest of the alleged victims in their own countries, but do not pay sufficient regard to the injustice of exposing the proprietor of a website to automatic worldwide liability. Country of origin rules, on the other hand, are criticised as paying insufficient regard to the interest of the alleged victim in his own country.

This article starts by considering the current state of the contest between country of origin and country of destination. It will then discuss an alternative which has gained some currency, the directing and targeting approach.

Country of origin

The country of origin principle is to a limited extent embodied in the internal market provisions of the EC Treaty. Achieving an internal market within Europe demands that Member States should not use their national laws to restrict the free flow of goods and services from other Member States. The converse is that Member States should enforce their home laws over anyone established in their territories. However, this principle is subject to severe qualifications, reflecting the political reality that no national government will lightly give up the right to enforce its country's domestic laws against incoming goods and services.

Until the Electronic Commerce Directive was adopted in 2000, the closest to a pure country of origin regime in Europe was that governing satellite broadcasting within Europe.[3] Essentially, broadcast content cannot be restricted in the country of reception if it is legal in the country of establishment of the broadcaster. However, even in such a tightly licensed and regulated area as broadcasting, Member States were still permitted under the terms of the Directive some residual, closely circumscribed, powers to suspend broadcasting if (for instance) there was perceived to be a serious threat to minors. The balance between home and destination country control embodied in the Directive has been at the heart of several cases that have come before the European Court of Justice.

The Electronic Commerce Directive dates from the early days of e-commerce. It contains an internal market clause which its promoters claimed created a country of origin regime for cross-border e-commerce, although the extent to which it actually did so is the subject of continuing debate. Unsurprisingly, given the broader scope of the Directive, it contains many more exceptions and derogations for countries of receipt than does the satellite broadcasting regime.

The political reality is that a country of origin solution without derogations for the country of receipt is extremely difficult to achieve. If it is feasible at all, it can only be achieved against the background of a substantial degree of uniformity of national laws.

Most internet liability issues revolve around content laws, the area in which differences in national law are perhaps most jealously guarded. If in the tightly regulated area of broadcasting, in the relatively homogenous zone of Europe, pure country of origin could not be achieved, what chance then of achieving it in the unregulated area of individual and press speech, on a worldwide basis?

Country of receipt

With the significant exception of the law applicable to business to business contracts, the rules of private international law, at least in Europe, tend to be receipt-oriented. For non-contractual liability, in many cases they permit jurisdiction to be taken, or local law to be applied, where the effects of the wrongdoing are felt. For contractual liability they lean towards enabling consumers to sue in their home countries and to have the protection at least of their local consumer protection laws.

Receipt-oriented rules have a disproportionately burdensome effect on online actors. By default a website is available throughout the world. The website proprietor who wishes to trade only with certain jurisdictions must take positive steps to prevent transactions occurring with customers in other jurisdictions. This is the reverse of the position that obtained in the offline world when the old rules were written. Then trade was domestic by default and a supplier would generally have to take positive steps in order address an overseas market. The advent of cheap cross-border online trade has put into question the appropriateness of the old rules.

Directing and targeting

An approach that is more enlightened than country of receipt and more achievable than country of origin is directing and targeting. According to this mid-way position a website is not to be regarded, through its mere availability in the country of receipt, as susceptible to that country's jurisdiction or as infringing its laws. However, if it targets that country or directs activities towards it, then it is so susceptible.

The usual criticism of a targeting test is that it lacks certainty. It is true that the general concept of targeting is sufficiently flexible that there is room to interpret it in either a receipt-oriented or origin-oriented manner. It is important therefore to have as much clarity as possible about what does and does not amount to targeting. For instance, can a site be regarded as directed to a country simply because it does not take positive steps to block access to the site from that country? If so, then the targeting test would effectively be a country of receipt test.

We suggest that one characteristic of a well-constructed targeting test is that an online actor can only be found to have targeted a country if he has engaged in positive conduct towards it. A properly formulated targeting test would mean that, for instance, the court in the French *Yahoo!* case[4] could not have found that the mere display of Nazi memorabilia was sufficient

to violate French law, without some element of targeting or direction at France. Nor would it have been open to it to find jurisdiction, as it did, on the basis that because Nazi memorabilia were of interest to all, the areas containing those items were directed at all countries simultaneously including France. However, it might still have been possible for a court to find that Yahoo!'s serving up of French banner advertisements to French IP addresses would satisfy a 'directed at' test. While it is doubtful whether the use of a particular language alone ought to suffice, this was not a mere use of language. It was an attempt to serve up French language advertisements to users coming to the site from French territory.

US courts in interstate internet cases have used longstanding "purposeful availment of the forum" principles, derived from the US Constitution requirement of "minimum contacts", to hold that the mere availability of a website, with nothing more, does not found jurisdiction. This approach can have close similarities to a targeting test.

This article now considers the extent to which "directing and targeting" tests are gaining traction. The three areas in which there has been most activity are trade mark infringement, defamation and consumer contracts. The article will consider both jurisdiction and applicable law examples, drawn from existing legislation and court decisions and also in proposals for future cross-border liability rules.

Jurisdiction within Europe--the general rule

The general rule under Art.2 of the EU Judgments Regulation[5] is that a defendant domiciled in a Member State shall be sued in the courts of that state.

The general rule requires a Member State court to assume jurisdiction even where a defendant domiciled in a Member State is sued there by a claimant domiciled outside a Member State. The court retains no discretion on grounds of *forum non conveniens* to grant a stay of such proceedings in favour of either a Member State or a non-Member State forum.[6]

Exceptions from the general jurisdiction rule

The general rule is subject to a number of exceptions provided for by the Regulation. One of these is Art.5(3), which provides that in matters relating to tort, delict or quasi-delict,[7] a person domiciled in a Member State may be sued in another Member State in the courts for the place where the harmful event occurred or may occur. This therefore permits a defendant domiciled within a Member State, exceptionally, to be sued in the court of another Member State. Trade mark infringement and defamation both fall within Art.5(3).

The interpretation of Art.5(3) is especially relevant to the possibility of being sued in a Member State in which a website is merely available. The broader the scope of Art.5(3), the greater the risk of being sued on a mere accessibility basis.

The scope of Art.5(3) of the Judgments Regulation

The question where the harmful event occurs for the purpose of Art.5(3) has been elaborated by several decisions of the European Court of Justice. The phrase "harmful event" can include both the event giving rise to the damage and the damage itself.[8] So where a French company discharged pollutants into the Rhine in France, which flowed downstream and damaged the claimant's crops in the Netherlands, the damage occurred in the Netherlands and the claimant could sue there.[9] However, the ECJ in the *Dumez* case held that the place where the "damage" occurs covers only:

"the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of the event".[10]

So a different place where indirect victims suffer consequential loss as a result of the harm initially suffered by direct victims is not a place where damage has occurred within Art.5(3).[11]

In *Shevill v Presse Alliance SA,* [12] the ECJ held that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged are governed by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention was not thereby impaired.

There has always been a trickle of cross-border tort cases in which Art.5(3) comes into play: waste released into the Rhine in France damaging crops in the Netherlands[13] ; a defamatory newspaper article published in the France finding its way into England[14] ; assurances given by telephone from Switzerland to London[15] are just some dating from the pre-internet era. But the true cross-border tort, in which the activities comprising the chain of constituent events cross national boundaries, has tended to be the exceptional case.

However the internet, by virtue of its inherently cross-border nature, has propelled the cross-border tort into the mainstream. Article 5(3), being an effects-based rule, has the potential to open up forum-shopping based on internet activity as never

before, particularly in the case of those torts which, in the context of transmitted information, may be characterised as "receipt-oriented".

By receipt-oriented torts the author means those in which the nature of the wrongful act is such that a court can easily hold that at least the damage, and perhaps all the components of the tort, are located in the country in which the information is received. It will be seen that, under current English law, defamation is probably the most receipt-oriented tort.

The location of the components of the tort is not obviously relevant, when the focus of the Judgments Regulation is on the location of the harmful event. However, the *Shevill* restriction referred to above reintroduced, at least for defamation cases, the location of the tort as a relevant consideration, notwithstanding the focus of Art.5(3) on the harmful event. That will have greater significance if, as is possible,[16] *Shevill* has wider application than to defamation cases alone.

The scope of Art.5(3) in internet cases

If the receipt of information through the mere availability of the website were enough to satisfy Art.5(3), then in a Judgments Regulation case the potential claimant would have a choice, for receipt-oriented torts, of litigating in any Member State. That choice would be constrained only by the *Shevill* restriction, established for defamation cases and potentially applicable in others, that in an Art.5(3) case damages can be recovered only for a wrong committed within the chosen forum. Even with that restriction online activity would incur greater exposure to foreign jurisdictions than would comparable offline activity.

As can be seen from the *MARITIM* case discussed below, local courts are capable of interpreting Art.5(3) in such a way as to afford it a long reach in the online arena. In that case a German court explicitly took jurisdiction on a mere availability basis. However, to generalise such a result would be contrary to the scheme of the Regulation, in which Art.5(3) is intended to be a limited exception from the basic rule that a defendant is to be sued in the courts of his domicile.[17]

In order to preserve the objective that Art.5(3) is a limited exception from the domicile rule a means has to be found, for online activity, of restricting the reach of Art.5(3). In non-Judgments Regulation cases English courts can invoke *forum non conveniens* considerations. However in Judgments Regulation cases this is not possible, even where the convenient forum would be a non-EU country.[18]

Can targeting considerations be relevant in an Art.5(3) case?

At first sight, if the Judgments Regulation applies a court is not permitted to have regard to targeting considerations. Where the claimant claims jurisdiction under Art.5(3), then if a harmful event has occurred within the jurisdiction and the matter relates to a tort, delict or quasi-delict, the court *must* assume jurisdiction.[19] And in the case of receipt-oriented torts it may be relatively easy to show that a harmful event has occurred within the jurisdiction.

However, that is tempered in England by the fact that the claimant must demonstrate a good arguable case that the terms of Art.5 are satisfied.[20] He must also establish that there is a serious issue to be tried on the merits.[21] For territorial torts this raises the question whether the availability of the foreign website in England and Wales constitutes a substantive tort in this jurisdiction. This, for some torts at least, allows the court to consider whether a website is directed to or targeted at this jurisdiction, even though Art.5(3) of the Regulation does not refer to this as a relevant factor. However, since this is a question of the substantive components of the tort in question, not a broad rule of jurisdiction, and different torts comprise different component elements, the relevance of targeting has to be considered individually for each tort.

Courts elsewhere in Europe that maintain a more rigorous separation between jurisdiction and substantive law may be unable to introduce substantive law aspects at the jurisdiction stage. This is illustrated by a German case in the Hamburg District Court, *Re the MARITIM Trade Mark.* [22] This was a trade mark case concerning a Danish website. The court held that it had jurisdiction to hear the claim, but dismissed the claim on its merits. On the question of jurisdiction, the court took a very broad view of Art.5(3):

"In the case of trademark infringements via the internet, the place of the tort is any place at which the internet domain can be called up. Websites used on the internet and their content are technically not restricted to specific countries, so that they can also generally be called up in Germany. This suffices for the court to awarded jurisdiction. Any undertaking that is actively involved in the internet will be aware that its on-line content can be called up throughout the world and must therefore expect to be sued in foreign courts in accordance with Art. 5(3) of the Convention."

The court made clear that as a matter of German law it was immaterial, when considering jurisdiction, whether infringement actually took place in Germany, or to consider the extent to which national trade marks should be given extraterritorial effect. These related to the substance of the claim and not to the jurisdiction of the court. That contrasts with the ability of the English courts to consider, at the jurisdiction stage, whether the claimant has established a good arguable case.

The views of the English courts on the relevance of directing and targeting have diverged considerably in their approaches to trade mark infringement and defamation.

Trade mark infringement

For trade mark infringement the English courts have determined that a mark visible on a foreign website is not used in the United Kingdom unless the site is targeted at this country. Since use is an essential component of a trade mark infringement claim, failure to show a good arguable case of use within the United Kingdom will enable the court to decline jurisdiction.

The significance of this point in cross-border internet cases was considered by Jacob J. (as he then was) in *Euromarket Designs Ltd v Peters Ltd.* [23]

Commenting on the Irish defendants' Irish website, he said:

"22. Now a person who visited that site would see ie ". That would be so, either in the original address of the web site, crateandbarrel-ie.com, or the current form, crateandbarrel. ie . " The reference to four floors is plainly a reference to a shop. So what would the visitor understand? Fairly obviously that this is advertising a shop and its wares. If he knew ie " meant Ireland, he would know the shop was in Ireland. Otherwise he would not. There is no reason why anyone in this country should regard the site as directed at him. So far as one can tell, no one has.

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24. Whether one gets there by a search or by direct use of the address, is it rational to say that the defendants are using the words 'Crate & Barrel' in the United Kingdom in the course of trade in goods? If it is, it must follow that the defendants are using the words in every other country of the world. Miss Vitoria says that the Internet is accessible to the whole world. So it follows that any user will regard any web site as being 'for him' absent a reason to doubt the same?. In *800-FLOWERS* I rejected the suggestion that the web site owner should be regarded as putting a tentacle onto the user's screen. Mr Miller here used another analogy. He said using the internet was more like the user focusing a super- telescope into the site concerned; he asked me to imagine such a telescope set up on the Welsh hills overlooking the Irish Sea. I think Mr Miller's analogy is apt in this case. Via the web you can look into the defendants' shop in Dublin. Indeed the very language of the internet conveys the idea of the user *going to* the site - 'visit' is the word.

This conclusion was reinforced by the obiter comments of Buxton L.J. in the Court of Appeal decision in *800 FLOWERS Trade Mark* [24] :

"[T]he very idea of 'use' within a certain area would seem to require some active step in that area on the part of the user that goes beyond providing facilities that enable others to bring the mark into the area. Of course, if persons in the United Kingdom seek the mark on the internet in response to direct encouragement or advertisement by the owner of the mark, the position may be different; but in such a case the advertisement or encouragement in itself is likely to suffice to establish the necessary use?

In *V&S Vin & Sprit Aktiebolag AB v Absolut Beach Pty Ltd* [25] the claimant relied on the availability of an Australian website in the United Kingdom bearing the mark complained of; willingness to accept orders placed via the website; and (the judge commented probably most importantly) the circulation in the United Kingdom by the defendant of its brochure in response to orders from the website. Pumfrey J. found that there was, just, a good arguable case of trade mark infringement sufficient to found jurisdiction.

The approach of the Hamburg District Court in *Re the MARITIM Trade Mark* [26] (see above) to the substantive elements of trade mark infringement in a cross-border internet case is instructive.

The proprietor of German and EU trademarks for *Maritim,* which it used for a chain of hotels in Germany, sued in Germany a Danish defendant who ran a bed and breakfast establishment in Copenhagen. The defendant had registered *Hotel Maritime* as a trade mark in Denmark and ran a website using the domain name hotel-maritime.dk. The website included information in German about the hotel. It also had a brochure in several languages, including German, which was sent to prospective clients (but only on request). The claimant asked for orders restraining (1) the defendant's use in business in Germany of the name Hotel Maritime to identify the hotel run by it, and (2) its use of the domain name *www.hotel-maritime.dk* in so far as its advertising was conducted under that domain name in the German language.

As mentioned above, the court found that it had jurisdiction to hear the claim. On the merits, the court found that there was no infringement. Where a potential infringement had been instigated abroad, there had to be a domestic connecting factor for there to be infringement. In this case there was no domestic connecting factor because the defendant's services could only be rendered abroad. Further, the mere possibility of receiving foreign advertising content was not sufficient. A greater

specific domestic link had to be established, otherwise any use of trade marks on the internet would constitute infringement in Germany. Nor did the use of the German language on the website establish sufficient domestic connection. Multilingual hotel information and advertising material was normal in this sector and justified in view of the international clientele. Language per se was therefore not relevant. It would only be relevant if its stated aim was to reach consumers in Germany. The website was directed to the Danish market and there were no elements, such as a German contact address, aimed at the German market. The use of the.dk domain was also relevant, since a consumer would assume (unlike with a.com domain) that the information was tailored to that country. The external format of the website also made sufficiently clear that it was not targeting the German market.

As to the brochure material sent to Germany, again there was no service capable of being provided in Germany, and the brochures were only sent out on request. This was insufficient to establish a domestic connecting factor. Nor did the brochures constitute advertising for the website. (Contrast these findings with the conclusion of Pumfrey J. in the English case of *Absolut Beach,* discussed above.)

The Scottish Court of Session has considered the application of Art.5(3) to an internet trade mark case, in *Bonnier Media Ltd v Smith.* [27] In this case the claimants were the owners, printers and publishers of a Scottish newspaper known as "business a.m. ", for which they had registered a UK trade mark. The claimants also operated a website under *www.businessam.co.uk*. The first defendant, who was resident and domiciled in Greece, was the managing director of the second defendant, a company incorporated in Mauritius. It was also averred that the second defendants had places of business in London and Athens; and that prior to residing in Greece the first defendant had had substantial business interests in Scotland. The first defendant had previously sued the claimant in England for defamation arising out of articles concerning the first defendant published in business a.m., which proceedings were defended.

The claimants alleged that the first defendant had intended (but failed) to acquire businessam.com, and had registered 22 other domain names which included the words businessam, business-am or businesspm.

The claimants alleged that there was only one possible reason to for registering such names, namely to pass themselves off as the pursuers, and that if any websites were set up members of the Scottish public seeking to find the claimants' website would be confused. The claimants had obtained an ex parte interim injunction and the defendants applied to discharge or restrict it.

The court would have jurisdiction to make an order to restrain a threatened wrong that was likely to produce a harmful event within Scotland. As to whether a wrong was threatened within Scotland, the defendants argued that merely putting up a website on a server outside Scotland was not a wrong that would occur in Scotland. The defendants relied upon *800-FLOWERS* and *Euromarkets v Peters* (see above for these cases). The court held that:

"the person who sets up the website can be regarded as potentially committing a delict in any country where the website can be seen, in other words in any country in the world. It does not follow that he actually commits a delict in every country in the world, however. It is obvious that the overwhelming majority of websites will be of no interest whatsoever in more than a single country or a small group of countries. In my opinion a website should not be regarded as having delictual consequences in any country where it is unlikely to be of significant interest. That result can readily be achieved by a vigorous application of the maxim *de minimis non curat praetor* ; if the impact of a website in a particular country is properly regarded as insignificant, no delict has been committed there."

The court then went on to characterise the *Euromarkets* case as one in which the defendant's trade with the United Kingdom was insignificant.

After reviewing the facts in the instant case, the court concluded:

"In my opinion an inference may readily be drawn from the foregoing facts that the defenders, acting together, intend to set up a website which is designed to pass themselves off as the pursuers, and to make use of a name sufficiently close to the pursuers' trade mark to amount to an infringement of that trade mark. Those acts are clearly aimed at the pursuers' business. That business is centred in Scotland, and it is in my opinion obvious that the defenders' actings are intended to have their main effect in Scotland. In these circumstances I am of opinion that the requirement that the effect in Scotland of the website should be significant is plainly satisfied, and that accordingly the defenders can be regarded as threatening a delict in Scotland. I accordingly conclude that the Scottish courts have jurisdiction over the defenders."

While the result of the case is unsurprising, it is doubtful whether a test based on "insignificance" is consistent with the English cases, or sets an appropriately high threshold.

The hurdle that a claimant has to surmount to prove use of a trade mark in a cross-border context is significantly higher as a

result of the introduction of targeting considerations. As has been seen, to found English jurisdiction the claimant must establish a good arguable case that a tort has been committed. The vulnerability to English jurisdiction of a "merely available " foreign website is likely to be relatively low for trade mark infringement. That contrasts with the position for defamation, to which this article now turns.

Defamation

For defamation the wrongful act is publication not, as in trade mark infringement, use. The English courts have so far held that publication takes place where the statement is downloaded, regardless of any question of targeting. On that analysis defamation is inherently a more receipt-oriented tort than trade mark infringement. The court can take jurisdiction over a defamation claim in circumstances where it could not do so for trade mark infringement.

In internet defamation cases English courts have adopted a robust destination-oriented stance on two critical points.

Place of publication

The first is that they have repeatedly confirmed the traditional rule that publication takes place where the statement is read and comprehended, which for the internet translates into the place where it is downloaded.[28] Since publication is the relevant act for establishing defamation, this leads to the conclusion that there is a domestic English law tort.[29]

Once the court has determined a good arguable case that there is a domestic English tort, it is a simple step to conclude that for jurisdiction purposes there is a harmful event within the jurisdiction for the purposes of Art.5(3) of the Judgments Regulation.

If there were any doubt about that, it was put to rest by the European Court of Justice in *Shevill v Presse Alliance SA.* [30] This was a reference to the European Court of Justice of an English defamation case under the Brussels Convention. The ECJ stated that damage is caused in the places where the publication is distributed, when the victim is known in those places. The court also stated that the place where the event giving rise to the damage occurred is the place where the publisher is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation. The court held that a claimant could therefore sue either in the country of publication, pursuant to Art.5(3), or in the country in which the defendant publisher was established. However, if the claimant chose to sue in the country of publication it could recover damages only in respect of the publication in that country. Otherwise, it could recover for all the Convention countries.

The court also held that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged are governed by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention was not thereby impaired.

When the case returned to the English courts the House of Lords held that the English law presumption of harm to the plaintiff from publication of a defamatory statement was sufficient to constitute a harmful event for the purpose of Art.5(3), without specific proof of damage.[31]

This presumption of harm means that in libel cases the requirement under Art.5(3) of the Regulation to prove that damage has been sustained in the jurisdiction will normally be easy to satisfy.[32]

Responsibility for publication

The second critical point concerns responsibility for the publication. The corollary of the proposition that publication takes place where the statement is downloaded is that, for most types of internet publication, no publication takes place until the reader accesses and downloads the article. The cause of action in libel arises when the words come to the attention of the reader. In order to attribute responsibility for that publication to the person who owns (say) the website, it is necessary to establish a causal connection between putting the material on the website and the later act of the reader in downloading the material. That raises some potentially interesting issues, which have not yet been fully developed in the English courts.

Material placed on the internet, such as on a public website, is prima facie available for viewing anywhere in the world. In the absence of any contrary factual circumstances someone who puts up a website outside England would, on existing pre-internet principles, be taken to know that it can and will be read in England and to authorise that publication.[33] The English and Australian courts have, so far, rigorously applied these pre-internet principles to publication on the internet. In particular, unlike in trade mark infringement, they have so far resisted any suggestion that directing or targeting of activities has any relevance to responsibility for cross-border defamation.

Responsibility for authorising a cross-border internet publication has so far been contested only in one English case, *Don*

King v Lennox Lewis, Lion Promotions LLC and Judd Burstein. [34] The defendants were a promotions company and two individuals, one of whom (Mr Burstein) was said to have made the statements complained of in two articles that appeared on US-based websites. The defendants applied to set aside service out of the jurisdiction. They argued, among other things, that they had not authorised downloading in England. Eady J. (who was upheld on appeal) said:

“42. A closely allied point put forward by Mr Price [the defendants' counsel] was that the downloading in England was not something that was authorised by Mr Lennox Lewis or, for that matter, by Mr Burstein. He submits that authorisation has to be seen in terms of agency, and it would be absurd to suggest that any of his clients were in such a relationship with any of the relevant persons in this jurisdiction who downloaded or read the offending words. It is not enough, says Mr Price, merely to ‘facilitate’ the ultimate act of downloading. I am by no means persuaded that authorisation, in the context of publication, has to be seen in terms of agency. It may be true that someone who gives an interview to a newspaper is not thereby creating the editor his agent or in any way binding the editor to publish the interview. He is nonetheless authorising the use of the information he provides and, to that extent, the law would regard him as responsible if a defamation is published as a result. Mr Price may no doubt wish to develop these arguments at trial, with particular reference to the way in which the law approaches internet publication, but the Claimant's case is that Mr Burstein caused the ultimate publications in England by virtue of having said what he did to fightnews.com and boxingtalk.com. That is plainly an arguable case in the context of the present application. “

The current approach of the courts appears to be that worldwide publication is the natural and probable (or reasonably foreseeable)[35] consequence of putting up a website and that the website proprietor has thereby authorised, or at least is to be held responsible for, every publication that takes place when a third party downloads an article from the website.

That approach is heavily influenced by the High Court of Australia decision in *Gutnick v Dow Jones & Co Inc,* [36] in which the court observed:

“However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction “ [39].

The English Court of Appeal in *King v Lewis* (above) cited *Gutnick* as suggesting that:

“a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant. We by no means propose a free-for-all for claimants libeled on the Internet. The court must still ascertain the most appropriate *forum*; “in an Internet case the court's discretion will tend to be more open-textured than otherwise; for that is the means by which the court may give effect to the publisher's choice of a global medium. But, as always, the case will depend upon its own circumstances”.

However, it is by no means obvious that every defendant should be automatically responsible for every publication that takes place when someone goes to its website and downloads an article. That approach may be superficially attractive when the defendant is an international American media company. But what of the church newsletter, the garden club magazine, the schoolgirl blogger? Are they to be characterised as a “global publisher “ and exposed to worldwide liability because they are taken to know the reach of the medium on which they have chosen to publish?[37] The current doctrine is seen to do less than justice when viewed in that context.

Eady J. also touched on the question of causation in *Richardson v Schwarzenegger,* [38] in which he said:

“There is no warrant for drawing a distinction (as was tentatively canvassed in argument) between those who deliberately publish or put matters on the World Wide Web as part of their business and those who do so incidentally, and without intending to target any particular jurisdiction for the receipt of their communications: *Lewis v King* at [33] to [34]. It seems to be a question of applying or adapting settled principles as to legal responsibility for publication, including that relating to foreseeability: see e.g. *McManus v Beckham* [2002] EWCA Civ 939. “

The judge's reference to *McManus v Beckham,* the most recent English authority on causation in defamation cases, is significant. The judgments of the Court of Appeal in that case emphasise that causation is not merely a question of factual inquiry, but of achieving a just and reasonable result.[39] It is a “control mechanism “[40] in respect of defamation liability. That is precisely what is required to counterbalance the destination-oriented approach so far adopted by the English and Australian courts.

Should the English courts wish to develop a directing and targeting approach for defamation, causation does provide a framework within which that can be done. It would be possible (and, we suggest, desirable) for the courts to develop a rule

that when a third party downloads an article in a jurisdiction that the defendant has not targeted, that act is too remote for the defendant to be regarded as having authorised the publication. Such a rule would have the advantage that it would be applicable in all cases, regardless of whether *forum non conveniens* is available. Whether the defendant had targeted the jurisdiction would depend on consideration of the objectively ascertainable factual circumstances.[41]

Different types of internet publication vary in the extent to which worldwide distribution is the inevitable result of the publication. In the case of Usenet newsgroups, for instance, the very nature and purpose of the Usenet system is to cause postings to be disseminated by replication to Usenet servers around the world where they are available for public consumption by downloading the postings. In those circumstances it might be quite difficult, absent any circumstances suggesting that the likely audience was predominantly local, for the author to suggest that he did not authorise publication to the world at large, including England. A court might well be prepared to infer publication in England without proof that anyone within the jurisdiction actually read the posting, at least at the jurisdiction stage.[42] If someone at the instigation of the claimant were to read the posting in order to provide evidence of actual publication for the purpose of legal proceedings, that is in principle sufficient to support the assertion that a tort has been committed within the jurisdiction. However, if that were the only publication then the action would be liable to be stayed or struck out for lack of a real or substantial tort within the jurisdiction.[43]

It might be thought that where a website is made available it is less inevitable than with Usenet newsgroups that worldwide publication will result, and therefore more arguable that the website publisher did not authorise publication in every country. However, this argument, indeed any arguments based on the degree of 'push' and 'pull', have not yet found favour with the courts.

It seems to us that questions of causation will inevitably have a part to play in some types of electronic publication. Assume, for instance, that an American sends an email from America to a recipient with a New Zealand email address. The email is defamatory of an English third party. The New Zealand recipient has a Blackberry device, to which the email is pushed automatically on receipt.[44] The New Zealand recipient happens to be travelling in England when uses his Blackberry to open and read the email. According to existing principles, that is a publication in England upon which the English courts could take jurisdiction.

Is the American sender to be taken to have authorised or caused the publication in England? It is now common knowledge that emails can be accessed on the move, anywhere in the world. According to the *Gutnick* approach, the very choice of a ubiquitous medium carries with it the risk of worldwide liability.[45] That suggests that the American sender would be liable for the English publication. But this communication was sent to a New Zealand email address. The author suggests that in those circumstances, the communication having been targeted at New Zealand, the just result is that the American sender should not be taken to have authorised publication outside New Zealand. It cannot be right that the choice of a ubiquitous medium is itself sufficient to hold the publisher responsible for every publication that results, in any part of the world.

On this basis, the proposition that targeting can never affect causation has to be rejected. Once it is accepted that targeting can be relevant to causation, then the door is opened to deploy objective directing and targeting criteria in internet defamation cases generally, so as to rein in the more extreme consequences of the current Anglo-Australian approach to place of publication.

Although the English courts have so far taken a robustly destination-oriented approach to applying English law in internet defamation cases and taking jurisdiction over defamatory content on merely available foreign internet sites, these questions have not yet been considered at the highest judicial level. The House of Lords has yet to consider these matters and has acknowledged that defamation on the internet raises difficult questions.

In *Berezovsky v Michaels,* [46] a non-Brussels Convention libel case, the House of Lords decided by a 3-2 majority not to stay libel proceedings brought by Russian businessmen against a US magazine with a small circulation in England. The magazine was stated also to be available on the internet within the English jurisdiction. However their Lordships were able to come to a conclusion without reference to this aspect. Lord Steyn commented:

"In their statements of claim the plaintiffs relied on the fact that the Forbes article is also available to be read on-line on the Internet within the jurisdiction. The Court of Appeal referred to this aspect only in passing. During the course of interesting arguments it became clear that there is not the necessary evidence before the House to consider this important issue satisfactorily. Having come to a clear conclusion without reference to the availability of the article on the Internet it is unnecessary to discuss it in this case " (996 h-j).

In his dissenting speech Lord Hoffmann stated:

"But that does not mean that we should always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this country, or whose publications have been downloaded here from the internet, can be required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England. "

Forum conveniens and targeting

It will be apparent that so far the English courts in defamation cases have adhered strongly to the view, most clearly expressed in *Gutnick,* that someone who puts up material on the web is taken to know the global reach of the medium and must take the consequences.

Taken together with the doctrine that publication takes place where the material is read and comprehended, that amounts to a full-blown country of destination rule, ameliorated only by *forum conveniens* considerations where available (i.e. in a non-Judgments Regulation case) and the power to strike out for abuse of process in an extreme case.[47]

Even where *forum conveniens* is available, the English courts have rejected the idea that targeting is a relevant consideration when deciding on the appropriate forum. In *King v Lewis* [48] the Court of Appeal roundly rejected an attempt by the defendant to argue that the courts should be more ready to stay defamation proceedings on *forum non conveniens* grounds where defendants did not target their publications towards the jurisdiction in which they have been sued.

In rejecting the notion of targeting, the Court of Appeal appears to have taken the view that a targeting test involves ascertaining the intention of the defendant. After noting the defendant's submission as being that the intention of the defendant should be taken into account, the Court of Appeal went on to say:

"it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has 'targeted', when in truth he has 'targeted' every jurisdiction in which his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to ?target ", it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice. "

However it is quite possible to approach a targeting question on the basis of the objectively ascertainable conduct of the defendant. In *Euromarket Designs Ltd v Peters Ltd,* [49] Jacob J. (as he then was), responding to counsel's criticism of his reference in a previous case[50] to the intention of the website owner, formulated an objective test for trade mark use:

"Would a reasonable trader regard the use concerned as ?in the course of trade in relation to goods' within the Member State concerned? "

There is no reason why in a defamation case an objective approach could not be adopted, if (as has been suggested) the legal basis for adopting a targeting test can be found in causation.

The suggestion by the Court of Appeal in *King v Lewis* that a defendant has targeted every jurisdiction in which his text may be downloaded amounts to nothing more than a bare refusal to admit for consideration any factor other than the inherent worldwide availability of a website. A different approach is certainly possible for defamation. US courts, when considering whether the defendant has "purposefully availed " himself of the jurisdiction, have regard to a variety of objective factors in defamation cases. These include not only factors such as the readership within the jurisdiction, but the focus of the story itself.[51]

The Law Commission of England and Wales in December 2002 published a Scoping Study entitled "Defamation and the Internet--A Preliminary Investigation ". Among the areas addressed was jurisdiction and applicable law. The Study concluded that the problems posed by defamation across national boundaries continued to present intractable problems.[52] The authors expressed some sympathy with the concern expressed about the levels of global risk, but observed that any solution would require an international treaty accompanied by greater harmonisation of the substantive law of defamation. The authors did not think that the problem could be solved within the short to medium term.[53]

Rome II

The Rome II Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations[54] has reached the stage of agreement on a common position. Privacy and rights relating to the personality, including defamation, are now to be excluded, following the inability of the Member States to reach agreement on a common rule. This was largely the result of concerns over freedom of speech and the potential exposure of the media to restrictive foreign laws, particularly in the online field.

In general Rome II tends to favour effects-based conflicts rules, which as has been discussed tend to create greater

exposure to foreign law for online activity than for offline. The impression that insufficient attention was paid from the outset to the differential impact on online activity is reinforced by the fact that the European Commission's original Proposal adopted on July 22, 2003 contained not a single mention of the internet or e-commerce. For a document prepared at a time when the most significant challenges for conflict of laws are presented by the internet, this was an extraordinary omission.

Consumer contracts

Consumer contracts--jurisdiction

Various provisions of the 1968 Brussels Jurisdiction Convention[55] and of the 1980 Rome Convention on the Law Applicable to Contractual Obligations[56] created a regime under which a consumer might in some circumstances invoke the protection of the courts of his domicile and the mandatory rules of his country of habitual residence, by way of exception to the otherwise applicable rules governing jurisdiction and choice of law. So in the Brussels and Rome Conventions there was an existing framework that favoured, for consumers, the country of destination over the supplier's chosen law or that of his country of origin.

The Brussels Convention was superseded in March 2002 by the Judgments Regulation. The Judgments Regulation applies generally to civil and commercial matters.[57] However it does not extend to revenue, customs or administrative matters, or to a variety of specifically excluded subject-matter. The Brussels Convention has continued to apply to Denmark.[58] The Brussels Convention also continues to apply to certain territories of EU Member States excluded from the operation of the Judgments Regulation by Art.299 of the EC Treaty. The Lugano Convention continues to apply to Iceland, Norway, and Switzerland.

Article 23 of the Judgments Regulation provides that if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

However, these provisions of Art.23 do not apply to consumer contract proceedings,[59] for which jurisdiction is determined by Arts 15-17. Article 15 provides that the general test for determining whether a consumer can bring proceedings in the courts of the place where the consumer is domiciled is whether:

"the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several countries including that Member State, and the contract falls within the scope of such activities ".

The original Commission proposal for the Judgments Regulation[60] sparked vigorous lobbying.

Trade bodies argued that any revisions should reflect the new country of origin philosophy which underlies, to an extent, the EC Treaty and the Electronic Commerce Directive; and that consumers would be harmed through suffering restricted choice if e-commerce providers were inhibited from providing their services across borders. Consumer organisations argued that consumers should not forfeit their existing legal protections when contracting electronically. The final form of the Regulation represented something of a compromise on this issue, substantially retaining the principle of the consumer exceptions but basing their applicability on a new concept of directing activities.

The Regulation in its originally proposed form contained a Recital 13 stating that:

"electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State".

The UK Government opposed the inclusion of that Recital. In the debate on the Second Reading of the Electronic Communications Bill on November 29, 1999 the Minister introducing the Bill stated[61] :

"The Brussels convention has existed for 31 years and, in that time, almost no consumer has used it to sue for breach of contract. None the less, the Commission sought to extend its provisions to electronic commerce by providing in a draft recital that any web site that could be accessed from another member state would thereby qualify as advertising directed at consumers in that member state and could activate the convention's provisions. That, of course, misses the point that, on the internet, any web site is, by definition, accessible from anywhere else. I am pleased to be able to tell the House that there is growing agreement among member states with our view that the new recital should be dropped."

Recital 13 was indeed dropped. However, that left the term "directs " in Art.15 wholly undefined. An attempt was made to remedy this by the minuting of a joint Council and Commission statement in relation to the Regulation.[62] The relevant part of

the statement reads:

"for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet.

In this context, the Council and Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a web site uses does not constitute a relevant factor."

Consumer contracts--applicable law and Rome I

The law applicable to consumer contracts is governed by Art.5 of the 1980 Rome Convention, implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990. Article 5 contains provisions closely mirroring those of the 1968 Brussels Jurisdiction Convention. The most relevant provision is that a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract.

This provision, pre-dating the internet, is a type of targeting test. The Guiliano/Lagarde Report, elaborating on what would count as specific invitation or advertising, made clear that in both cases the trader must have done acts aimed specifically at the country in question. In *Rayner v Davies* [63] Waller L.J., commenting on the Guiliano/Lagarde Report in the context of the identical provisions of the 1968 Brussels Jurisdiction Convention, said:

"'specific invitation" is coupled with 'advertising' preceding the conclusion of the contract. That seems to contemplate some positive conduct on the part of the seller of goods or services preceding the contract, and (I would suggest normally) preceding the involvement of the consumer."

The Brussels Jurisdiction Regulation was viewed by some as likely to become a precedent for future revisions to the 1980 Rome Convention, and so it proved. On January 14, 2003 the European Commission issued a Green Paper on the conversion of the 1980 Rome Convention into a Community instrument, a project known as "Rome I". The Green Paper was followed by a Proposal[64] for a Regulation.

The Rome I Proposal seeks to modernise Art.5 of the 1980 Convention. In doing so it has made significant changes.

The consumer protection aspects of the Proposal differ in a number of ways from the 1980 Convention. The proposal, in summary, is that consumer contracts shall be governed by the law of the Member State in which the consumer has his habitual residence, on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several states including that Member State, and the contract falls within the scope of such activities, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence. The main differences from the 1980 Convention are:

The existing trigger of advertising or specific invitation would be replaced by a directed activities test based on that of the Judgments Regulation. Like the Judgments Regulation it lacks any proper definition of what would constitute "by any means directing activities towards one or more Member States. Recital 10 attempts to link the interpretation of directing activities back to the Judgments Regulation and its accompanying Council and Commission Declaration:

"Harmony with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of 'targeted activity' as a condition for applying the consumer-protection rule and that the concept be interpreted harmoniously in the two instruments, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation No 44/2001 states that '*for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities* ". The declaration also states that '*the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor*."

While Recital 10 does suggest that mere accessibility is not sufficient to count as a directed activity, the proposed text makes insufficiently clear that only positive conduct (see *Rayner v Davies,* above) should be regarded as targeting. While a properly limited concept of directing or targeting activities is likely to be a fruitful approach,[65] the version proposed by the Commission would expose online traders to greater risk than do the provisions of the existing 1980 Convention.

Recital 10 suggests that it would be appropriate, when considering whether or not activities have been directed at a Member State, to take into account the fact that a contract has been concluded. This would be a departure from the 1980 Convention approach in which the consumer protection provisions are triggered only by activities that precede the making of the contract.[66] The fact that a contract has been concluded is, under the 1980 Convention and ought to be under the proposed Regulation, neutral.

Rather than being confined to mandatory rules, the whole law of the consumer's habitual residence would apply to the contract.

The 1980 Convention trigger requiring the contract to be concluded in the place of the consumer's habitual residence would be replaced by a test based on the trader's actual or deemed knowledge of the consumer's habitual residence.

At the time of writing the UK Government has declined to opt in to Rome I (mainly because of concerns over the separate issue of mandatory rules of third countries under Art.8.3). The Rome I proposal is in its early stages and can be expected to be heavily lobbied.

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C.T.L.R. 2007, 13(2), 41-51

1.Art.5(3) of the Brussels Judgments Regulation, permitting jurisdiction based upon the place of occurrence of a harmful event or the arising of damage, is a country of destination rule.
2.The rule in defamation that publication takes place where a statement it is read and comprehended translates, in a cross-border context, into a country of destination rule.
3.Television without Frontiers Directive (89/552, amended by Directive 97/36).
4.*League against Racism and Anti-Semitism and another (LICRA) v Yahoo! Inc,* Tribunal de Grande Instance de Paris, November 20, 2000.
5.Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Council Regulation 44/2001 of December 22, 2000).
6.*Owusu v Jackson (t/ a Villa Holidays Bal-Inn Villas),* ECJ [2005] 2 All E.R. (Comm) 577. The decision of the Court of Appeal in *Re Harrods (Buenos Aires) Ltd* [1992] Ch.72 is no longer good law. See also *Antec International Ltd v Biosafety USA Inc* [2006] All E.R. (D) 208 (Jan).
7.This expression has an autonomous meaning and should not be interpreted simply as referring to the national law of one or other Convention State (*Kalfelis v Bankhaus Schroder, Mßnchmeyer, Hengst & Co* [1988] E.C.R. 5565).
8.*Handelskwekerij G J Bier BV v Mines de Potasse d "Alsace SA* [1976] E.C.R. 1735, ECJ.
9.*ibid.*
10*Dumez France v Hessisch* e *Landesbank* [1990] E.C.R. 49, ECJ. See also *Domicrest Ltd v Swiss Bank Corp* [1998] 3 All E.R. 577, *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205 and *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm).
11. See also *Marinari v Lloyds Bank Plc* (Case C-364/93) [1996] Q.B. 217.
12.[1995] 2 A.C. 18.
13.*Handelswekerij GJ Bier BV v Mines de Potasse D "Alsace SA,* above fn.8.
14.*Shevill v Presse Alliance SA* [1995] 2 A.C. 18, ECJ.
15.*Domicrest Ltd v Swiss Bank Corp,* above fn.10.
16.See e.g. *IBS Technologies (PVT) Ltd v APM Technologies SA,* Ch.D, April 7, 2003, unreported, regarding the application of *Shevill* to copyright.
17.*Kalfelis v Bankhaus Schroder, Mßnchmeyer, Hengst & Co,* above fn.7.
18.*Owusu v Jackson,* above fn.6.
19.Assuming that factors such as *lis pendens* (Art. 21) are absent.
20.*Tesam Distribution Ltd v Schuh Mode Team GmbH* [1990] I.L.Pr. 149, CA; *Mßlnycke AB v Procter & Gamble Ltd* [1992] 1 W.L.R. 1112, CA.
21.*ABKCO Music & Records Inc v Music Collection International Ltd* [1995] R.P.C. 657, CA.
22.[2003] I.L. Pr. 17. The aspect of the decision dealing with the merits is discussed below.
23.[2001] F.S.R. 20.

24.[2001] EWCA Civ 721.
25.[2002] I.P. & T. 203, Ch.D.
26.Above fn.22.
27.[2002] S.C.L.R. 977.
28.See, e.g. *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB), in which Eady J. stated that it was now "well settled " that "an internet publication takes place in any jurisdiction where the relevant words are read or downloaded ".
29.This is the same result as for offline defamation cases. For defamation, the applicable law is determined according to English common law principles, unaffected by the Private International Law (Miscellaneous Provisions) Act 1995 (which excludes defamation from its scope). According to those principles, if the tort is found to have been committed in this country then it is a domestic tort and only English law is relevant. In traditional defamation cases this is very likely since they will usually be founded on evidence of actual publication by circulation of physical copies in this jurisdiction. See, for instance, *Berezovsky v Michaels* (below); and see also *Chadha v Dow Jones & Co, Inc* [1999] E.M.L.R. 724.
30.Above fn.12.
31.*Shevill v Presse Alliance* [1996] 3 All E.R. 929.
32.The presumption of damage is theoretically not irrebuttable, albeit before the coming into force of the Human Rights Act 1998 on October 1, 2000 it was so in practice (*Dow Jones & Co, Inc v Jameel* [2005] EWCA Civ 75).
33. "Authorisation " is one aspect of the "unrespectable complexity " of causation rules in defamation law (per Laws L.J. in *McManus v Beckham* [2002] EWCA Civ 939). Competing causation formulations discussed in *McManus* include "natural and probable result " and "reasonably foreseeable ".
34.[2004] EWHC 168 (QB); on appeal [2004] EWCA Civ 1329.
35.For a full discussion of the appropriate formulation see *McManus v Beckham,* above fn.33.
36.[2001] V.S.C. 305; on appeal, [2002] H.C.A. 56.
37. "? the *dicta* in *Gutnick ?* emphasise the Internet publisher's very choice of a ubiquitous medium. " (*King v Lewis, ibid.* , [31]). See also, in New Zealand, *University of Newlands v Nationwide News Pty* (2002) 210 C.L.R. 575; [2005] C.T.L.R. 2 N-17.
38.[2004] EWHC 2422 (QB).
39.*ibid.,* Waller L.J., [34] Laws L.J., [39], [42].
40.*ibid.,* Waller L.J., [33].
41.The author discusses below the misconception that a targeting test necessarily involves ascertaining the subjective intention of the publisher.
42.At trial, however, the claimant will be required to prove substantial publication within the jurisdiction, whether by direct evidence or by inference from the surrounding circumstances (*Al Amoudi v Brisard* [2006] EWHC 1062 (QB)).
43.*Dow Jones v Jameel,* above fn.32.
44.The technical mechanism involved is that a dedicated server at the (normally) corporate receiving end processes the incoming emails and forwards them immediately to the individual recipient's Blackberry device, where they are stored. This contrasts with the traditional email or webmail process, where the emails remain stored on the corporate or ISP server until the individual recipient accesses the email account and downloads the new emails to their local machine. The traditional email process can vary in details. For instance on a corporate network the list of emails visible in the inbox is likely to be updated in real time, whereas for remote access to the corporate email server, or for an account with an ISP, both the list and the emails themselves have to be downloaded by the user.
45.See above fn.37.
46.[2000] 2 All E.R. 986, HL. This was not a Brussels Convention case.
47.*Dow Jones & Co, Inc. v Jameel,* above fn.32.
48.[2004] EWHC 168 (QB).
49.See above fn.23.
50.*800-FLOWERS* *800-FLOWERS Trade Mark* [2000] F.S.R. 697.
51.*Calder v Jones* 465 U.S. 783 (1984); *Young v New Haven Advocate* F.3d, No.01-2340, 2002 WL 31780988 (4th Cir., December 13, 2002); *Revell v Lidov* (5th Cir., No.01-10521, December 31, 2002). For a discussion of targeting tests generally, see G. J. H. Smith, "Directing and Targeting--the Answer to the Internet's Jurisdiction Problems? " (2004) 5 *Computer Law Review International* 145.
52.Para.4.30.
53.Para.4.54.
54.COM/2003/0427 final, July 22, 2003.
55.Implemented by the Civil Jurisdiction and Judgments Act 1982.
56.Implemented by the Contracts (Applicable Law) Act 1990.
57.Art.1.
58.See, however, the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] O.J. L299/62-70.
59.Art.23(5).
60.COM (1999) 0348 dated July 14, 1999.
61.*Hansard,* November 29, 1999, col. 48 (House of Commons).
62.*http://register.consilium.eu.int.*
63.[2002] EWCA Civ 1880 (CA) at [24].

64.Proposal for a Regulation of the European Parliament and Council on the law applicable to contractual obligations (Rome I) COM (2005) 650, December 15, 2005.
65.For a more detailed discussion of this approach, see Smith, above fn.51.
66.*Rayner v Davies* [2002] EWCA Civ 1880 (CA) per Waller L.J. at [24].

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Catherine Barnard[*]

The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?

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I. Introduction

When negotiating the IGC mandate for the Lisbon Treaty, one of the UK government's much vaunted 'red lines' was to protect the UK from the consequences in the change of status of the Charter of Fundamental Rights.[7] The principal and most public demonstration of this desire was the adoption of what became Protocol 7 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Under Article 51 TEU-L, the Protocol will have the same legal value as the Treaties.

The status of the UK / Poland Protocol is much contested. I will argue that, for Eurosceptic audiences, the UK government has been willing to let it be referred to as an opt-out. Yet for more informed audiences the UK government insists that it is not an opt-out but merely a clarification. I will consider the force of these arguments and suggest that the reality may lie somewhere in between. However, I begin by placing the Protocol into the broader context of the incorporation of the Charter into the Treaty, before examining the content of the Protocol.

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[*] I am grateful to the conference participants for their very useful comments and to Michael Dougan and *Eleanor Spaventa* for subsequent discussion and observations.

[7] *Tony Blair* MP, then British Prime Minster, described these red lines to the Liaison Committee of the 18 June 2007 (reported in the House of Commons' European Scrutiny Committee's 35th Report, para. 52) in the following terms: "First we will not accept a treaty that allows the charter of fundamental rights to change UK law in any way. Secondly, we will not agree to something which displaces the role of British foreign policy and our foreign minister. Thirdly, we will not agree to give up our ability to control our common law and judicial and police system. Fourthly, we will not agree to anything that moves to qualified-majority voting, something that can have a big say in our own tax and benefits system".

II. The Lisbon Treaty and the Charter

A. Incorporation of the Charter into the Treaty

The Charter,[8] first solemnly proclaimed in December 2000, was intended to make existing fundamental rights more visible[9] rather than to create new rights.[10] A large number of the rights are derived from the European Convention on Human Rights, the Community Social Charter 1989 and the Council of Europe's Social Charter 1961.[11] Others are derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter is therefore intended to codify existing rights[12] – to act as a showcase for those rights. As *Dashwood* puts it, the Charter is not, in itself, a source of rights but simply a record of rights that receive protection within the Union, from one source or another.[13]

Article 6(1) TEU-L gives legal effect to the Charter of Fundamental Rights 2000 as amended during the Constitutional Treaty negotiations.[14] The first paragraph of Article 6(1) provides:

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

Thus, instead of the Charter being incorporated as a whole into the text of the Lisbon Treaty, as it had been in the Constitutional Treaty, it is incorporated by reference. Nevertheless, it has the "same legal value as the Treaties". In other words, it will form part of the primary law of the EU. The consequence of this is that its provisions are potentially enforceable (i.e. directly effective) in the national courts, when Community law issues are at stake, as well as before the European Court of Justice. This has given rise to a number of worries, especially in the UK.

The UK was particularly concerned that social and economic rights were included in the same document as civil and political rights,[15] reasoning that while civil and political rights are essentially negative and do not require state resources, economic and social rights are positive and do. The UK has therefore been most reluctant to talk about economic and social *rights*, preferring instead the word 'principles' which the UK considers not to be directly effective.

The crude dichotomy between civil and political rights on the one hand, and economic and social rights on the other, has been challenged.[16] It did, nevertheless, influence the drafting of the Charter. While traditional civil and political rights tend to be drafted in the language of rights (e.g. Article 2 "Everyone has the *right* to life",

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8 OJ [2007] C303/1. On the background to the Charter, see *de Búrca*, (2001); *Lenaerts / de Smijter* (2001).

9 The Cologne Presidency conclusions of June 1999 said (http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/57886.pdf, para. 44) "The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.' Annex IV adds "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens".

10 See, e.g. the Preamble to the Protocol "WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles".

11 5th Recital to the Preamble to the Charter 2007. Art. 6(2) TEU-L gives the EU the power to accede to the ECHR. It adds "Such accession shall not affect the Union's competences as defined in the Treaties".

12 See also the Preamble to the Protocol "WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles".

13 'The paper tiger that is no threat to Britain's fundamental rights' *Parliamentary Brief*, 10 March 2008. http://www.thepolitician.org/ articles/the-paper-tiger-646.html.

14 Amendments were made to the horizontal provisions, notably the addition of Arts 52(4) and (5). The revised Charter can be found in OJ [2007] C 303/1.

15 See Cologne Presidency Conclusions 1999, Annex IV (http://ue.eu. int/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm) "In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union".' For discussion of the difficulty of equating the two groups of rights, see *Goldsmith* (2001), 1212.

16 For a discussion of the distinction between the two groups of rights, see *Kenner* (2003).

Article 11 "Everyone has the *right* to freedom of expression"), economic and social rights, found predominantly in the Solidarity Title, tend to be drafted in the language of principles (e.g. Article 25 "The Union *recognises and respects* the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life").[17] As we have seen, principles are not intended to be directly effective. Rather, they are "factors to be taken into account by courts when interpreting legislation but which do not in and of themselves create enforceable rights".[18]

To make this point abundantly clear, the UK was behind the move to amend the horizontal provisions of the Charter at the time of the Constitutional Treaty and these changes were maintained at Lisbon. A new Article 52(5) was introduced which says that the provisions of the Charter containing principles "may be implemented by legislative and executive acts" of the Union and the Member States when implementing Union law. Such provisions "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality". In other words principles will not be directly effective in the national courts.

However, the stumbling block remains that the Charter does not identify which provisions contain rights and which principles.[19] The revised explanations[20] were intended to address this problem. They were "drawn up as a way of providing guidance in the interpretation of this Charter" and must be "given due regard by the courts of the Union and of the Member States".[21] The explanations give examples of principles, including Article 25 on the rights of the elderly, Article 26 on the integration of persons with disabilities and Article 37 on environmental protection. The explanations also state that some articles may contain elements of rights and principles, such as Article 23 on equality between men and women, Article 33 on family and professional life and Article 34 on social security and social assistance. Therefore, some social and economic rights will not be mere principles but may give rise to directly effective rights.[22] Unfortunately for the UK government, two of the provisions in the Solidarity Title which cause British business most concern, Article 28 on collective agreements and collective action and Article 30 on unfair dismissal (which are considered in detail below), appear to be drafted in terms of rights, not principles, and so are potentially directly effective.[23] As we shall see, the need to address this perceived problem influenced the drafting of the Protocol. However, first we need to consider the scope of application of the Charter.

B. To whom / what does the Charter Apply?

Article 51(1) of the Charter says the Charter applies to (1) to the institutions, bodies, offices and agencies of the Union, with due regard for the principle of subsidiarity; and (2) to the Member States but only when they are implementing Union law, a point emphasized by the Czech Republic in its Declaration in the Charter. This says "The Czech Republic stresses that [the Charter's] provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law".[24] In other words, purely national issues will not be affected by the Charter.

The meaning of Article 51(1) is clarified in the explanations. These make clear that Article 51 "seeks to establish clearly that the Charter applies *primarily* to the institutions and bodies of the Union, in compliance with the principle of subsidiarity".[25] The institutions include the European Court of Justice.

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17 For a full discussion, see *Hepple* (2005), 35.

18 House of Lords Constitution Committee, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution*, 6th Report, 2007-8, HL Paper 84, paras. 60-61. See also *Goldsmith* (2001), 1212.

19 See also House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, paras. 5.15, 5.18-5.20.

20 Explanations relating to the Charter of Fundamental Rights OJ [2007] C303/17.

21 Art. 52(7) of the Charter. See also Art. 6(1), third para TEU-L "The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

22 See, e.g. Article 31 "Every worker has the right to working conditions which respect his or her health, safety and dignity".

23 See,. Case C-438/05 *International Transport Workers' Federation* v. *Viking Line ABP* [2007] ECR I-000, para. 44.

24 Declaration 53, first paragraph. See also Art. 4(1) TEU-L and Art. 5(2) second sentence.

25 Emphasis added. The institutions already consider themselves bound by the Charter: Commission Communication, *Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals*, COM(2005) 172. See also House of Lords EU Select Committee: *Human Rights Proofing EU Legislation*, 16th Report of Session 2005-06, HL Paper 67.

However, the explanations add "As regards the Member States,[26] it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law" (citing *Wachauf*,[27] *ERT*[28] and *Annibaldi*[29]). Thus, at first sight the explanations seem wider than the Charter due to the reference to "the scope of Union law" which would include situations of Member States derogating from Community law as well implementing it. However, the remaining text of the explanations talks of the application of the Charter to states only when *implementing* Union law. Even if the explanations are wider, it is unlikely that they will be used to contradict the express wording of the Charter since the explanations are merely guidance on the interpretation of the Charter.

The Charter will therefore apply to states only when implementing Community law (*quaere* as to the meaning of implementing) and not when they are derogating from it. Does this, in fact, matter? Probably not as much as would first appear, due to the role of general principles of European Community law. General principles of law, recognised by the European Court of Justice as binding on the Community institutions and the Member States when acting in the field of Community law, are derived from the Constitutional traditions of the Member States and international treaties.[30] It has long been established that fundamental rights are one of the general principles of law.[31] This point has been confirmed by Article 6(3) TEU-L:

> "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Traditionally, general principles of law have been used to challenge European Community legislative acts. When that challenge is based on fundamental rights, the challenge is usually unsuccessful on the facts.[32] However, the European Court of Justice is more willing to strike down Community *administrative* measures on the basis that they breach fundamental human rights.[33]

Increasingly, fundamental rights, as general principles of law, have also been used to limit Member State action[34] or to allow Member States to restrict free movement.[35] Therefore, due to the existence of the general principles of law, when acting in the sphere of Community law (otherwise than when implementing Community law to which the Charter will apply), Member States will still be required to respect – not the Charter – but the general principles of law which include human rights, many of which, like the Charter itself, will be derived from international treaties, including the European Convention of Human Rights.[36] So much for visibility and clarification.

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[26] The explanation adds "Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law".

[27] Case 5/88 *Wachauf* [1989] ECR 2609.

[28] Case C-260/89 *ERT* [1991] ECR I-2925.

[29] Case C-309/96 *Annibaldi* [1997] ECR I-7493.

[30] See generally, *Tridimas* (2006).

[31] See eg Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH* v *Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4.

[32] Case C-377/98 *Netherlands* v. *Council* (Biotechnology Directive) [2001] ECR I-7079.

[33] Case C-404/92P *X v Commission* [1994] ECR I-4737.

[34] E.g. Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-109/01 *Akrich* [2003] ECR I-9607.

[35] E.g. Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria* [2003] ECR I-5659.

[36] Art. 6(2) TEU-L gives the EU the power to accede to the ECHR. Declaration 2 adds: "The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention".

C. COMPETENCE

During its original drafting, a number of states were concerned that the Charter might be used as a Trojan horse to expand the EC's competence to legislate. The horizontal provisions found in Title VII of the Charter try to reassure the Member States. The second sentence of Article 51(1) provides:

> "They [the Unions institutions, bodies, offices and agencies as well as the Member Sates] shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties".

In addition, Article 51(2) provides:

> "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".
>
> This is reinforced by the second paragraph of Article 6(1) TEU-L which says:[37]
>
> "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties".

The accompanying explanations to the Charter add that Article 51(2) and the second sentence of Article 51(1) confirm that "the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union".[38]

Clearly, this careful ring-fencing of competence in Title VII of the Charter had satisfied the UK since there is no reference to it in Protocol No. 7. The Czech Republic and Poland were less certain. In its Declaration on the Charter, the Czech Republic emphasises:

> "… that the Charter does not extend the field of application of Union law and does not establish any new power for the Union. It does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field".[39]

Poland is also keen to ensure that the Charter does not curtail its right to legislate. Its Declaration says:

> "The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity".

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[37] See also Declaration 1 of the Final Act of the Treaty of Lisbon: "The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".

[38] The explanations add: "Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers".

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (… C-249/96 *Grant* [1998] ECR I-621, paragraph 45 …). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be "implementation of Union law" (within the meaning of paragraph 1 and the above-mentioned case-law).

[39] Declaration 53, second paragraph.

Given these Declarations, what is the nature and function of the UK / Poland Protocol? In order to make an assessment, we begin by examining the provisions of the Protocol.

III. The UK / Poland Protocol

A. ARTICLE 1(1): COMPATIBILITY

The Protocol offers protection to Poland and the UK in three ways. First, it addresses the question of litigants raising the Charter before national courts or the ECJ to challenge the compatibility of national law with Charter rights. According to Article 1(1):

> "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".

There are three possible readings of this provision. The first, and most natural, focuses on the phrase "The Charter does not *extend the ability* of the ECJ or any Polish or British court …". This suggests that the Charter does not give these courts greater powers than they already have under Community law when national law is implementing Community law. So, at a minimum, where the Charter incorporates a right that has already been recognised by the ECJ - for example, the right to freedom of expression[40] - British and Polish courts, and the ECJ when acting in the course of Article 226 proceedings, can rely on the Charter to declare national law inconsistent with that right where national law is implementing Community law. However, the British and Polish courts cannot apply the Charter to situations governed purely by national law.

Therefore, if this first reading is correct then Article 1(1) merely confirms Article 51(1) and (2) of the Charter and emphasises that the Charter is not a universal bill of rights. It therefore serves as a reminder to national courts that they should apply the Charter only to national law when implementing Community law and not to issues of purely internal law. This helped to address UK concerns about so-called "competence creep" where national judges might decide to apply the Charter to situations governed purely by national law.

A second possible reading of Article 1(1) is that if the Charter goes further than the fundamental rights already recognised as general principles of law – a question which itself is highly contested[41] – then these "new" provisions cannot be used by the British and Polish courts and the ECJ to review UK and Polish legislation.

The third, and least likely, reading of Article 1(1) is that it is intended to prevent the Charter from being used to challenge national law implementing Community law. If this is the case then the UK and Poland are in fact derogating from the Charter and it becomes a true opt-out. However, the UK government does not claim the Protocol is a full opt-out (see below) and the recitals to the Protocol appear to indicate that there is no change intended to the *status quo*. And, even if the third reading is correct, there would be nothing to prevent the ECJ / national courts avoiding the Protocol's limitations by relying on general principles of law, instead of the Charter, to challenge national rules in the scope of EC Law.

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[40] Case C-260/89 *ERT* [1991] ECR I-2925, Case C–368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH ('Familiapress')* v. *Heinrich Bauer Verlag* [1997] ECR I–3689.

[41] See the discussion in EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, para. 5.37ff which considers whether Article 8 on protection of personal data and Article 13 on freedom of the arts and sciences go further than the pre-existing general principles of law.

Whatever the ultimate interpretation of Article 1(1), nothing in the Protocol will prevent British courts from continuing to refer to the Charter in identifying the scope of fundamental rights,[42] drawing on the Charter in the same way as they draw on many international human rights instruments, when interpreting the content of fundamental rights.[43]

B. ARTICLE 1(2): NO JUSTICIABLE RIGHTS IN TITLE IV

1. THE CONTENT OF ARTICLE 1(2)

The second way that Poland and the UK are protected by the Protocol can be found in Article 1(2). It provides:

> "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law".[44]

Title IV is the Solidarity Title of the Charter. As we have seen, the UK thought that the content of this Title related to *principles*, not rights, and so the question of their direct effectiveness would not arise. However, as we have also seen, some of the provisions in the Solidarity Title, in particular Articles 28 and 30 appear to be drafted in terms of rights, or at least a mixture of right and principles. Article 1(2) therefore does a belt and braces job, making sure ("for the avoidance of doubt") that if any of the provisions of Title IV are in fact classed as rights they are not directly effective in the UK and Poland. In this respect the Protocol does appear to contain a genuine opt-out for the UK and Poland. This opt-out is, however, subject to the (rather obvious) caveat that Title IV rights are not justiciable except in so far as Poland or the UK has provided for such rights in its national law. Presumably this means that national rules on strike action and dismissal will continue to apply but could be interpreted, *Marleasing*-style, in the light of the Charter.

We turn now to consider the two Articles in Title IV of the Charter most likely to be affected by this Protocol, Articles 28 and 30, both sensitive provisions in the UK.

2. ARTICLE 28 OF THE CHARTER

(a) Article 28 and the Protocol

Article 28 provides:

> "Workers and employers, or their respective organisations, have, *in accordance with Union law and national laws and practices*, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, *including strike action*".[45]

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42 See for example *R v East Sussex County Council and the Disability Rights Commission ex parte A, B, X & Y* [2003] EHC 167 (Admin) per Munby J at paragraph 73: "the Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention".

43 Conclusions of House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, para. 5.111.

44 See also the Preamble to the Protocol "REAFFIRMING that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter".

45 The Explanations add: "This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. … The modalities and limits for the exercise of collective action, including strike action, come under national

The UK, with its absence of a written constitution, has no '*right* to strike'. Instead, trade unions enjoy only an *immunity* from being sued in tort where certain conditions are satisfied (see below). From a trade union perspective, a right-based system, as typically found on the Continent, is more favourable because strikes are presumed *lawful* and so the state has to justify limiting the 'right'. By contrast, in an immunity based system, strikes are presumed *unlawful* and trade unions have to justify why they are going on strike by fitting themselves into the immunity provided by the statute. Given the structural differences in approach between the common law and Continental systems, the UK government was concerned about the EU introducing a 'right' to strike in the UK via the backdoor of the Charter. Further, successive Conservative governments in the UK have, since 1979, significantly curtailed the trade unions' ability to call their members out on strike. The Labour government has maintained this stance,[46] thereby helping to ensure a flexible labour market in the UK.[47] This background helps to explain why the UK wanted an opt-out from Article 28 if Article 28 does indeed enshrine a *right* to strike (as opposed to a principle on collective action). Article 1(2) appears to deliver this.

Yet, Article 1(2) might be less significant in practice than would first appear. This can be demonstrated by examining the following examples. First, consider the situation of the police in the UK who are prohibited, by statute, from taking industrial action. They might try to rely on Article 28 to argue that they should be able to strike. Such a claim will fail because the matter falls outside the scope of the Charter since the UK is not implementing Community law, as required by Article 51(1).

Second, consider the situation of a dock workers' trade union calling its members out on strike to protest at the health and safety implications of dangerous waste being imported into a British dock from another Member State. As a result, the waste cannot enter the UK and the importers allege a breach of Article 28 EC by the trade unions. The trade union wishes to invoke Article 28 of the Charter in its defence. It cannot do so because, as the discussion in heading II.B above indicates, the Charter does not apply where states/trade unions are derogating from EC Law. Article 1(2) of the Protocol is thus not relevant in this situation.

Third, consider a Directive that bans strike action in sensitive sectors, such as energy, which is duly implemented in the UK. The trade unions might wish to challenge the implementing measure in the UK as contravening Article 28. Here the Protocol would have some effect by denying the trade unions a claim in the national courts. However, assuming they had locus standi, the trade unions could have challenged the original Directive directly before the ECJ under Article 230, relying on the right to strike as a general principle of law as the ground of challenge. They could also argue that the Community had no power to adopt such a measure in the first place, due to the exclusion of competence under Article 137(5).

So it would only be in the most exceptional situations that the UK government would need to invoke Article 1(2). Furthermore, Article 28 of the Charter may be less significant to trade unions than they had first anticipated due to the Court of Justice's ruling in *Viking*.

(b) Viking *and the UK*

The Charter tried to limit the scope of the right in Article 28 by referring to taking collective action in accordance with (1) Union law and (2) national laws and practices.[48] At first it was thought that the reference to national law and practices would be the greatest limit on the right to strike. In the UK, national law grants trade unions immunity from liability in tort if the so-called 'golden formula' is satisfied i.e. the collective action is taken "in contemplation or furtherance of a trade dispute".[49] A 'trade dispute' is defined in s.244(1) Trade Union Labour Relations (Consolidation) Act 1992 as a dispute between "workers and their employer which relates wholly or mainly" to one or more of the following:

a. Terms and conditions of employment, or physical working conditions
b. Engagement or non-engagement of workers, termination or suspension of employment or duties of one or more workers

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laws and practices, including the question of whether it may be carried out in parallel in several Member States".

46 See e.g. the Prime Minister's Foreword to the *Fairness at Work White Paper*, Cm3968 (1997): "There will be no going back. The days of strikes without ballots, mass picketing, closed shops and secondary action are over".

47 CBI's evidence to House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, para.5.32.

48 See also Art. 52(6) of the Charter: "Full account shall be taken of national laws and practices as specified in this Charter".

49 S.219 TULR(C)A 1992.

c. Allocation of work or job duties between workers or groups of workers
d. Matters of discipline
e. A worker's membership / non-membership of a trade union
f. Facilities for officials of a trade union
g. Trade union recognition, negotiation and consultation agreements or machinery.

Further, courts will check whether the immunity has been lost because the strike is for a prohibited reason (e.g. secondary industrial action) or because the relevant procedures have not been complied with (e.g. failure to ballot the relevant workers, failure to give employers the correct notice).

While national law, in the UK at least, imposes significant restrictions on strike action, the *Viking* case[50] suggests that *Union* law might provide the greatest limit on the right to take collective action in the future. *Viking* concerned a Finnish company that wanted to reflag its vessel, the *Rosella* which traded the loss-making route between Helsinki and Tallinn in Estonia, under the Estonian flag so that Viking could man the ship with an Estonian crew to be paid considerably less than the existing Finnish crew. The International Transport Workers' Federation (ITF) had been running a Flag of Convenience (FOC) campaign trying to stop ship owners from taking just such action. It therefore told its affiliates to boycott the *Rosella* and to take other solidarity industrial action against both the *Rosella* and other Viking vessels. The Finnish Seaman's Union (FSU) also threatened strike action. Viking therefore sought an injunction in the English High Court,[51] restraining the ITF and the FSU from breaching, *inter alia*, Article 43 EC.

The first question was whether Community law applied at all. For the ECJ the answer was clear: collective action falls in principle "within the scope of Article 43".[52] The Court dismissed the argument that just because Article 137(5) excluded Community competence in respect of, *inter alia*, the right to strike, strike action as a whole fell outside the scope of Community law.[53] The Court also rejected the argument that fundamental rights fell outside Community law.[54] It then appeared to make a significant concession: it recognised the right to strike as a fundamental principle of Community law for the first time. It said the right to take collective action, including the right to strike, was recognised both by various international instruments which the Member States have signed or co-operated in,[55] and the Charter of Fundamental Rights 2000.[56] It then said:

> "… the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures".[57]

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50 Case C-438/05 *International Transport Workers' Federation* v. *Viking Line ABP* [2007] ECR I-000.

51 ITF had its base in London and so jurisdiction was established pursuant to the Brussels Regulation 44/2001 OJ [2001] L12/1.

52 Para. 37.

53 Paras. 39-41.

54 Citing C-112/00 *Schmidberger* [2003] ECR I-5659, para. 77, Case C-36/02 *Omega* [2004] ECR I-9609, para. 36.

55 Citing the European Social Charter 1961 – to which express reference is made in Article 136 EC – and ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers 1989.

56 Para. 43.

57 Para. 44. Case C–341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-000, paras. 90-92.

However, this observation came with a sting in its tail: the right to take industrial action is not absolute but subject to "certain restrictions" under Community law and national law and practices.[58] *Viking* lays down the Community restrictions: collective action would be justified only if it were established that the jobs or conditions of employment at issue were jeopardised or under serious threat[59] and the action was proportionate. Proportionality meant in this context whether FSU had other means at its disposal which were "less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action".[60] Thus, the Court of Justice appears to suggest that industrial action should be the last resort; and the British courts would have to verify whether the FSU had exhausted all other avenues under Finnish law before going on strike. Since the case has now been settled we shall never have the opportunity of hearing what the Court of Appeal thought on these matters.

It could be argued that the effect of the *Viking* judgment is to narrow still further the immunity granted to trade unions by UK law. As we have seen, according to *Viking,* trade unions can call their members out on strike only if the jobs of their members or the terms and conditions of employment are seriously jeopardised. While this might cover headings (a) and (b) of s.244 TULR(C)A, headings (c)-(g) appear to fall outside the ECJ's definition. Moreover, the proportionality test in these cases may well mean that trade unions have to carry on negotiating longer than before, especially when a well-advised employer holds out the prospect that there might be a settlement just round the corner. How will trade unions know if they have "exhausted those means"?

If this analysis is correct, it may well mean that the reference in Article 28 of the Charter to limits laid down by *Union* law is, in the context of transnational disputes, a more powerful constraint on the right to strike than the limits laid down by national law. As the House of Lords Select Committee noted, the Charter "seemed to be employed by the Court more as a brake than an accelerator in these cases".[61] Little did the UK government expect that it would have the ECJ as an ally not a foe in its desire to draw the teeth of Article 28 of the Charter. The *Viking* litigation has thus significantly reduced the need for Article 1(2) of the Protocol.

3. ARTICLE 30

The other provision which caused the UK concern was Article 30. This provides:

> "Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices".

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58 Para. 44.

59 Para. 81.

60 Para. 87.

61 House of Lords Constitution Committee, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution*, 6th Report, 2007-8, HL Paper 84, para.5.35.

UK business was concerned that this gave individuals the right to protection against unfair dismissal, a right that had not previously been recognised by the Court of Justice. To an extent the UK's concerns appear unfounded: the UK already has legislation governing dismissal, extensive case law (which, through the application of the 'band of reasonable responses' test,[62] tends to favour employers) and important guidance offered by the Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice. Article 2, the third limb of protection for Poland and the UK in the Protocol, was included to ensure that such rules and practices would continue to govern Article 30 of the Charter as well as the other rights in the Charter which refer to national laws and practices.[63] It provides:

> "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom".

This suggests that the Charter goes no further than pre-existing national law. British and Polish employers can breathe a sigh of relief.

4. CONCLUSION

There is a perplexing irony about the UK and Polish position under Article 1(2) of the Charter in particular. The UK has a labour government. The Labour party's origins lie in the workers' movement. Yet it is a Labour government which has highlighted the Solidarity Title as problematic. This irony is more acute in Poland where the Solidarity movement was so influential in challenging the Communist regime. This point was admitted by the (new) Polish government elected between the conclusion of the IGC in October 2007 and finalising the Treaty of Lisbon in December 2007. Its Declaration on the Protocol says:[64]

> "Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union".

This Declaration appears to undermine significantly any potential use of the Article 1(2) 'opt-out' in respect of Poland. In truth, as this Declaration shows, Poland's concerns are not with social and labour rights. Poland's real fears lie with subjects such as gay marriage and abortion but the Protocol (and the Charter) do not touch on these.

IV. Is the Protocol an Opt-out?

In the previous section we considered the content of the Protocol. Depending on the reading of Article 1 of the Protocol, it may contain elements of opt-out for the UK and Poland, particularly in respect of Title IV of the Charter, although most of the Protocol is merely clarification. The Preamble to the Protocol makes this point clear. It says the purpose of the Protocol is to "*clarify* certain aspects of the application of the Charter" (emphasis added). Therefore, outside the rights in Title IV, the Charter will apply to the UK and Poland. They will continue to have to respect Charter rights under Article 6(1) TEU-L when they are implementing EC law, a point noted by the Preamble to Protocol:

"WHEREAS the Charter is to be applied in strict accordance with the provisions of the aforementioned

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62 *Iceland Frozen Foods v. Jones* [1982] IRLR 439, 442 (EAT) "in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what the right course to adopt for that of the employer ... in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another might quite easily take another; .. the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted". Confirmed in *Post Office* v. *Foley*; *Midland Bank plc* v. *Madden* [2000] IRLR 827 (Court of Appeal).

63 See also Article 52(6) of the Charter.

64 Declaration 62. See *Dougan* (2008), 669.

Article 6 and Title VII of the Charter itself;

WHEREAS the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article".

However, there is a remarkable feature of the public discourse in the UK about this Protocol. On the one hand there is a general perception that the Protocol contains a full opt-out for the UK (and Poland) from the Charter *as a whole.* On the other, the British government, in its public pronouncements to official *fora* (e.g. Select Committees), suggests the opposite.

In fact, there appears to be a rather complex political game at play. To a predominantly Eurosceptic audience, the more UK opt-outs there were to the Lisbon Treaty the better (although this does not answer the question why, if an 'opt-out' to the Charter was necessary at Lisbon, an opt-out had not been negotiated from the Constitutional Treaty[65]). The perception of an opt-out, and certainly the existence of the Protocol, helped the UK government make the case that the Lisbon Treaty was different to the Constitutional Treaty and so there was no need to have a referendum on the Lisbon Treaty (*Tony Blair* had made a manifesto commitment in 2005 for a referendum on the Constitutional Treaty, a referendum which was highly likely to result in a "no" vote).

So, it was very helpful to the UK government that the Eurosceptic press in the UK, at least initially, was willing to accept the line that there was now an opt-out to the Charter of Fundamental Rights. For example, in June 2007 the DAILY MAIL said: "Mr Blair's final appearance on the European stage produced a clear negotiating success as Britain won a legally-binding opt-out from the controversial charter".[66] The NEWS OF THE WORLD said "EU chiefs have agreed to give Britain an opt-out on the Charter of Fundamental Rights which could bring in new laws which would destroy jobs".[67] The DAILY EXPRESS also repeated *Tony Blair's* views that he has "already signed up to the charter in principle, but insists he has secured an opt-out that means it won't apply here".[68] The SUNDAY EXPRESS echoed similar sentiments: "Under the treaty, the charter will be legally binding on all EU states, but the UK has an opt-out designed to limit its effect on our own national laws". It did, however, add that "Judges at the ECJ insisted that the so-called 'safeguards' will not prevent the charter from altering national law and it will be the ECJ's judges who would ultimately decide on how to interpret the charter".[69]

The SUNDAY EXPRESS' story, only a couple of days after the Brussels European Council in June 2007, shows just how quickly the mood began to change. By mid-July 2007 THE SUN was already saying "Opt-out a 'sham'".[70] As the Treaty was coming up to be signed, THE SUN said:[71] "Mr *Brown* insists Britain has won an opt-out [from the Charter]. But Labour MPs have warned the opt-out is meaningless". The SUNDAY EXPRESS also noted that "Critics claim Government opt-outs will not work and that this charter of 50 rights will be imposed by the European Court of Justice through the 'back door', affecting policies on abortion, immigration and public services and force an end to the ban on secondary picketing in industrial disputes".[72]

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65 *Craig* (2008) 163.

66 *B. Brogan*, Deal but at What price?, DAILY MAIL, 23 June 2007.

67 *J. Lyons*, EU Traitor, THE NEWS OF THE WORLD, 24 June 2007.

68 Q&A, SUNDAY EXPRESS, 24 June 2007

69 *Julia Hartley-Brewer* and *Jason Groves*, EU Deal Unravels within Hours, SUNDAY EXPRESS, 24 June 2007.

70 13 July 2007 and 29 August 2007

71 *George Pascoe-Watson*, Two words that could change the shape of Britain forever, THE SUN, 12 December 2007.

72 How Brussels will get its way, SUNDAY EXPRESS, 21 October 2007.

While, on the one hand, the UK government was trying to placate Eurosceptics in the UK, on the other the UK did not want to upset its partners, particularly other Member States to whom the Protocol was presented by the UK very late in the day. It also did not want to upset the trade unions who threatened to throw their weight behind a campaign for a referendum on the treaty.[73] So the government offered reassurances to 'informed' audiences that the Protocol was merely clarificatory and not an opt-out.[74] For example, in evidence to the House of Lords Select Committee, the Department of Work and Pensions (DWP) said categorically, "The UK Protocol does not constitute an 'opt-out'. It puts beyond doubt the legal position that nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law".[75] *Jack Straw*, Secretary of State for Justice, was even more robust. He said the Protocol was intended to reflect the terms of the Charter's horizontal articles themselves and puts beyond doubt what should have been obvious from other provisions.[76]

Alan Dashwood, who has advised the UK government extensively on the Constitutional Treaty, shares *Jack Straw*'s view. He wrote that the function of the Protocol was "interpretative – to state unequivocally, and with the force of primary law, what ought to be obvious from a reading of the Charter in the light of the horizontal provisions and of the official explanations".[77]

It is, however, surprising that these reassurances emphasise Article 1(1) of the Charter and the question of competence – and the fact that the Charter does not extend it – rather than the question of enforceability in Article 1(2)..

The extent of the government's political game was revealed when *Jim Murphy MP*, Minister for Europe, wrote to the House of Commons' European scrutiny committee:[78]

"The UK-specific Protocol which the Government secured is not an 'opt-out' from the Charter. Rather, the Protocol clarifies the effect the Charter will have in the UK".

The right wing press responded angrily. For example, the DAILY MAIL said "As the Scrutiny Committee forcibly pointed out, the Government's opt-outs do not stand up to even cursory

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73 "In the face of the prospect that they [trade unions] will throw their weight behind the campaign for a referendum on the treaty, Mr Brown has now said that there was no 'opt-out' after all. Instead his Government will insist that the charter will create no new rights anywhere across the EU": *S. Cable*, Brown olive branch to unions over EU treaty, DAILY MAIL, 7 September 2007. See also *J. Goves* Now the unions call for EU referendum; Fury at PM's bid to sign away the right to strike, SUNDAY EXPRESS, 9 Sept. 2007.

74 The British government also does not describe the protocol as an opt-out, using instead its official title of Protocol. Its formal title is **"**Protocol on the application of the charter of fundamental rights of the European Union to Poland and to the United Kingdom". See e.g. the Foreign Office's website on the Charter although its presentation of the successful achievement of the UK's four 'red lines' might cause confusion if not read carefully:

"We have also secured a UK-specific deal different to that in the other 26 Member States – and different from the Constitutional Treaty – because we have secured extra safeguards for the UK (the four 'red lines')":

- The UK has a right to opt-in to JHA, thus protecting our common law system and criminal and judicial processes.
- *The UK has a legally-binding Protocol on the Charter, thus protecting our social and labour legislation*.
- There is clarification on the role of the High Representative including a Declaration confirming that foreign policy will remain in the hands of the Member States.
- There are stronger safeguards for protecting our social security system.

http://www.fco.gov.uk/resources/en/pdf/pdf19/fco_beu_pdf_reformtreaty10myths (emphasis added).

75 House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, para.5.86.

76 House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, paras. 5.96.

77 The paper tiger that is no threat to Britain's fundamental rights, *Parliamentary Brief*, 10 March 2008. http://www.thepolitician.org/ articles/the-paper-tiger-646.html.

78 European Scrutiny, 35th report, 2006-7.

> scrutiny".[79] THE SUN said "When Tony Blair agreed the outline EU Treaty last June, he boasted Britain had an 'opt-out' from the Charter of Fundamental Rights – which includes the right to strike. But the Commons European Scrutiny Committee report publishes a letter from Labour's Europe Minister Jim Murphy in which he concedes we do NOT".[80]

So, is Protocol No.7 an opt-out, in the same way as, say, the Social Policy Protocol and Social Policy Agreement which gave the UK a real opt-out from the Social Chapter of the Maastricht Treaty? Or is the function of Protocol No.7 merely to "clarify certain aspects of the application of the Charter" and is thus not an opt-out at all? The EU House of Lords' Select Committee said "The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol".[81] I would generally share this view, except in respect of the points outlined in section C above where there is evidence of an opt-out from the rights outlined in Title IV.

V. Conclusions

The Protocol to the Charter is an exercise in smoke and mirrors. It was introduced largely for presentational reasons to help convince the British public that the Lisbon Treaty was different to the Constitutional Treaty. This presentational ploy has come unravelled but the government has nevertheless achieved its objective: the European Union (Amendment) Bill 2007, and now Act of 2008, ratifying the Lisbon Treaty has passed through the UK Parliament relatively unscathed, albeit subject to unsuccessful judicial review proceedings brought by spread-betting millionaire Stuart Wheeler, on the government's decision not to hold a referendum.[82]

Will the Charter have a particular impact? Many think that the position pre- and post- the Lisbon Treaty will not be as different as might at first appear.[83] The Court of Justice has finally come off the fence and started to refer to the Charter[84] but the reference to the Charter is merely to buttress or confirm the interpretation of a Community measure.[85] And, as we saw in *Viking*, the reference to the Charter might not necessarily be good news for individuals actually invoking the Charter in support. On the other hand, others suggest that, in time, reference to the Charter will become the norm and that it will wholly transform certain types of litigation. This has been the experience in the UK when the European Convention of Human Rights was incorporated into national law by the Human Rights Act 1998. If this is the case then the Protocol may become more significant than first appeared.

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80 *G. Wilson*, 10 days to save Britain, THE SUN, 9 October 2007.

81 House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, paras. 5.87.

82 http://news.bbc.co.uk/1/hi/uk_politics/7442980.stm; http://news.bbc.co.uk/1/hi/uk_politics/7472449.stm

83 House of Lords Constitution Committee, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution*, 6th Report, 2007-8, HL Paper 84, para. 67.

84 Case C-540/03 *EP v EU Council (Family Reunification Directive)* [2007] ECR I-000, para. 38, Case C-432/05 *Unibet* v. *Justitiekanslern* [2007] ECR I-000, para. 37, Case C-244/06 *Dynamic Medien Vertriebs GmbH* v. *Avides Media AG* [2008] ECR I-000, para. 41. Prior to this the Charter has been referred to by a number of Advocates General (see, e.g. AG *Jacobs*' Opinion in Case C-50/00 *Unión de Pequeños Agricultores v. Council of the European Union* [2002] ECR I-6677; AG *Geelhoed*'s Opinion in Case C-224/98 *D'Hoop v. Office National d'Emploi* [2002] ECR I-000), as has the Court of First Instance (see, e.g. Case T-177/01 *Jégo Quéré et Cie SA v. European Commission* [2002] ECR II-000), the European Court of Human Rights (see eg *Godwin v UK* [2002] 35 EHRR 18) and national courts (see, e.g. *R (on the application of Robertson) v. Wakefield MDC* [2002] QB 1052, 170)).

85 See e.g. *Viking* "As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices" (para. 44).

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