Central and East European Moot Court Competition 2011

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In co-operation with:
Vilnius University
VILNIUS

MOOT BUNDLE 2011

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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 2011

REDULLOC PLC and RORROH ERIH
v
OFFICE OF FAIR TRADING

1. The Member State and its national law

Esilanep is an EU Member State as of 1st January 2007. Prior to this, a number of high profile commercial scandals took place in Esilanep, including flagrant abuses of national competition law. In the elections of 2006, the People's Power Party (PPP) won a huge majority by virtue of its anti-corruption stance and plans to help consumers by cracking down on competition law breaches. Its membership of the EU provided further impetus to eliminate competition law breaches.

Part of the PPP's legislative program involved the adoption of the *Office for Fair Trading Act 2008* (the OFT Act) which created the Office for Fair Trading (the "OFT"). The OFT has two primary functions: (1) to ensure that traders operating in its territories do not use contractual terms that would be harmful for consumers; and (2) to investigate and hear cases concerning alleged infringements of competition law. All investigations are carried out by the OFT's *Investigations Department*, which has sole discretion in whether or not to bring an action against the trader. Where an action is brought, the allegations are heard by the OFT's *Infringements Panel*, which has sole discretion in deciding whether or not a breach has occurred and, if so, whether to impose a sanction upon the infringing trader.

As regards its first function ("consumer protection"), the OFT receives complaints from consumers and investigates the traders against which the complaints were made. In the event that the OFT considers the trader to have breached consumer protection law, *Article 20* of the *Office for Fair Trading Act 2008*, which implements *Article 4* of EC Regulation 2006/2004 (the "Consumer Protection Regulation"), permits the OFT to take action against that trader. This provision states as follows:

OFT Act 2008 Article 20
(1) Where it is established that a trader's terms or conditions are inconsistent with consumer protection law (whether national or EU), the OFT may:
(a) decide that the infringing term or condition shall not be binding on the consumer;
(b) instruct the trader to refrain from using the infringing term or condition in his future dealings

As regards its second function ("competition authority"), the OFT receives complaints from consumers and conducts its own investigations into potential breaches of competition law. The OFT is also designated as the appropriate national competition authority, pursuant to *EC Regulation 1/2003* (the "Competition Regulation"), and maintains close links with the European Commission to ensure, pursuant in particular to Article 16 of that Regulation, that its decisions do not 'run counter' to any competition law decision taken, or under consideration, by the Commission.

Given Esilanep's history and the PPP's tough stance on competition law, any breach of competition law (whether national or EU) is deemed by the *Office for Fair Trading Act 2008* to constitute a criminal offence. In the event that any trader operating in Esilanep is found, either by the OFT or by the European Commission, to have breached national/EU competition law, the OFT is empowered to impose a range of criminal sanctions on that trader and, in certain circumstances, the imposition of such sanctions are mandatory. The relevant law is contained in *Article 40* of the *Office for Fair Trading Act 2008*, which states as follows:

OFT Act 2008 Article 40
(1) The OFT may impose on any legal or natural person any, or a combination of, the following sanctions in order to penalise breaches of competition law (whether national or EU) and dissuade the infringing trader from repeating a similar, or other, infringement of competition law:
(a) Fines;
(b) custodial sentences, not exceeding 12 months imprisonment;
(c) directors disqualification orders, preventing any person(s) knowingly involved in the infringement from acting as director of a particular company, or of a particular type of company, or of any company whatsoever (for a period not exceeding 15 years).
(2) Where the infringement is sufficiently serious to warrant a fine exceeding 9 million Euros, imposed by the OFT or the European Commission in pursuance of EC Regulation 1/2003, the OFT shall impose a directors disqualification order for a minimum compulsory period of 3 years against any director or manager resident in Esilanep who was found to have been knowingly involved in the infringement .

As regards the procedure applicable to OFT investigations and deliberations, the PPP was keen to ensure that its tough stance on unfair trading practices did not amount to a breach of its obligations under the European Convention on Human Rights (the "ECHR"), of which it has been a signatory state since 1989. Accordingly, the Act contains the following provisions:

OFT Act 2008 Article 50
All OFT investigations and deliberations shall guarantee the right to a fair trial, within the meaning of Article 6 of the European

Convention on Human Rights.

OFT Act 2008 Article 51
A trader shall not be liable to the criminal sanctions contained in this Act unless the OFT's Infringements Panel is satisfied beyond all reasonable doubt that an infringement of competition law has taken place, or would have taken place in the absence of the OFT investigation.

OFT Act 2008 Article 52
During the OFT investigations stage, any trader alleged to have breached consumer protection or competition law shall be entitled to be made aware of the evidence against him, except in exceptional cases where disclosure of such information may infringe the human rights of any other person. An alleged infringer shall have the right to make representations to the Investigation Department.

OFT Act 2008 Article 53
In the event that the Investigations Department decides to initiate proceedings before the Infringement Panel, such proceedings shall be conducted by way of a full public oral hearing and all evidence to be relied upon by either the Investigation Department or alleged infringer shall be disclosed and presented in accordance with the rules and procedure of criminal evidence, including those concerning witness and expert evidence. Any legal or natural person alleged to have infringed competition law, or against which sanctions are considered, shall be entitled to be heard and to be legally represented at any such oral hearing.

OFT Act 2008 Article 54
In the event that the Infringements Panel concludes that the trader has infringed consumer protection or competition law and imposes a sanction against such trader, that trader shall have the right to appeal against such a decision to the Esilanep High Court, which is entitled to overturn, in whole or in part, any decision adopted by the Infringements Panel. Any such appeal shall pay particular regard to ensuring that the investigations and deliberations which led to the finding of infringement and imposition of sanctions were conducted in a manner which is compatible with Esilanep's obligations under Article 6 of the European Convention on Human Rights.

2. The facts leading to the dispute

Netsrac is an EU citizen resident in Evirdeerf (a Member State of the EU). She has not seen her brother for almost five years, as he married a girl from Lanimirc (a Member State of the EU) in August 2005 and shortly thereafter moved to Lanimirc to live with her. Netsrac decides to combine her annual skiing trip with a visit to Lanimirc, to spend Christmas with her brother and his family. She briefly investigates train connections, but realises quickly that the trip would be expensive, complicated and very lengthy. She thus decides to book a return flight to Suinliv airport in the neighbouring EU country of Esilanep in December 2009 and to rent a car from there to drive to Lanimirc.

Unfortunately, when Netsrac arrives at the airport she finds that the contract for hire of the car she had provisionally booked with Bare Bones Car-hire Ltd ("BBC") appears to ban her from taking the car into Lanimirc as it contains the following clause:

Any vehicle hired from BBC may not be driven into and/or dropped off in any Middle-East country, nor in Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Estonia, Georgia, Herzogovina, Kazakhstan, Kyrgyzstan, Lanimirc, Latvia, Macedonia, Moldova, Montenegro, Romania, Russia, Serbia, Tajikistan, Turkey, Turkmenistan, Ukraine and Uzbekistan.

Upon further investigation, it becomes clear that every single car rental company present at Suinliv airport, and all of the major ones, not only in Esilanep, but also in Slovakia and Hungary, which Netsrac contacts, have identical restrictions, and none of them permit their cars to be driven into Lanimirc.

Accordingly, Netsrac is forced to take a lengthy and uncomfortable bus journey to her brother's house. Fortunately, she has her laptop with her and during the journey she drafts a letter of complaint to the OFT concerning the clause in BBC's hire terms.

The letter prompts an OFT investigation which begins in January 2010. The Investigations Department informs the European Commission that its investigation is underway (pursuant to the co-operation procedures laid down in Article 12 of ***Regulation 1/2003***).

3. The European Commission's investigation

In February 2010, the OFT Investigations Department is informed by the Commission that it is more appropriate for it to investigate the matter due to the fact that all but one of the car-hire companies renting cars from Suinliv airport are companies registered outside the territory of Esilanep so raising an inter-Community dimension. Accordingly, pursuant to ***Article 11(6)*** of ***Regulation 1/2003,*** the OFT is relieved of its competence to investigate the matter. The OFT provides the Commission with the information it has gathered thus far as

regards the alleged breach of competition law and suspends this aspect of its investigatory activities. Nevertheless, it continues to investigate the facts so far as they relate to a potential infringement of consumer protection law.

The Commission's investigation reveals that the only car-hire company registered under Esilanep law is BBC, which is a subsidiary company of Redulloc plc ("Redulloc"); an investment holding company registered in Esilanep with a number of subsidiaries providing various economic services in different Member States of the European Union. Redulloc holds 100% of the shareholding in each of its subsidiaries but does not directly involve itself in the management of any of its subsidiary companies save for the appointment of one non-managerial director to the board of directors of each subsidiary. In the case of BBC the director appointed is Rorroh Erih, who is an experienced investment advisor and is the only director of both BBC and Redulloc actually resident in Esilanep. Mr Erih had agreed to sit on the BBC board on the basis that he would never be called upon to play a more active role than attending BBC's annual directors' and shareholder's meetings. The only income he receives from either company comes from his post as financial director of Redulloc.

Following the Commission's initial investigations, in accordance with its standard procedure and following investigations (assisted by the OFT and also other EU Member State competition authorities) its officials inform the relevant car hire companies that they are the subject of an investigation into an alleged infringement of ***Article 101 TFEU*** by entering into an agreement to prevent the hire of vehicles to Lanimirc, thus affecting trade between Member States, such practice having as its object or effect the prevention, restriction or distortion of competition within the internal market, in particular by directly or indirectly fixing trading conditions; by limiting or controlling the market of hire vehicles.

The Directorate General IV of the European Commission accordingly invites all the hire companies and their legal representatives to attend a meeting in April 2010 at the Commission's office to be conducted by the investigating officials where they are invited to make representations in respect of the alleged infringement before the issue was passed to the Commission for a formal decision and ruling. Redulloc was amongst those invited to attend and be represented at the meeting; following the officials' indication that a finding of infringement against the parent company on the basis of its knowledge and direct involvement in the case was also being considered.

As part of their representations to the Commission, the hire companies refer to a report published in January 2009 (the 2009 report – The Car Insurance Market in EU States) commissioned by the EU which had a brief to report upon the success of the compulsory civil liability motor insurance harmonisation measures put in place by various directives culminating in EC Directive 2009/103. In particular the report was asked to consider the efficiency and efficacy of the national measures creating and appointing a national insurance bureau and body to take responsibility for ensuring the appropriate provision of compensation. The 2009 report exposed a number of defects and problems in a number of Member States including Lanimirc; not least as a result of the extraordinarily high level of car theft in that country and the inability of the national compensation body to either a) effectively deal with and b) ensure payment of appropriate levels of compensation to claimants whether in relation to personal injury or property damage suffered. The situation was stated to be particularly exacerbated by the poor standard of roads in that country, with a number of potholes and uneven surfaces, and the consequent damage caused to motor vehicles.

Concerned by the contents of the report, the Ministry for Consumer Affairs in Esilanep decided to publish and distribute guidance notes to interested parties, both highlighting the problem and recommending that immediate action be taken by them to ensure that potentially affected consumers would receive adequate protection, guidance and information. These leaflets were sent to all national insurance and motor vehicle hire companies.

The car-hire companies admit that, in consequence of the 2009 report, a meeting was arranged between representatives of all major EU car-hire companies when it was agreed that an appropriate safety measure would be for all hire company rental agreements to automatically include the 'potentially offending' clause in all their hire agreements. The hire companies also provided evidence that their move had been fully supported by the larger national/European motor insurance providers. However, they argued forcefully that there was no breach of the actual terms of Article 101 as the action taken would not lead to any actual or potential prevention, restriction or distortion of competition in the internal market. They supported their argument by drawing the Commission's attention to the fact that:-

- there would be a very small number of potential hirers affected so that the effect of the clause was 'de minimis';
- that the inclusion of the clause would not in any way prevent other companies from entering the hire car market, in fact it would give them an additional benefit to offer to potential customers;
- that the inclusion or otherwise of the clause was voluntary and therefore completely non-binding on the hire companies; and
- that it did not enable the imposition of any onerous conditions, higher costs or penalty of any kind upon consumers.

The Commission officials are unimpressed by these arguments, stating that their recommendation to the full sitting of the Commission will be to find an infringement contrary to Article 101 TFEU. They also state their intention to recommend the imposition of a fine upon the parent companies of a number of the hire companies involved; to include Redulloc (relying on the *Akzo* case when a parent company holding 100% of the shares in a subsidiary creates a rebuttable presumption that the parent company exercised decisive influence over the commercial policy of the subsidiary).

The formal notice sent to Redulloc added that in the light of the *Akzo* presumption it was not accepted that Redulloc had no involvement or knowledge of the actions of its subsidiaries nor that they did not exercise any effective or actual control over its subsidiaries. In their view Redulloc and BBC could be treated as one single economic entity with Redulloc having full knowledge of BBC's action. When the grounds supporting this finding were sought by Redulloc's lawyers, as the finding did not reflect evidence given at the meeting, the officials responded that they had received credible evidence from one of the hire companies attending the aforementioned meeting that Mr Erih, in his dual capacity as a director of both BBC and Redulloc, was not only aware, but also actively encouraged the infringement. This evidence had in fact initiated the Commission's investigation and in exchange the Commission had exercised its leniency policy and exempted the company which had given it this information from any financial sanction. The Commission officials were not prepared to disclose further particulars; indicating that such disclosure was unnecessary and furthermore might be prejudicial in that it would compromise the identity and rights of the witness and might jeopardize the application of the Commission's leniency policy for future 'whistleblowers'.

4. The European Commission's decision

No further hearing takes place and in June 2010 the Commission publishes its decision which follows the recommendation of its officials and so finds against all the hire companies on the basis of a breach of Article 101 TFEU. The Commission also imposes a fine of fifteen million euros on Redulloc, stating that as the undertakings in question represented the major EU motor vehicle hire companies and the various manifestations of their agreement had been put into practice in a market which, in addition, was both highly concentrated and oligopolistic, it considered these practices a grave infringement. The Commission also confirmed that in imposing its fine on the parent company it did so based on the rebuttable presumption set out in the *Akzo* case law according to which BBC and Redulloc constituted a single economic entity.

In addition, as the Commission underlined in its decision, it was also satisfied that Mr Erih was not only aware of, but also actively encouraged the infringement, so further supporting its finding. The Commission then communicates the decision to the Esilanep competition authorities in accordance with Article 15 of the Competition Regulation.

5. Proceedings before the OFT's Infringements Panel

In the interim the OFT has continued its investigation of the case as part of its consumer protection obligations under Article 20 OFT Act and so it has convened a sitting of the Infringement Panel to take place in July 2010 when the case will be further considered.

As the findings of the Commission against BBC and Redulloc automatically activate the provisions of Section 40 (2) of the OFT Act; so requiring the imposition of a mandatory disqualification order against any offending director resident in Esilanep, the Investigations Department seeks the joinder of this issue on the same date, a request to which the Infringement Panel accedes.

Competition Issues

BBC, Redulloc and Rorroh Erih are duly advised of, and invited to appear at, the hearing. Expecting a full consideration of the issues with evidence and witnesses, in accordance with the procedure set out in the OFT Act, they are astounded to find that the Infringement Panel are only prepared to hear limited arguments on the consumer protection issues and no submissions whatsoever on the competition issue, nor on the question of mandatory disqualification. The Panel explains that under Article 16 of the Competition Regulation they are unable to review, reconsider or overturn the Commission's findings.

In accordance with Article 40 (2) the Panel then formally imposes an automatic disqualification of 3 years on Mr Erih. This decision will effectively prevent him from carrying on his employment in either BBC or Redulloc; causing him a total loss of income from those companies. It will also affect the subsidiary income he receives from a number of directorships he holds in other companies in Esilanep.

Consumer Protection Issues

In their Consumer Protection capacity, the Infringements Panel also finds against the hire companies. Although there is no national consumer protection law regulating the position (the Esilanep government taking the view that the provisions of EU legislation would provide sufficient national protection), the Panel finds that the actions of the hire companies are in breach of the directly effective provisions of Art 56 TFEU ensuring Free Movement of Services within the European Union and Directive 2006/123 (the Services Directive). As the basis for its decision the Panel cites the following:

1. The case-law of the ECJ confirming that Article 56 covers not only providers but also recipients of services (*Cowan*, *Outlane*).
2. That hire car companies are providing an economic service and so fall within Art 56 TFEU and the Services Directive.
3. In light of the findings of the Commission of an infringement of Article 101 TFEU the hire companies, acting together, can be treated similarly to the bodies in *Viking*, *Lavall* and *Walrave* and so are bound to ensure that their actions do not affect potentially, or actually, the free movement of services within the EU.

The Infringement Panel accordingly directs all hire companies operating in the territory of Esilanep to remove the infringing clause from all their car-hire agreements entered into within the territory of Esilanep, thus enabling any renter to take hire cars to Lanimirc.

BBC, Redulloc and Mr Erih are particularly horrified by the findings of the Infringements Panel and on the advice of their lawyers immediately appeal both decisions directly to the Esilanep High Court. They also seek disclosure of the 'whistleblowers' report, a request to which the High Court accedes, formally requesting the Commission for disclosure for the purposes of judicial proceedings in accordance with the procedure contained in Article 15 of the Competition Regulation. The Commission, however, not only replied that this report cannot be made available since it would jeopardise its leniency policy, but also reminds the High Court of the binding nature of the Commission decision, citing Article 16 of the Competition Regulation.

In support of the claim for judicial review of the decision BBC, Redulloc and Mr Erih submit the following:

1. Article 56 TFEU only regulates the activities of Member States and cannot be used as a ground for commencing a claim against a private company;
2. That the cases of *Viking* and *Lavall* do not apply to their situation, as none of the applicants have any delegated authority to act on behalf of Esilanep and so cannot be brought within the ambit of either Article 56 TFEU or the Services Directive.
3. That the proceedings before the Commission and the OFT completely fail to comply with the fundamental right to a *'fair trial'* before '*an independent and impartial tribunal'* required 'w*hen considering the imposition of criminal sanctions'* as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the "Charter") and Article 6 of the ECHR and so are fundamentally flawed; and
4. That the Commission are obliged to provide a detailed response and supporting documentation when requested to do so by the national court pursuant to Article 15 of the Competition Regulation and in accordance with the sincere obligation enshrined in Article 4 (3) TEU.

The OFT lawyers reply that proceedings before the Commission should not be considered to be 'proceedings of a criminal law nature' (as confirmed in Article 23(5) of Regulation 1/2003) and that the procedure followed by the Commission, and as a result the OFT, does not come under Article 6 ECHR at all or, alternatively, that it is in compliance with the requirements set out under this Article. This is unaffected by the fact that a Member State has chosen to categorise breaches of competition law as a matter of criminal law within its national legislation.

Redulloc refutes this argument and states that the provisions of Article 53 of the Act require the standard of protection given to be that which is given to defendants in 'criminal proceedings' and so Article 40 (2) is incompatible with the protection required by Articles 47 and 48 of the Charter and Article 6 ECHR.

Aware that it neither has the right to review (1) the legality of the Competition Regulation nor (2) the findings of the Commission, the High Court immediately decides to suspend the national proceedings pending a reference to the Court of Justice to the European Union in accordance with the provisions of Article 267 TFEU. It refers the following questions for a preliminary ruling:

Application of Article 56 TFEU to private body

1. a) are the provisions for free movement of services contained in Article 56 et seq TFEU capable of being relied upon against individuals?

b) If the answer to part a) is in the negative, can those provisions nevertheless be relied upon against a public limited company such as Redulloc plc by virtue of the fact (i) that, together with other companies, it exercises an influence on the market which is akin to that of a state body, and/or (ii) that, it in practice exercises certain consumer protection functions on behalf of the state by applying official but non-binding guidance notes?

Application of Article 56 to insertion of limitation clause in hire agreement

2. a) Do Articles 56 et seq TFEU preclude the systematic imposition of a term in hire car contracts restricting the right to use hire cars concerned within another Member State of the European Union?
b) In determining the existence of a breach under Articles 56 et seq TFEU, to what extent can reliance be placed upon the finding of a breach of Article 101 TFEU by the European Commission showing that the imposition of the term has actually or potentially affected trade between Member States?

Interpretation of Regulation 1/2003

3. a) Should Article 16 of Regulation 1/2003 be interpreted as meaning that national courts and competition authorities are

prevented from finding, in proceedings seeking to impose additional, possibly criminal, sanctions for breach of national competition law, that the manager of an undertaking is not proved to have been knowingly involved in the infringement even though the Commission has made the opposite finding in its decision? In particular, how should the expression 'run counter to' within this article be interpreted?

b) Should the obligation of sincere cooperation enshrined in Article 4 (3) TEU be interpreted as obliging the Commission, independently of the considerations of public policy associated with its leniency policy, to disclose information sought by national courts under Article 15 of Regulation 1/2003, in order to impose additional sanctions for breach of national competition law?

Charter of Fundamental Rights and Freedoms and European Convention on Human Rights

4) a) If the answer to question 3 a) is in the affirmative, is Article 16 of Regulation 1/2003 valid in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union?

b) Should Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which consecrate respectively the right to an effective remedy and to a fair trial and the right of defence, be interpreted as precluding a national provision, such as Article 40(2) of the OFT Act 2008, according to which criminal sanctions for breach of competition law are automatically imposed where a fine exceeding EUR 9 million has been imposed in a decision of the European Commission in which it has equally found that the manager of the infringing undertaking has been knowingly involved in the infringement?

Simultaneously, concerned that a core issue in this case was the finding of an infringement against their clients by the European Commission and knowing that the High Court is neither entitled to review the Commission's decision nor is it entitled to consider the legality of the sanctions and fine system set out in the Competition Regulation, Redulloc's lawyers had initiated a challenge against the decision which, although unsuccessful before the General Court, is now to be reviewed by the Court of Justice. In this review, the Court of Justice will consider whether the Commission's finding against Redulloc which relied (1) upon the single economic entity presumption contained in *Akzo* and (2) upon the evidence which the Commission refused to disclose and which was obtained from a 'whistleblower', is compatible with Article 6 TEU.

Redulloc and Mr Erih also decide to raise the issue directly with the office of the EU Ombudsman and with the appropriate committees in the European Parliament. They gain their support and their agreement that this is an important area of law that requires clarification. Particular mention is made of the strengthening of the status of the ECHR when combined with the Charter of Fundamental Rights within the EU, following the implementation of Article 6 TEU as amended.

As a result, aware of the linked proceedings under Article 267 TFEU for a preliminary ruling, both cases are listed together so that the issue can be considered by the European Court of Justice. The Court of its own motion invites the parties to address the following additional questions:

5. Should the Commission be considered to be an independent and impartial tribunal within the meaning of Article 6 (1) ECHR?

6 a) Do proceedings in which a body considers whether an infringement has been committed pursuant to the provisions set out in Articles 101 and 102 TFEU, in combination with the sanctions provided for in Regulation 1/2003 fall within the scope of a 'criminal charge' or a charge of a 'criminal offence', as set out in Article 6 ECHR?

b) Is the economic unity doctrine, as applied by the Commission in the disputed decision, contrary to the principle of individual responsibility and the presumption of innocence under Article 6 (2) ECHR and Articles 47 and 48 of the Charter of Fundamental Rights?

COMPETITION RULES 2011

1.. Competition

This is the seventeenth year of this annual competition, this year to be held in Vilnius, Lithuania.

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.

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IMPORTANT: To be eligible to participate written registration and acknowledgement is required by e-mail to the British Centre on or before the 28th February 2011 and written pleadings are to be submitted by e-mail attachment on or before the 28th March 2011 (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

The 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 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

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 cover submissions on all questions unless teams are notified differently.

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 5 from those referred by the fictitious EU Member State for a ruling by the Court to the European Union under the Article 267 TFEU procedure, with the Applicant team Redulloc plc and Erih Rorroh and the Respondents representing Esilanep Office of Fair Trading. 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 the remaining problem questions, referred by the fictitious EU Member State national court for ruling by the ECJ, with the Applicants representing Redulloc plc and Erih Horror and the Respondents representing the Office of Fair Trading. 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 28th March 2011 and should be submitted to d.ashmore@uw.edu.pl. Due receipt of written pleadings will be confirmed by the organizers by 1st April 2011. 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 Vilnius.

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 Vilnius (at the present time it is not believed that any team will need a visa to enter Lithuania for the competition but teams should check this directly with their Lithuanian 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 Vilnius.

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 13th April 2011 (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 29th April 2011 at the registration of the team in Vilnius in which case it may be paid in either euro or in local currency. The exact amount of the fee in Lithuanian currency will be confirmed in April 2011.

PLEASE NOTE THAT ALL FEES DUE OR EXTRA MONIES PAYABLE MUST BE RECEIVED NO LATER THAN CLOSURE OF REGISTRATION ON 29th April 2011.

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)

Local organiser contact details:

Agne Augutaviciute: e-mail agne.augutaviciute@tf.vu.lt

PRELIMINARY INFORMATION ON THE ECJ

The following is a short introductory guide to the role of the ECJ within the European Union 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 EU 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 EU 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 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU 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 Union 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 267 reference to the ECJ asking for guidance on the interpretation, application or validity of an EU 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 Union law but it is for the national court to apply that Union 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 29th April 2011
16.00-19.00 Registration of teams
19.00 Welcome Reception and Opening Ceremony

SATURDAY 30th April 2011
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 1st May 2011
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 2nd May 2010
Departure of teams and time for sightseeing.

ACKNOWLEDGMENTS

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

- Carsten Zatschler, Alexander Kornezov and Catherine Howdle , ECJ, referendaires)

- CELS, 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 Barnard, Dashwood, Steiner and Weatherill for agreeing to the reproduction of extracts of their work 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 CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION (TEU)

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

[...]

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.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

Article 52
(ex Article 46 TEC)
1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.
[...]

CHAPTER 3: SERVICES

Article 56
(ex Article 49 TEC)
Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57
(ex Article 50 TEC)
Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include:

(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.
[...]

TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS
CHAPTER 1: RULES ON COMPETITION
SECTION 1: RULES APPLYING TO UNDERTAKINGS

Article 101
(ex Article 81 TEC)
1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,
— any decision or category of decisions by associations of undertakings,
— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102
(ex Article 82 TEC)
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EXTRACTS FROM THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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.
[...]

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.

EXTRACTS FROM THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

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 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

EXTRACTS FROM 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.

TITLE II: ORGANISATION OF THE COURT OF JUSTICE

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.

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.

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.

.....

EXTRACTS OF RULES OF PROCEDURE OF THE COURT OF JUSTICE

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.

.....

Council Regulation (EC) No 1/2003 (the Competition Regulation)

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

(4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

(10) Regulations such as 19/65/EEC(6), (EEC) No 2821/71(7), (EEC) No 3976/87(8), (EEC) No 1534/91(9), or (EEC) No 479/92(10) empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called "block" exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.

(11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.

(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best

possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.

(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.

(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-

business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

(35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17(12) should therefore be repealed and Regulations (EEC) No 1017/68(13), (EEC) No 4056/86(14) and (EEC) No 3975/87(15) should be amended in order to delete the specific procedural provisions they contain.

(37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

HAS ADOPTED THIS REGULATION:

CHAPTER I: PRINCIPLES

Article 1: Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.

3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2: Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3: Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of

the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II: POWERS

Article 4: Powers of the Commission

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5: Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,

- ordering interim measures,

- accepting commitments,

- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6: Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III: COMMISSION DECISIONS

Article 7: Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8: Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9: Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10: Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV: COOPERATION

Article 11: Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents

it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12: Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13: Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14: Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15: Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16: Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V: POWERS OF INVESTIGATION

Article 17: Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

Article 18: Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 22: Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI: PENALTIES

Article 23: Fines

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

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CHAPTER VII: LIMITATION PERIODS

Article 25: Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

CHAPTER VIII: HEARINGS AND PROFESSIONAL SECRECY

Article 27: Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28: Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER X: GENERAL PROVISIONS

Article 30: Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31: Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32: Exclusions

This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.

Article 33: Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, inter alia:

(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

(b) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

Article 35: Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

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Article 44: Report on the application of the present Regulation

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

Article 45: Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 May 2004.

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

Done at Brussels, 16 December 2002.

For the Council

The President

M. Fischer Boel

Commission Regulation (EC) No 773/2004 (the Competition Proceedings Regulation)

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(1), and in particular Article 33 thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EC) No 1/2003 empowers the Commission to regulate certain aspects of proceedings for the application of Articles 81 and 82 of the Treaty. It is necessary to lay down rules concerning the initiation of proceedings by the Commission as well as the handling of complaints and the hearing of the parties concerned.

(2) According to Regulation (EC) No 1/2003, national courts are under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national competition authorities are relieved from their competence once the Commission has initiated proceedings for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of the initiation of proceedings by the Commission. The Commission should therefore be able to make public its decisions to initiate proceedings.

(3) Before taking oral statements from natural or legal persons who consent to be interviewed, the Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the statements recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.

(4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 fines may be imposed on undertakings and associations of undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete or misleading answer given by a member of their staff to questions in the course of inspections. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during the inspection.

(5) Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.

(6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.

(7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.

(8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.

(9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so, it should inform the complainant of the identity of that authority.

(10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.

(11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 1/2003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.

(12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned,

complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

(13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of "other confidential information" includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings that submit or have submitted documents or statements to identify confidential information.

(14) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

HAS ADOPTED THIS REGULATION:

CHAPTER I: SCOPE

Article 1: Subject-matter and scope

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II: INITIATION OF PROCEEDINGS

Article 2: Initiation of proceedings

1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.

3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.

4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III: INVESTIGATIONS BY THE COMMISSION

Article 3: Power to take statements

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

Article 4: Oral questions during inspections

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.

2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.

3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV: HANDLING OF COMPLAINTS

Article 5: Admissibility of complaints

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

Article 6: Participation of complainants in proceedings

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the

oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

Article 7: Rejection of complaints

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

Article 8: Access to information

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Article 9

Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V: EXERCISE OF THE RIGHT TO BE HEARD

Article 10: Statement of objections and reply

1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.

3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, 28 paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

Article 11: Right to be heard

1. The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

Article 12: Right to an oral hearing

The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

Article 13: Hearing of other persons

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing.

2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.

3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

Article 14: Conduct of oral hearings

1. Hearings shall be conducted by a Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.

3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.

4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.

6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI: ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15: Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.

2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

Article 16: Identification and protection of confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

(a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;

(b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;

(c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

CHAPTER VII: GENERAL AND FINAL PROVISIONS

Article 17: Time-limits

1. In setting the time-limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

3. The time-limits referred to in Article 3(3), Article 4(3) and Article 16(3) shall be at least two weeks.

4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

Article 18: Repeals

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 3385/94 are repealed.

References to the repealed regulations shall be construed as references to this regulation.

Article 19: Transitional provisions

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

Article 20: Entry into force

This Regulation shall enter into force on 1 May 2004.

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

Done at Brussels, 7 April 2004.
For the Commission
Mario Monti
Member of the Commission
(1) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).
(2) OJ L 354, 30.12.1998, p. 18.
(3) OJ L 354, 30.12.1998, p. 22.
(4) OJ L 377, 31.12.1994, p. 28.

ANNEX: FORM C - COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.

2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. Details of the alleged infringement and evidence

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.

4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).

5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. Finding sought from the Commission and legitimate interest

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.

7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

IV. Proceedings before national competition authorities or national courts

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.
Date and signature.

Council and Parliament Regulation (EC) 2006/2004 (the Comsumer Protection Regulation)

Council and Parliament Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Consumer Protection Regulation)

of 27 October 2004

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Council Resolution of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market [3] acknowledged that a continuing effort is required to improve cooperation between administrations and invited the Member States and the Commission to examine as a matter of priority the possibility of reinforcing administrative cooperation in the enforcement of legislation.

(2) Existing national enforcement arrangements for the laws that protect consumers' interests are not adapted to the challenges of enforcement in the internal market and effective and efficient enforcement cooperation in these cases is not currently possible. These difficulties give rise to barriers to cooperation between public enforcement authorities to detect, investigate and bring about the cessation or prohibition of intra-Community infringements of the laws that protect consumers' interests. The resulting lack of effective enforcement in cross-border cases enables sellers and suppliers to evade enforcement attempts by relocating within the Community. This gives rise to a distortion of competition for law-abiding sellers and suppliers operating either domestically or cross-border. The difficulties of enforcement in cross-border cases also undermine the confidence of consumers in taking up cross-border offers and hence their confidence in the internal market.

(3) It is therefore appropriate to facilitate cooperation between public authorities responsible for enforcement of the laws that protect consumers' interests in dealing with intra-Community infringements, and to contribute to the smooth functioning of the internal market, the quality and consistency of enforcement of the laws that protect consumers' interests and the monitoring of the protection of consumers' economic interests.

(4) Enforcement cooperation networks exist in Community legislation, to protect consumers above and beyond their economic interests, not least where health is concerned. Best practice should be exchanged between the networks established by this Regulation and these other networks.

(5) The scope of the provisions on mutual assistance in this Regulation should be limited to intra-Community infringements of Community legislation that protects consumers' interests. The effectiveness with which infringements at national level are pursued should ensure that there is no discrimination between national and intra-Community transactions. This Regulation does not affect the responsibilities of the Commission with regard to infringements of Community law by the Member States, nor does it confer on the Commission powers to stop intra-Community infringements defined in this Regulation.

(6) The protection of consumers from intra-Community infringements requires the establishment of a network of public enforcement authorities throughout the Community and these authorities require a minimum of common investigation and enforcement powers to apply this Regulation effectively and to deter sellers or suppliers from committing intra-Community infringements.

(7) The ability of competent authorities to cooperate freely on a reciprocal basis in exchanging information, detecting and investigating intra-Community infringements and taking action to bring about their cessation or prohibition is essential to guaranteeing the smooth functioning of the internal market and the protection of consumers.

(8) Competent authorities should also make use of other powers or measures granted to them at national level, including the power to initiate or refer matters for criminal prosecution, in order to bring about the cessation or prohibition of intra-Community infringements without delay as a result of a request for mutual assistance, where this is appropriate.

(9) Information exchanged between competent authorities should be subject to the strictest guarantees of confidentiality and professional secrecy in order to ensure investigations are not compromised or the reputation of sellers or suppliers unfairly harmed. 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 [4] and 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 [5] should apply in the context of this Regulation.

(10) The enforcement challenges that exist go beyond the frontiers of the European Union and the interests of Community consumers need to be protected from rogue traders based in third countries. Hence, there is a need for international agreements to be negotiated with third countries regarding mutual assistance in the enforcement of the laws that protect consumers' interests. These international agreements should be negotiated at Community level in the areas covered by this Regulation in order to ensure the optimum protection of

Community consumers and the smooth functioning of enforcement cooperation with third countries.

(11) It is appropriate to coordinate at Community level the enforcement activities of the Member States in respect of intra-Community infringements in order to improve the application of this Regulation and contribute to raising the standard and consistency of enforcement.

(12) It is appropriate to coordinate at Community level the administrative cooperation activities of the Member States, in respect of their intra-Community dimension, in order to improve the application of the laws that protect consumers' interests. This role has already been demonstrated in the establishment of the European extra-judicial network.

(13) Where the coordination of the activities of the Member States under this Regulation entails Community financial support, the decision to grant such support shall be taken in accordance with the procedures set out in Decision No 20/2004/EC of the European Parliament and of the Council of 8 December 2003 establishing a general framework for financing Community actions in support of consumer policy for the years 2004 to 2007 [6], in particular Actions 5 and 10 set out in the Annex to that Decision and future Decisions.

(14) Consumer organisations play an essential role in terms of consumer information and education and in the protection of consumer interests, including in the settlement of disputes, and should be encouraged to cooperate with competent authorities to enhance the application of this Regulation.

(15) 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 [7].

(16) The effective monitoring of the application of this Regulation and the effectiveness of consumer protection requires regular reports from the Member States.

(17) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [8]. Accordingly this Regulation should be interpreted and applied with respect to those rights and principles.

(18) Since the objective of this Regulation, namely cooperation between national authorities responsible for the enforcement of consumer protection law, cannot be sufficiently achieved by the Member States because they cannot ensure cooperation and coordination by acting alone, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

CHAPTER I: INTRODUCTORY PROVISIONS

Article 1: Objective

This Regulation lays down the conditions under which the competent authorities in the Member States designated as responsible for the enforcement of the laws that protect consumers' interests shall cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests.

Article 2: Scope

1. The provisions on mutual assistance set out in Chapters II and III shall cover intra-Community infringements.

2. This Regulation shall be without prejudice to the Community rules on private international law, in particular rules related to court jurisdiction and applicable law.

3. This Regulation shall be without prejudice to the application in the Member States of measures relating to judicial cooperation in criminal and civil matters, in particular the operation of the European Judicial Network.

4. This Regulation shall be without prejudice to the fulfilment by the Member States of any additional obligations in relation to mutual assistance on the protection of the collective economic interests of consumers, including in criminal matters, ensuing from other legal acts, including bilateral or multilateral agreements.

5. This Regulation shall be without prejudice to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [9].

6. This Regulation shall be without prejudice to Community law relating to the internal market, in particular those provisions concerning the free movement of goods and services.

7. This Regulation shall be without prejudice to Community law relating to television broadcasting services.

Article 3: Definitions

For the purposes of this Regulation:

(a) "laws that protect consumers' interests" means the Directives as transposed into the internal legal order of the Member States and the Regulations listed in the Annex;

(b) "intra-Community infringement" means any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found;

(c) "competent authority" means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers' interests;

(d) "single liaison office" means the public authority in each Member State designated as responsible for coordinating the application of this Regulation within that Member State;

(e) "competent official" means an official of a competent authority designated as responsible for the application of this Regulation;

(f) "applicant authority" means the competent authority that makes a request for mutual assistance;

(g) "requested authority" means the competent authority that receives a request for mutual assistance;

(h) "seller or supplier" means any natural or legal person who, in respect of the laws that protect consumers' interests, is acting for purposes relating to his trade, business, craft or profession;

(i) "market surveillance activities" means the actions of a competent authority designed to detect whether intra-Community infringements have taken place within its territory;

(j) "consumer complaint" means a statement, supported by reasonable evidence, that a seller or supplier has committed, or is likely to commit, an infringement of the laws that protect consumers' interests;

(k) "collective interests of consumers" means the interests of a number of consumers that have been harmed or are likely to be harmed by an infringement.

Article 4: Competent authorities

1. Each Member State shall designate the competent authorities and a single liaison office responsible for the application of this Regulation.

2. Each Member State may, if necessary in order to fulfil its obligations under this Regulation, designate other public authorities. They may also designate bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements in accordance with Article 8(3).

3. Each competent authority shall, without prejudice to paragraph 4, have the investigation and enforcement powers necessary for the application of this Regulation and shall exercise them in conformity with national law.

4. The competent authorities may exercise the powers referred to in paragraph 3 in conformity with national law either:

(a) directly under their own authority or under the supervision of the judicial authorities; or

(b) by application to courts competent to grant the necessary decision, including, where appropriate, by appeal, if the application to grant the necessary decision is not successful.

5. Insofar as competent authorities exercise their powers by application to the courts in accordance with paragraph 4(b), those courts shall be competent to grant the necessary decisions.

6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:

(a) to have access to any relevant document, in any form, related to the intra-Community infringement;

(b) to require the supply by any person of relevant information related to the intra-Community infringement;

(c) to carry out necessary on-site inspections;

(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;

(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking;

(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;

(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.

7. Member States shall ensure that competent authorities have adequate resources necessary for the application of this Regulation. The competent officials shall observe professional standards and be subject to appropriate internal procedures or rules of conduct that ensure, in particular, the protection of individuals with regard to the processing of personal data, procedural fairness and the proper observance of the confidentiality and professional secrecy provisions established in Article 13.

8. Each competent authority shall make known to the general public the rights and responsibilities it has been granted under this Regulation and shall designate the competent officials.

Article 5: Lists

1. Each Member State shall communicate to the Commission and the other Member States the identities of the competent authorities, of other public authorities and bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements, and of the single liaison office.

2. The Commission shall publish and update the list of single liaison offices and competent authorities in the Official Journal of the European Union.

CHAPTER II: MUTUAL ASSISTANCE

Article 6: Exchange of information on request

1. A requested authority shall, on request from an applicant authority, in accordance with Article 4, supply without delay any relevant information required to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur.

2. The requested authority shall undertake, if necessary with the assistance of other public authorities, the appropriate investigations or any other necessary or appropriate measures in accordance with Article 4, in order to gather the required information.

3. On request from the applicant authority, the requested authority may permit a competent official of the applicant authority to accompany the officials of the requested authority in the course of their investigations.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 7: Exchange of information without request

1. When a competent authority becomes aware of an intra-Community infringement, or reasonably suspects that such an infringement may occur, it shall notify the competent authorities of other Member States and the Commission, supplying all necessary information, without delay.

2. When a competent authority takes further enforcement measures or receives requests for mutual assistance in relation to the intra-Community infringement, it shall notify the competent authorities of other Member States and the Commission.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 8: Requests for enforcement measures

1. A requested authority shall, on request from an applicant authority, take all necessary enforcement measures to bring about the cessation or prohibition of the intra-Community infringement without delay.

2. In order to fulfil its obligations under paragraph 1, the requested authority shall exercise the powers set out under Article 4(6) and any additional powers granted to it under national law. The requested authority shall determine, if necessary with the assistance of other public authorities, the enforcement measures to be taken to bring about the cessation or prohibition of the intra-Community infringement in a proportionate, efficient and effective way.

3. The requested authority may also fulfil its obligations under paragraphs 1 and 2 by instructing a body designated in accordance with the second sentence of Article 4(2) as having a legitimate interest in the cessation or prohibition of intra-Community infringements to take all necessary enforcement measures available to it under national law to bring about the cessation or prohibition of the intra-Community infringement on behalf of the requested authority. In the event of a failure by that body to bring about the cessation or prohibition of the intra-Community infringement without delay, the obligations of the requested authority under paragraphs 1 and 2 shall remain.

4. The requested authority may only take the measures set out in paragraph 3 if, after consultation with the applicant authority on the use of these measures, both applicant and requested authority are in agreement that:

- use of the measures in paragraph 3 is likely to bring about the cessation or prohibition of the intra-Community infringement in at least equally efficient and effective a way as action by the requested authority,

and

- the instruction of the body designated under national law does not give rise to any disclosure to that body of information protected under Article 13.

5. If the applicant authority is of the opinion that the conditions set out under paragraph 4 are not fulfilled, it shall inform the requested authority in writing, setting out the grounds for its opinion. If the applicant authority and the requested authority are not in agreement, the requested authority may refer the matter to the Commission, which shall issue an opinion in accordance with the procedure referred to in Article 19(2).

6. The requested authority may consult the applicant authority in the course of taking the enforcement measures referred to in paragraphs 1 and 2. The requested authority shall notify without delay the applicant authority, the competent authorities of other Member States and the Commission of the measures taken and the effect thereof on the intra-Community infringement, including whether it has ceased.

7. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 9: Coordination of market surveillance and enforcement activities

1. Competent authorities shall coordinate their market surveillance and enforcement activities. They shall exchange all information necessary to achieve this.

2. When competent authorities become aware that an intra-Community infringement harms the interests of consumers in more than two Member States, the competent authorities concerned shall coordinate their enforcement actions and requests for mutual assistance via the single liaison office. In particular they shall seek to conduct simultaneous investigations and enforcement measures.

3. The competent authorities shall inform the Commission in advance of this coordination and may invite the officials and other accompanying persons authorised by the Commission to participate.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 10: Database

1. The Commission shall maintain an electronic database in which it shall store and process the information it receives under Articles 7, 8 and 9. The database shall be made available for consultation only by the competent authorities. In relation to their responsibilities to notify information for storage

in the database and the processing of personal data involved therein, the competent authorities shall be regarded as controllers in accordance with Article 2(d) of Directive 95/46/EC. In relation to its responsibilities under this Article and the processing of personal data involved therein, the Commission shall be regarded as a controller in accordance with Article 2(d) of Regulation (EC) No 45/2001.

2. Where a competent authority establishes that a notification of an intra-Community infringement made by it pursuant to Article 7 has subsequently proved to be unfounded, it shall withdraw the notification and the Commission shall without delay remove the information from the database. Where a requested authority notifies the Commission under Article 8(6) that an intra-Community infringement has ceased, the stored data relating to the intra-Community infringement shall be deleted five years after the notification.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

CHAPTER III: CONDITIONS GOVERNING MUTUAL ASSISTANCE

Article 11: General responsibilities

1. Competent authorities shall fulfil their obligations under this Regulation as though acting on behalf of consumers in their own country and on their own account or at the request of another competent authority in their own country.

2. Member States shall take all necessary measures to ensure effective coordination of the application of this Regulation by the competent authorities, other public authorities, bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements designated by them and the competent courts, through the single liaison office.

3. Member States shall encourage cooperation between the competent authorities and any other bodies having a legitimate interest under national law in the cessation or prohibition of intra-Community infringements to ensure that potential intra-Community infringements are notified to competent authorities without delay.

Article 12: Request for mutual assistance and information exchange procedures

1. The applicant authority shall ensure that all requests for mutual assistance contain sufficient information to enable a requested authority to fulfil the request, including any necessary evidence obtainable only in the territory of the applicant authority.

2. Requests shall be sent by the applicant authority to the single liaison office of the requested authority, via the single liaison office of the applicant authority. Requests shall be forwarded by the single liaison office of the requested authority to the appropriate competent authority without delay.

3. Requests for assistance and all communication of information shall be made in writing using a standard form and communicated electronically via the database established in Article 10.

4. The languages used for requests and for the communication of information shall be agreed by the competent authorities in question before requests have been made. If no agreement can be reached, requests shall be communicated in the official language(s) of the Member State of the applicant authority and responses in the official language(s) of the Member State of the requested authority.

5. Information communicated as a result of a request shall be communicated directly to the applicant authority and simultaneously to the single liaison offices of the applicant and requested authorities.

6. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 13: Use of information and protection of personal data and professional and commercial secrecy

1. Information communicated may only be used for the purposes of ensuring compliance with the laws that protect consumers' interests.

2. Competent authorities may invoke as evidence any information, documents, findings, statements, certified true copies or intelligence communicated, on the same basis as similar documents obtained in their own country.

3. Information communicated in any form to persons working for competent authorities, courts, other public authorities and the Commission, including information notified to the Commission and stored on the database referred to in Article 10, the disclosure of which would undermine:

- the protection of the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data,

- the commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

or

- the purpose of inspections or investigations,

shall be confidential and be covered by the obligation of professional secrecy, unless its disclosure is necessary to bring about the cessation or prohibition of an intra-Community infringement and the authority communicating the information consents to its disclosure.

4. For the purpose of applying this Regulation, Member States shall adopt the legislative measures necessary to restrict the rights and obligations under Articles 10, 11 and 12 of Directive 95/46/EC as necessary to safeguard the interests referred to in Article 13(1)(d) and (f) of that Directive. The Commission may restrict the rights and obligations under Articles 4(1), 11, 12(1), 13 to 17 and 37(1) of Regulation (EC) No 45/2001 where such restriction constitutes a necessary measure to safeguard the

interests referred to in Article 20(1)(a) and (e) of that Regulation.

5. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

3. A requested authority may refuse to comply with a request for information under Article 6 if:

(a) in its opinion, following consultation with the applicant authority, the information requested is not required by the applicant authority to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur;

(b) the applicant authority does not agree that the information is subject to the provisions on confidentiality and professional secrecy set out in Article 13(3);

or

(c) criminal investigations or judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority.

4. A requested authority may decide not to comply with the obligations referred to in Article 7 if criminal investigations or judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority.

5. The requested authority shall inform the applicant authority and the Commission of the grounds for refusing to comply with a request for assistance. The applicant authority may refer the matter to the Commission which shall issue an opinion, in accordance with the procedure referred to in Article 19(2).

6. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

CHAPTER V: FINAL PROVISIONS

Article 22: Entry into force

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

It shall apply from 29 December 2005.

The provisions on mutual assistance set out in Chapters II and III shall apply from 29 December 2006.

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

Done at Strasbourg, 27 October 2004.

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04)

I. THE SCOPE OF THE NOTICE

1. The present notice addresses the co-operation between the Commission and the courts of the EU Member States, when the latter apply Articles 81 and 82 EC. For the purpose of this notice, the "courts of the EU Member States" (hereinafter "national courts") are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC(1).

2. The national courts may be called upon to apply Articles 81 or 82 EC in lawsuits between private parties, such as actions relating to contracts or actions for damages. They may also act as public enforcer or as review court. A national court may indeed be designated as a competition authority of a Member State (hereinafter "the national competition authority") pursuant to Article 35(1) of Regulation (EC) No 1/2003 (hereinafter "the regulation")(2). In that case, the co-operation between the national courts and the Commission is not only covered by the present notice, but also by the notice on the co-operation within the network of competition authorities(3).

II. THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

A. THE COMPETENCE OF NATIONAL COURTS TO APPLY EC COMPETITION RULES

3. To the extent that national courts have jurisdiction to deal with a case(4), they have the power to apply Articles 81 and 82 EC(5). Moreover, it should be remembered that Articles 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market(6). According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim(7).

4. Depending on the functions attributed to them under national law, national courts may be called upon to apply Articles 81 and 82 EC in administrative, civil or criminal proceedings(8). In particular, where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities(9). Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.

5. National courts can apply Articles 81 and 82 EC, without it being necessary to apply national competition law in parallel. However, where a national court applies national competition law to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 81(1) EC(10) or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices(11).

6. The regulation does not only empower the national courts to apply EC competition law. The parallel application of national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States may not lead to a different outcome from that of EC competition law. Article 3(2) of the regulation provides that agreements, decisions or concerted practices which do not infringe Article 81(1) EC or which fulfil the conditions of Article 81(3) EC cannot be prohibited either under national competition law(12). On the other hand, the Court of Justice has ruled that agreements, decisions or concerted practices that violate Article 81(1) and do not fulfil the conditions of Article 81(3) EC cannot be upheld under national law(13). As to the parallel application of national competition law and Article 82 EC in the case of unilateral conduct, Article 3 of the regulation does not provide for a similar convergence obligation. However, in case of conflicting provisions, the general principle of primacy of Community law requires national courts to disapply any provision of national law which contravenes a Community rule, regardless of whether that national law provision was adopted before or after the Community rule(14).

7. Apart from the application of Articles 81 and 82 EC, national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect. National courts may thus have to enforce Commission decisions(15) or regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. When applying these EC competition rules, national courts act within the framework of Community law and are consequently bound to observe the general principles of Community law(16).

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments(17). When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or

concerted practices(18). Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission(19). Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC(20) and in the annual report on competition policy(21).

B. PROCEDURAL ASPECTS OF THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

9. The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they can impose in case of an infringement of those rules, are largely covered by national law. However, to some extent, Community law also determines the conditions in which EC competition rules are enforced. Those Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission's opinion on questions concerning the application of EC competition rules(22) or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations(23). These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force (24).

10. In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and - to the extent that they are competent to do so - impose sanctions provided for under national law. However, the application of these national provisions must be compatible with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

(a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive(25);

(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages(26);

(c) the rules on procedures and sanctions which national courts apply to enforce Community law

- must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness)(27) and they

- must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence)(28).

On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

C. PARALLEL OR CONSECUTIVE APPLICATION OF EC COMPETITION RULES BY THE COMMISSION AND BY NATIONAL COURTS

11. A national court may be applying EC competition law to an agreement, decision, concerted practice or unilateral behaviour affecting trade between Member States at the same time as the Commission or subsequent to the Commission(29). The following points outline some of the obligations national courts have to respect in those circumstances.

12. Where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission(30). To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices(31) and if so, about the progress of proceedings and the likelihood of a decision in that case(32). The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision(33). The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in this way, in particular when the outcome of a civil dispute depends on them. However, where the national court cannot reasonably doubt the Commission's contemplated decision or where the Commission has already decided on a similar case, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ask the Commission for the information mentioned above or to await the Commission's decision.

13. Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the Court of Justice(34). Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law. However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice

for a preliminary ruling on the validity of the Commission decision is warranted(35).

14. When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties (36).

III. THE CO-OPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

15. Other than the co-operation mechanism between the national courts and the Court of Justice under Article 234 EC, the EC Treaty does not explicitly provide for co-operation between the national courts and the Commission. However, in its interpretation of Article 10 EC, which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law(37). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks(38).

16. It is also appropriate to recall the co-operation between national courts and national authorities, in particular national competition authorities, for the application of Articles 81 and 82 EC. While the co-operation between these national authorities is primarily governed by national rules, Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State. Points 31 and 33 to 35 of this notice are mutatis mutandis applicable to those submissions.

A. THE COMMISSION AS AMICUS CURIAE

17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers(39).

18. The national court may send its request for assistance in writing to European Commission Directorate General for Competition B - 1049 Brussels Belgium

or send it electronically to comp-amicus@cec.eu.int

19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence(40). In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.

20. The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

1. The Commission's duty to transmit information to national courts

21. The duty for the Commission to assist national courts in the application of EC competition law is mainly reflected in the obligation for the Commission to transmit information it holds to national courts. A national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position. A national court may also ask the Commission when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted(41).

22. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request. Where the Commission has to ask the national court for further clarification of its request or where the Commission has to consult those who are directly affected by the transmission of the information, that period starts to run from the moment that it receives the required information.

23. In transmitting information to national courts, the Commission has to uphold the guarantees given to natural and legal persons by Article 287 EC(42). Article 287 EC prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than

the one that provided the information might seriously harm the latter's interests(43).

24. The combined reading of Articles 10 and 287 EC does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 287 EC.

25. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 287 EC confers on natural and legal persons and it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court(44). Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.

26. There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it(45). Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.

2. Request for an opinion on questions concerning the application of EC competition rules

27. When called upon to apply EC competition rules to a case pending before it, a national court may first seek guidance in the case law of the Community courts or in Commission regulations, decisions, notices and guidelines applying Articles 81 and 82 EC(46). Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters(47). The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.

28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information(48). In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.

29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.

30. In line with what has been said in point 19 of this notice, the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission's opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.

3. The Commission's submission of observations to the national court

31. According to Article 15(3) of the regulation, the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which is called upon to apply those provisions. The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court(49).

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations(50).

34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC

(a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;

(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness)(51); and

(c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).

B. THE NATIONAL COURTS FACILITATING THE ROLE OF THE COMMISSION IN THE ENFORCEMENT OF EC COMPETITION RULES

36. Since the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty(52), the regulation provides for three examples of such assistance: (1) the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (see point 33), (2) the transmission of judgements applying Articles 81 or 82 EC); and (3) the role of national courts in the context of a Commission inspection.

1. The transmission of judgements of national courts applying Articles 81 or 82 EC

37. According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties. The transmission of national judgements on the application of Articles 81 or 82 EC and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement.

2. The role of national courts in the context of a Commission inspection

38. Finally, national courts may play a role in the context of a Commission inspection of undertakings and associations of undertakings. The role of the national courts depends on whether the inspections are conducted in business premises or in non-business premises.

39. With regard to the inspection of business premises, national legislation may require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned. Such authorisation may also be sought as a precautionary measure. When dealing with the request, the national court has the power to control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national court may ask the Commission, directly or through the national competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned(53).

40. With regard to the inspection of non-business premises, the regulation requires the authorisation from a national court before a Commission decision ordering such an inspection can be executed. In that case, the national court may control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national court may ask the Commission, directly or through the national competition authority, for detailed explanations on those elements that are necessary to allow its control of the proportionality of the coercive measures envisaged(54).

41. In both cases referred to in points 39 and 40, the national court may not call into question the lawfulness of the Commission's decision or the necessity for the inspection nor can it demand that it be provided with information in the Commission's file(55). Furthermore, the duty of loyal co-operation requires the national court to take its decision within an appropriate timeframe that allows the Commission to effectively conduct its inspection(56).

IV. FINAL PROVISIONS

42. This notice is issued in order to assist national courts in the application of Articles 81 and 82 EC. It does not bind the national courts, nor does it affect the rights and obligations of the EU Member States and natural or legal persons under Community law.

Directive 2006/123/EC (the Services Directive)

Directive 2006/123/EC of the European Parliament and of the Council

of 12 December 2006

on services in the internal market

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the first and third sentence of Article 47(2) and Article 55 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) The European Community is seeking to forge ever closer links between the States and peoples of Europe and to ensure economic and social progress. In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of services is ensured. In accordance with Article 43 of the Treaty the freedom of establishment is ensured. Article 49 of the Treaty establishes the right to provide services within the Community. The elimination of barriers to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress. In eliminating such barriers it is essential to ensure that the development of service activities contributes to the fulfilment of the task laid down in Article 2 of the Treaty of promoting 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.

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

(3) The report from the Commission on "The State of the Internal Market for Services" drew up an inventory of a large number of barriers which are preventing or slowing down the development of services between Member States, in particular those provided by SMEs, which are predominant in the field of services. The report concludes that a decade after the envisaged completion of the internal market, there is still a huge gap between the vision of an integrated European Union economy and the reality as experienced by European citizens and providers. The barriers affect a wide variety of service activities across all stages of the provider's activity and have a number of common features, including the fact that they often arise from administrative burdens, the legal uncertainty associated with cross-border activity and the lack of mutual trust between Member States.

(4) Since services constitute the engine of economic growth and account for 70 % of GDP and employment in most Member States, this fragmentation of the internal market has a negative impact on the entire European economy, in particular on the competitiveness of SMEs and the movement of workers, and prevents consumers from gaining access to a greater variety of competitively priced services. It is important to point out that the services sector is a key employment sector for women in particular, and that they therefore stand to benefit greatly from new opportunities offered by the completion of the internal market for services. The European Parliament and the Council have emphasised that the removal of legal barriers to the establishment of a genuine internal market is a matter of priority for achieving the goal set by the European Council in Lisbon of 23 and 24 March 2000 of improving employment and social cohesion and achieving sustainable economic growth so as to make the European Union the most competitive and dynamic knowledge-based economy in the world by 2010, with more and better jobs. Removing those barriers, while ensuring an advanced European social model, is thus a basic condition for overcoming the difficulties encountered in implementing the Lisbon Strategy and for reviving the European economy, particularly in terms of employment and investment. It is therefore important to achieve an internal market for services, with the right balance between market opening and preserving public services and social and consumer rights.

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

two freedoms, depending on their strategy for growth in each Member State.

(6) Those barriers cannot be removed solely by relying on direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.

(7) This Directive establishes a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity or profession and its system of regulation. That framework is based on a dynamic and selective approach consisting in the removal, as a matter of priority, of barriers which may be dismantled quickly and, for the others, the launching of a process of evaluation, consultation and complementary harmonisation of specific issues, which will make possible the progressive and coordinated modernisation of national regulatory systems for service activities which is vital in order to achieve a genuine internal market for services by 2010. Provision should be made for a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues. That coordination of national legislative regimes should ensure a high degree of Community legal integration and a high level of protection of general interest objectives, especially protection of consumers, which is vital in order to establish trust between Member States. This Directive also takes into account other general interest objectives, including the protection of the environment, public security and public health as well as the need to comply with labour law.

(8) It is appropriate that the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services.

(9) This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.

(12) This Directive aims at creating a legal framework to ensure the freedom of establishment and the free movement of services between the Member States and does not harmonise or prejudice criminal law. However, Member States should not be able to restrict the freedom to provide services by applying criminal law provisions which specifically affect the access to or the exercise of a service activity in circumvention of the rules laid down in this Directive.

[...]

(15) This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter of fundamental Rights of the European Union and the accompanying explanations, reconciling them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights include the right to take industrial action in accordance with national law and practices which respect Community law.

(17) This Directive covers only services which are performed for an economic consideration. Services of general interest are not covered by the definition in Article 50 of the Treaty and therefore do not fall within the scope of this Directive. Services of general economic interest are services that are performed for an economic consideration and therefore do fall within the scope of this Directive. However, certain services of general economic interest, such as those that may exist in the field of transport, are excluded from the scope of this Directive and certain other services of general economic interest, for example, those that may exist in the area of postal services, are the subject of a derogation from the provision on the freedom to provide services set out in this Directive. This Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member States, in particular in the social field, in accordance with Community rules on competition. This Directive does not deal with the follow-up to the Commission White Paper on Services of General Interest.

(30) There is already a considerable body of Community law on service activities. This Directive builds on, and thus complements, the Community acquis. Conflicts between this Directive and other Community instruments have been identified and are addressed by this Directive, including by means of derogations. However, it is necessary to provide a rule for any residual and exceptional cases where there is a conflict between a provision of this Directive and a provision of another Community instrument. The existence of such a conflict should be determined in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

(32) This Directive is consistent with Community legislation on consumer protection, such as Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive) [12] and Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the

enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [13].

(33) The services covered by this Directive concern a wide variety of ever-changing activities, including business services such as management consultancy, certification and testing; facilities management, including office maintenance; advertising; recruitment services; and the services of commercial agents. The services covered are also services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; distributive trades; the organisation of trade fairs; car rental; and travel agencies. Consumer services are also covered, such as those in the field of tourism, including tour guides; leisure services, sports centres and amusement parks; and, to the extent that they are not excluded from the scope of application of the Directive, household support services, such as help for the elderly. Those activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet.

(34) According to the case-law of the Court of Justice, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a "service" has to be carried out on a case by case basis in the light of all their characteristics, in particular the way they are provided, organised and financed in the Member State concerned. The Court of Justice has held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds. These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this Directive.

((36) The concept of "provider" should cover any natural person who is a national of a Member State or any legal person engaged in a service activity in a Member State, in exercise either of the freedom of establishment or of the free movement of services. The concept of provider should thus not be limited solely to cross-border service provision within the framework of the free movement of services but should also cover cases in which an operator establishes itself in a Member State in order to develop its service activities there. On the other hand, the concept of a provider should not cover the case of branches in a Member State of companies from third countries because, under Article 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community. ((38) The concept of "legal persons", according to the Treaty provisions on establishment, leaves operators free to choose the legal form which they deem suitable for carrying out their activity. Accordingly, "legal persons", within the meaning of the Treaty, means all entities constituted under, or governed by, the law of a Member State, irrespective of their legal form.

(43) One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the "red tape" involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.

[...]

(45) In order to examine the need for simplifying procedures and formalities, Member States should be able, in particular, to take into account their necessity, number, possible duplication, cost, clarity and accessibility, as well as the delay and practical difficulties to which they could give rise for the provider concerned.

(46) In order to facilitate access to service activities and the exercise thereof in the internal market, it is necessary to establish an objective, common to all Member States, of administrative simplification and to lay down provisions concerning, inter alia, the right to information, procedures by electronic means and the establishment of a framework for authorisation schemes. Other measures adopted at national level to meet that objective could involve reduction of the number of procedures and formalities applicable to service activities and the restriction of such procedures and formalities to those which are essential in order to achieve a general interest objective and which do not duplicate each other in terms of content or purpose.

(48) In order to further simplify administrative procedures, it is appropriate to ensure that each provider has a single point through which he can complete all procedures and formalities (hereinafter referred to as "points of single contact"). The

number of points of single contact per Member State may vary according to regional or local competencies or according to the activities concerned. The creation of points of single contact should not interfere with the allocation of functions among competent authorities within each national system. Where several authorities at regional or local level are competent, one of them may assume the role of point of single contact and coordinator. Points of single contact may be set up not only by administrative authorities but also by chambers of commerce or crafts, or by the professional organisations or private bodies to which a Member State decides to entrust that function. Points of single contact have an important role to play in providing assistance to providers either as the authority directly competent to issue the documents necessary to access a service activity or as an intermediary between the provider and the authorities which are directly competent.

((50) It is necessary for providers and recipients of services to have easy access to certain types of information It should be for each Member State to determine, within the framework of this Directive, the way in which providers and recipients are provided with information. In particular, the obligation on Member States to ensure that relevant information is easily accessible to providers and recipients and that it can be accessed by the public without obstacle could be fulfilled by making this information accessible through a website. Any information given should be provided in a clear and unambiguous manner.

(51) The information provided to providers and recipients of services should include, in particular, information on procedures and formalities, contact details of the competent authorities, conditions for access to public registers and data bases and information concerning available remedies and the contact details of associations and organisations from which providers or recipients can obtain practical assistance. The obligation on competent authorities to assist providers and recipients should not include the provision of legal advice in individual cases. Nevertheless, general information on the way in which requirements are usually interpreted or applied should be given. Issues such as liability for providing incorrect or misleading information should be determined by Member States.

(64) In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 43 and 49 of the Treaty respectively. The restrictions to be prohibited particularly affect the internal market for services and should be systematically dismantled as soon as possible.

(65) Freedom of establishment is predicated, in particular, upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds but capable of producing the same result. Thus, access to a service activity or the exercise thereof in a Member State, either as a principal or secondary activity, should not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. However, these criteria should not include requirements according to which a provider or one of his employees or a representative must be present during the exercise of the activity when this is justified by an overriding reason relating to the public interest. Furthermore, a Member State should not restrict the legal capacity or the right of companies, incorporated in accordance with the law of another Member State on whose territory they have their primary establishment, to bring legal proceedings. Moreover, a Member State should not be able to confer any advantages on providers having a particular national or local socio-economic link; nor should it be able to restrict, on grounds of place of establishment, the provider's freedom to acquire, exploit or dispose of rights and goods or to access different forms of credit or accommodation in so far as those choices are useful for access to his activity or for the effective exercise thereof.

(69) In order to coordinate the modernisation of national rules and regulations in a manner consistent with the requirements of the internal market, it is necessary to evaluate certain non-discriminatory national requirements which, by their very nature, could severely restrict or even prevent access to an activity or the exercise thereof under the freedom of establishment. This evaluation process should be limited to the compatibility of these requirements with the criteria already established by the Court of Justice on the freedom of establishment. It should not concern the application of Community competition law. Where such requirements are discriminatory or not objectively justified by an overriding reason relating to the public interest, or where they are disproportionate, they must be abolished or amended. The outcome of this assessment will be different according to the nature of the activity and the public interest concerned. In particular, such requirements could be fully justified when they pursue social policy objectives.

(70) For the purposes of this Directive, and without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task.

(71) The mutual evaluation process provided for in this Directive should not affect the freedom of Member States to set in their legislation a high level of protection of the public interest, in particular in relation to social policy objectives. Furthermore, it is necessary that the mutual evaluation process take fully into account the specificity of services of general economic interest and of the particular tasks assigned to them. This may justify certain restrictions on the freedom of establishment, in particular where such restrictions pursue the protection of public health and social policy objectives and where they satisfy the conditions set out in Article 15(3)(a), (b) and (c). For example, with regard to the obligation to take a specific legal form in order to exercise certain services in the social field, the Court of Justice has already recognised that it may be justified to subject the provider to a requirement to be non-profit making.

(72) Services of a general economic interest are entrusted with important tasks relating to social and territorial cohesion. The performance of these tasks should not be obstructed as a result of the evaluation process provided for in this Directive. Requirements which are necessary for the fulfilment of such tasks should not be affected by this process while, at the same time, unjustified restrictions on the freedom of establishment should be addressed.

(76) This Directive does not concern the application of Articles 28 to 30 of the Treaty relating to the free movement of goods. The restrictions prohibited pursuant to the provision on the freedom to provide services cover the requirements applicable to access to service activities or to the exercise thereof and not those applicable to goods as such.

(78) In order to secure effective implementation of the free movement of services and to ensure that recipients and providers can benefit from and supply services throughout the Community regardless of borders, it is necessary to clarify the extent to which requirements of the Member State where the service is provided can be imposed. It is indispensable to provide that the provision on the freedom to provide services does not prevent the Member State where the service is provided from imposing, in compliance with the principles set out in Article 16(1)(a) to (c), its specific requirements for reasons of public policy or public security or for the protection of public health or the environment.

(79) The Court of Justice has consistently held that Member States retain the right to take measures in order to prevent providers from abusively taking advantage of the internal market principles. Abuse by a provider should be established on a case by case basis.

(80) It is necessary to ensure that providers are able to take equipment which is integral to the provision of their service with them when they travel to provide services in another Member State. In particular, it is important to avoid cases in which the service could not be provided without the equipment or situations in which providers incur additional costs, for example, by hiring or purchasing different equipment to that which they habitually use or by needing to deviate significantly from the way they habitually carry out their activity.

(81) The concept of equipment does not refer to physical objects which are either supplied by the provider to the client or become part of a physical object as a result of the service activity, such as building materials or spare parts, or which are consumed or left in situ in the course of the service provision, such as combustible fuels, explosives, fireworks, pesticides, poisons or medicines.

(83) It is necessary to ensure that the provision on the freedom to provide services may be departed from only in the areas covered by derogations. Those derogations are necessary in order to take into account the level of integration of the internal market or certain Community instruments relating to services pursuant to which a provider is subject to the application of a law other than that of the Member State of establishment. Moreover, by way of exception, measures against a given provider should also be adopted in certain individual cases and under certain strict procedural and substantive conditions. In addition, any restriction of the free movement of services should be permitted, by way of exception, only if it is consistent with fundamental rights which form an integral part of the general principles of law enshrined in the Community legal order.

[...]

(89) The derogation from the provision on the freedom to provide services concerning matters relating to the registration of vehicles leased in a Member State other than that in which they are used follows from the case law of the Court of Justice, which has recognised that a Member State may impose such an obligation, in accordance with proportionate conditions, in the case of vehicles used on its territory. That exclusion does not cover occasional or temporary rental.

((91) It is necessary to afford Member States the possibility, exceptionally and on a case-by-case basis, of taking measures which derogate from the provision on the freedom to provide services in respect of a provider established in another Member State on grounds of the safety of services. However, it should be possible to take such measures only in the absence of harmonisation at Community level.

(92) Restrictions on the free movement of services, contrary to this Directive, may arise not only from measures applied to providers, but also from the many barriers to the use of services by recipients, especially consumers. This Directive mentions, by way of illustration, certain types of restriction applied to a recipient wishing to use a service performed by a provider established in another Member State. This also includes cases where recipients of a service are under an obligation to obtain authorisation from or to make a declaration to their competent authorities in order to receive a service from a provider established in another Member State. This does not concern general authorisation schemes which also apply to the use of a service supplied by a provider established in the same Member State.

(94) In accordance with the Treaty rules on the free movement of services, discrimination on grounds of the nationality of the recipient or national or local residence is prohibited. Such discrimination could take the form of an obligation, imposed only on nationals of another Member State, to supply original documents, certified copies, a certificate of nationality or official translations of documents in order to benefit from a service or from more advantageous terms or prices. However, the prohibition of discriminatory requirements should not preclude the reservation of advantages, especially as regards tariffs, to certain recipients, if such reservation is based on legitimate and objective criteria.

(95) The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient's nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to

apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment. Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination.

(97) It is necessary to provide in this Directive for certain rules on high quality of services, ensuring in particular information and transparency requirements. These rules should apply both in cases of cross border provision of services between Member States and in cases of services provided in a Member State by a provider established there, without imposing unnecessary burdens on SMEs. They should not in any way prevent Member States from applying, in conformity with this Directive and other Community law, additional or different quality requirements.

(98) Any operator providing services involving a direct and particular health, safety or financial risk for the recipient or a third person should, in principle, be covered by appropriate professional liability insurance, or by another form of guarantee which is equivalent or comparable, which means, in particular, that such an operator should as a general rule have adequate insurance cover for services provided in one or more Member States other than the Member State of establishment.

(99) The insurance or guarantee should be appropriate to the nature and extent of the risk. Therefore it should be necessary for the provider to have cross-border cover only if that provider actually provides services in other Member States. Member States should not lay down more detailed rules concerning the insurance cover and fix for example minimum thresholds for the insured sum or limits on exclusions from the insurance cover. Providers and insurance companies should maintain the necessary flexibility to negotiate insurance policies precisely targeted to the nature and extent of the risk. Furthermore, it is not necessary for an obligation of appropriate insurance to be laid down by law. It should be sufficient if an insurance obligation is part of the ethical rules laid down by professional bodies. Finally, there should be no obligation for insurance companies to provide insurance cover.

(102) In order to increase transparency and promote assessments based on comparable criteria with regard to the quality of the services offered and supplied to recipients, it is important that information on the meaning of quality labels and other distinctive marks relating to these services be easily accessible. That obligation of transparency is particularly important in areas such as tourism, especially the hotel business, in which the use of a system of classification is widespread. Moreover, it is appropriate to examine the extent to which European standardisation could facilitate compatibility and quality of services. European standards are drawn up by the European standards-setting bodies, the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). Where appropriate, the Commission may, in accordance with the procedures laid down in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations [20] and of rules on Information Society services, issue a mandate for the drawing up of specific European standards.

[...]

(104) The development of a network of Member States' consumer protection authorities, which is the subject of Regulation (EC) No 2006/2004, complements the cooperation provided for in this Directive. The application of consumer protection legislation in cross-border cases, in particular with regard to new marketing and selling practices, as well as the need to remove certain specific obstacles to cooperation in this field, necessitates a greater degree of cooperation between Member States. In particular, it is necessary in this area to ensure that Member States require the cessation of illegal practices by operators in their territory who target consumers in another Member State.

(107) In normal circumstances mutual assistance should take place directly between competent authorities. The liaison points designated by Member States should be required to facilitate this process only in the event of difficulties being encountered, for instance if assistance is required to identify the relevant competent authority.

(108) Certain obligations of mutual assistance should apply to all matters covered by this Directive, including those relating to cases where a provider establishes in another Member State. Other obligations of mutual assistance should apply only in cases of cross-border provision of services, where the provision on the freedom to provide services applies. A further set of obligations should apply in all cases of cross-border provision of services, including areas not covered by the provision on the freedom to provide services. Cross-border provision of services should include cases where services are provided at a distance and where the recipient travels to the Member State of establishment of the provider in order to receive services. [...]

(110) It should not be possible for Member States to circumvent the rules laid down in this Directive, including the provision on the freedom to provide services, by conducting checks, inspections or investigations which are discriminatory or disproportionate.

(111) The provisions of this Directive concerning exchange of information regarding the good repute of providers should not pre-empt initiatives in the area of police and judicial cooperation in criminal matters, in particular on the exchange of information between law enforcement authorities of the Member States and on criminal records.

(112) Cooperation between Member States requires a well-functioning electronic information system in order to allow competent authorities easily to identify their relevant

interlocutors in other Member States and to communicate in an efficient way.

(113) It is necessary to provide that the Member States, in cooperation with the Commission, are to encourage interested parties to draw up codes of conduct at Community level, aimed, in particular, at promoting the quality of services and taking into account the specific nature of each profession. Those codes of conduct should comply with Community law, especially competition law. They should be compatible with legally binding rules governing professional ethics and conduct in the Member States.

(114) Member States should encourage the setting up of codes of conduct, in particular, by professional bodies, organisations and associations at Community level. These codes of conduct should include, as appropriate to the specific nature of each profession, rules for commercial communications relating to the regulated professions and rules of professional ethics and conduct of the regulated professions which aim, in particular, at ensuring independence, impartiality and professional secrecy. In addition, the conditions to which the activities of estate agents are subject should be included in such codes of conduct. Member States should take accompanying measures to encourage professional bodies, organisations and associations to implement at national level the codes of conduct adopted at Community level.

(115) Codes of conduct at Community level are intended to set minimum standards of conduct and are complementary to Member States' legal requirements. They do not preclude Member States, in accordance with Community law, from taking more stringent measures in law or national professional bodies from providing for greater protection in their national codes of conduct.

(116) Since the objectives of this Directive, namely the elimination of barriers to the freedom of establishment for providers in the Member States and to the free provision of services between Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

[...]

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: GENERAL PROVISIONS

Article 1: Subject matter

1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

4. This Directive does not affect measures taken at Community level or at national level, in conformity with Community law, to protect or promote cultural or linguistic diversity or media pluralism.

5. This Directive does not affect Member States' rules of criminal law. However, Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive.

7. This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

Article 2: Scope

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

Article 4: Definitions

For the purposes of this Directive, the following definitions shall apply:

1) "service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty;

2) "provider" means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service;

3) "recipient" means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service;

4) "Member State of establishment" means the Member State in whose territory the provider of the service concerned is established;

9) "competent authority" means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof;

10) "Member State where the service is provided" means the Member State where the service is supplied by a provider established in another Member State;

Article 6: Points of single contact

1. Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact:

(a) all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association;

(b) any applications for authorisation needed to exercise his service activities.

2. The establishment of points of single contact shall be without prejudice to the allocation of functions and powers among the authorities within national systems.

Article 7: Right to information

1. Member States shall ensure that the following information is easily accessible to providers and recipients through the points of single contact:

(a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;

(b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities;

(c) the means of, and conditions for, accessing public registers and databases on providers and services;

(d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;

(e) the contact details of the associations or organisations, other than the competent authorities, from which providers or recipients may obtain practical assistance.

2. Member States shall ensure that it is possible for providers and recipients to receive, at their request, assistance from the competent authorities, consisting in information on the way in which the requirements referred to in point (a) of paragraph 1 are generally interpreted and applied. Where appropriate, such advice shall include a simple step-by-step guide. The information shall be provided in plain and intelligible language.

3. Member States shall ensure that the information and assistance referred to in paragraphs 1 and 2 are provided in a clear and unambiguous manner, that they are easily accessible at a distance and by electronic means and that they are kept up to date.

4. Member States shall ensure that the points of single contact and the competent authorities respond as quickly as possible to any request for information or assistance as referred to in paragraphs 1 and 2 and, in cases where the request is faulty or unfounded, inform the applicant accordingly without delay.

5. Member States and the Commission shall take accompanying measures in order to encourage points of single contact to make the information provided for in this Article available in other Community languages. This does not interfere with Member States' legislation on the use of languages.

6. The obligation for competent authorities to assist providers and recipients does not require those authorities to provide legal advice in individual cases but concerns only general information on the way in which requirements are usually interpreted or applied.

CHAPTER III: FREEDOM OF ESTABLISHMENT FOR PROVIDERS

SECTION 2: Requirements prohibited or subject to evaluation

Article 14: Prohibited requirements

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

1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, including in particular:

(a) nationality requirements for the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies;

Article 15: Requirements to be evaluated

1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

7. Member States shall notify the Commission of any new laws, regulations or administrative provisions which set requirements as referred to in paragraph 6, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent Member States from adopting the provisions in question.

Within a period of 3 months from the date of receipt of the notification, the Commission shall examine the compatibility of any new requirements with Community law and, where appropriate, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.

The notification of a draft national law in accordance with Directive 98/34/EC shall fulfil the obligation of notification provided for in this Directive.

CHAPTER IV: FREE MOVEMENT OF SERVICES

SECTION 1: Freedom to provide services and related derogations

Article 16: Freedom to provide services

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

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

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

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

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

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

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

[...]

(g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

4. By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.

Article 17: Additional derogations from the freedom to provide services

Article 16 shall not apply to:

[...] provisions regarding contractual and non-contractual obligations, including the form of contracts, determined pursuant to the rules of private international law.

Article 18: Case-by-case derogations

1. By way of derogation from Article 16, and in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services.

2. The measures provided for in paragraph 1 may be taken only if the mutual assistance procedure laid down in Article 35 is complied with and the following conditions are fulfilled:

(a) the national provisions in accordance with which the measure is taken have not been subject to Community harmonisation in the field of the safety of services;

(b) the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of establishment in accordance with its national provisions;

(c) the Member State of establishment has not taken any measures or has taken measures which are insufficient as compared with those referred to in Article 35(2);

(d) the measures are proportionate.

3. Paragraphs 1 and 2 shall be without prejudice to provisions, laid down in Community instruments, which guarantee the freedom to provide services or which allow derogations therefrom.

SECTION 2: Rights of recipients of services

Article 19: Prohibited restrictions

Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

(a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;

(b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.

Article 20: Non-discrimination

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

Article 21: Assistance for recipients

1. Member States shall ensure that recipients can obtain, in their Member State of residence, the following information:

(a) general information on the requirements applicable in other Member States relating to access to, and exercise of, service activities, in particular those relating to consumer protection;

(b) general information on the means of redress available in the case of a dispute between a provider and a recipient;

(c) the contact details of associations or organisations, including the centres of the European Consumer Centres Network, from which providers or recipients may obtain practical assistance.

Where appropriate, advice from the competent authorities shall include a simple step-by-step guide. Information and assistance shall be provided in a clear and unambiguous manner, shall be easily accessible at a distance, including by electronic means, and shall be kept up to date.

2. Member States may confer responsibility for the task referred to in paragraph 1 on points of single contact or on any other body, such as the centres of the European Consumer Centres Network, consumer associations or Euro Info Centres.

Member States shall communicate to the Commission the names and contact details of the designated bodies. The Commission shall transmit them to all Member States.

3. In fulfilment of the requirements set out in paragraphs 1 and 2, the body approached by the recipient shall, if necessary, contact the relevant body for the Member State concerned. The latter shall send the information requested as soon as possible to the requesting body which shall forward the information to the recipient. Member States shall ensure that those bodies give each other mutual assistance and shall put in place all possible measures for effective cooperation. Together with the Commission, Member States shall put in place practical arrangements necessary for the implementation of paragraph 1.

4. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt measures for the implementation of paragraphs 1, 2 and 3 of this Article, specifying the technical mechanisms for the exchange of information between the bodies of the various Member States and, in particular, the interoperability of information systems, taking into account common standards.

CHAPTER V: QUALITY OF SERVICES

Article 22: Information on providers and their services

1. Member States shall ensure that providers make the following information available to the recipient:

(a) the name of the provider, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;

(b) where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register; [...]

(f) the general conditions and clauses, if any, used by the provider;

(g) the existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and/or the competent courts;

(h) the existence of an after-sales guarantee, if any, not imposed by law;

(i) the price of the service, where a price is pre-determined by the provider for a given type of service;

(j) the main features of the service, if not already apparent from the context;

(k) the insurance or guarantees referred to in Article 23(1), and in particular the contact details of the insurer or guarantor and the territorial coverage.

2. Member States shall ensure that the information referred to in paragraph 1, according to the provider's preference:

(a) is supplied by the provider on his own initiative;

(b) is easily accessible to the recipient at the place where the service is provided or the contract concluded;

(c) can be easily accessed by the recipient electronically by means of an address supplied by the provider;

(d) appears in any information documents supplied to the recipient by the provider which set out a detailed description of the service he provides.

3. Member States shall ensure that, at the recipient's request, providers supply the following additional information:

(a) where the price is not pre-determined by the provider for a given type of service, the price of the service or, if an exact price cannot be given, the method for calculating the price so

that it can be checked by the recipient, or a sufficiently detailed estimate;

(d) any codes of conduct to which the provider is subject and the address at which these codes may be consulted by electronic means, specifying the language version available;

(e) where a provider is subject to a code of conduct, or member of a trade association or professional body which provides for recourse to a non-judicial means of dispute settlement, information in this respect. The provider shall specify how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement.

4. Member States shall ensure that the information which a provider must supply in accordance with this Chapter is made available or communicated in a clear and unambiguous manner, and in good time before conclusion of the contract or, where there is no written contract, before the service is provided.

5. The information requirements laid down in this Chapter are in addition to requirements already provided for in Community law and do not prevent Member States from imposing additional information requirements applicable to providers established in their territory.

6. The Commission may, in accordance with the procedure referred to in Article 40(2), specify the content of the information provided for in paragraphs 1 and 3 of this Article according to the specific nature of certain activities and may specify the practical means of implementing paragraph 2 of this Article.

Article 23: Professional liability insurance and guarantees

1. Member States may ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, or to the financial security of the recipient, subscribe to professional liability insurance appropriate to the nature and extent of the risk, or provide a guarantee or similar arrangement which is equivalent or essentially comparable as regards its purpose.

2. When a provider establishes himself in their territory, Member States may not require professional liability insurance or a guarantee from the provider where he is already covered by a guarantee which is equivalent, or essentially comparable as regards its purpose and the cover it provides in terms of the insured risk, the insured sum or a ceiling for the guarantee and possible exclusions from the cover, in another Member State in which the provider is already established. Where equivalence is only partial, Member States may require a supplementary guarantee to cover those aspects not already covered.

When a Member State requires a provider established in its territory to subscribe to professional liability insurance or to provide another guarantee, that Member State shall accept as sufficient evidence attestations of such insurance cover issued by credit institutions and insurers established in other Member States.

3. Paragraphs 1 and 2 shall not affect professional insurance or guarantee arrangements provided for in other Community instruments.

4. For the implementation of paragraph 1, the Commission may, in accordance with the regulatory procedure referred to in Article 40(2), establish a list of services which exhibit the characteristics referred to in paragraph 1 of this Article. The Commission may also, in accordance with the procedure referred to in Article 40(3), adopt measures designed to amend non-essential elements of this Directive by supplementing it by establishing common criteria for defining, for the purposes of the insurance or guarantees referred to in paragraph 1 of this Article, what is appropriate to the nature and extent of the risk.

5. For the purpose of this Article

- "direct and particular risk" means a risk arising directly from the provision of the service,

- "health and safety" means, in relation to a recipient or a third person, the prevention of death or serious personal injury,

- "financial security" means, in relation to a recipient, the prevention of substantial losses of money or of value of property,

- "professional liability insurance" means insurance taken out by a provider in respect of potential liabilities to recipients and, where applicable, third parties arising out of the provision of the service.

Article 26: Policy on quality of services

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular through use of one of the following methods:

(a) certification or assessment of their activities by independent or accredited bodies;

(b) drawing up their own quality charter or participation in quality charters or labels drawn up by professional bodies at Community level.

2. Member States shall ensure that information on the significance of certain labels and the criteria for applying labels and other quality marks relating to services can be easily accessed by providers and recipients.

3. Member States shall, in cooperation with the Commission, take accompanying measures to encourage professional bodies, as well as chambers of commerce and craft associationsand consumer associations, in their territory to cooperate at Community level in order to promote the quality of service provision, especially by making it easier to assess the competence of a provider.

4. Member States shall, in cooperation with the Commission, take accompanying measures to encourage the development of independent assessments, notably by consumer associations, in relation to the quality and defects of service provision, and, in particular, the development at Community

level of comparative trials or testing and the communication of the results.

5. Member States, in cooperation with the Commission, shall encourage the development of voluntary European standards with the aim of facilitating compatibility between services supplied by providers in different Member States, information to the recipient and the quality of service provision.

Article 27: Settlement of disputes

1. Member States shall take the general measures necessary to ensure that providers supply contact details, in particular a postal address, fax number or e-mail addressand telephone number to which all recipients, including those resident in another Member State, can send a complaint or a request for information about the service provided. Providers shall supply their legal address if this is not their usual address for correspondence.

Member States shall take the general measures necessary to ensure that providers respond to the complaints referred to in the first subparagraph in the shortest possible time and make their best efforts to find a satisfactory solution.

2. Member States shall take the general measures necessary to ensure that providers are obliged to demonstrate compliance with the obligations laid down in this Directive as to the provision of information and to demonstrate that the information is accurate.

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CHAPTER VI: ADMINISTRATIVE COOPERATION

Article 28: Mutual assistance – general obligations

1. Member States shall give each other mutual assistance, and shall put in place measures for effective cooperation with one another, in order to ensure the supervision of providers and the services they provide.

2. For the purposes of this Chapter, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States and the Commission. The Commission shall publish and regularly update the list of liaison points.

CHAPTER VII: CONVERGENCE PROGRAMME

Article 37: Codes of conduct at Community level

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community level, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community law.

2. Member States shall ensure that the codes of conduct referred to in paragraph 1 are accessible at a distance, by electronic means.

CHAPTER VIII: FINAL PROVISIONS

Article 44: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 28 December 2009.

They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 45: Entry into force

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 46: Addressees

This Directive is addressed to the Member States.
Done at Strasbourg, 12 December 2006.
For the European Parliament
The President
J. Borrell Fontelles
For the Council
The President
M. Pekkarinen

Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11)

I. INTRODUCTION

(1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC [1].

(2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

(4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

(5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

(6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.

(7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. [2]

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

(8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel [3]; or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

(9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC,.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

(a) The undertaking cooperates genuinely [5], fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:

- providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

- remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;

- making current (and, if possible, former) employees and directors available for interviews with the Commission;

- not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

- not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

(b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;

(c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

(13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. Procedure

(14) An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.

(15) The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

(16) An undertaking making a formal immunity application to the Commission must:

(a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or

(b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However,

the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

(17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.

(18) Once the Commission has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

(19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

(20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

(21) The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.

(22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the Commission will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Commission, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

III. REDUCTION OF A FINE

A. Requirements to qualify for reduction of a fine

(23) Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

(24) In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.

(25) The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

- first undertaking to provide significant added value: a reduction of 30-50 %,

- second undertaking to provide significant added value: a reduction of 20-30 %,

- subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

B. Procedure

(27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the Commission and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Commission which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.

(28) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.

(29) If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.

(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;

(c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

(36) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

(37) From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.

(38) The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

(39) In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

(40) The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 [10], even after the decision has been taken.

COMMISSION WHITE PAPER on Damages actions for breach of the EC antitrust rule

Brussels, 2.4.2008 {SEC(2008) 404}{SEC(2008) 405}{SEC(2008) 406

WHITE PAPER on Damages actions for breach of the EC antitrust rules

PURPOSE AND SCOPE OF THE WHITE PAPER

Why a White Paper on damages actions for breaches of the EC antitrust rules?

Any citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage. This right of victims to compensation is guaranteed by Community law , as the European Court of Justice recalled in 2001 and 2006.[1] Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.[2]

In its 2005 Green Paper, the Commission concluded that this failure is largely due to various legal and procedural hurdles in the Member States' rules governing actions for antitrust damages before national courts. Indeed, such antitrust damages cases display a number of particular characteristics that are often insufficiently addressed by traditional rules on civil liability and procedure. This gives rise to a great deal of legal uncertainty .[3] These particularities include the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants.

The current ineffectiveness of antitrust damages actions is best addressed by a combination of measures at both Community and national levels, in order to achieve effective minimum protection of the victims' right to damages under Articles 81 and 82 in every Member State and a more level playing field and greater legal certainty across the EU. The European Parliament[4] concurred with the findings in the Green Paper, as did other stakeholders, and called upon the Commission to prepare a White Paper with detailed proposals to address the obstacles to effective antitrust damages actions.

Objectives, guiding principles and scope of the White Paper

This White Paper considers and puts forward proposals for policy choices and specific measures that would ensure, more than is the case today, that all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered. The primary objective of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle.

More effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable.[5] Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules. Safeguarding undistorted competition is an integral part of the internal market and important for implementing the Lisbon strategy. A competition culture contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices.

The Commission followed the further guiding principle that the legal framework for more effective antitrust damages actions should be based on a genuinely European approach. The policy choices proposed in this White Paper therefore consist of balanced measures that are rooted in European legal culture and traditions.

Another important guiding principle of the Commission's policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and the competition authorities of the Member States. Accordingly, the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement.

In view of the foregoing and in line with the requirement set out by the Court of Justice that any victim of antitrust infringements must be able to exercise his right to compensation effectively, the issues addressed in the White Paper concern, in principle, all categories of victim, all types of breach of Articles 81 and 82 and all sectors of the economy. The Commission also considers it appropriate that the policy should cover both actions for damages which do, and actions which do not, rely on a prior finding of an infringement by a competition authority.

Directive 2009/103/EC (the Motor Vehicles insurance Directive)

Directive 2009/103/EC of the European Parliament and of the Council

of 16 September 2009

relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability

(codified version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [3], Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [4], Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [5] and Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Fourth motor insurance Directive) [6] have been substantially amended several times [7]. In the interests of clarity and rationality those four Directives should be codified, as well as Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [8].

(2) Insurance against civil liability in respect of the use of motor vehicles (motor insurance) is of special importance for European citizens, whether they are policyholders or victims of an accident. It is also a major concern for insurance undertakings as it constitutes an important part of non-life insurance business in the Community. Motor insurance also has an impact on the free movement of persons and vehicles. It should therefore be a key objective of Community action in the field of financial services to reinforce and consolidate the internal market in motor insurance.

(3) Each Member State must take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the insurance cover are to be determined on the basis of those measures.

(4) In order to exclude any possible misinterpretation of this Directive and to make it easier to obtain insurance cover for vehicles bearing temporary plates, the definition of the territory in which the vehicle is normally based should refer to the territory of the State of which the vehicle bears a registration plate, irrespective of whether such a plate is permanent or temporary.

(5) While respecting the general criterion of the registration plate to determine the territory in which the vehicle is normally based, a special rule should be laid down for accidents caused by vehicles without a registration plate or bearing a registration plate which does not correspond or no longer corresponds to the vehicle. In this case and for the sole purpose of settling the claim, the territory in which the vehicle is normally based should be deemed to be the territory in which the accident took place. [...]

(8) Such a guarantee agreement presupposes that all Community motor vehicles travelling in Community territory are covered by insurance. The national law of each Member State should, therefore, provide for the compulsory insurance of vehicles against civil liability, such insurance to be valid throughout Community territory.

(9) The system provided for in this Directive could be extended to vehicles normally based in the territory of any third country in respect of which the national bureaux of the Member States have concluded a similar agreement. [...]

(12) Member States' obligations to guarantee insurance cover at least in respect of certain minimum amounts constitute an important element in ensuring the protection of victims. The minimum amount of cover for personal injury should be calculated so as to compensate fully and fairly all victims who have suffered very serious injuries, while taking into account the low frequency of accidents involving several victims and the small number of accidents in which several victims suffer very serious injuries in the course of one and the same event. A minimum amount of cover per victim or per claim should be provided for. With a view to facilitating the introduction of these minimum amounts, a transitional period should be established. However, a period shorter than the transitional period should be provided for, in which Member States should increase these amounts to at least half the levels provided for. [...]

(14) It is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified.

It is important to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact. However, Member States should be given the possibility of applying certain limited exclusions as regards the payment of compensation by that body and of providing that compensation for damage to property caused by an unidentified vehicle may be limited or excluded in view of the danger of fraud. [...]

(20) Motor vehicle accident victims should be guaranteed comparable treatment irrespective of where in the Community accidents occur.

(21) The members of the family of the policyholder, driver or any other person liable should be afforded protection comparable to that of other third parties, in any event in respect of their personal injuries.

(22) Personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised road users, who are usually the weakest party in an accident, should be covered by the compulsory insurance of the vehicle involved in the accident where they are entitled to compensation under national civil law. This provision does not prejudge the issue of civil liability, or the level of awards of damages in respect of a given accident, under national legislation.

(23) The inclusion within the insurance cover of any passenger in the vehicle is a major achievement of the existing legislation. This objective would be placed in jeopardy if national legislation or any contractual clause contained in an insurance policy excluded passengers from insurance cover because they knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of the accident. The passenger is not usually in a position to assess properly the level of intoxication of the driver. The objective of discouraging persons from driving while under the influence of intoxicating agents is not achieved by reducing the insurance cover for passengers who are victims of motor vehicle accidents. Cover of such passengers under the vehicle's compulsory motor insurance does not prejudge any liability they might incur pursuant to the applicable national legislation, nor the level of any award of damages in a specific accident.

(24) All compulsory motor insurance policies should cover the entire territory of the Community.

(25) Some insurance undertakings insert into insurance policies clauses to the effect that the contract will be cancelled if the vehicle remains outside the Member State of registration for longer than a specified period. This practice is in conflict with the principle set out in this Directive, according to which compulsory motor insurance should cover, on the basis of a single premium, the entire territory of the Community. It should therefore be specified that the insurance cover is to remain valid during the whole term of the contract, irrespective of whether the vehicle remains in another Member State for a particular period, without prejudice to the obligations under Member States' national legislation with respect to the registration of vehicles.

(26) In the interests of the party insured, every insurance policy should guarantee for a single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based, when that cover is higher.

(27) Steps should be taken to make it easier to obtain insurance cover for vehicles imported from one Member State into another, even though the vehicle is not yet registered in the Member State of destination. A temporary derogation from the general rule determining the Member State where the risk is situated should be made available. For a period of 30 days from the date when the vehicle is delivered, made available or dispatched to the purchaser, the Member State of destination should be considered to be the Member State where the risk is situated. [...]

(30) The right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents. In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be provided for victims of any motor vehicle accident.

(31) In order to obtain an adequate level of protection for victims of motor vehicle accidents, a "reasoned offer" procedure should be extended to any kind of motor vehicle accident. This same procedure should also apply mutatis mutandis where the accident is settled by the system of national insurers' bureaux.

(32) Under Article 11(2) read in conjunction with Article 9(1)(b) 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 [10], injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled. [...]

(34) Parties injured as a result of a motor vehicle accident falling within the scope of this Directive and occurring in a State other than that of their residence should be entitled to claim in their Member State of residence against a claims representative appointed there by the insurance undertaking of the responsible party. This solution would enable damage suffered by injured parties outside their Member State of residence to be dealt with under procedures which are familiar to them. [...]

(38) The activities of the claims representative are not sufficient in order to confer jurisdiction on the courts in the injured party's Member State of residence if the rules of private international law on the conferral of jurisdiction do not so provide. [...]

(54) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1: GENERAL PROVISIONS

Article 1: Definitions

For the purposes of this Directive:

1. "vehicle" means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled;

2. "injured party" means any person entitled to compensation in respect of any loss or injury caused by vehicles;

3. "national insurers' bureau" means a professional organisation which is constituted in accordance with Recommendation No 5 adopted on 25 January 1949 by the Road Transport Sub-committee of the Inland Transport Committee of the United Nations Economic Commission for Europe and which groups together insurance undertakings which, in a State, are authorised to conduct the business of motor vehicle insurance against civil liability;

4. "territory in which the vehicle is normally based" means:

(a) the territory of the State of which the vehicle bears a registration plate, irrespective of whether the plate is permanent or temporary; or

(b) in cases where no registration is required for a type of vehicle but the vehicle bears an insurance plate, or a distinguishing sign analogous to the registration plate, the territory of the State in which the insurance plate or the sign is issued; or

(c) in cases where neither a registration plate nor an insurance plate nor a distinguishing sign is required for certain types of vehicle, the territory of the State in which the person who has custody of the vehicle is permanently resident; [...]

6. "insurance undertaking" means an undertaking which has received its official authorisation in accordance with Article 6 or Article 23(2) of Directive 73/239/EEC;

7. "establishment" means the head office, agency or branch of an insurance undertaking as defined in Article 2(c) of Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services [14].

Article 2: Scope

The provisions of Articles 4, 6, 7 and 8 shall apply to vehicles normally based on the territory of one of the Member States:

(a) after an agreement has been concluded between the national insurers' bureaux under the terms of which each national bureau guarantees the settlement, in accordance with the provisions of national law on compulsory insurance, of claims in respect of accidents occurring in its territory, caused by vehicles normally based in the territory of another Member State, whether or not such vehicles are insured;

(b) from the date fixed by the Commission, upon its having ascertained in close cooperation with the Member States that such an agreement has been concluded;

(c) for the duration of that agreement.

Article 3: Compulsory insurance of vehicles

Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.

The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.

Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:

(a) according to the law in force in other Member States, any loss or injury which is caused in the territory of those States;

(b) any loss or injury suffered by nationals of Member States during a direct journey between two territories in which the Treaty is in force, if there is no national insurers' bureau responsible for the territory which is being crossed; in such a case, the loss or injury shall be covered in accordance with the national laws on compulsory insurance in force in the Member State in whose territory the vehicle is normally based.

The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries.

CHAPTER 5: SPECIAL CATEGORIES OF VICTIM, EXCLUSION CLAUSES, SINGLE PREMIUM, VEHICLES DISPATCHED FROM ONE MEMBER STATE TO ANOTHER

Article 13: Exclusion clauses

1. Each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by:

(a) persons who do not have express or implied authorisation to do so;

(b) persons who do not hold a licence permitting them to drive the vehicle concerned;

(c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned.

However, the provision or clause referred to in point (a) of the first subparagraph may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.

Member States shall have the option — in the case of accidents occurring on their territory — of not applying the

provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.

2. In the case of vehicles stolen or obtained by violence, Member States may provide that the body specified in Article 10(1) is to pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article. Where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State.

Member States which, in the case of vehicles stolen or obtained by violence, provide that the body referred to in Article 10(1) is to pay compensation may fix in respect of damage to property an excess of not more than EUR 250 to be borne by the victim.

3. Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger.

Article 14: Single premium

Member States shall take the necessary steps to ensure that all compulsory policies of insurance against civil liability arising out of the use of vehicles:

(a) cover, on the basis of a single premium and during the whole term of the contract, the entire territory of the Community, including for any period in which the vehicle remains in other Member States during the term of the contract; and

(b) guarantee, on the basis of that single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher.

CHAPTER 8: FINAL PROVISIONS

Article 28: National provisions

1. Member States may, in accordance with the Treaty, maintain or bring into force provisions which are more favourable to injured parties than the provisions needed to comply with this Directive.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 30: Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 31: Addressees

This Directive is addressed to the Member States.
Done at Strasbourg, 16 September 2009.
For the European Parliament
The President
J. Buzek
For the Council
The President
C. Malmström

C-36-74 Walrave and Koch [1974]

B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo.

Subject of the case

ON THE INTERPRETATION OF ARTICLES 7, 48 AND 59 OF THE EEC TREATY AND THE PROVISIONS OF REGULATION (EEC) NO 1612/68 ON FREEDOM OF MOVEMENT FOR WORKERS WITHIN THE COMMUNITY (OJ L 257 OF 19. 10. 1968, P. 2),

1 BY ORDER DATED 15 MAY 1974 FILED AT THE COURT REGISTRY ON 24 MAY 1974, THE ARRONDISSEMENTSRECHTBANK UTRECHT REFERRED UNDER ARTICLE 177 OF THE EEC TREATY VARIOUS QUESTIONS RELATING TO THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 7, ARTICLE 48 AND THE FIRST PARAGRAPH OF ARTICLE 59 OF THE EEC TREATY AND OF REGULATION NO 1612/68 OF THE COUNCIL OF 15 OCTOBER 1968 (OJ L 257, P. 2) ON FREEDOM OF MOVEMENT FOR WORKERS WITHIN THE COMMUNITY.

2 THE BASIC QUESTION IS WHETHER THESE ARTICLES AND REGULATION MUST BE INTERPRETED IN SUCH A WAY THAT THE PROVISION IN THE RULES OF THE UNION CYCLISTE INTERNATIONALE RELATING TO MEDIUM-DISTANCE WORLD CYCLING CHAMPIONSHIPS BEHIND MOTORCYCLES, ACCORDING TO WHICH " L' ENTRAINEUR DOIT ETRE DE LA NATIONALITE DE COUREUR " (THE PACEMAKER MUST BE OF THE SAME NATIONALITY AS THE STAYER) IS INCOMPATIBLE WITH THEM.

3 THESE QUESTIONS WERE RAISED IN AN ACTION DIRECTED AGAINST THE UNION CYCLISTE INTERNATIONALE AND THE DUTCH AND SPANISH CYCLING FEDERATIONS BY TWO DUTCH NATIONALS WHO NORMALLY TAKE PART AS PACEMAKERS IN RACES OF THE SAID TYPE AND WHO REGARD THE AFOREMENTIONED PROVISION OF THE RULES OF UCI AS DISCRIMINATORY.

4 HAVING REGARD TO THE OBJECTIVES OF THE COMMUNITY, THE PRACTICE OF SPORT IS SUBJECT TO COMMUNITY LAW ONLY IN SO FAR AS IT CONSTITUTES AN ECONOMIC ACTIVITY WITHIN THE MEANING OF ARTICLE 2 OF THE TREATY.

5 WHEN SUCH ACTIVITY HAS THE CHARACTER OF GAINFUL EMPLOYMENT OR REMUNERATED SERVICE IT COMES MORE PARTICULARLY WITHIN THE SCOPE, ACCORDING TO THE CASE, OF ARTICLES 48 TO 51 OR 59 TO 66 OF THE TREATY.

6 THESE PROVISIONS, WHICH GIVE EFFECT TO THE GENERAL RULE OF ARTICLE 7 OF THE TREATY, PROHIBIT ANY DISCRIMINATION BASED ON NATIONALITY IN THE PERFORMANCE OF THE ACTIVITY TO WHICH THEY REFER.

7 IN THIS RESPECT THE EXACT NATURE OF THE LEGAL RELATIONSHIP UNDER WHICH SUCH SERVICES ARE PERFORMED IS OF NO IMPORTANCE SINCE THE RULE OF NON-DISCRIMINATION COVERS IN IDENTICAL TERMS ALL WORK OR SERVICES.

8 THIS PROHIBITION HOWEVER DOES NOT AFFECT THE COMPOSITION OF SPORT TEAMS, IN PARTICULAR NATIONAL TEAMS, THE FORMATION OF WHICH IS A QUESTION OF PURELY SPORTING INTEREST AND AS SUCH HAS NOTHING TO DO WITH ECONOMIC ACTIVITY.

9 THIS RESTRICTION ON THE SCOPE OF THE PROVISIONS IN QUESTION MUST HOWEVER REMAIN LIMITED TO ITS PROPER OBJECTIVE.

10 HAVING REGARD TO THE ABOVE, IT IS FOR THE NATIONAL COURT TO DETERMINE THE NATURE OF THE ACTIVITY SUBMITTED TO ITS JUDGMENT AND TO DECIDE IN PARTICULAR WHETHER IN THE SPORT IN QUESTION THE PACEMAKER AND STAYER DO OR DO NOT CONSTITUTE A TEAM.

11 THE ANSWERS ARE GIVEN WITHIN THE LIMITS DEFINED ABOVE OF THE SCOPE OF COMMUNITY LAW.

12 THE QUESTIONS RAISED RELATE TO THE INTERPRETATION OF ARTICLES 48 AND 59 AND TO A LESSER EXTENT OF ARTICLE 7 OF THE TREATY.

13 BASICALLY THEY RELATE TO THE APPLICABILITY OF THE SAID PROVISIONS TO LEGAL RELATIONSHIPS WHICH DO NOT COME UNDER PUBLIC LAW, THE DETERMINATION OF THEIR TERRITORIAL SCOPE IN THE LIGHT OF RULES OF SPORT EMANATING FROM A WORLD-WIDE FEDERATION AND THE DIRECT APPLICABILITY OF CERTAIN OF THOSE PROVISIONS.

14 THE MAIN QUESTION IN RESPECT OF ALL THE ARTICLES REFERRED TO IS WHETHER THE RULES OF AN INTERNATIONAL SPORTING FEDERATION CAN BE REGARDED AS INCOMPATIBLE WITH THE TREATY.

15 IT HAS BEEN ALLEGED THAT THE PROHIBITIONS IN THESE ARTICLES REFER ONLY TO RESTRICTIONS WHICH HAVE THEIR ORIGIN IN ACTS OF AN AUTHORITY AND NOT TO THOSE RESULTING FROM LEGAL ACTS OF PERSONS OR ASSOCIATIONS WHO DO NOT COME UNDER PUBLIC LAW.

16 ARTICLES 7, 48, 59 HAVE IN COMMON THE PROHIBITION, IN THEIR RESPECTIVE SPHERES OF APPLICATION, OF ANY DISCRIMINATION ON GROUNDS OF NATIONALITY.

17 PROHIBITION OF SUCH DISCRIMINATION DOES NOT ONLY APPLY TO THE ACTION OF PUBLIC AUTHORITIES BUT EXTENDS LIKEWISE TO RULES OF ANY OTHER NATURE AIMED AT REGULATING IN A COLLECTIVE MANNER GAINFUL EMPLOYMENT AND THE PROVISION OF SERVICES.

18 THE ABOLITION AS BETWEEN MEMBER STATES OF OBSTACLES TO FREEDOM OF MOVEMENT FOR PERSONS AND TO FREEDOM TO PROVIDE SERVICES, WHICH ARE FUNDAMENTAL OBJECTIVES OF THE COMMUNITY CONTAINED IN ARTICLE 3 (C) OF THE TREATY, WOULD BE COMPROMISED IF THE ABOLITION OF BARRIERS OF NATIONAL ORIGIN COULD BE NEUTRALIZED BY OBSTACLES RESULTING FROM THE EXERCISE OF THEIR LEGAL AUTONOMY BY ASSOCIATIONS OR ORGANIZATIONS WHICH DO NOT COME UNDER PUBLIC LAW.

19 SINCE, MOREOVER, WORKING CONDITIONS IN THE VARIOUS MEMBER STATES ARE GOVERNED SOMETIMES BY MEANS OF PROVISIONS LAID DOWN BY LAW OR REGULATION AND SOMETIMES BY AGREEMENTS AND OTHER ACTS CONCLUDED OR ADOPTED BY PRIVATE PERSONS, TO LIMIT THE PROHIBITIONS IN QUESTION TO ACTS OF A PUBLIC AUTHORITY WOULD RISK CREATING INEQUALITY IN THEIR APPLICATION.

20 ALTHOUGH THE THIRD PARAGRAPH OF ARTICLE 60, AND ARTICLES 62 AND 64, SPECIFICALLY RELATE, AS REGARDS THE PROVISION OF SERVICES, TO THE ABOLITION OF MEASURES BY THE STATE, THIS FACT DOES NOT DEFEAT THE GENERAL NATURE OF THE TERMS OF ARTICLE 59, WHICH MAKES NO DISTINCTION BETWEEN THE SOURCE OF THE RESTRICTIONS TO BE ABOLISHED.

21 IT IS ESTABLISHED, MOREOVER, THAT ARTICLE 48, RELATING TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY AS REGARDS GAINFUL EMPLOYMENT, EXTENDS LIKEWISE TO AGREEMENTS AND RULES WHICH DO NOT EMANATE FROM PUBLIC AUTHORITIES.

22 ARTICLE 7 (4) OF REGULATION NO 1612/68 IN CONSEQUENCE PROVIDES THAT THE PROHIBITION ON DISCRIMINATION SHALL APPLY TO AGREEMENTS AND ANY OTHER COLLECTIVE REGULATIONS CONCERNING EMPLOYMENT.

23 THE ACTIVITIES REFERRED TO IN ARTICLE 59 ARE NOT TO BE DISTINGUISHED BY THEIR NATURE FROM THOSE IN ARTICLE 48, BUT ONLY BY THE FACT THAT THEY ARE PERFORMED OUTSIDE THE TIES OF A CONTRACT OF EMPLOYMENT.

24 THIS SINGLE DISTINCTION CANNOT JUSTIFY A MORE RESTRICTIVE INTERPRETATION OF THE SCOPE OF THE FREEDOM TO BE ENSURED.

25 IT FOLLOWS THAT THE PROVISIONS OF ARTICLES 7, 48 AND 59 OF THE TREATY MAY BE TAKEN INTO ACCOUNT BY THE NATIONAL COURT IN JUDGING THE VALIDITY OR THE EFFECTS OF A PROVISION INSERTED IN THE RULES OF A SPORTING ORGANIZATION.

26 THE NATIONAL COURT THEN RAISES THE QUESTION OF THE EXTENT TO WHICH THE RULE ON NON-DISCRIMINATION MAY BE APPLIED TO LEGAL RELATIONSHIPS ESTABLISHED IN THE CONTEXT OF THE ACTIVITIES OF A SPORTING FEDERATION OF WORLD-WIDE PROPORTIONS.

27 THE COURT IS ALSO INVITED TO SAY WHETHER THE LEGAL POSITION MAY DEPEND ON WHETHER THE SPORTING COMPETITION IS HELD WITHIN OR OUTSIDE THE COMMUNITY.

28 BY REASON OF THE FACT THAT IT IS IMPERATIVE, THE RULE ON NON-DISCRIMINATION APPLIES IN JUDGING ALL LEGAL RELATIONSHIPS IN SO FAR AS THESE RELATIONSHIPS, BY REASON EITHER OF THE PLACE WHERE THEY ARE ENTERED INTO OR OF THE PLACE WHERE THEY TAKE EFFECT, CAN BE LOCATED WITHIN THE TERRITORY OF THE COMMUNITY.

29 IT IS FOR THE NATIONAL JUDGE TO DECIDE WHETHER THEY CAN BE SO LOCATED, HAVING REGARD TO THE FACTS OF EACH PARTICULAR CASE, AND, AS REGARDS THE LEGAL EFFECT OF THESE RELATIONSHIPS, TO DRAW THE CONSEQUENCES OF ANY INFRINGEMENT OF THE RULE ON NON-DISCRIMINATION.

30 FINALLY, THE NATIONAL COURT HAS RAISED THE QUESTION WHETHER THE FIRST PARAGRAPH OF ARTICLE 59, AND POSSIBLY THE FIRST PARAGRAPH OF ARTICLE 7, OF THE TREATY HAVE DIRECT EFFECTS WITHIN THE LEGAL ORDERS OF THE MEMBER STATES.

31 AS HAS BEEN SHOWN ABOVE, THE OBJECTIVE OF ARTICLE 59 IS TO PROHIBIT IN THE SPHERE OF THE PROVISION OF SERVICES, INTER ALIA, ANY DISCRIMINATION ON THE GROUNDS OF THE NATIONALITY OF THE PERSON PROVIDING THE SERVICES.

32 IN THE SECTOR RELATING TO SERVICES, ARTICLE 59 CONSTITUTES THE IMPLEMENTATION OF THE NON-DISCRIMINATION RULE FORMULATED BY ARTICLE 7 FOR THE GENERAL APPLICATION OF THE TREATY AND BY ARTICLE 48 FOR GAINFUL EMPLOYMENT.

33 THUS, AS HAS ALREADY BEEN RULED (JUDGMENT OF 3 DECEMBER 1974 IN CASE 33/74, VAN BINSBERGEN) ARTICLE 59 COMPRISES, AS AT THE END OF THE TRANSITIONAL PERIOD, AN UNCONDITIONAL PROHIBITION PREVENTING, IN THE LEGAL ORDER OF EACH MEMBER STATE, AS REGARDS THE PROVISION OF SERVICES - AND IN SO FAR AS IT IS A QUESTION OF NATIONALS OF MEMBER STATES - THE IMPOSITION OF OBSTACLES OR LIMITATIONS BASED ON THE NATIONALITY OF THE PERSON PROVIDING THE SERVICES.

34 IT IS THEREFORE RIGHT TO REPLY TO THE QUESTION RAISED THAT AS FROM THE END OF THE TRANSITIONAL PERIOD THE FIRST PARAGRAPH OF ARTICLE 59, IN ANY EVENT IN SO FAR AS IT REFERS TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY, CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.

Operative part

ON THOSE GROUNDS, THE COURT IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE ARRONDISSEMENTSRECHTBANK UTRECHT, HEREBY RULES :

1. HAVING REGARD TO THE OBJECTIVES OF THE COMMUNITY, THE PRACTICE OF SPORT IS SUBJECT TO COMMUNITY LAW ONLY IN SO FAR AS IT CONSTITUTES AN ECONOMIC ACTIVITY WITHIN THE MEANING OF ARTICLE 2 OF THE TREATY.

2. THE PROHIBITION ON DISCRIMINATION BASED ON NATIONALITY CONTAINED IN ARTICLES 7, 48 AND 59 OF THE TREATY DOES NOT AFFECT THE COMPOSITION OF SPORT TEAMS, IN PARTICULAR NATIONAL TEAMS, THE FORMATION OF WHICH IS A QUESTION OF PURELY SPORTING INTEREST AND AS SUCH HAS NOTHING TO DO WITH ECONOMIC ACTIVITY.

3. PROHIBITION ON SUCH DISCRIMINATION DOES NOT ONLY APPLY TO THE ACTION OF PUBLIC AUTHORITIES BUT EXTENDS LIKEWISE TO RULES OF ANY OTHER NATURE AIMED AT COLLECTIVELY REGULATING GAINFUL EMPLOYMENT AND SERVICES.

4. THE RULE ON NON-DISCRIMINATION APPLIES IN JUDGING ALL LEGAL RELATIONSHIPS IN SO FAR AS THESE RELATIONSHIPS, BY REASON EITHER OF THE PLACE WHERE THEY ARE ENTERED INTO OR OF THE PLACE WHERE THEY TAKE EFFECT, CAN BE LOCATED WITHIN THE TERRITORY OF THE COMMUNITY.

5. THE FIRST PARAGRAPH OF ARTICLE 59, IN ANY EVENT IN SO FAR AS IT REFERS TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY, CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.

C-17-74 Transocean Marine Paint Association v Commission [1974]

Summary

1. THE OBLIGATION IMPOSED UPON THE COMMISSION BY ARTICLES 2 AND 4 OF REGULATION NO 99/63 TO INFORM AN UNDERTAKING, IN WRITING OR BY GIVING NOTICE IN THE OFFICIAL JOURNAL, OF THE OBJECTIONS RAISED AGAINST IT AND TO DEAL, IN ITS DECISIONS, ONLY WITH THESE OBJECTIONS, IS ESSENTIALLY CONCERNED WITH THE STATEMENT OF THE REASONS WHICH LEAD IT TO APPLY ARTICLE 85 (1). ON THE OTHER HAND, THE COMMISSION CANNOT BE EXPECTED TO ANTICIPATE THE CONDITIONS AND OBLIGATIONS TO WHICH IT IS ENTITLED TO SUBJECT THE EXEMPTION LAID DOWN IN ARTICLE 85 (3).

2. IT IS CLEAR, HOWEVER, BOTH FROM THE NATURE AND OBJECTIVE OF THE PROCEDURE FOR HEARINGS, AND FROM ARTICLES 5, 6 AND 7 OF REGULATION NO 99/63, THAT THIS REGULATION, NOTWITHSTANDING THE CASES SPECIFICALLY DEALT WITH IN ARTICLES 2 AND 4, APPLIES THE GENERAL RULE THAT PERSONS WHOSE INTERESTS ARE PERCEPTIBLY AFFECTED BY A DECISION TAKEN BY A PUBLIC AUTHORITY MUST BE GIVEN THE OPPORTUNITY TO MAKE THEIR POINT OF VIEW KNOWN.

3. SINCE ARTICLE 85 (3) CONSTITUTES, FOR THE BENEFIT OF UNDERTAKINGS, AN EXCEPTION TO THE GENERAL PROHIBITION CONTAINED IN ARTICLE 85 (1), THE COMMISSION MUST BE IN A POSITION AT ANY MOMENT TO CHECK WHETHER THE CONDITIONS JUSTIFYING THE EXEMPTION ARE STILL PRESENT. ACCORDINGLY, IN RELATION TO THE DETAILED RULES TO WHICH IT MAY SUBJECT THE EXEMPTION, THE COMMISSION ENJOYS A LARGE MEASURE OF DISCRETION, WHILE AT THE SAME TIME HAVING TO ACT WITHIN THE LIMITS IMPOSED UPON ITS COMPETENCE BY ARTICLE 85. ON THE OTHER HAND, THE EXERCISE OF THIS DISCRETIONARY POWER IS LINKED TO A PRELIMINARY CANVASSING OF OBJECTIONS WHICH MAY BE RAISED BY THE UNDERTAKINGS.

1 BY DECISION OF 21 DECEMBER 1973 THE COMMISSION, PURSUANT TO ARTICLE 85 (3) OF THE EEC TREATY, RENEWED, SUBJECT TO NEW CONDITIONS, THE EXEMPTION FROM THE PROHIBITION CONTAINED IN ARTICLE 85 (1), WHICH HAD BEEN GRANTED, BY DECISION OF 27 JUNE 1967, TO AN AGREEMENT RESTRICTING COMPETITION ON THE MARKET IN MARINE PAINTS, CONCLUDED BETWEEN THE UNDERTAKINGS CONSTITUTING THE TRANSOCEAL MARINE PAINT ASSOCIATION (HEREINAFTER REFERRED TO AS THE ASSOCIATION).

2 INTER ALIA, ARTICLE 3 (1) (D) OF THE DECISION REQUIRES MEMBERS OF THE ASSOCIATION TO INFORM THE COMMISSION WITHOUT DELAY OF 'ANY LINKS BY WAY OF COMMON DIRECTORS OR MANAGERS BETWEEN A MEMBER OF THE ASSOCIATION AND ANY OTHER COMPANY OR FIRM IN THE PAINTS SECTOR OR ANY FINANCIAL PARTICIPATION BY A MEMBER OF THE ASSOCIATION IN SUCH OUTSIDE COMPANIES OR VICE-VERSA INCLUDING ALL CHANGES IN SUCH LINKS OR PARTICIPATIONS ALREADY IN EXISTENCE '.

3 THIS ACTION HAS BEEN BROUGHT FOR THE PURPOSE OF ANNULLING THAT SINGLE PROVISION.

4 THE APPLICANTS FIRSTLY STATE THAT THE OBLIGATION IN ISSUE WAS MENTIONED NEITHER IN THE 'NOTICE OF OBJECTIONS' OF 27 JULY 1973, NOR AT THE TIME OF THE HEARING ON 27 SEPTEMBER 1973, AND THAT FURTHERMORE IT WAS NOT MENTIONED IN ANY LETTER OR MEMORANDUM FROM THE COMMISSION, PRIOR TO THE DECISION, SO THAT THEY WERE NEVER GIVEN THE OPPORTUNITY TO MAKE THEIR VIEWS KNOWN ON THIS SUBJECT. ACCORDINGLY, AS REGARDS THE CLAUSE IN ISSUE, THE COMMISSION IS SAID TO HAVE INFRINGED RULES OF PROCEDURE LAID DOWN BY REGULATION NO 99/63 OF THE COMMISSION OF 25 JULY 1963 (OJ 127 OF 20. 8. 1963), ON THE HEARINGS PROVIDED FOR IN ARTICLE 19 OF REGULATION NO 17 OF THE COUNCIL OF 6 FEBRUARY 1962 (OJ 13 OF 21. 2. 1962) AND IN PARTICULAR ARTICLES 2 AND 4 OF THE SAID REGULATION NO 99/63.

5 SECONDLY, THE APPLICANTS ALLEGE AN INFRINGEMENT OF ARTICLE 85 OF THE TREATY AND OF ARTICLE 8 (1) OF REGULATION NO 17, IN THAT THE OBLIGATION IMPOSED UPON THE UNDERTAKINGS IS WIDER IN SCOPE THAN ANYTHING WHICH MAY BE IMPOSED UPON THEM UNDER ARTICLE 85.

6 IN A COMMUNICATION OF 27 JULY 1973 ENTITLED 'NOTICE OF OBJECTIONS', DRAWN UP IN DUTCH, THE COMMISSION STATED THAT A SIMPLE RENEWAL OF THE EXEMPTION COULD NOT BE ENVISAGED, SINCE THE POSITION OF THE MEMBERS OF THE ASSOCIATION ON THE MARINE PAINTS MARKET HAD CHANGED AS A RESULT OF THE INCREASE IN THE NUMBER OF UNDERTAKINGS COMPOSING THE ASSOCIATION, THE INCREASED SIZE OF CERTAIN OF THEM AND THE LINKS WHICH TWO OF THE MEMBERS, ASTRAL AND URRUZOLA, HAD FORGED WITH LARGE INDUSTRIAL CHEMICAL CONCERNS.

7 THE COMMISSION ADDED THAT IT WAS NEVERTHELESS WILLING TO RENEW THE EXEMPTION FOR A PERIOD OF FIVE YEARS, BUT AT THE SAME TIME MAKING IT SUBJECT TO FRESH CONDITIONS AND OBLIGATIONS, ONE OF WHICH WAS FORMULATED SO AS TO INVOLVE, FOR THE MEMBERS OF THE ASSOCIATION, APART FROM THE OBLIGATIONS CONTAINED IN ARTICLE 4 OF THE DECISION OF 27 JUNE 1967, THE FURTHER OBLIGATION TO NOTIFY TO THE COMMISSION WITHOUT DELAY 'IEDERE WIJZIGING IN DE DEELNEMINGSVERHOUDINGEN VAN DE LEDEN' (LITERALLY : ANY CHANGE IN THE PARTICIPATORY RELATIONSHIPS OF THE MEMBERS).

8 THE APPLICANTS CLAIM THAT AT NO TIME COULD THEY INFER FROM THIS STATEMENT THAT THE COMMISSION INTENDED TO IMPOSE ON THEM A CONDITION SUCH AS THAT CONTAINED IN THE PROVISION IN ISSUE, AND ONE TO WHICH THEY WOULD NOT BE ABLE, BY REASONS OF ITS BREADTH, TO ADHERE AND WHICH, WITHOUT GOOD REASON, WOULD HARM THEIR INTERESTS. IF THEY HAD BEEN IN A POSITION TO REALIZE THE COMMISSION'S INTENTIONS THEY WOULD NOT HAVE FAILED TO MAKE KNOWN THEIR OBJECTIONS ON THIS MATTER SO AS TO DRAW THE COMMISSION'S ATTENTION TO THE INCONVENIENCE WHICH WOULD RESULT FROM THE OBLIGATION IN ISSUE AND TO THE ILLEGALITY BY WHICH IT IS VITIATED. SINCE THEY WERE NOT GIVEN THIS OPPORTUNITY, THEY ALLEGE THAT THE DECISION, INSOFAR AS THE OBLIGATION IN ISSUE IS CONCERNED, MUST BE ANNULLED SINCE IT IS VITIATED BY A PROCEDURAL DEFECT.

9 THE DEFENDANT REPLIES, FIRSTLY, THAT THE REQUIREMENT LAID DOWN IN ARTICLE 2 OF REGULATION NO 99/63, ACCORDING TO WHICH 'THE COMMISSION SHALL INFORM UNDERTAKINGS AND ASSOCIATIONS OF UNDERTAKINGS IN WRITING OF THE OBJECTIONS RAISED AGAINST THEM', IN THE SAME WAY AS THE OBLIGATION IMPOSED UPON IT BY ARTICLE 4 OF THE SAME REGULATION, TO DEAL ONLY WITH 'THOSE OBJECTIONS RAISED AGAINST UNDERTAKINGS AND ASSOCIATIONS OF UNDERTAKINGS IN RESPECT OF WHICH THEY HAVE BEEN AFFORDED THE OPPORTUNITY OF MAKING KNOWN THEIR VIEWS', DO NOT RELATE TO THE CONDITIONS WHICH THE COMMISSION INTENDS TO ATTACH TO A DECISION GRANTING EXEMPTION.

10 THE COMMISSION ADDS THAT THE CONCERN WHICH IS GIVEN EXPRESSION IN THE CLAUSE IN ISSUE WAS KNOWN TO THE APPLICANTS, IN PARTICULAR BECAUSE OF THE IMPORTANCE ATTACHED TO THE CASE OF THE COMPANIES ASTRAL AND URRUZOLA, AND THIS BOTH IN THE COMMUNICATION OF 27 JULY 1973 AND DURING THE COURSE OF THE HEARING.

11 ACCORDING TO ARTICLE 19 OF REGULATION NO 17 OF THE COUNCIL, THE COMMISSION, BEFORE TAKING DECISIONS AS PROVIDED FOR IN ARTICLES 2, 3, 6, 7, 8, 15 AND 16 OF THAT REGULATION, SHALL GIVE THE UNDERTAKINGS OR ASSOCIATIONS OF UNDERTAKINGS CONCERNED THE OPPORTUNITY OF BEING HEARD ON THE MATTERS TO WHICH THE COMMISSION HAS TAKEN OBJECTION. IN REFERRING TO ARTICLE 6, THIS PROVISION RELATES TO DECISIONS TAKEN PURSUANT TO A REQUEST FOR THE APPLICATION OF ARTICLE 85 (3).

12 ACCORDING TO ARTICLE 24 OF THE SAME REGULATION THE COMMISSION SHALL HAVE POWER TO ADOPT IMPLEMENTING PROVISIONS IN THIS CONTEXT, WHICH IT DID IN REGULATION NO 99/63.

13 IT IS CLEAR BOTH FROM THE TITLE AND FROM THE FIRST RECITAL OF THIS REGULATION THAT IT IS CONCERNED WITH ALL THE HEARINGS PROVIDED FOR IN ARTICLE 19 OF REGULATION NO 17 OF THE COUNCIL AND, ACCORDINGLY, ALSO APPLIES TO PROCEDURES WITH REGARD TO ARTICLE 85 (3). HOWEVER, THE OBLIGATION IMPOSED UPON THE COMMISSION BY ARTICLES 2 AND 4 OF REGULATION NO 99/63 TO INFORM AN UNDERTAKING, IN WRITING OR BY GIVING NOTICE IN THE OFFICIAL JOURNAL, OF THE OBJECTIONS RAISED AGAINST IT AND TO DEAL, IN ITS DECISIONS, ONLY WITH THESE OBJECTIONS, IS ESSENTIALLY CONCERNED WITH THE STATEMENT OF THE REASONS WHICH WOULD LEAD IT TO APPLY PARAGRAPH (1) OF ARTICLE 85, EITHER BY ORDERING THAT AN INFRINGEMENT BE TERMINATED OR IMPOSING A FINE UPON THE UNDERTAKINGS, OR BY REFUSING TO GIVE THE LATTER NEGATIVE CLEARANCE OR THE BENEFIT OF PARAGRAPH (3) OF THE SAME PROVISION.

14 ON THE OTHER HAND, THE COMMISSION CANNOT BE EXPECTED TO ANTICIPATE THE CONDITIONS AND OBLIGATIONS TO WHICH IT IS ENTITLED TO SUBJECT THE EXEMPTION LAID DOWN IN ARTICLE 85 (3). IN FACT, THE INVESTIGATION OF A REQUEST FOR EXEMPTION MAY BRING TO LIGHT VARIOUS WAYS IN WHICH THE OPERATION OF AN AGREEMENT OR THE CONTROL OF THAT OPERATION MAY BE UNDERTAKEN, THIS PROMPTING THE COMMISSION TO WITHDRAW THE OBJECTIONS WHICH IT HAD RAISED AGAINST THE REQUEST AND JUSTIFYING THE GRANT, POSSIBLY SUBJECT TO CERTAIN CONDITIONS, OF THE BENEFIT OF ARTICLE 85 (3).

15 IT IS CLEAR, HOWEVER, BOTH FROM THE NATURE AND OBJECTIVE OF THE PROCEDURE FOR HEARINGS, AND FROM ARTICLES 5, 6 AND 7 OF REGULATION NO 99/63, THAT THIS REGULATION, NOTWITHSTANDING THE CASES SPECIFICALLY DEALT WITH IN ARTICLES 2 AND 4, APPLIES THE GENERAL RULE THAT A PERSON WHOSE INTERESTS ARE PERCEPTIBLY AFFECTED BY A DECISION TAKEN BY A PUBLIC AUTHORITY MUST BE GIVEN THE OPPORTUNITY TO MAKE HIS POINT OF VIEW KNOWN. THIS RULE REQUIRES THAT AN UNDERTAKING BE CLEARLY INFORMED, IN GOOD TIME, OF THE ESSENCE OF

CONDITIONS TO WHICH THE COMMISSION INTENDS TO SUBJECT AN EXEMPTION AND IT MUST HAVE THE OPPORTUNITY TO SUBMIT ITS OBSERVATIONS TO THE COMMISSION. THIS IS ESPECIALLY SO IN THE CASE OF CONDITIONS WHICH, AS IN THIS CASE, IMPOSE CONSIDERABLE OBLIGATIONS HAVING FAR-REACHING EFFECTS.

16 SINCE ARTICLE 85 (3) CONSTITUTES, FOR THE BENEFIT OF UNDERTAKINGS, AN EXCEPTION TO THE GENERAL PROHIBITION CONTAINED IN ARTICLE 85 (1) THE COMMISSION MUST BE IN A POSITION AT ANY MOMENT TO CHECK WHETHER THE CONDITIONS JUSTIFYING THE EXEMPTION ARE STILL PRESENT. ACCORDINGLY, IN RELATION TO THE DETAILED RULES TO WHICH IT MAY SUBJECT THE EXEMPTION, THE COMMISSION ENJOYS A LARGE MEASURE OF DISCRETION, WHILE AT THE SAME TIME HAVING TO ACT WITHIN THE LIMITS IMPOSED UPON ITS COMPETENCE BY ARTICLE 85. ON THE OTHER HAND, THE EXERCISE OF THIS DISCRETIONARY POWER IS LINKED TO A PRELIMINARY CANVASSING OF OBJECTIONS WHICH MAY BE RAISED BY THE UNDERTAKINGS.

17 IT IS CLEAR FROM THE FILE THAT THIS REQUIREMENT WAS NOT FULFILLED IN RESPECT OF THE OBLIGATION IN ISSUE.

18 THE STATEMENT CONTAINED IN THE COMMUNICATION OF 27 JULY 1973 COULD BE INTERPRETED IN WIDELY DIFFERING WAYS, INTER ALIA, AS REQUIRING MERELY THAT THE INFORMATION WHICH HAD ALREADY TO BE SUPPLIED UNDER ARTICLE 4 OF THE DECISION OF 27 JUNE 1967 BE SUPPLEMENTED BY THE NOTIFICATION OF ANY LINKS WHICH MIGHT EXIST BETWEEN THE UNDERTAKINGS WHICH ARE MEMBERS OF THE ASSOCIATION. THE AMBIGUITY OF THIS STATEMENT IS HIGHLIGHTED BY THE FACT THAT DURING THE PROCEEDINGS BEFORE THE COURT THE COMMISSION SUGGESTED DIFFERENT VERSIONS OF IT BOTH IN ENGLISH, WHICH IS THE LANGUAGE CHOSEN BY THE APPLICANTS AS THE LANGUAGE OF THE CASE, AND IN FRENCH, IN THE TRANSLATION IN THE STATEMENT OF DEFENCE AND IN THE CORRECTION PROPOSED DURING THE ORAL PROCEDURE.

19 ALTHOUGH IT IS CLEAR FROM THE MINUTES OF THE HEARING THAT THE LINKS BETWEEN TWO MEMBERS OF THE ASSOCIATION, THE COMPANIES ASTRAL AND URRUZOLA, AND TWO IMPORTANT INDUSTRIAL CHEMICAL CONCERNS WERE EXAMINED IN DEPTH - WHICH MOREOVER PROMPTED THE COMMISSION TO DISPENSE WITH ITS REQUIREMENT THAT THESE TWO MEMBERS SHOULD LEAVE THE ASSOCIATION - THE SAID MINUTES SHOW THAT AT NO TIME WAS THE GENERAL CONDITION LATER CONTAINED IN THE DECISION THE SUBJECT OF AN EXCHANGE OF POINTS OF VIEW. THIS FACT CONFIRMS THE APPLICANTS' ASSERTION THAT THEY WERE CONVINCED THAT THE OBLIGATION AS STATED IN THE 'NOTICE OF OBJECTIONS' CONCERNED ONLY THE MUTUAL RELATIONS BETWEEN MEMBERS OF THE ASSOCIATION AND NOT SUCH LINKS AS MIGHT EXIST WITH OUTSIDE UNDERTAKINGS, INCLUDING THOSE OPERATING OUTSIDE THE COMMON MARKET AND CONCERNED WITH THE MANUFACTURE OF PAINTS OTHER THAN MARINE PAINTS.

20 ACCORDINGLY, THE CONDITION STATED IN ARTICLE 3 (1) (D) OF THE DECISION WAS IMPOSED IN BREACH OF PROCEDURAL REQUIREMENTS AND THE COMMISSION MUST BE GIVEN THE OPPORTUNITY TO REACH A FRESH DECISION ON THIS POINT AFTER HEARING THE OBSERVATIONS OR SUGGESTIONS OF THE MEMBERS OF THE ASSOCIATION.

21 NOTWITHSTANDING THE IMPORTANCE OF THE SUBJECT MATTER OF THIS PART OF THE DECISION, IT IS NEVERTHELESS CAPABLE OF BEING SEVERED, FOR THE TIME BEING, FROM THE OTHER PROVISIONS, AND A PARTIAL ANNULMENT IS THEREFORE POSSIBLE AND IS JUSTIFIED BY THE FACT THAT, TAKEN AS A WHOLE, THE DECISION IS FAVOURABLE TO THE INTERESTS OF THE UNDERTAKINGS CONCERNED.

22 THE PROVISION IN ISSUE SHOULD THEREFORE BE ANNULLED AND THE CASE REMITTED TO THE COMMISSION.

Operative part

THE COURT HEREBY :

1. ANNULS ARTICLE 3 (1) (D) OF THE DECISION OF 21 DECEMBER 1973;
2. REFERS THE CASE BACK TO THE COMMISSION.
3. ORDERS THE COMMISSION TO PAY THE COSTS.

Hoechst AG v Commission of the European Communities [1989]

Judgment of the Court of 21 September 1989.

Action for annulment - Competition law - Regulation Nº 17 - Investigation - Fundamental right to the inviolability of the home - Statement of reasons - Periodic penalty payments - Procedural defects.

Joined cases 46/87 and 227/88.

Hoechst AG, applicant,
v
Commission of the European Communities,
defendant,
APPLICATION for a declaration that the following Commission decisions, adopted in Cases IV/31.865 - PVC, and IV/31.866 - Polyethylene, are void :
(i) Decision K(87)19/5 of 15 January 1987 concerning an investigation under Article 14(3) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p . 87);
(ii) Decision K(87)248 of 3 February 1987 imposing a periodic penalty payment under Article 16 of Regulation No 17;
(iii) Decision K(88)928 of 26 May 1988 fixing the definitive amount of a periodic penalty payment under Article 16 of Regulation No 17,
THE COURT
Judgment

Grounds
1 By applications lodged at the Court Registry on 16 February 1987 and 5 August 1988 respectively, Hoechst AG brought two actions under the second paragraph of Article 173 of the EEC Treaty for declarations that three Commission decisions adopted in Cases IV/31.865 - PVC and IV/31.866 - Polyethylene, under Regulation No 17 of the Council of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p . 87)) were void . The first action is directed against Decision K(87)19/5 of 15 January 1987 concerning an investigation under Article 14(3) of Regulation No 17 and Decision K(87)248 of 3 February 1987 imposing a periodic penalty payment under Article 16 of Regulation No 17 . The second action is directed against Decision K(88)928 of 26 May 1988 fixing the definitive amount of a periodic penalty payment under Article 16 of Regulation No 17 .

2 Having grounds for suspecting the existence, as between certain producers and suppliers of PVC and polyethylene in the Community, of agreements or concerted practices concerning the fixing of prices and delivery quotas for those products, the Commission decided to carry out an investigation into several undertakings, including the applicant in respect of which it adopted the abovementioned contested decision of 15 January 1987 (hereinafter referred to "the decision ordering the investigation ").

3 On 20, 22 and 23 January 1987, the Commission sought to carry out the investigation in question, but the applicant refused to submit to the investigation on the ground that it constituted an unlawful search . The applicant expressed the same point of view in its reply to a telex in which the Commission called upon it to undertake to submit to the investigation and set a periodic penalty payment, in the event of non-compliance, of ECU 1 000 for each day of delay . The Commission then adopted the abovementioned contested decision of 3 February 1987, in which it imposed the periodic penalty payment mentioned above on the applicant (hereinafter referred to as "the decision imposing the periodic penalty payment ").

4 By decision of 12 February 1987, the Amtsgericht (Local Court) Frankfurt am Main dismissed an application by the Bundeskartellamt (Federal Cartel Office) whose assistance had been sought in accordance with Regulation No 17, for a search warrant on the ground that no facts had been put before it to justify the suspicion of the existence of agreements or concerted practices .

5 By order of 26 March 1987, the President of the Court of Justice dismissed the applicant' s application for suspension of the operation of the decision ordering the investigation and the decision imposing the periodic penalty payment .

6 On 31 March 1987 the Bundeskartellamt obtained from the Amtsgericht Frankfurt am Main a search warrant issued directly in the name of the Commission . The latter carried out the investigation on 2 and 3 April 1987 .

7 After giving the applicant an opportunity to express its views and after hearing the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission, in the abovementioned contested decision of 26 May 1988 (hereinafter referred to as "the decision fixing the definitive amount "), fixed the definitive amount of the periodic penalty payment at ECU 55 000, that is to say, ECU 1 000 per day from 6 February to 1 April 1987 inclusive .

8 Reference is made to the Report for the Hearing for a fuller account of the background to the dispute, the course of the procedure and

the submissions and arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

The decision ordering the investigation

9 The applicant relies on three submissions against the decision ordering the investigation, alleging that the Commission exceeded its powers of investigation, that the statement of reasons for the decision was inadequate and that the procedure followed was irregular .

13 The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment of 14 May 1974 in Case 4/73 Nold v Commission ((1974)) ECR 491). The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as "the European Convention on Human Rights ") is of particular significance in that regard (see, in particular, the judgment of 15 May 1986 in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary ((1986)) ECR 1651).

14 In interpreting Article 14 of Regulation No 17, regard must be had in particular to the rights of the defence, a principle whose fundamental nature has been stressed on numerous occasions in the Court' s decisions (see, in particular, the judgment of 9 November 1983 in Case 322/81 Michelin v Commission ((1983)) ECR 3461, paragraph 7).

15 In that judgment, the Court pointed out that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties . But it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable .

16 Consequently, although certain rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation and the privileged nature of correspondence between lawyer and client (recognized by the Court in the judgment of 18 May 1982 in Case 155/79 AM & S v Commission ((1982)) ECR 1575) must be respected as from the preliminary-inquiry stage .

17 Since the applicant has also relied on the requirements stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities .

18 No other inference is to be drawn from Article 8(1) of the European Convention on Human Rights which provides that : "Everyone has the right to respect for his private and family life, his home and his correspondence ". The protective scope of that article is concerned with the development of man' s personal freedom and may not therefore be extended to business premises . Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject .

19 None the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention . The need for such protection must be recognized as a general principle of Community law . In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive (judgment of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62 San Michele and Others v Commission ((1962)) ECR 449). [...]

48 Since none of the submissions raised against the decision ordering the investigation can be accepted, the application for a declaration that that decision is void must be dismissed .

The decision imposing the periodic penalty payment

49 According to the applicant, the adoption of the decision imposing the periodic penalty payment was vitiated by a breach of essential procedural requirements because the Commission adopted it without first having heard the undertaking concerned and consulted the Advisory Committee on Restrictive Practices and Dominant Positions .

50 The Commission, on the other hand, considers that there has been no breach of essential procedural requirements since such hearing and consultation took place before the definitive fixing of the periodic penalty payment .

51 It should be pointed out that the undertakings concerned must be given the opportunity "of being heard on the matters to which the Commission has taken objection", pursuant to Article 19(1) of Regulation No 17, before the adoption of various decisions, including those provided for in Article 16 concerning periodic penalty payments .

52 That hearing is an essential part of the rights of the defence . It is necessary in order for undertakings and associations of undertakings to be able "to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions" (third recital in the preamble to Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p . 47)).

53 With regard to the Advisory Committee on Restrictive Practices and Dominant Positions, Article 16(3) provides that "Article 10(3) to (6) shall apply ". Those provisions govern the powers, composition, and procedure for consulting the Advisory Committee .

54 According to Article 1 of Regulation No 99/63, "before consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17 ". That provision confirms that the hearing of the undertakings concerned and the consultation of the Advisory Committee are necessary in the same situations .

55 In determining whether the Commission was required to hear the applicant and consult the Advisory Committee before adopting the decision imposing the periodic penalty payment, it should be borne in mind that the fixing of periodic penalty payments under Article 16 of Regulation No 17 necessarily involves two stages . In its first decision, referred to in Article 16(1), the Commission imposes a periodic penalty payment expressed in terms of a number of units of account per day of delay, calculated from a date fixed by it . Since that decision does not determine the total amount of the periodic penalty payment, it cannot be enforced . That amount can be definitively fixed only in another decision .

56 Therefore, the obligation to hear the undertaking concerned and to consult the Advisory Committee on Restrictive Practices and Dominant Positions is fulfilled if the hearing and consultation take place before the fixing of the definitive amount of the periodic penalty payment, so that both the undertaking concerned and the Advisory Committee are then in a proper position to express their views on all the matters on the basis of which the Commission has imposed the periodic penalty payment and fixed the definitive amount thereof .

57 Furthermore, the requirement to hear the undertaking and consult the Advisory Committee before the adoption of a decision imposing a periodic penalty payment on an undertaking which has refused to submit to an investigation would entail delaying the date of adoption of that decision and, therefore, jeopardizing the effectiveness of the decision ordering the investigation .

58 It follows from the foregoing that the adoption of the decision imposing the periodic penalty payment was not vitiated by a breach of essential procedural requirements . The application for a declaration that that decision is void must therefore be dismissed .

66 It follows from the foregoing that the applications must be dismissed .

Operative part

On those grounds,
THE COURT
hereby :

(1) Dismisses the applications;
(2) Orders the applicant to pay the costs .

C-185/95 P Baustahlgewebe GmbH v Commission of the European Communities [1998]

Opinion of Mr Advocate General Léger delivered on 3 February 1998.

1 By this appeal Baustahlgewebe GmbH (`BStG' or `the appellant'), a company incorporated under German law, is asking the Court to set aside the judgment of the Court of First Instance of 6 April 1995 in Baustahlgewebe v Commission (1) `the judgment appealed against' or `the judgment'), partly dismissing its application for the annulment of Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (2) (`the contested Decision' or `the Decision') and fixing the fine imposed on the appellant at ECU 3 million.

I - Facts and procedure

2 The product to which the Decision relates is welded steel mesh. This is a prefabricated reinforcement product made from smooth or ribbed cold-drawn reinforcing steel wires joined together by right-angle spot welding to form a network. It is used in almost all areas of reinforced concrete construction.

3 According to the contested Decision, there are several types of welded steel mesh:

- mesh from stock or standard mesh (Lager- oder Standardmatten), - catalogue mesh (Listenmatten), - tailor-made mesh (Zeichnungsmatten). (3)

4 In paragraphs 2 and 3 of the judgment the Court of First Instance found as follows:

`2 As from 1980 a number of agreements and practices, which gave rise to the Decision, came into being in that sector on the German, French and Benelux markets.

3 For the German market, on 31 May 1983 the Federal Cartel Office granted authorisation for the establishment of a structural crisis cartel of German producers of welded steel mesh, which, after being renewed once, expired in 1988. The purpose of the cartel was to reduce capacity; it also provided for delivery quotas and price fixing, the latter being authorised, however, only for the first two years of its operation (points 126 and 127 of the Decision).'

5 In the contested Decision, the Commission fined 14 producers of welded steel mesh for having, in the words of Article 1 of the Decision, `infringed Article 85(1) of the EEC Treaty by participating from 27 May 1980 until 5 November 1985 on one or more occasions in one or more agreements or concerted practices (hereinafter referred to as "agreements") consisting in the fixing of selling prices, the restricting of sales, the sharing of markets and in measures to implement these agreements and to monitor their operation'.

6 With regard to the facts giving rise to the action before the Court of First Instance, it appears from the judgment that the contested Decision criticises the appellant in particular for:

on the German market:

- `participation in agreements concerning trade interpenetration between Germany and France with the French undertaking Tréfilunion. Those agreements were allegedly concluded during a conversation of 7 June 1985 between Michael Müller (4) and Mr Marie, a director of Tréfilunion ...'. The Court of First Instance adds that `according to the Decision ... the concessions made by each side at the meeting were adhered to, as evidenced by the facts that neither Tréfilunion nor the other French producers complained to the Commission about the German structural crisis cartel and that the applicant's works at Gelsenkirchen (Germany) did not export catalogue mesh to France' and that `any future export business was to be linked to a delivery quota'; (5)

- with regard to `the agreements intended to protect the German structural crisis cartel against uncontrolled imports of welded steel mesh, ... having participated in an agreement with Sotralentz concerning quota arrangements for exports by the latter to Germany'; (6)

- `having participated in agreements concerning the German market intended, first, to regulate exports by Benelux producers to Germany and, secondly, to observe the prices in force on the German market'; (7)

- `[in the] desire to restrict or regulate imports into Germany ...', concluding two supply contracts of 24 November 1976 and 22 March 1982 with Bouwstaal Roermond BV (later Tréfilarbed Bouwstaal Roermond) and Arbed SA afdeling Nederland. `In those contracts, BStG took over exclusive sales in Germany, at a price to be fixed according to specific criteria, of a specified annual volume of welded steel

mesh from the Roermond works. Bouwstaal Roermond BV and Arbed SA afdeling Nederland undertook, for the term of those contracts, not to make any direct or indirect deliveries to Germany'. (8) `The Decision ... states that the exclusive distribution agreements did not satisfy the conditions of Commission Regulation (EEC) No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10, ...), at least since the making of the wider arrangements on trade between Germany and Benelux. Since that date those agreements had to be regarded as part of a comprehensive market-sharing arrangement ...'; (9)

- `having participated in an agreement with Tréfilarbed stopping reexports of welded steel mesh from the St Ingbert works to Germany via Luxembourg'; (10)

on the Benelux market:

- `having participated in agreements between the German producers exporting to the Benelux States and the other producers selling in the Benelux States concerning observance of prices fixed for the Benelux market. According to the Decision, those agreements were decided on at meetings held in Breda and Bunnik between August 1982 and November 1985 ...' (11) `The Decision ... also criticises the applicant for having participated in agreements between the German producers, on the one hand, and the Benelux producers (the "Breda club"), on the other, consisting in the application of quantitative restrictions to German exports to Belgium and the Netherlands and communication of export figures of certain German producers to the Belgo-Dutch group.' (12)

7 The Commission imposed on BStG a fine of ECU 4.5 million.

8 On 20 October 1989 the appellant brought an action for the annulment of the contested Decision. By orders of 15 November 1989 the Court of Justice referred this case and 10 others connected with it to the Court of First Instance pursuant to Article 14 of Council Decision No 88/591/ECSC, EEC, Euratom, of 24 October 1988 establishing a Court of First Instance of the European Communities. (13)

9 BStG claimed that the Court should annul the provisions of the Decision applying to it or, alternatively, that the fine should be reduced to a reasonable amount, and that the Commission should be ordered to pay the costs. BStG also sought authorisation to examine certain documents relating to the procedure before the Commission and to the relations between the Commission, the Bundeskartellamt and the representatives of the German cartel association concerning the structural crisis cartel.

10 The Commission claimed that the Court of First Instance should dismiss the application as unfounded and order the appellant to pay the costs.

11 In support of its application the appellant put forward three pleas in law alleging breach of the rights of the defence, infringement of Article 85(1) of the Treaty and infringement of Article 15(2) of Council Regulation No 17. (14)

II - The judgment appealed against

12 The Court of First Instance gave judgment annulling Article 1 of the contested Decision `as regards the finding therein that the [appellant] participated in an agreement with Sotralentz SA to set quotas for the latter's exports to the German market and the finding that an agreement existed between the [appellant] and Tréfilunion to make their future exports subject to quotas'. Consequently, the Court of First Instance reduced the fine of ECU 4.5 million to ECU 3 million and dismissed the application with regard to the remaining claims.

III - The appeal

13 With its appeal, BStG asks the Court of Justice, first, to set aside the judgment of the Court of First Instance in so far as it fixes the fine at ECU 3 million, dismisses its application and orders it to pay part of the costs and, second, to annul Articles 1, 2 and 3 of the contested Decision in so far as they apply to the appellant and were not annulled by that judgment.

14 In the alternative, BStG asks that the fine be reduced to a reasonable amount. It also seeks an order for costs against the Commission. (15)

15 The Commission, for its part, seeks the dismissal of the appeal and an order for costs against the appellant.

16 In support of its appeal, BStG complains that the Court of First Instance:

- infringed the appellant's right to legal protection within a `reasonable period' because of the excessive length of the proceedings;

- infringed the principle of `orality' in that the judgment was delivered 22 months after the closure of the oral procedure;

- disregarded the principles applying in the matter of proof;

- misapplied the provisions of the Rules of Procedure concerning the offer of evidence out of time;

- dismissed the appellant's request for access to the Commission's files;

- misapplied Article 85(1) of the Treaty;

- contravened Article 15 of Regulation No 17 with regard to fixing the fine. (16)

17 I shall examine each of these pleas in the order given above, and as the first is the most important I shall consider it at some length.

IV - Discussion of the pleas in support of the appeal

the fine in order to ensure that Article 6 of the Convention is applied.

1. Admissibility of the plea

(a) The provision relied upon

23 One of the questions raised by this plea concerns the Court's jurisdiction to take cognisance of the principle on which it has based.

24 With regard to the principles of the Convention, the Court observed quite recently that, `as the Court has consistently held (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33), fundamental rights form an integral part of the general principles of Community law whose observance 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 treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The Convention has special significance in that respect. As the Court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognised and guaranteed (see, in particular, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41).' (17)

25 Article F(2) of the Treaty on European Union (18) reaffirmed the European Union's respect for the Convention, so that it is now accepted that it is within the Court's remit to secure respect for the rights recognised by the Convention.

26 It is clear from the Court's case-law that the Convention lays down rules all of which are not merely safeguarded in Community law by the Court. Those rules also guide the Court in formulating fundamental principles which are of the utmost importance in this area.

27 It must also be observed that the constitutional traditions common to the Member States make a substantial contribution to the development of these fundamental principles.

28 Like those traditions, the Convention is the source which has inspired not only the fundamental rights, but also the other general principles of Community law. (19)

29 The existing case-law on the subject has in particular been developed in cases concerning respect for the principles of the Convention in connection with certain Community administrative procedures in the area of, for example, the civil service (20) and competition law, (21) and cases concerning the interpretation of Community law in the light of those principles. (22) In particular, Article 6 of the Convention has been applied in quite a number of cases. (23)

30 In the present case it is not a matter of ensuring respect for the principle of a `fair hearing' on the part of a Member State or a Community institution in relation to a disputed measure. The issue in the present appeal is whether judicial proceedings before the Court of First Instance respected the right to legal process within a `reasonable time', a right which forms part of the abovementioned principle. (24) The Court of First Instance, like the national courts and the other Community institutions, is subject to the principles of the Convention.

31 Article 6 of the Convention enshrines the right of any person to a `fair ... hearing within a reasonable time', which is available where a court is required to determine `his civil rights and obligations or ... any criminal charge against him'. It cannot be disputed - and the Commission does not dispute - that, in the light of the case-law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a `criminal charge'. (25)

32 Therefore, the principle pleaded by BStG is one of those which it is the Court's task to ensure is respected.

33 For the sake of completeness, let me add that, although it has not yet been positively established by the Court, (26) I think there is no doubt that Article 6 applies to legal persons because it is clear from the case-law of the European Commission of Human Rights that the pronoun `everyone' covers legal persons as well as natural persons. (27)

34 Furthermore, legal persons do not differ from natural persons to such an extent that their safeguards must be limited, for the proper administration of justice, in actions to which they are parties.

35 Although the nature and extent of the damage suffered by reason of the length of proceedings may be very different, depending on whether the penalty is a term of imprisonment or a fine, or whether the amount of the fine must be paid by the party concerned from his own resources which are intended to meet his everyday needs, an excessive delay in giving judgment cannot be tolerated in either case. In my opinion, these differences are relevant only to the question whether the length of the procedure is `reasonable'. They also lead to sanctions or redress suited to the nature of the offence.

36 Therefore everyone must be entitled to have his case disposed of within a `reasonable time'.

(b) The nature of the plea

37 Under Article 168a of the EC Treaty, there is a right of appeal to the Court of Justice `on points of law only and in accordance with the conditions laid down by the Statute'. Article 51, first paragraph, of the EC Statute of the Court of Justice provides that: `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 Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance.'

38 In certain respects, the question whether a period of time is excessive might be regarded as a question of fact which, as such, would be outside the jurisdiction of the Court of Justice.

39 However, I take the view that this is a question of law because the Court will not confine itself to confirming a series of facts. The Court will have to distinguish the facts according to their respective influence on the length of the period in question, after carrying out an exercise consisting in either classifying them as matters which may indicate shortcomings in the administration of justice or accepting that they may justify the length of time taken. In determining in this way whether the duration of the proceedings was reasonable or unreasonable, the Court makes a legal assessment which produces legal effects.

40 Furthermore, the period of time in question is attributed to the Court of First Instance itself, so that the Court of Justice is not being asked to review an assessment or a legal characterisation of the facts by that Court and to substitute its own.

41 Let me add that, in any event, if the Court of Justice had no obligation to review the correct application of Article 6 of the Convention by the Court of First Instance, this would imply de facto that the latter is not subject to the Convention.

42 I consider that the plea concerning the excessive length of the proceedings is admissible from this viewpoint also.

(c) The measure sought

43 With regard to the measure sought by the appellant if it were found that the Court of First Instance had contravened Article 6 of the Convention, I would merely observe that, in principle, this is within the normal jurisdiction of the Court. Article 54 of the Statute provides that, if the appeal is well founded, the Court is to quash the decision of the Court of First Instance and the former may then give final judgment where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

44 Therefore the Court of Justice is perfectly able to reduce or even discharge the fine imposed on any party or, if it does not have the necessary facts, it may refer the case back to the Court of First Instance for this purpose.

45 However, it is at this stage that the question of the scope of BStG's plea arises.

2. The scope of the plea

46 First of all, it is clear that, were the Court to find that the time taken by the Court of First Instance in giving judgment in the action is not `reasonable' within the meaning of Article 6 of the Convention, this could not lead to referring the case back to the latter Court. After quashing the judgment appealed against, the Court of Justice could not permit the further time necessary for re-examination of the case to be added to the period which has elapsed since the matter was first brought before the Court of First Instance. The remedy would actually be worse than the ailment.

47 However, there seems little point in re-examining the case with regard to the plea concerning the excessive length of the procedure. If procedural irregularities justify quashing the judgment appealed against, it is justifiable to re-examine the case because of the connection between the breach of procedural rules and the action. As we have seen, Article 51 of the EC Statute of the Court of Justice requires a breach of procedure `which adversely affects the interests of the appellant' in order for the Court to have jurisdiction. In most cases such procedural irregularities disregard the principles laid down to safeguard the parties. Under those circumstances, a retrial before the first court, complying this time with the rules of procedure, is undoubtedly the best response to the parties' complaints.

48 Nevertheless, as we have just seen, if the case has to be re-examined because of the annulment of excessively long proceedings, this would not only not remedy the damage, which has, so to speak, been suffered once and for all, but would actually be likely to increase it.

49 Consequently, the Court of Justice is the only court which could take effective action on a breach of Article 6 of the Convention by the Court of First Instance.

50 Therefore, assuming that the length of time in question does not meet the requirements of the Convention, the next question is what action the Court could take on BStG's application for the fine to be reduced or remitted.

51 First, it is necessary, as I have said, to examine the principles developed by the national legal systems to resolve similar problems, in order to determine whether there is a common legal tradition which might offer guidance to the Court.

52 Although the legal systems of all the Member States recognise a right to a hearing within a `reasonable time', they do not all lay down the same remedies for the infringement of that principle. The procedures of the criminal courts differ from one Member State to another. They often act purely on the directions of the judge, there being no basis in constitutional law or even, sometimes, in statute, for the steps they take. In some States the prosecution is ruled inadmissible (Federal Republic of Germany, Kingdom of Belgium and Kingdom of the Netherlands) or withdrawn (Kingdom of Belgium and Ireland). The penalty may also be reduced (Federal Republic of Germany, Kingdom of Belgium, Kingdom of Spain, Republic of Finland, Grand Duchy of Luxembourg, Kingdom of the Netherlands and Kingdom of Denmark, in the case of imprisonment) or suspended (Federal Republic of Germany and Kingdom of Belgium). In the Kingdom of Spain, the defendant may petition for a pardon where the principle of `reasonable time' has not been adhered to.

53 However, in most Member States a breach of the principle does not affect the validity of the proceedings in question. It merely enables an action for compensation to be brought before the competent court.

54 The Member States appear for that reason to regard a right to compensation as the most appropriate way of settling cases where a `reasonable time' has been exceeded.

55 It does not seem to me that modifying the penalty or taking steps with regard to the actual prosecution is a suitable remedy for exceeding time limits, quite apart from the fact that the rules are not the same in all the Member States.

56 If the appellant's plea is indeed based on a point of law, I do not think it is of the kind which permits the sanction imposed by the Commission, as partly upheld by the Court of First Instance, to be called into question.

57 In so far as sanctions imposed are based on grounds of Community law, they can be reviewed in any case following reconsideration of those grounds. It is because the Court of First Instance misapplies the law applicable to the case that the Court of Justice has the right to quash the judgment entirely or in part and thus to remit or reduce the fine imposed. (28) The interpretation of the law given by the Court of Justice when exercising its power of review leads to a different assessment of the degree of liability of the party in question and may be such as to call into question the penalty imposed. Therefore a connection exists between the subject-matter of the proceedings and the penalty ultimately imposed.

58 That is not the case here because neither the finding that the acts with which BStG was charged, nor the assessment of its responsibility in carrying out the agreements, nor the application of the relevant law were affected by the time (however long) taken by the Court of First Instance to examine the contested Decision.

59 Furthermore, as this complaint has no connection with any defective interpretation of the Community law applicable to the case, a re-examination of the matter would in no way answer the plea that the proceedings were not contested within a `reasonable time'. The absence of any connection means that the Court cannot, in default of a provision expressly authorising it to do so, recognise a right to plead that the proceedings were not conducted within a `reasonable time' in order to reduce or remit, by amending the judgment appealed against, the fine imposed on BStG. I think it would be difficult to identify criteria for choosing between remitting and reducing the fine or, if it were reduced, the criteria necessary for determining the amount of the fine, unless there were some method of evaluating the damage, which could then be deducted from the fine.

60 However, this course would entail two main drawbacks. As it is based on the idea of compensation, it would require the amount of the redress to be deducted from a penalty. It may appear strange to deduct a sum fixed in proportion to certain damage from a sum primarily fixed by reference to the gravity of certain conduct. In this way the present appeal procedure, which is directed against a judgment imposing a penalty, would acquire a dual purpose. Above all, the Court of Justice cannot give a proper ruling on a question of damage without having the information necessary for evaluating it, unless it orders the re-opening of the oral procedure.

61 For all these reasons I conclude that BStG's plea is invalid and consequently I propose that the Court dismiss it without further consideration.

62 However, it seems to me impermissible, and even legally unacceptable, to hold that Article 6 of the Convention lays down a rule with which it is the Court's task to secure compliance while, at the same time, proposing that the Court should not give a ruling on a plea based on that Article, without mentioning (although there is no requirement to do so) the remedy which, in my view, could make up for the inadequacy of the relevant provisions.

3. Action for liability as the appropriate remedy

63 As an appeal is not an effective response where proceedings are not conducted within a `reasonable time', I think an action for compensation must represent the means for preventing this principle of the Convention from becoming a dead letter when it is raised against proceedings before the Court of First Instance.

64 Let me outline the factors which, in my opinion, would permit the Court, if necessary, to rule as admissible an action for compensation on the ground that the Court of First Instance had breached the rule requiring proceedings to be conducted within a `reasonable time'.

65 The action for compensation exists in the common legal tradition of the Member States and in Community law. As we have seen, the national legal systems recognise the principle of compensation for the damage suffered by the party concerned as a result of a breach of the `reasonable time' rule. Article 215, second paragraph, of the Treaty allows an action to be brought for the non-contractual liability of the Community arising from damage caused by its institutions. In his Opinion in the SGEEM and Etroy v EIB case, (29) Advocate General Gulmann contended that the word `institutions' in Article 215 refers to Article 4 of the Treaty, which lists the Community institutions. (30) However, the Court went further in finding that the term should not be understood as referring only to the institutions listed in Article 4. (31) Consequently, it does not appear that the Court of Justice or the Court of First Instance should be regarded as being outside the ambit of Article 215. (32)

66 In the procedural respect, however, there is a serious difficulty in that, under Article 3(1) of the abovementioned Decision 88/591, as amended by Article 1 of the Council Decision of 8 June 1993, (33) the Court of First Instance itself has jurisdiction to hear such actions when they are brought by natural or legal persons.

67 Again without prejudging the issue whether the time taken by the Court of First Instance to give judgment was unreasonable or its own share of the responsibility in the present case, it is not feasible to entrust a judicial body with the task of determining whether its own conduct is wrongful or unlawful. This would unquestionably be contrary to the principle of an impartial tribunal laid down in Article 6(1) of the Convention. I think it would be difficult to avoid such a conflict by referring the case back to a differently constituted court from that which gave the original judgment because, if we adopt the approach taken by the Strasbourg Court, a change in the constitution of a court may not be enough to remove entirely the impression of partiality which would arise from a judgment concerning the court which it itself delivers. (34)

68 Furthermore, it is clear from the preambles to Decisions 88/591 and 93/350 that the establishment of a second court, i.e. the Court of First Instance, is designed to improve the judicial protection of individuals. It is hardly possible to envisage a more serious breach of this

requirement than by allowing one of the parties to act as judge in its own case.

69 Therefore Article 3 of Decision 88/591 must be read in the light of the principle of impartiality laid down by the Convention, particularly as it is difficult to imagine that the Community legislature could have conceived that the scope of that decision would cover the examination by the Court of First Instance of its own liability.

70 Although the jurisdiction of the Court of Justice in this area necessarily leads to the examination by a single court of the plea in question, it is accepted that a two-tier judicial system, as understood in the Community legal order and in general, ensures that justice is done. However, this procedural safety net, designed to reduce the risk of mistakes in law by means of a review of the law applied by the Court of First Instance, must not deprive the parties of the essential safeguard of the impartiality of the court before which they bring their action. It cannot be denied that the two-tier court system is only one aspect of judicial protection. Therefore the principle of impartiality, which precludes the assessment by a court of its own conduct, must in this case take precedence.

71 In those circumstances, the jurisdiction of the Court of First Instance in actions brought by natural or legal persons under Article 178 of the Treaty must be understood, for the purpose of the protection of individuals, as not extending to actions for compensation relating to judicial acts of that Court itself.

72 Consequently, for an action such as that in question here, Article 178 of the Treaty prevails and the Court of Justice retains jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215.

73 The second paragraph of Article 215 lays down the principle of the Community's non-contractual liability by referring to the `general principles common to the laws of the Member States'. As we have seen, most Member States allow compensation for damage arising from disregard of the right to obtain judgment within a `reasonable time'.

74 The Court of Justice should therefore, as it is authorised to do by the second paragraph of Article 215, seek guidance in that common tradition in finding an identical means of settling disputes which supplements, within its own scope, the area covered by the appeal. Consequently, it is only a matter of remedying the deficiencies of this action in order to reply to a specific plea in an area which, in addition, is more concerned with the machinery of justice than the adjudicative function of the courts.

75 Finally, the admissibility of such an action is subject to the conditions of general law, such as the five-year limitation period of Article 43 of the EC Statute of the Court of Justice, which provides that the period runs from `the occurrence of the event giving rise [to non-contractual liability]'. In the present case, the event in question is the judgment delivered at the end of a period found to be `unreasonable'.

76 These are the steps which could be contemplated to ensure the effectiveness of Article 6 of the Convention in regard to a `reasonable time'.

B - Second plea: infringement of the so-called principle of `orality'

77 BStG contends that, in giving judgment 22 months after the closure of the oral procedure, the Court of First Instance infringed the so-called principle of `orality'. According to the appellant, this is an unwritten fundamental principle of Community procedure, upheld by the codes of procedure of the Member States.

78 The appellant submits that the abovementioned principle means that only the arguments put forward during the oral procedure can be taken into account in a court's decision. It adds that the principle enables the parties to set out their views clearly and rapidly, thereby enabling the court to form a direct, personal opinion on the case and the parties' arguments. The two years which elapsed between the hearing and the judgment under challenge blurred the impressions left by the hearing and, therefore, BStG considers that this irregularity in the procedure must lead to the judgment being set aside.

79 The Commission considers that the oral element does not have primacy in the Community law on the organisation of the courts and that this plea must be dismissed.

80 The principle of orality, as recognised in the legal systems of the Member States, appears to have a number of different aspects.

81 In the strict sense, the principle means that a party has the right to state his case in the course of a hearing during which he or his representative has an opportunity to speak and to reply to the court's questions. The courts and tribunals of the Member States have rules which combine written and oral procedural elements in varying proportions, but the principle of orality is common to all of them.

This is also true of the procedure before the Court of First Instance, which includes an oral phase. (35)

82 In the wider sense, the principle of orality comprises the immediacy of the proceedings, which means that the court must have direct and personal contact with all those taking part in the hearing. (36)

83 The concept of `immediacy' (or `Unmittelbarkeit' in German law, `immédiateté' in French law, `inmediación' in Spanish law and `imediaçao' in Portuguese law) takes full account of the requirements of the principle of orality where it calls for a direct relationship between the court and the party concerned. `Immediacy' in physical terms, which means that the court cannot interpose an intermediary between itself and the party or his representative, presupposes that a judge who was not present at the hearing cannot contribute to the decision in the case. Article 33(2) of the Rules of Procedure of the Court of First Instance provides that `only those Judges who were present at the oral proceedings may take part in the deliberations'.

84 The aspect of the principle of orality which is at issue in the present case is `immediacy' in time. The Court of First Instance is alleged to have allowed too much time to elapse between the date of the hearing and the delivery of judgment, so that the benefit of the hearing was lost, so to speak, as the memory of it faded in the minds of the judges.

85 Because of its temporal dimension, this aspect may appear to relate to the issue of `reasonable time'. Furthermore, the time taken by a court to give judgment is a factor which is taken into account by the Strasbourg Court to assess whether a period of time is `reasonable'. It is one of the aspects of the criterion, used by that Court, of the effect of the conduct of the competent authorities, in this case the courts, on the length of the period in question. (37)

86 However, the two aspects are not comparable because, considered in isolation, failure to meet the requirement of `immediacy' goes to the substance of the case. A breach of the rule invalidates the oral proceedings and its benefits because the content of the discussion, which is an additional element inseparable from the written file, is missed by the judges who constituted the court. A judgment delivered under these conditions may thus overlook essential aspects of the case. In contrast, a breach of the `reasonable time' principle does not affect the decision. Consequently the damage which it causes cannot be confused with the penalty.

87 It follows that a breach of the two principles does not produce the same consequences. Contrary to what is possible in the case of `reasonable time', and as in the case of other procedural irregularities which may affect a plaintiff's interests, the proceedings may be annulled and reopened where his interests have not been irremediably damaged.

88 However, before giving a ruling on the plea in question, the Court must state its views on the existence and, if necessary, the force in Community law of the principle of `immediacy', which means that its place in the Community legal order must be determined.

89 There is no procedural rule which states that judgments of the Court of First Instance must be delivered within a particular period or even within a period which could be described as reasonable, taking care not to confuse the use of this adjective with that referring to `time' in Article 6 of the Convention, which is more general.

90 However important it is, it does not appear that the principle of `immediacy' can be counted among the general principles of law the observance of which is ensured by the Court. (38)

91 As I have already stated, the Convention does not distinguish the question of the time taken by a court to give judgment from the general problem of `reasonable time'. Moreover, the requirements of Article 6 of the Convention relate only to a public hearing. (39) However, there is no question arising with regard to the public nature of the hearing in the present case.

92 In the vast majority of Member States the courts must give their decisions within a specified period, normally soon after the conclusion of the hearing (Federal Republic of Germany, Republic of Austria, Kingdom of Belgium, Republic of Finland, Kingdom of the Netherlands and Kingdom of Denmark), or even on the same day, subject to certain exceptions, as the conclusion of the oral proceedings (United Kingdom of Great Britain and Northern Ireland, Kingdom of Spain, Hellenic Republic, Ireland, Portuguese Republic and Kingdom of Sweden).

93 However, two qualifications must be made. Firstly, the rules which give effect to the principle of `immediacy', unlike the `reasonable time' principle in certain Member States, are not constitutional but, rather, statutory. They are normally included in codes of civil, criminal or administrative procedure. Secondly, their effectiveness is not systematically guaranteed because, in addition to those States which do not specify a maximum time-limit, there are others which do not attach any penalty to failure to meet the specified time-limit, at least not by invalidating the proceedings in question (United Kingdom of Great Britain and Northern Ireland, Kingdom of Belgium and Kingdom of Denmark).

94 Furthermore, in the present case the question of `immediacy' arises in relation to a non-national court. The laws of the Member States do not on their own permit the identification of a common supralegal tradition justifying the acceptance of a general principle of law applying to their own courts when dealing with cases based on Community law. In those circumstances, those laws can with even less cause be regarded as suggesting, without the support of a Community provision or a rule contained in international instruments concerning the protection of human rights (such as the Convention), that a rule exists which requires a Community court such as the Court of First Instance to adhere to a time-limit for giving judgment. We have seen that there are no provisions of that kind which imply such a rule.

95 Of course, care must be taken to ensure that the absence of a rule laying down a maximum period within which a judgment must be delivered does not amount to an acceptance that there is no time-limit whatever to the length of deliberations or lead to the dismissal of any appeal against proceedings which could be described as interminable. On this point it is sufficient to observe that it is precisely the `reasonable time' principle, already examined, which aims to meet this requirement.

96 Therefore I must conclude that the plea relating to the principle of orality is inadmissible.

C - Third plea: breach of the principles applying in the matter of evidence

97 BStG objects to the reasoning whereby the Court of First Instance found the facts in question to have been established to the requisite legal standard and dismissed four times the appellant's complaints, its offer concerning witnesses and its request to appear. (40)

98 The appellant contends that the Court of First Instance fundamentally disregarded the principles relating to evidence, concerning both its presentation and its assessment. The Court of First Instance is said merely to have verified that the Commission had `legally succeeded' in producing proof of certain allegations so as to support the decision in question. The appellant also claims that the Court of First Instance did not ascertain whether the evidence produced by the Commission could have been interpreted differently or whether the evidence offered by the appellant could have cast doubt on the Commission's evidence.

99 The appellant's plea has five limbs:

- the Court of First Instance applied an incorrect criterion, when assessing the evidence, by failing to consider whether the indicia adduced by the Commission could be explained otherwise than by the existence of an agreement;

- by refusing to examine the evidence offered, the Court of First Instance failed to fulfil its `obligation to examine the case' and breached the `fair hearing' principle;

- furthermore, the Court of First Instance failed to observe the principle of `unfettered assessment of evidence' by not examining in detail the appellant's account of the facts and the evidence which it offered to produce;

- the Court of First Instance did not apply the rule that the defendant should be given the benefit of the doubt;

- the offers of evidence by BStG were refused on inadequate grounds, contrary to the right to a fair hearing.

100 The Commission considers it necessary to point out that an appeal to the Court of Justice may be based only on pleas alleging infringement of rules of law, excluding the assessment of facts, and that the criterion used by the Court of First Instance to assess the facts falls logically within the latter category. The Commission disputes the appellant's argument that the Court of First Instance must always allow requests for measures of inquiry and observes that the measures of procedural organisation taken by the Court, in the form of questions to the appellant, show that the Court did not neglect to examine the appellant's evidence.

101 BStG replies that the Court of Justice has jurisdiction to hear an appeal on the ground of a procedural irregularity and that it may examine the rules and the general principles of law concerning the burden of proof in the same way as the procedural rules for the administration of evidence. BStG adds that measures for the organisation of procedure cannot replace measures of inquiry and that the unjustified refusal of an offer of evidence amounts to a premature assessment of evidence prohibited by Community law.

1. The criterion for examination by the Court of First Instance

102 First of all, let me say that the appellant has no justification for saying that the Court of First Instance did not carry out an adequate examination of the facts which it put to it. It is clear from paragraph 61 of the contested judgment concerning the 1985 agreement

between BStG and Tréfilunion, paragraphs 84 to 86 concerning the agreements on quotas and prices with the Benelux producers, paragraphs 111 to 113 concerning the agreement between BStG and Tréfilarbed, and paragraphs 125 and 126 concerning quota and price agreements on the Benelux market, that the Court gave a complete account of BStG's arguments.

103 In its reply to the Commission, BStG makes it clear that the issue is not the assessment of the evidence itself, but the Court's criterion for assessing it and the extent of its review. (41)

104 I do not think that the distinction made by the appellant is justified. To cast doubt on the criterion used by the Court of First Instance amounts indirectly to questioning its discretion, that is to say, criticising the conclusions it reached on the evidence put before it. The appellant does the same in claiming that the Court of First Instance did not take account of other, more favourable, assumptions, because it was by exercising its discretion that it ruled out those assumptions and took a different approach.

105 Therefore it is necessary to apply the settled case-law of the Court of Justice which states that it is clear from both Article 49, first paragraph, of the EC Statute of the Court of Justice, Article 168a of the Treaty and Article 51 of that Statute, and also from Article 112(1)(c) of the Rules of Procedure of the Court of Justice, that the latter does not have jurisdiction to make findings as to the facts or, in principle, to examine the evidence used by the Court of First Instance in support of those facts. According to the same case-law relating to the abovementioned provisions, it is for the Court of First Instance alone to assess the value which should be attached to the items of evidence produced to it. (42) Therefore, such appraisal does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice. (43)

106 In support of its complaint, BStG has failed entirely to show that the Court of First Instance manifestly misinterpreted the evidence before it. Moreover, in this part of its submissions BStG does not specify which statements in the Court's judgment, which it contends should be set aside, allegedly indicate such distortion.

107 Let me add, although it is not really necessary, that BStG's argument may also be understood as insisting on a requirement that a more complete statement should be given of the reasons on which the judgment is based, including observations on alternative explanations, favourable to the applicant, of the facts submitted to the Court of First Instance. The Court of First Instance, it argues, has an obligation to show that it did not fail to examine the facts in the light of the explanations given by one of the parties.

108 Obviously, the Court of First Instance must state the reasons on which its judgments are based. (44) Those judgments must therefore clearly state the reasons which convinced the Court and the reasoning of the Community authority which led to the Court's conviction, in such a way that the parties may be aware of the elements in the reasoning which were accepted and so that the Court of Justice can exercise its power of review.

109 However, it seems to me excessive, where the reasoning of the judgment is based on detailed facts, as in the present case, and not on assumptions, to require the Court of First Instance to indicate why it formed the view that the circumstances adduced by one party to throw a different light on the facts in issue lacked persuasive power. It cannot be inferred, from the fact that there was no formal discussion by the Court of First Instance of the explanations offered by one party, that those matters were not examined, since the Court's reasoning is based on detailed circumstances and implicitly, but necessarily, excludes the appellant's arguments.

110 On this point BStG merely gives a general appraisal of the reasoning of the Court of First Instance judgment and fails to offer any support for its own argument. (45)

111 Consequently the first limb of the third plea must be ruled inadmissible.

2. The obligation on the Court of First Instance to `examine the case' and the `fair hearing' principle

112 According to BStG, these principles require the Court of First Instance to allow offers of evidence, save in certain limited cases which have not been shown to exist here. It considers that the refusal of its offers to produce witnesses and to appear personally amounts to a premature assessment of evidence, which is incompatible with the principles of the rule of law. BStG adds that, even if no offers had been made, the principle that in criminal proceedings a court must enquire into the facts without being bound by the parties' applications means that it must of its own motion extend its examination to all the evidence, and that this obligation to examine the case of its own motion means also that the Court of First Instance ought to have attempted to obtain the best possible evidence.

113 First of all, it must be borne in mind that the Court of Justice has jurisdiction to review observance of the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence. (46)

114 Apart from that derived from Article 6 of the Convention, the principles on which the appellant relies are not embodied in specific rules which would make it possible to ascertain their meaning and effect and to establish whether they have binding force. I must therefore confine my discussion to the provisions of the Convention.

115 Article 6(3)(d) provides that `Everyone charged with a criminal offence has the following minimum rights: ... 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'. (47)

116 That provision, as construed by the European Court of Human Rights, does not impose an unconditional obligation on a court to accept offers of witness evidence by parties.

117 For example, in the Vidal v Belgium judgment of 22 April 1992, the Strasbourg Court observed that `Article 6§(3)(d) ... leaves it to [the national courts], again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system ... it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words `under the same conditions', is a full `equality of arms' in the matter" ...'. (48)

118 Therefore it appears that the right to obtain an examination of a witness is conditioned by the `fairness' of the proceedings, which may be deemed to be affected in a case in which the testimony of a witness requested by the person charged is refused where it might have given the court evidence capable of countering the testimony of a prosecution witness.

119 In the present case it must be held that the Court of First Instance did not carry out the examination of witnesses in a way which indicates an arbitrarily selective assessment of the testimony necessary for its decision.

120 Concerning BStG's argument that offers of evidence by parties may be refused only subject to very strict conditions, regard must be had to Article 66(1) of the Rules of Procedure of the Court of First Instance: `The Court of First Instance, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved.' (49) This confirms that the Court of First Instance remains competent to assess the relevance of the evidence put before it. (50)

121 In addition, the Court of First Instance cannot be required to examine systematically the witnesses offered by the parties, without interfering with the smooth conduct of the proceedings, which is frequently threatened by delaying tactics, or to refrain from exercising its discretion with regard to the evidence before it, which includes the option to refuse a measure if it considers that sufficient information is provided by the documents in the file.

122 In this respect the Court of First Instance appears to be justified in making any decision to accept offers of evidence subject to the condition that the party concerned should specify grounds likely to justify the examination requested. (51)

123 Moreover, the Court of First Instance ordered measures of procedural organisation in the form of questions to which the parties were asked to reply in writing. (52) It is common ground that, of the seven questions put to the appellant, five related expressly to its offers of evidence and at least one aimed to obtain from the appellant particulars of `the concrete, factual reasons why it [disputed] the manifest content of the documents produced'. (53)

124 This shows, if confirmation were needed, that the Court of First Instance did not neglect to examine the offers of evidence submitted to it.

125 In my opinion, therefore, it was with a view to the proper administration of justice and in compliance with the relevant rules that the Court of First Instance was able to accede to the requests for personal appearance and for the hearing of witnesses without prejudging the main issue, as the Court guarded against any risk of an arbitrary decision by examining the reasons for the offers of evidence, subject to giving sufficient grounds in law for the decision on the main issue, as we shall see later, when discussing the plea alleging breach of Article 85(1) of the Treaty.

3. The principles of `unfettered assessment of evidence' and `benefit of the doubt'

126 In the third limb of the third plea, BStG complains that the Court of First Instance omitted to examine the facts in detail and to exhaust all the sources of information available to it. It also complains, in the fourth limb, that the Court did not give it the benefit of the doubt resulting from its explanation of the evidence presented by the Commission.

127 In reality the appellant is seeking to challenge the Court's appraisal of the value of the evidence before it. As I have pointed out, (54) such appraisal does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice. BStG adduces nothing to support its argument to show that the conclusions reached by the Court of First Instance in its reasoning on the basis of the evidence before it were manifestly wrong.

128 As I have already said, it is for the Court of First Instance, precisely by virtue of the same discretion as that to which the appellant refers, to decide whether that evidence is sufficient to establish the facts so that no doubt remains.

129 Furthermore, it must be noted that BStG has not put forward any argument to show that the Court of First Instance made a mistake in law in its appraisal, neither has it specified the points criticised in the judgment which it seeks to have annulled. The appellant has not referred to the breach of any rule of law and merely disputes the assessment of the facts by the Court of First Instance.

130 The third and fourth limbs of the third plea must for that reason be ruled inadmissible.

4. Reasons for refusing offers of evidence

131 The reply to the argument that the Court of First Instance did not state sufficient reasons for refusing BStG's offers of evidence is closely related to the Court's discretion to assess the value of the evidence available to it. In other words, if the Court considers that the probative value of the documents in the file is sufficient to persuade the Court, it must then - first and foremost - state the grounds justifying the decision on the main issue. If this condition is fulfilled, I consider that the Court can then refuse, with a brief statement of reasons, the offers of evidence made to it.

132 It follows that the Court of First Instance was not in breach of the obligation to state reasons by merely indicating that it would not take action on the appellant's offers with regard to the examination of witnesses and its own personal appearance, because the Court took care to set out first the reasons why it considered that the Commission had established to the requisite legal standard the acts alleged to have been committed by BStG. I shall consider this last-mentioned statement of reasons, in so far as it is challenged, when I come to the sixth plea alleging breach of Article 85(1) of the Treaty.

133 The fifth limb of the third plea must accordingly be dismissed as unfounded and that plea dismissed in its entirety.

E - Fifth plea: infringement of the right of access to the file

146 The appellant claims that the Court of First Instance infringed the rights of the defence by refusing its request for access to the file.

147 In dismissing, first, the request for the production of all the procedural documents, the Court of First Instance observed that

`the [appellant] does not deny having received, in the course of the administrative procedure before the Commission, all the documents from the file that were of direct or indirect concern to it and on which the statement of objections was based',

and that

`the [appellant] has not produced any evidence to show that other documents were relevant to its defence',

which led the Court to conclude that

`the [appellant] was enabled to put forward, as it wished, its views on all the objections made by the Commission against it in the statement of objections which was addressed to it and on the evidence supporting those objections, mentioned by the Commission in the statement of objections or in the annexes thereto, and that, accordingly, the rights of the defence have been safeguarded'.

The Court added that

`It follows that, both in preparing its application and in the proceedings before the Court, the [appellant's] lawyers have had an opportunity to examine the legality of the Decision in full knowledge of the circumstances and fully to provide for the [appellant's] defence'. (57)

148 Second, in dismissing the request for the production of all the documents from the Federal Cartel Office and the documents

concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German undertakings involved in the structural crisis cartel, the Court of First Instance observed that:

`the [appellant] does not claim that, through not having such documents at its disposal, it was unable to defend itself against the objections raised against it and that it has adduced no evidence to show how such documents might contribute to determination of the present dispute'

and that

`in any event, ... the documents concerned relate to the structural crisis cartel which does not, as such, form part of the infringements covered by the Decision ... and ..., therefore, the documents relating to that cartel are unconnected with the subject-matter of these proceedings'. (58)

149 BStG contends that the rule that the Commission must make available to undertakings involved in a procedure pursuant to Article 85(1) of the Treaty all the documents, whether in their favour or otherwise, which it has obtained during the course of the investigation applies not only to the administrative procedure, but also to the procedure before the Court of First Instance. The Court's demand for evidence to show that other documents are relevant to the appellant's defence fails to take account of the fact that the appellant cannot judge the importance of a document the existence and contents of which are unknown to it. The importance attached to the structural crisis cartel in the contested judgment means that the refusal of the request for the production of documents relating to the cartel amounts to an infringement of the rights of the defence.

150 I have previously had occasion to set out the reasons why I consider it essential to make it a fundamental principle of Community law that an undertaking involved in a procedure under Article 85(1) of the Treaty should have a right of access to the entire file during the administrative procedure. (59)

151 Access to documents, whether incriminating or exculpatory, makes it possible to verify not only whether the Commission has disregarded the latter type, but above all that it has evaluated them correctly.

152 Adherence to this principle during the administrative procedure has now been facilitated by the method described by the Commission, with a view to greater transparency, in the Twenty-third Report on Competition Policy of 5 May 1994:

`With the Statement of Objections the Commission sends a copy of all the documents on which it is relying to establish the existence of an infringement. It also sends any documents that, on the basis of careful examination of the file, appear to go against or contradict the Commission's case (known as "exculpatory" documents). If an undertaking thereafter makes a reasoned request that the Commission re-examine its file to determine whether it has any further documents which concern a specified matter that the undertaking considers useful to its defence, the Commission will do so, and forward any such documents.' (60)

153 In the present case I do not think that the requirements relating to the transparency of the administrative procedure were disregarded, during the judicial proceedings, as a result of the decision of the Court of First Instance not to grant the request for access to the file.

154 As the Court of First Instance observed in paragraph 34 of its judgment, BStG received all the documents that were of direct or indirect concern to it and on which the statement of objections was based. Furthermore, in exercising its absolute power to make factual findings, the Court observed, in paragraph 23, that the letter of 12 March 1987 from the Director-General for Competition accompanying the statement of objections showed that `the main documents concerning the case were enclosed and that, in order to avoid any disclosure of business secrets, only the documents of direct or indirect concern to the addressee undertaking were enclosed', adding that `the undertakings were entitled, in order to prepare their observations, to examine other documents held by the Commission, subject to obtaining prior authorisation'.

155 In order to explain why it did not request authorisation at that time, BStG states that it was not represented by a lawyer during the administrative procedure and that it did not examine the file since the complaints of which it had been notified did not hold it responsible.

156 However, after observing that the letter of 12 March 1987 showed `that the Commission considered that the addressee undertakings had infringed Article 85 of the Treaty', (61) the Court of First Instance states that the appellant was `one of the addresses of the statement of objections ..., that it was designated by name on several occasions in the analysis contained in the factual part and in the legal assessment of the statement of objections ... and that it received numerous annexes on which the Commission based its objections'. (62) The Court adds that the appellant sent a letter to the Commission in which it submitted written observations on the statement of objections and asked for a hearing.

157 It is clear from these numerous findings that BStG was directly implicated by the statement of objections. The Court of First Instance was therefore justified in finding that the fact that BStG did not appoint a lawyer was a matter of its own choice and that the administrative procedure was not affected by a breach of the rights of defence. It should be added that the appellant does not deny that it refrained from enquiring as to the Commission's position, in spite of the information in the statement of objections, concerning the extent of the appellant's involvement in the offences in question. Consequently, the Court of First Instance was justified in finding, without infringing the rights of defence, that it was unnecessary to order the Commission to produce the documents requested, as the appellant had not adduced any evidence to show that other documents were necessary for its defence.

158 On this point I think that the effective grant of the right of access to the file, as confirmed during the administrative procedure, entitled the Court of First Instance to require the appellant to produce `evidence to show that other documents were relevant to its defence' (63) before ordering the production of documents during the judicial proceedings. There can certainly be no question of requiring the undertaking concerned to show the effects which the document requested might have had on the decision, which presupposes that the undertaking knew the detailed contents of the document. This would amount to imposing on it an impossible burden of proof. (64) The undertaking must merely provide the Court with information showing that the document could be useful for the purposes of the case.

159 For reasons of the proper administration of justice, the right of access cannot be absolute. It must therefore not be possible for the undertaking concerned to challenge the failure to disclose any document in the file without previously identifying it and without showing - to however limited an extent - how it will assist that undertaking. (65)

160 It would also be necessary for the undertaking to be aware of the document's existence, which is precisely what the principle of access to the entire file aims to safeguard. (66)

161 In the BPB Industries and British Gypsum v Commission judgment the documents which were not disclosed were identified, so that the only point in dispute was whether they `fell within the categories of documents which the Commission may legitimately refuse to disclose by reason of their confidential nature'. (67)

162 In the present case, paragraph 23 of the contested judgment shows that, among the documents requested, those of direct or indirect concern to the appellant had already been disclosed, the others being covered by the obligation of secrecy.

163 It is clear that, under those circumstances, BStG could not request the production of documents which had already been sent. With regard to those which were not disclosed, it is sufficient to observe that, during the administrative procedure, the appellant did not try to ascertain their subject-matter or the reasons why they were confidential, although it was aware that they would in principle not be disclosed and the Commission had informed it of its right to examine them, subject to authorisation.

164 With regard to the request to examine the documents sent to the Commission by the Federal Cartel Office and those concerning the trilateral negotiations between the Commission, the Federal Cartel Office and the representatives of the German undertakings involved in the structural crisis cartel, the grounds for refusing BStG's request do not appear excessive. (68)

165 The contested Decision gives a very detailed account of the connection between the structural crisis cartel and the anti-competitive conduct found to exist, (69) from which it appears, as the Court of First Instance confirmed in paragraph 55 et seq. of its judgment, that the cartel did not, as such, form an integral part of the infringements ascertained by the Commission. As the appellant was unable to point to a particular document, on the ground that the documents were apparently not included in the Commission's file and therefore had not already been sent to the appellant, the latter ought at least to have stated the reasons why it considered it would be useful to examine them, since they were not directly connected with the conduct the subject of complaint, other than that described by the Decision. It seems to me reasonable, on the same grounds as those relating to the procedural documents, that this should be a preliminary requirement for a request by BStG for production. The Court of First Instance was therefore entitled to find that the appellant had failed to state reasons justifying access to these documents.

166 The plea alleging infringement of the right of access to the file must for these reasons be dismissed. [...]

313 For the reasons set out above, I propose that the Court should:
- dismiss the appeal in its entirety;
- order the appellant to pay the costs pursuant to Article 69(2) of the Rules of Procedure

C-199/92 P Hüls AG v Commission of the European Communities [1999]

Judgment of the Court (Sixth Chamber) of 8 July 1999.

Appeal - Rules of Procedure of the Court of First Instance - Reopening of the oral procedure - Commission's Rules of Procedure - Procedure for the adoption of a decision by the College of Members of the Commission - Competition rules applicable to undertakings - Concepts of agreement and concerted practice - Principles and rules applicable to evidence - Presumption of innocence - Fine.

Summary

1 The fact that the Court has, by a previous order, given a person leave to intervene in support of the form of order sought by a party does not preclude a fresh examination of the admissibility of the intervention.

2 Pursuant to Articles 168a of the Treaty (now Article 225 EC) and the first paragraph of Article 51 of the Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice.

It follows that, inasmuch as they relate to the assessment by the Court of First Instance of the evidence adduced, an appellant's complaints cannot be examined in an appeal. However, it is incumbent on the Court to verify whether, in making that assessment, the Court of First Instance committed an error of law by infringing the general principles of law, such as the presumption of innocence and the applicable rules of evidence, such as those concerning the burden of proof.

3 Acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

4 A request by a party that the Court of Justice order measures of inquiry for the purpose of ascertaining the circumstances in which the Commission adopted the decision which was the subject of the contested judgment goes beyond the scope of an appeal, which is limited to questions of law.

On the one hand, measures of inquiry would necessarily lead to the Court ruling on questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

On the other hand, an appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the Statute of the Court of Justice, deliver judgment itself in the case and examine possible defects in the decision that was challenged before the Court of First Instance.

5 A party is entitled to ask the Court of First Instance, as a measure of organisation of procedure, to order the opposite party to produce documents which are in its possession. However, when such a request is made after the oral procedure is closed, the Court of First Instance need only rule on the request if it decides to reopen the oral procedure.

6 If made after the oral procedure is closed, a request for measures of inquiry can be admitted only if it relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure. The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not have put forward before the close of the oral procedure.

7 The Court of First Instance is not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which a Commission decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court.

8 The presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

9 The concept of a concerted practice, as it results from the actual terms of Article 85(1) of the Treaty (now Article 81(1) EC), implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two.

Subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period.

A concerted practice is caught by Article 85(1) of the Treaty, even in the absence of anti-competitive effects on the market.

First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.

10 It is not for the Court of Justice, where it is deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community competition law.

Grounds

1 By application lodged at the Registry of the Court of Justice on 14 May 1992, Hüls AG (`Hüls') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992 in Case T-9/89 Hüls v Commission [1992] ECR II-499 (`the contested judgment').

Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the contested judgment, are as follows.

3 Several undertakings active in the European petrochemical industry brought an action before the Court of First Instance for the annulment of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 - Polypropylene) (OJ 1986 L 230, p. 1, `the Polypropylene Decision').

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Montedison SpA (`Monte'), Hoechst AG, Imperial Chemical Industries plc (`ICI') and Shell International Chemical Company Ltd (`Shell')) together accounted for 64% of the market. Following the expiry of the controlling patents held by Monte, new producers appeared on the market in 1977, bringing about a substantial increase in real production capacity which was not, however, matched by a corresponding increase in demand. This led to rates of utilisation of production capacity of between 60% in 1977 and 90% in 1983. Each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

5 Hüls was one of the producers which supplied the market in 1977, with a market share on the west European market of between 4.5 and 6.5%.

6 Following simultaneous investigations at the premises of several undertakings in the sector, the Commission addressed requests for information to a number of polypropylene producers under Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It appears from paragraph 6 of the contested judgment that the evidence obtained led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 81 EC (ex Article 85), regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. This led the Commission to commence the procedure provided for by Article 3(1) of Regulation No 17 and to send a written statement of objections to several undertakings, including Hüls.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Hüls had infringed Article 81(1) EC by participating, with other undertakings, and in Hüls's case from some time between 1977 and 1979 until at least November 1983, in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

- contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;

- set `target' (or minimum) prices from time to time for the sale of the product in each Member State of the EEC;

- agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings and from late 1982 a system of `account management' designed to implement price rises to individual customers;

- introduced simultaneous price increases implementing the said targets;

- shared the market by allocating to each producer an annual sales target or `quota' (1979, 1980 and for at least part of 1983) or in default of a definitive agreement covering the whole year by requiring producers to limit their sales in each month by reference to some previous period (1981, 1982) (Article 1 of the Polypropylene Decision).

8 The Commission then ordered the various undertakings concerned to bring that infringement to an end forthwith and to refrain thenceforth from any agreement or concerted practice which might have the same or similar object or effect. The Commission also ordered them to terminate any exchange of information of the kind normally covered by business secrecy and to ensure that any scheme for the exchange of general information (such as Fides) was so conducted as to exclude any information from which the behaviour of specific producers could be identified (Article 2 of the Polypropylene Decision).

9 Hüls was fined ECU 2 750 000, or DEM 5 898 447.50 (Article 3 of the Polypropylene Decision).

10 On 2 August 1986, Hüls lodged an action for annulment of that decision before the Court of Justice which, by order of 15 November 1989, referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, Hüls sought annulment of the Polypropylene Decision, in the alternative reduction of the fine imposed on it and, in any event, an order that the Commission pay the costs.

12 The Commission contended that the application should be dismissed and the applicant ordered to pay the costs.

13 By a separate document lodged at the Registry of the Court of First Instance on 4 March 1992, Hüls asked the Court of First Instance to postpone the date on which judgment would be delivered, to reopen the oral procedure and to order measures of inquiry, pursuant to Articles 62, 64, 65 and 66 of its Rules of Procedure, as a result of the statements made by the Commission at the hearing before it in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 BASF and Others v Commission [1992] ECR II-315 (`the PVC judgment of the Court of First Instance').

The contested judgment

The fine

36 At paragraph 353 the Court of First Instance found that it was clear from its assessments relating to proof of the infringement that the

Commission had correctly established the role played by Hüls in the infringement from the end of 1978 or the beginning of 1979 and that it was entitled to base its determination on that role when calculating the fine to be imposed on Hüls.

37 It noted, in paragraph 361, that in order to determine the amount of the fine imposed on Hüls the Commission had first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Polypropylene Decision was addressed (point 108 of the Decision) and had then defined the criteria for achieving a fair balance between the fines imposed on each of those undertakings (point 109 of the Decision).

38 At paragraph 381 the Court of First Instance concluded that the fine imposed on Hüls was proportionate to the gravity of the infringement of the Community's competition rules which Hüls has been found to have committed but that it should be reduced owing to the shorter duration of the infringement.

The request that the oral procedure be reopened

39 In reaching its decision on the request, referred to in paragraph 382, that the oral procedure be reopened, after hearing the views of the Advocate General once again, the Court of First Instance considered, at paragraph 383, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of its Rules of Procedure or to order measures of inquiry.

The appeal

43 In its appeal Hüls requests the Court of Justice to:

- set aside the contested judgment and declare the Polypropylene Decision non-existent;

- in the alternative, set aside the contested judgment and declare the Polypropylene Decision as a whole null and void;

- in the further alternative, set aside the contested judgment and declare the Polypropylene Decision null and void in so far as it was upheld, the fine fixed at ECU 2 337 500 and Hüls ordered to pay the costs, and to give judgment in accordance with the forms of order sought by Hüls at first instance;

- in the further alternative, refer the case back to the Court of First Instance;

- order the Commission to pay the costs.

44 As a protective measure, Hüls asks the Court of Justice to direct the Commission to produce the original or a certified copy of the minutes of the Commission's meeting which probably took place on 23 April 1986 and at which the Polypropylene Decision was adopted pursuant to Article 12 of its Rules of Procedure, to produce the text of the Polypropylene Decision in the languages in which it was adopted by the College of Members of the Commission and to indicate whether alterations were subsequently made to the decision adopted by the College of Members of the Commission and, if so, what were the alterations. In its reply Hüls also asks to be granted access to those documents.

45 By order of the Court of Justice of 30 September 1992, DSM NV (`DSM') was given leave to intervene in support of the orders sought by Hüls. DSM requests the Court to:

- annul the contested judgment;

- declare the Polypropylene Decision non-existent or annul it;

- declare the Polypropylene Decision non-existent or annul it as regards all addressees of that decision, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment concerning them, or whether or not their appeals were rejected;

- in the alternative, refer the case back to the Court of First Instance on the issue whether the Polypropylene Decision is non-existent or should be annulled;

- in any event, order the Commission to pay the costs of the proceedings, both in relation to the proceedings before the Court of Justice

and to those before the Court of First Instance, including the costs incurred by DSM in its intervention.

46 The Commission contends that the Court should:

- declare the appeal inadmissible in so far as Hüls is relying on infringement of substantive Community law when the Polypropylene Decision was reviewed, and reject the appeal as unfounded as to the remainder;

- in the alternative, reject the appeal as unfounded;

- in any event, order Hüls to pay the costs;

- reject the intervention as a whole as inadmissible;

- alternatively, reject the forms of order sought in the intervention to the effect that the Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, irrespective of whether those addressees appealed against the judgment of the Court of First Instance concerning them, or whether their appeals were rejected, and reject the remainder of the intervention as unfounded;

- in the further alternative, reject the intervention as unfounded;

- in any event, order DSM to pay the costs arising out of the intervention.

47 In support of its appeal, Hüls puts forward pleas alleging breach of procedure and infringement of Community law relating, first, to the fact that the Court of First Instance refused to hold the Polypropylene Decision non-existent or to annul it for breach of essential procedural requirements; secondly, to the refusal by the Court of First Instance to reopen the oral procedure and to order the necessary measures of organisation and inquiry; and, thirdly, to the establishment and review of the facts submitted for the assessment of the Court of First Instance, to its assessment of the individual responsibility of those participating in the infringement, and to its setting of the amount of the fine.

48 At the Commission's request and despite Hüls's objection, by decision of the President of the Court of Justice of 27 July 1992 proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P Commission v BASF and Others [1994] ECR I-2555 (`the PVC judgment of the Court of Justice'), which was delivered on the appeal against the PVC judgment of the Court of First Instance. [...]

Pleas in law in support of the appeal: breach of procedure and infringement of Community law

69 In support of its appeal Hüls, referring to paragraphs 382 to 385 of the contested judgment, claims that, inasmuch as the Court of First Instance held, first, that the Polypropylene Decision was not non-existent and was not to be annulled and, secondly, rejected Hüls's request that it reopen the oral procedure and order the necessary measures of organisation and inquiry, it infringed Community law and committed a breach of procedure adversely affecting its interests, within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice. Referring to paragraphs 90 to 261 of the contested judgment, Hüls claims that, in establishing and reviewing the facts submitted for its assessment, the Court of First Instance committed infringements of Community law, which also had repercussions on its assessment of the individual responsibility of those participating in the infringement and its setting of the amount of the fine, a question which was dealt with in paragraphs 343 to 381 of the contested judgment.

Failure to find that the Polypropylene Decision was non-existent or to annul it for breach of essential procedural requirements. [...]

84 As regards, first, the conditions under which an act may be rendered non-existent, this Court observes that, as is clear in particular from paragraphs 48 to 50 of its PVC judgment, acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

85 However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

86 From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that,

for reasons of legal certainty, such a finding is reserved for quite extreme situations.

87 As was the case in the PVC actions, whether considered in isolation or even together, the irregularities alleged by Hüls, which relate to the procedure for the adoption of the Polypropylene Decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.

88 The Court of First Instance did not therefore infringe Community law as regards the conditions capable of rendering an act non-existent.

89 Secondly, with regard to the refusal by the Court of First Instance to find defects relating to the adoption and notification of the Polypropylene Decision such as to lead to its annulment, this plea was raised for the first time in the request that the oral procedure be reopened and measures of organisation of procedure and inquiry be taken. Consequently, the question whether the Court of First Instance was obliged to examine it overlaps with the question whether that Court should have acceded to the request, which is the subject-matter of the plea alleging breach of procedure.

90 Thirdly and finally, inasmuch as the appellant asks the Court of Justice to order measures of inquiry or offers evidence in order to establish the conditions under which the Commission adopted the Polypropylene Decision, suffice it to point out that such measures cannot be considered in an appeal, which is limited to points of law.

91 On the one hand, measures of inquiry would necessarily lead to the Court ruling on questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

92 On the other hand, the appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the EC Statute of the Court of Justice, deliver judgment itself in the case. As long as the contested judgment is not set aside, the Court is not therefore required to examine possible defects in the Polypropylene Decision.

93 It follows from the foregoing that the first limb of the plea alleging infringement of Community law must be dismissed.

Failure to reopen the oral procedure and to order measures of organisation of procedure and inquiry

94 By the second limb of its plea of infringement of Community law and its plea of breach of procedure, Hüls complains that the Court of First Instance failed to reopen the oral procedure and to order measures of organisation of procedure and inquiry.

95 In so far as Hüls's plea of infringement of Community law concerns the refusal by the Court of First Instance to reopen the oral procedure and to order measures of organisation of procedure and inquiry, it overlaps with the plea of breach of procedure. Those pleas must therefore be examined together.

96 It is appropriate, therefore, to examine, first, whether, in refusing to reopen the oral procedure and to order measures of organisation of procedure and inquiry, the Court of First Instance committed errors of law.

97 Hüls claims that, in refusing to reopen the oral procedure, in accordance with its request of 4 March 1992, the Court of First Instance infringed Article 62 of its Rules of Procedure. In not ordering the Commission to produce its internal documents relating to the Polypropylene Decision, the Court of First Instance also infringed Article 21 of the EC Statute of the Court of Justice and Article 64(3)(d) of the Rules of Procedure of the Court of First Instance.

98 With regard, first, to Article 62 of the Rules of Procedure of the Court of First Instance, Hüls states that, under that provision, the Court of First Instance does not have unlimited discretion to decide whether to reopen the oral procedure. The case-law of the Court of Justice on Article 61 of its own Rules of Procedure may be transposed for the purpose of interpreting that provision and would enable the conclusion to be drawn that there is a requirement to reopen the oral procedure when two conditions are satisfied.

99 First, a request that the oral procedure be reopened must be based on material circumstances until then unknown, that is to say new facts that the party in question could not have put forward before the end of the oral procedure. Secondly, the party making the request must show that those facts are material to the outcome of the case. The presence, in this case, of new facts of relevance to the outcome of the case means that Article 62 of the Rules of Procedure of the Court of First Instance was infringed.

100 On the one hand, with regard to new facts, Hüls states that in its request of 4 March 1992, it adduced facts concerning the procedural practice followed by the Commission of which it only acquired knowledge in the course of the oral procedure before the Court of First Instance in the PVC cases.

101 First, Commission decisions are no longer signed by the President and the Secretary General, contrary to Article 12 of its Rules of Procedure. Secondly, the rules on languages are no longer observed, and the College of Members of the Commission adopts only drafts drawn up in some languages of procedure, while the Member who is competent in the matter alone adopts the texts in the other languages, in breach of Articles 12 and 27 of those Rules of Procedure. Thirdly, the Commission makes substantial alterations to its decisions, subsequent to their adoption, in breach of Article 253 EC (ex Article 190).

102 Those are not general presumptions, as the Commission maintains, but precise information, based on statements made by the Commission's Agents at the hearing before the Court of First Instance on 10 December 1991 in the PVC case, relating to specific points in the administrative procedure leading to the adoption of decisions in competition cases.

103 The pleas are not out of time, contrary to what the Commission contends on the basis of Article 48 of the Rules of Procedure of the Court of First Instance and by analogy with the revision procedure. The statements by the Commission's Agents were made only at the hearing on 10 December 1991 and not on the occasion of other previous hearings. Moreover, Article 62 of the Rules of Procedure of the Court of First Instance does not contain any time-bar rule; that would be contrary to the very aim and spirit of that provision.

104 Bringing legal proceedings to a speedy conclusion is primarily in the interests of the applicant, in particular when it has paid a fine or lodged a security as Hüls did, so that there is no reason to introduce a time-bar in respect of Article 62. Article 48 of the Rules of Procedure of the Court of First Instance confirms that interpretation, since it does not provide for a time-bar either. As for the three-month time-limit laid down in Article 125 of those Rules of Procedure for revision of judgments, Hüls considers that this is intended to safeguard the legal certainty attaching to res judicata and that it cannot be applied by analogy to cases where new pleas in law are put forward or a request is made that the oral procedure be reopened.

105 On the other hand, with regard to the relevance of the new facts for resolving the dispute, the Court of First Instance itself confirmed, in paragraph 384 of its judgment, that an infringement of the rules on languages laid down by the Commission's Rules of Procedure can entail annulment of the contested decision. That is also the case where Article 12 of the Commission's Rules of Procedure or Article 190 of the Treaty is infringed. According to Hüls, it is certain that, in this case, the new facts would have been a decisive factor for the outcome of the case since they would have entailed the non-existence or, at the least, the nullity of the Polypropylene Decision.

106 The two conditions whose existence should have led the Court of First Instance to reopen the oral procedure are therefore satisfied in this case. Since the Court of First Instance did not do so, it infringed Article 62 of its Rules of Procedure. [...]

121 On the question of the alleged breach, by the Court of First Instance, of its duty to clarify the facts, relied on by Hüls in a very broad way, the Commission points out that Article 64(3)(d) of the Rules of Procedure of the Court of First Instance does not determine the conditions under which measures of organisation of procedure may be requested. For the same reasons as led it to reject the request that the oral procedure be reopened, the Court of First Instance properly declined to order the measures of organisation of procedure requested by Hüls. The purpose of such measures, as described in Article 64(1) of the Rules of Procedure of the Court of First Instance, is to ensure that cases are prepared for hearing and procedures carried out, not to remedy the applicant's negligence in submitting its pleas in law. Lastly, there is no contradiction between the contested judgment and the measures of organisation of procedure adopted by the Court of First Instance in the PVC cases, since the course taken by the proceedings was different in those cases.

122 Turning first to measures of organisation of procedure, the Court must point out that, under Article 21 of the EC Statute of the Court of Justice, it may require the parties to produce all documents and to supply all information which it considers desirable. Article 64(1) of the Rules of Procedure of the Court of First Instance provides that measures of organisation of procedure are to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions.

123 Under Article 64(2)(a) and (b) of the Rules of Procedure of the Court of First Instance, measures of organisation of procedure are, in particular, to have as their purpose to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence and to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and (4), those measures may consist of asking for documents or any papers relating to the case to be produced and their adoption may be proposed by the parties at any stage of the procedure.

124 As the Court of Justice held in its judgment in Baustahlgewebe v Commission, cited above, paragraph 93, a party is entitled to ask the Court of First Instance, as a measure of organisation of procedure, to order the opposite party to produce documents which are in its possession.

125 However, it follows from both the purpose and subject-matter of measures of organisation of procedure, as set out in Article 64(1) and (2) of the Rules of Procedure of the Court of First Instance, that they form part of the various stages of the procedure before the Court of First Instance, the conduct of which they are intended to facilitate.

126 It follows that, after the hearing has taken place, a party may ask for measures of organisation of procedure only if the Court of First Instance decides to reopen the oral procedure. Accordingly, the Court of First Instance would only have to take a decision on such a request if it had upheld the request to reopen the oral procedure, so that there is no need to examine separately the complaints made by Hüls in this regard.

127 As regards the request for measures of inquiry, the case-law of the Court (see, in particular, Case 77/70 Prelle v Commission [1971] ECR 561, paragraph 7, and Case C-415/93 Bosman [1995] ECR I-4921, paragraph 53) makes it clear that, if made after the oral procedure is closed, such a request can be admitted only if it relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure.

128 The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not have put forward before the close of the oral procedure. [...]

135 It must therefore be concluded that the Court of First Instance did not commit any error of law in refusing to reopen the oral procedure and to order measures of organisation of procedure and of inquiry.

136 It follows from the foregoing that the second limb of the plea of infringement of Community law and the plea of breach of procedure must also be rejected.

Infringements of Community law committed by the Court of First Instance in establishing and reviewing the facts submitted for its assessment, in assessing the individual responsibility of those participating in the infringement, and in setting the amount of the fine

General

137 By a third branch of the plea of infringement of Community law, Hüls complains that the Court of First Instance committed errors of law in its establishment and review of the facts which had repercussions on its assessment of the individual responsibility of those participating in the infringement and on its setting of the amount of the fine.

138 In appeals, the assessment of the evidence is not outside the purview of the Court of Justice where the legal criteria for the taking of evidence, its use and evaluation as well as questions of the burden of proof and degree of proof are involved.

139 According to Hüls, the assessment of the evidence is therefore open to review where it is a matter of determining whether the Court of First Instance has observed and correctly applied the rules of evidence, logic or general rules dictated by experience. It must also be ascertained whether the facts established justify the conclusions drawn from them. In competition cases, factual allegations made by the Commission should be such as to support the conclusions which it draws from them. As regards the question of degree of proof, it is sufficient, but not necessary, that the factual situation can be deduced from sufficiently serious, precise and concordant presumptions that are not contradicted by contrary presumptions. Furthermore, the evidence must be considered as a whole, with account taken of the characteristics of the market in question.

140 According to Hüls, those requirements are based on the presumption of innocence laid down in Article 6(2) of the ECHR which also applies in the Community legal order. In appeals non-observance of the presumption of innocence must be assumed where, in proceeding to establish and review the facts, the Court of First Instance reaches results that are incompatible with the party's arguments and do not take them properly into account or where the facts proved do not suffice to support the conclusions drawn. Decisions vitiated by such defects should, under the terms of the first paragraph of Article 54 of the EC Statute of the Court of Justice, be quashed, since the conditions referred to in the first paragraph of Article 51 of that Statute are fulfilled.

Participation in regular meetings

141 According to Hüls, the Court of First Instance wrongly supposed, in paragraphs 114 to 129 of the contested judgment, that it had regularly taken part in producers' meetings from the end of 1978 or the beginning of 1979. In that connection, it indicates that the passage in ICI's reply to the Commission's request for information on which the Court of First Instance based its finding that Hüls

participated regularly in those meetings does not contain any statement as to the length of time over which it did so. The status of `regular participant' does not enable the period over which an undertaking took part in meetings to be determined. The Court of First Instance thus ignored the lack of probative force of the ICI statements and failed to satisfy the requirements relating to the assessment of evidence.

142 The tables mentioned in paragraph 115 of the contested judgment constitute highly suspect evidence, and do not allow conclusions to be drawn as to the length of time over which Hüls participated in meetings. They give no indication as to who drew them up or their source. The figures mentioned cannot be described as sales figures: it cannot be excluded that they were one of many proposals for setting up a system of monitoring quotas. The tables could have been drawn up in various ways without any meetings taking place, and the Fides system could have been the source. In no way, therefore, can they constitute proof that meetings were held.

143 The Court of First Instance based itself solely on a general explanation provided by ICI, formulated in English in the subjunctive, the German translation of which is incorrect. ICI's statement concerns only one of the tables and does not therefore prove that the data in the table setting out the quota system for 1979 came from Hüls.

144 As regards the indications given by the Court of First Instance to the effect that the incomplete reply by Hüls to the request for information as well as its participation in the 1982-1983 meetings corroborated the allegation that Hüls had regularly participated in the regular meetings, it need merely be observed that participation in the meetings in 1982-1983 has no bearing on Hüls's conduct four or five years previously.

145 According to Hüls, there was never any collusion between the participants, only at most concerted practices, which would presuppose that the undertakings concerted together and corresponding conduct on the market, and that there was a relationship of cause and effect between the two. Even if it were admitted that the occasional participation by Hüls in the meetings led to its concerting with others, conduct by Hüls on the market was lacking.

146 Hüls concludes that the Court of First Instance, in breach of the principles of Community law relating to the degree of proof required and the assessment of evidence, found, on the basis of inconsistent facts, that it had participated in regular meetings since 1978-1979, whilst proof of that participation had been adduced for only one meeting in 1981 and then for 1982-1983. Furthermore, even for the period 1981-1983, the Court of First Instance could only have arrived at a finding that Hüls had participated in meetings with the intention of fixing prices and sales volumes by disregarding the principles relating to the burden of proof. At paragraph 126, the Court of First Instance required Hüls to adduce proof that it was not guilty, contrary to the presumption of innocence. That was incompatible with the principles of Community law. The burden of proof lay not on Hüls but on the Commission. Hüls's non-participation in meetings was, after all, a negative fact which it could not prove.

147 According to the Commission, it is not true that the information provided by ICI concerning Hüls's participation in meetings from the end of 1978 or the beginning of 1979 was the sole item of evidence. Rather, it should be viewed in conjunction, in particular, with the table fixing quotas for 1979, referred to in paragraph 115 of the contested judgment, which showed a quota for Hüls based on data that could only have come from Hüls.

148 The Commission also points out that the Court of First Instance did not require Hüls to establish its innocence, but merely indicated that there was not sufficient evidence to justify unusual conduct on the part of Hüls, which claimed that it had taken part in meetings without any intention of associating itself with anti-competitive actions which were agreed on at the meetings. Paragraphs 116 and 117 of the contested judgment showed, moreover, that because of the way Hüls had conducted itself, the Court of First Instance attached less weight to its assertions than it did to the evidence on which the Commission had based its decision. The Court of First Instance did not therefore commit any infringement of law and certainly not any breach of the presumption of innocence within the meaning of Article 6 of the ECHR.

149 The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order (see, to that effect, Bosman, cited above, paragraph 79).

150 It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, ztürk, Series A No 73, and of 25 August 1987 Lutz, Series A No 123-A).

151 As regards the question whether Hüls's complaints are well founded, it must first be pointed out that, contrary to the latter's assertion, the Court of First Instance found that ICI's reply in respect of Hüls's participation in regular meetings was corroborated by other facts, such as the tables referred to in paragraph 115 of the contested judgment.

152 Secondly, the question of the value to be attached to those tables, to the abovementioned reply from ICI and to the replies provided by most of the applicants in response to a written question from the Court of First Instance, according to which those tables could only have been established on the basis of the Fides system statistics, forms part of the assessment of evidence and cannot be reviewed by the Court of Justice on appeal.

153 Thirdly, on the evidence before the Court of First Instance, the latter was entitled to take into account, in assessing the credibility of Hüls's statements denying having participated in other meetings during the previous years, items of evidence which showed that, contrary to the information supplied in its reply to the request for information, Hüls had taken part in some meetings in 1982 and 1983.

154 Fourthly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Baustahlgewebe v Commission, cited above, paragraph 58).

155 However, since the Commission was able to establish that Hüls had participated in meetings between undertakings of a manifestly anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The Court of First Instance did not therefore improperly reverse the burden of proof in paragraph 126 of the contested judgment.

156 Fifthly and lastly, Hüls's arguments concerning the lack of proof of conduct on the market corresponding to concerted action on the part of the undertakings and of effects restrictive of trade are based on a misconception of the evidential requirements in respect of concerted practices within the meaning of Article 81(1) EC.

157 At paragraph 119 of the contested judgment, the Court of First Instance considered that the Commission was entitled, in the alternative, to describe as concerted practices, within the meaning of Article 81(1) EC, the regular meetings of polypropylene producers in which the applicant participated from the end of 1978 or the beginning of 1979 until September 1983.

158 The Court of Justice has consistently held that a concerted practice refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307, paragraph 63).

159 The criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the market (see Suiker Unie and Others v Commission, cited above, paragraph 173; Case 172/89 Züchner [1981] ECR 2021, paragraph 13; Ahlström Osakeyhtiö and Others v Commission, cited above, paragraph 63, and John Deere v Commission, cited above, paragraph 86).

160 According to that case-law, although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see, to that effect, Suiker Unie and Others v Commission, paragraph 174; Züchner, paragraph 14; and John Deere v Commission, paragraph 87, all cited above).

161 It follows, first, that the concept of a concerted practice, as it results from the actual terms of Article 81(1) EC, implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two.

162 However, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their

competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.

163 Secondly, contrary to Hüls's argument, a concerted practice as defined above is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market.

164 First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

165 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.

166 Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 81(1) EC (see Case 24/67 Parke Davis v Centrafarm [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.

167 Consequently, contrary to Hüls's argument, the Court of First Instance was not in breach of the rules applying to the burden of proof when it considered that, since the Commission had established to the requisite legal standard that Hüls had taken part in polypropylene producers' concerting together for the purpose of restricting competition, it did not have to adduce evidence that their concerting together had manifested itself in conduct on the market or that it had had effects restrictive of competition; on the contrary, it was for Hüls to prove that that did not have any influence whatsoever on its own conduct on the market.

168 In those circumstances, it is not necessary to examine all the aspects of the interpretation given by the Court of First Instance to Article 81(1) EC and it need merely be held that in any event the Court of First Instance did not infringe the principle of the presumption of innocence or the rules of evidence in considering that the Commission had established to the requisite legal standard that Hüls had participated regularly in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system. It follows that Hüls's complaints in that respect must be rejected.

The price initiatives

169 According to Hüls, at paragraphs 166 to 177 of the contested judgment, the Court of First Instance disregarded requirements as to the assessment of the evidence and degree of proof and reached general conclusions that were unsupported by findings of fact. Without taking into account the fact that Hüls had only participated sporadically and over a limited period in meetings at which price issues were discussed, the Court of First Instance arrived at a general presumption according to which Hüls had taken part in regular meetings of the producers at which they agreed price initiatives.

170 Furthermore, when it concluded from that participation that Hüls had subscribed to the price initiatives and their implementation and considered that, if that were not the case, it was for Hüls to produce corroborating evidence, the Court of First Instance wrongly required Hüls to prove its innocence. The Court of First Instance also overlooked the extenuating circumstances which undermine the presumption established in that connection at paragraph 168 of the contested judgment.

171 Hüls also maintains that, even if it took part in meetings, it gave price instructions taking up the meetings' advice only three times, between July and November 1982, and those instructions were purely internal and never communicated to customers. Those initiatives were never put into practice by Hüls, which is of decisive importance for the purposes of a finding that there was no collusion between producers, but only concerted practices: in Hüls's case, there was no practice on the market corresponding to the concerted action. Thus those price instructions would have had no effect on the market whatsoever, since the sales offices did not pass them on to customers. Hüls carried out an independent price policy, pursuing, in its own interests, a policy of investing in special products in order to disengage from loss-making mass products.

172 In confining its findings to the period after 1982, the Court of First Instance recognised that it had no evidence against Hüls for the prior period, which should have been taken into account when the fine was set. The deliberately imprecise conclusions in the contested judgment contradict the findings of fact and amount to a breach of the duty to state reasons. Moreover, the Court of First Instance attached manifestly exaggerated importance to inconsistent evidence and inferred conduct from ICI's statements with which it could charge Hüls on an individual basis. Mere participation by Hüls in a few isolated meetings does not warrant the conclusion that it took part in price agreements in the form of implementing their results.

173 The Commission reiterates the arguments which it put forward in connection with Hüls's participation in the meetings and submits

that it is for a party seeking to rely on wholly atypical conduct to produce concrete evidence in support of its case. However, purely general assertions concerning its mental reservations and feigning intention are not enough. The Commission adds that the Court of First Instance rightly drew attention to the fact that the price instructions given by Hüls were not purely internal. As regards the probative force of the information supplied by ICI, the Commission points out that that is a question of the assessment of evidence, and such a complaint is inadmissible on appeal.

174 The Court holds first of all that the Court of First Instance was entitled to consider, without improperly reversing the burden of proof, that since the Commission had been able to establish that Hüls had taken part in the meetings at which price initiatives were decided on, organised and monitored, it was incumbent on Hüls to produce evidence to support its claims that it had not subscribed to those initiatives.

175 Secondly, it is not for the Court of Justice, in an appeal, to question the assessment made by the Court of First Instance, at paragraph 173 of the contested judgment, concerning the fact that the price instructions sent to the sales offices by Hüls's head office were intended to produce external effects.

176 Lastly, Hüls's arguments seeking to show that its conduct on the market was independent of the price initiatives or that the findings of the Court of First Instance in that connection concerned only part of the period referred to in the Polypropylene Decision are irrelevant.

177 The Court of First Instance considered, in paragraph 291 of the contested judgment, that the Commission was entitled to treat the common intentions existing between Hüls and the other polypropylene producers, which related in particular to price initiatives, as agreements within the meaning of Article 81(1) EC.

178 It is settled case-law that, for the purposes of applying Article 81(1) EC, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1964] ECR 299, at p. 342; see also, to the same effect, Case C-277/87 Sandoz Prodotti Farmaceutici v Commission [1990] ECR I-45; Case C-219/95 P Ferriere Nord v Commission [1997] ECR I-4411, paragraphs 14 and 15).

179 It does not, therefore, appear that the Court of First Instance infringed the rules of evidence or failed to comply with the obligation to state reasons in holding that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision, that these were part of a system and that those price initiatives continued to have effects until November 1983. Hüls's complaints concerning that part of the contested judgment must therefore be dismissed.

The measures designed to facilitate the implementation of the price initiatives

180 According to Hüls, the Court of First Instance wrongly accepted, in paragraphs 189 to 199 of the contested judgment, in particular at paragraph 190, that Hüls had, in participating in certain meetings, also subscribed to measures designed to facilitate the implementation of the price initiatives, without indicating what those measures were, who had participated in them and when, and how the allegations had been proved. Hüls claims that, according to the Court of First Instance, its participation in all those measures followed from the fact that it had not adduced any evidence to prove the contrary. Hüls observes that such reasoning fails to satisfy not only the obligation to state reasons but also the conditions governing assessment of the evidence, taking into account the legal arguments it put forward and the facts on which they were based.

181 With regard to `account leadership', Hüls contends that there were simply proposals and discussions which never resulted in that type of agreement. The documents produced by the Commission do not enable any conclusion to be drawn regarding implementation of a system of leadership. The terms in which the judgment of the Court of First Instance is couched show that no binding agreement was implemented, and in fact that no agreement was reached. This also shows that the producers were not ready to commit themselves in a binding way to anti-competitive measures and their implementation and at the meetings practised a combination of mental reservations and disinformation. The passage cited in paragraph 191 of the contested judgment only sets out the general problems concerning `customer tourism' and cannot support the conclusions of the Court of First Instance with regard to the allocation of customers to certain producers and the naming of `account leaders'. In that connection, Hüls states that it never was the leader for the four customers allocated to it with regard to quantities or prices, even if was their supplier in isolated cases. That differentiated conduct with regard to deliveries is diametrically opposed to the hypothesis that Hüls exercised `account leadership'.

182 According to the Commission, paragraph 190 of the contested judgment must be read in its context. Hüls's submissions concerning the non-implementation of the `account leadership' system are at odds with the evidence cited by the Court of First Instance in paragraphs 192 and 193, from which it is clear that that system operated at least partially for two months, even if those concerned were not satisfied with it.

183 The Court holds that it need merely point out here that, contrary to Hüls's submissions, at paragraphs 190 to 192 and 197 to 198 of the contested judgment, the Court of First Instance gave sufficient reasons concerning the existence and nature of the measures for facilitating the implementation of the price initiatives and concerning the identity of the undertakings which participated in those measures.

184 The assessment made by the Court of First Instance of the evidence before it, in particular the notes of the meetings and the replies by ICI and Hüls to the request for information, is not open to review by the Court of Justice.

185 Lastly, for the reasons set out in paragraph 178 above, the arguments intended to show that Hüls did not implement the `account leadership' system are irrelevant since the Court of First Instance held, at paragraph 291 of the contested judgment, that the Commission was entitled to treat the common intentions existing between Hüls and the other polypropylene producers which related to measures to facilitate the implementation of the price initiatives as agreements within the meaning of Article 81(1) EC.

186 It follows that the Court of First Instance did not infringe the rules of evidence or neglect its obligation to state reasons in holding that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom there had emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives mentioned in the Polypropylene Decision. Hüls's complaints in that respect likewise cannot be upheld.

Target tonnages and quotas

187 With regard to the target tonnages and quotas which are dealt with in paragraphs 231 to 261 of the contested judgment, Hüls indicates that the Court of First Instance first made the mistaken finding that it participated regularly in the periodic meetings of producers. The Court of First Instance then found that Hüls's name appeared in various tables, thus suggesting that the mention of its name constituted additional evidence going beyond presence at the meetings. Hüls complains that the Court of First Instance wrongly concluded from the fact that its name appeared in tables that it had participated regularly in the periodic meetings and had thus given the false impression that there was a whole series of items of evidence concerning its participation, whereas all the allegations could be linked merely to the appearance of its name in some tables. Lastly, those tables, whose authors and date of preparation cannot be ascertained, in no way corroborate the existence of conduct contrary to the competition rules.

188 The Commission states that the contested judgment provides a detailed assessment of the evidence. Hüls ignores, in its criticisms, the existing evidence. The complaint is inadmissible, because it relates to the assessment of evidence, and unfounded, because it contradicts the existing evidence which was closely assessed by the Court of First Instance.

189 On this point, it need merely be stated that, in so far as Hüls's complaints relate to the findings of the Court of First Instance on the question of its participation in the regular meetings, they must be rejected for the reasons set out in paragraphs 151 to 167 of this judgment.

190 In so far as they relate to the assessment made by the Court of First Instance of the evidence presented to it, in particular the tables of participants at the meetings, Hüls's complaints are inadmissible on appeal.

191 It does not, therefore, appear that the Court of First Instance infringed the rules of evidence or its duty to state reasons in considering that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom common purposes emerged in relation to sales volume targets for 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 which are mentioned in the Polypropylene Decision and which formed part of the quota system. On that point, too, Hüls's complaints must be rejected.

Individual responsibility of the participants in an infringement and calculation of the fine

192 Lastly, Hüls claims that the Court of First Instance was not able to establish exactly the extent, in time and in relation to the facts, of the participation of each economic operator. Where a number of undertakings have taken part in an infringement of the provisions of Article 81 EC, each must have its participation in each isolated act proved with the same degree of certainty as if it were the sole perpetrator of an infringement. Each can only be held responsible within the proven limits of its participation and the degree of complicity of each participant taken individually should be established separately.

193 In particular, the fine should be calculated individually, on the basis of the facts to which its participation is linked. The Commission and the Court of First Instance did not comply with those principles, in particular when they set the fine on the basis of Hüls's turnover, without taking into account the particular details of its situation.

194 In that connection, it follows, first, from the foregoing that, contrary to Hüls's contention, the Court of First Instance did not commit any error of law when it imputed to it participation in the infringement in question or when it assessed the duration and degree of that participation.

195 Secondly, according to consistent case-law (see, inter alia, Joined Cases 100/80 to 103/80 Musique Diffusion Française v Commission [1983] ECR 1825, paragraph 120, and Case 183/83 Krupp v Commission [1985] ECR 3609, paragraph 37), in determining the fine, account may be taken both of the overall turnover of the undertaking, which gives some indication, however approximate and imperfect it may be, of the size and economic strength of that undertaking, and of the part of that turnover represented by the goods concerned in the infringement which therefore serves to provide an indication of the extent of that infringement.

196 It is clear from paragraph 361 of the contested judgment, which refers to points 108 and 109 of the Polypropylene Decision, that the polypropylene deliveries in the Community and turnover of each undertaking were taken into account. The Court of First Instance did not therefore commit any error of law in that respect.

197 Moreover, it is not for the Court of Justice, where it is deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community law (see, inter alia, Case C-320/92 P Finsider v Commission [1994] ECR I-5697, paragraph 46).

198 It follows that the complaints concerning the assessment of the individual responsibility of the participants in the infringement and determination of the amount of the fine cannot be upheld. The third limb of the plea in law based on infringement of Community law must also be dismissed.

199 Since none of the pleas in law put forward by Hüls have been upheld, the appeal must be dismissed in its entirety.

Operative part

On those grounds,

THE COURT
(Sixth Chamber)
hereby:
1. Dismisses the appeal;
2. Orders Hüls AG to pay the costs;
3. Orders DSM NV to pay its own costs.

Joined cases C-395/96 P and C-396/96 P Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission of the European Communities [2000].

Judgment of the Court (Fifth Chamber) of 16 March 2000.

Competition - International maritime transport - Liner conferences - Regulation (EEC) No 4056/86 - Article 86 of the EC Treaty (now Article 82 EC) - Collective dominant position - Exclusivity agreement between national authorities and liner conferences - Liner conference insisting on application of the agreement - Fighting ships - Loyalty rebates - Rights of defence - Fines - Assessment criteria.

Summary

1. It is clear from the very wording of Articles 85(1)(a), (b), (d) and (e) and 86(a) to (d) of the Treaty (now Articles 81(1)(a), (b), (d) and (e) EC and 82(a) to (d) EC) that the same practice may give rise to an infringement of both provisions. Simultaneous application of Articles 85 and 86 of the Treaty cannot therefore be ruled out a priori. However, the objectives pursued by each of those two provisions must be distinguished. Article 85 of the Treaty applies to agreements, decisions and concerted practices which may appreciably affect trade between Member States, regardless of the position on the market of the undertakings concerned. Article 86 of the Treaty, on the other hand, deals with the conduct of one or more economic operators consisting in the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.(see paras. 33-34)

2. In terms of Article 86 of the Treaty (now Article 82 EC), a dominant position may be held by several undertakings. The concept of undertaking in the chapter of the Treaty devoted to the rules on competition presupposes the economic independence of the entity concerned. It follows that the expression one or more undertakings in Article 86 of the Treaty implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. That is how the expression collective dominant position should be understood.

In order to establish the existence of a collective entity, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned. In particular, it must be ascertained whether economic links exist between those undertakings which enable them to act together independently of their competitors, their customers and consumers. The mere fact that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article 85(1) of the Treaty (now Article 81(1) EC) does not, of itself, constitute a sufficient basis for such a finding. On the other hand, an agreement, decision or concerted practice (whether or not covered by an exemption under Article 85(3) of the Treaty) may undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers.

The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.

Furthermore, a finding that two or more undertakings hold a collective dominant position must, in principle, proceed upon an economic assessment of the position on the relevant market of the undertakings concerned, prior to any examination of the question whether those undertakings have abused their position on the market. (see paras. 35-36, 38, 41-45)

3. It emerges from the provisions of Regulation No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport that, by its very nature and in the light of its objectives, a liner conference, as defined by the Council for the purposes of qualification for block exemption under that regulation, can be characterised as a collective entity which presents itself as such on the market vis-à-vis both users and competitors. So seen, it was logical for the Council to lay down in that regulation the provisions necessary to avoid a liner conference having effects incompatible with Article 86 of the Treaty (now Article 82 EC). That in no way prejudges the question whether, in a given situation, a liner conference holds a dominant position on a particular market or, a fortiori, has abused that position. As is clear from Article 8(2) of that regulation, it is by its conduct that a conference holding a dominant position may have effects which are incompatible with Article 86 of the Treaty. (see paras. 48-49)

4. The soundness of a legal assessment by the Commission is to be assessed in the light not only of the facts and circumstances expressly mentioned in the part of the decision devoted to that assessment, but also of any other undisputed factor referred to in the

same decision.(see para. 56)

5. Although it is true that the Court of First Instance must, in principle, reply to the arguments presented in the course of the procedure and give reasons for a decision on the inadmissibility of an application so that the Court of Justice is able, in the context of an appeal, to exercise its power of review, the Court of First Instance cannot be required, every time that a party raises, in the course of the procedure, a new plea in law which clearly does not satisfy the requirements of Article 48(2) of its Rules of Procedure, either to explain in its judgment the reasons for which that plea is inadmissible, or to examine it in detail. The fact that the Court of First Instance does not expressly rule on the admissibility of a plea does not affect the appellant's situation, so long as that plea is clearly inadmissible. (see paras. 106-108)

6. There is an abuse of a dominant position where a liner conference in a dominant position, having a share of over 90% of the market in question and only one competitor, selectively cuts its prices in order deliberately to match those of its competitor. The liner conference concerned derives a dual benefit from that practice, known as fighting ships. First, it eliminates the principal, and possibly the only, means of competition open to the competing undertaking. Second, the liner conference concerned can continue to require its users to pay higher prices for the services which are not threatened by that competition. (see paras. 117, 119-120)

7. The applicability to an agreement of Article 85 of the Treaty (now Article 81 EC) does not prevent Article 86 of the Treaty (now Article 82 EC) being applied to the conduct of the parties to the same agreement, provided that the conditions for the application of each provision are fulfilled. More particularly, the grant of an exemption under Article 85(3) does not prevent application of Article 86 of the Treaty. The fact that operators subject to effective competition have a practice which is authorised does not mean that adoption of that same practice by an undertaking in a dominant position can never constitute an abuse of that position. Analysis of the conduct of an undertaking in a dominant position must take account of the fact that an undertaking which has a very large market share and has held it for some time is in a position of strength which makes it an unavoidable trading partner. (see paras. 130-132)

8. Article 8(1) of Regulation No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport expressly provides that abuse of a dominant position is to be prohibited, no prior decision to that effect being required. That plain wording is fully in harmony with the principles regarding the effectiveness of Article 86 of the Treaty (now Article 82 EC) and the impossibility of exemption. No exemption of any kind may be granted in respect of an abuse of a dominant position. It follows that Article 8(2) of that regulation, which provides that the Commission may withdraw the benefit of the block exemption where it finds, in a particular case, that the conduct of liner conferences benefiting from the exemption laid down in Article 3 has effects which are incompatible with Article 86 of the Treaty, does not and could not restrict the Commission's power to impose fines for infringement of Article 86 of the Treaty. (see paras. 135-136)

9. The statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure pursuant to the Community competition rules. The essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings. It follows that the Commission is required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed. A statement of objections which merely identifies as the perpetrator of an infringement a collective entity does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually if the infringement is made out. The fact that the collective entity does not have legal personality is not relevant in this regard. Similarly, a statement of objections in those terms is not sufficient to warn the companies concerned that the amount of the fines imposed will be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement. (see paras. 142-145)

Parties

In Joined Cases C-395/96 P and C-396/96 P,
Compagnie Maritime Belge Transports SA (C-395/96 P), and
Dafra-Lines A/S (C-396/96 P),
appellants,
APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 8 October 1996 in Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie Maritime Belge Transports and Others v Commission [1996] ECR II-1201, seeking to have that judgment set aside,
the other parties to the proceedings being:
Commission of the European Communitiesdefendant at first instance, and other parties
Judgment
Grounds

1 By applications lodged at the Court Registry on 10 December 1996, Compagnie Maritime Belge SA (CMB) and Compagnie Maritime

Belge Transports SA (CMBT), in Case C-395/96 P, and Dafra-Lines A/S (Dafra), in Case C-396/96 P, brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of 8 October 1996 in Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie Maritime Belge Transports and Others v Commission [1996] ECR II-1201 (the contested judgment), in which the Court of First Instance dismissed their applications for the annulment of Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ 1993 L 34, p. 20; the contested decision).

5 The contested decision states:

Article 1

The Cewal, Cowac and Ukwal shipping conferences and the undertakings that are members thereof, a list of which is attached as Annex I to this decision, have infringed Article 85(1) of the EEC Treaty by entering into non-competition agreements according to which each member undertaking of one conference refrains from operating as an independent shipping company ("outsider") in the area of activity of the other two conferences in order to share out the liner market between northern Europe and western Africa on a geographical basis.

Article 2

In order to eliminate the principal independent competitor in the trade in question, the undertakings that are members of Cewal have abused their joint dominant position by:

- participating in the implementation of the cooperation agreement with Ogefrem and by [requesting] repeatedly by a variety of means that it be strictly complied with,

- modifying its freight rates by departing from the tariff in force in order to offer rates the same as or less than those of the principal independent competitor for vessels sailing on the same date or neighbouring dates (practice known as fighting ships), and

- establishing 100% loyalty arrangements (including goods sold fob) which went beyond the terms of Article 5(2) of Regulation (EEC) No 4056/86, accompanied by the use, as described in this decision, of blacklists of disloyal shippers.

Article 3

The undertakings concerned by this decision are hereby required to bring to an end the infringement referred to in Article 1.

The member undertakings of Cewal are also required to bring to an end the infringements referred to in Article 2.

Article 4

The undertakings concerned by this decision are hereby required to refrain in future from any agreement or concerted practice which may have the same or similar object or effect as the agreements and practices referred to in Article 1.

Article 5

It is recommended that the members of Cewal amend the terms of their loyalty contracts so that they conform with Article 5(2) of Regulation (EEC) No 4056/86.

Article 6

Fines are hereby imposed on the member undertakings of Cewal by reason of the infringements referred to in Article 2, with the exception of the following shipping companies: Angonave, Portline, Compagnie Maritime Zaïroise (CMZ) and Scandinavian West Africa Lines (SWAL).

The fines are as follows:

- Compagnie Maritime Belge: ECU 9.6 million,

- Dafra Line: ECU 200 000,

- Nedlloyd Lijnen BV: ECU 100 000,

- Deutsche Afrika Linien-Woermann Linie: ECU 200 000.

Article 7

The fines imposed in Article 6 shall be paid in ecu within three months of the date of notification of this decision to the account of the Commission of the European Communities No 310-0933000-43, Banque Bruxelles-Lambert, Agence Européenne, Rond-Point Robert Schuman 5, B-1040 Bruxelles.

On expiry of that period interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this decision was adopted, plus 3.5 percentage points, i.e. 13.25%.

Article 8

[This decision is addressed to the Cewal, Cowac and Ukwal shipping conferences and the undertakings that are members thereof, a list of which is attached as Annex I to this decision.] [...]

6 By application lodged at the Registry of the Court of First Instance on 19 March 1993, CMB and CMBT brought an action, registered as Case T-24/93, seeking primarily to have the contested decision annulled.

7 By applications lodged at the Registry of the Court of First Instance on 19 and 22 March 1993, Dafra, Deutsche Afrika-Linien GmbH & Co. and Nedlloyd Lijnen BV each brought an action. Those applications, registered as Cases T-25/93, T-26/93 and T-28/93 respectively, likewise sought primarily to have the contested decision annulled.

8 The applicants relied on four pleas in support of their actions for annulment:

- in Case T-26/93, the applicant asserted a plea alleging procedural defects;

- in Cases T-24/93, T-25/93 and T-28/93, the applicants maintained that the practices in question did not affect intra-Community trade and, in Cases T-24/93 and T-25/93, that the markets in question were not part of the common market;

- in Cases T-24/93 to T-26/93, the applicants denied that the practices at issue had as their object or effect the distortion of competition within the meaning of Article 85(1) of the EEC Treaty (now Article 81(1) EC);

- in each of those cases, the applicants maintained that the practices in question did not constitute an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty (now Article 82 EC).

9 Although the Court of First Instance reduced the fines imposed, it dismissed the applications for annulment of the contested decision.

10 Only Dafra, CMB and CMBT have appealed against the contested judgment.

11 In the present appeal, Dafra, CMB and CMBT rely on three pleas to challenge the contested judgment:

- they deny the collective dominant position which Cewal members are presumed to hold;

- they dispute each of the three findings of the Court of First Instance as to abuse of a dominant position, concerning respectively the agreement with the [Zairean] Office de Gestion du Fret Maritime (Ogefrem), fighting ships and loyalty contracts;

- they object to the fines imposed.

Findings of the Court

The first ground of appeal: the Court of First Instance based its reasoning on grounds not included in the contested decision

The plea relating to the fines

Arguments of the appellants

138 The appellants submit, first, that the Court of First Instance erred in law in accepting all the factors which the Commission took into account in order to determine the amount of the fines imposed.

139 Their second ground of appeal is that the Court of First Instance erred in law when it confirmed that the Commission was entitled to impose on them individual fines whereas, in the statement of objections, the Commission threatened to impose fines on Cewal and not on any one of its members.

140 Furthermore, the fact that the fines were imposed not on Cewal but on some of its members constitutes a breach of their fundamental procedural rights. The amount of the fine was to be calculated on Cewal's turnover and not on that of its members. Moreover, it would have been for the members of Cewal to decide how the burden of the fine should be shared, if only in accordance with their shares in the conference, whereas in fact the fines were imposed as to 95% on CMB.

Findings of the Court

141 It is appropriate first to examine the second ground of appeal.

142 It is settled case-law that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. The essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings (Joined Cases 100/80 to 103/80 Musique Diffusion Française and Others v Commission [1983] ECR 1825, paragraphs 10 and 14).

143 It follows that the Commission is required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed.

144 It is clear that a statement of objections which merely identifies as the perpetrator of an infringement a collective entity, such as Cewal, does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually if the infringement is made out. Contrary to what the Court of First Instance held, the fact that Cewal does not have legal personality is not relevant in this regard.

145 Similarly, a statement of objections in those terms is not sufficient to warn the companies concerned that the amount of the fines imposed will be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement.

146 It follows that the Court of First Instance erred in law when it confirmed that the Commission was entitled to impose on members of Cewal individual fines, fixed in accordance with an assessment of their participation in the conduct in question, when the statement of objections was addressed only to Cewal.

147 In the light of the foregoing, this last plea must be declared well founded and, consequently, the contested judgment upholding the contested decision must be set aside in so far as it concerns the fines imposed on the appellants.

148 Pursuant to the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. Since there is sufficient information before the Court to enable the Court of Justice itself to give final judgment, it is not necessary to refer the case back to the Court of First Instance.

149 It follows that Articles 6 and 7 of the contested decision must be annulled as regards the fines imposed on the appellants.

150 It is therefore not necessary to examine the other grounds of appeal put forward by the appellants in support of this plea.

Operative part

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Sets aside the judgment of the Court of First Instance of 8 October 1996 in Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie Maritime Belge Transports and Others v Commission to the extent that it upheld the fines imposed on Compagnie Maritime Belge Transport SA, Compagnie Maritime Belge SA and Dafra-Lines A/S;

2. Annuls Articles 6 and 7 of Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty as regards Compagnie Maritime Belge Transport SA, Compagnie Maritime Belge SA and Dafra-Lines A/S;

3. Dismisses the remainder of the appeal;

4. Orders Compagnie Maritime Belge Transport SA, Compagnie Maritime Belge SA and Dafra-Lines A/S to bear their own costs, and to pay three quarters of those of the Commission of the European Communities and all those of Grimaldi and Cobelfret.

C-451/99 Cura Anlagen GmbH v Auto Service Leasing [2002]

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2002 (1)

(Vehicle leasing - Prohibition on using in a Member State for longer than a certain time a vehicle registered in another Member State - Obligations to register the vehicle and to pay a consumption tax in the Member State of use - Obligation to insure with an insurer authorised in the Member State of use - Obligation to undergo roadworthiness testing - Restrictions on the freedom to provide services - Justifications)

REFERENCE to the Court under Article 234 EC by the Handelsgericht Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Cura Anlagen GmbH

and

Auto Service Leasing GmbH (ASL),

on the interpretation of Articles 49 EC to 55 EC and Article 28 EC,

THE COURT (Fifth Chamber),

composed of: S. von Bahr, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

Judgment

1. By order of 10 November 1999, received at the Court Registry on 26 November 1999, the Handelsgericht Wien (Vienna Commercial Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 49 EC to 55 EC and of Article 28 EC.
2. That question was raised in proceedings between Cura Anlagen GmbH ('Cura Anlagen'), a company established in Austria, and Auto Service Leasing GmbH ('ASL'), a company established in Germany and without a place of business in Austria, concerning the performance of a vehicle leasing contract concluded between those two companies.

Legal background

3. Under Paragraph 79 of the Kraftfahrgesetz 1967 (Austrian Law on Motor Vehicles; 'the KFG'), use in Austria of a vehicle with foreign plates and without a permanent base in Austria is authorised for a maximum duration of one year only.
4. Paragraph 82(8) of the KFG provides that a vehicle with foreign registration plates brought into Austria by a legal person established there may be used for a maximum of three days. Thereafter, the foreign plates must be removed and surrendered to the competent authority, and, if the vehicle continues to be used in Austria, it must be registered there in accordance with Paragraph 37 of the KFG.
5. Registration of a vehicle in Austria is subject to compliance with the following conditions:

- the legal person in whose name the vehicle is to be registered must be the legal possessor and be established in Austria or at least

have a principal place of business there (Paragraph 37(2) of the KFG);

- the vehicle must be covered by a compulsory civil liability insurance contract made with an insurer authorised in Austria (Paragraphs 37(2)(b), 59 and 61 of the KFG);

- a report must be produced on the roadworthiness and safety of the vehicle, establishing that it is not a source of excessive pollution (Paragraphs 37(2)(h) and 57a of the KFG);

- a fuel consumption tax must have been paid (Paragraph 37(2)(d) of the KFG and Paragraph 1(3) and (5)(f) of the Normverbrauchsabgabegesetz (Austrian Law imposing a Standard Fuel Consumption Tax; 'the NoVAG')).

6.
Concerning that latter condition, Paragraphs 1 and 2 of the NoVAG provide, subject to exceptions contained in Paragraph 3 of the same Law, that a consumption tax must be paid for every vehicle supplied for consideration, leased by way of trade, or registered for the first time in Austria.

7.
Under Paragraph 5 of the NoVAG, the amount of the tax corresponds to a percentage of the price paid for the vehicle if it is supplied new, or its normal value, exclusive of VAT, in other cases. Under Paragraph 6(2) of the NoVAG, that percentage varies in relation to the type of fuel and the fuel consumption of the vehicle. Under Paragraph 6(3) of the NoVAG, the tax may not exceed 16% of the value of the vehicle.

The dispute in the main proceedings and the question referred

8.
In February 1999, ASL and Cura Anlagen entered into a leasing contract whereby ASL leased a German-registered passenger vehicle (in this case an Audi A3) to Cura Anlagen for 36 months, for a fixed monthly sum, including the cost of compulsory insurance, plus an additional rate per 1 000 km covered by the vehicle over and above a certain distance.

9.
It was agreed that Cura Anlagen, which was to take possession of the vehicle from ASL in Munich, was to use it primarily in Austria. It was also agreed that, for the duration of the contract, the vehicle would remain registered in the name of ASL and would thus retain its German registration plates.

10.
After bringing the vehicle into Austria in February 1999, Cura Anlagen was unable to use it there in accordance with the terms of the contract by reason of the provisions of the KFG prohibiting the driving of a vehicle with foreign plates in Austria for more than three days.

11.
Cura Anlagen then brought an action before the Handelsgericht Wien, seeking an order that ASL should either consent to the registration of the leased vehicle in Austria in the name of Cura Anlagen and at the same time pay the consumption tax of EUR 2 460 thereon, or get the vehicle registered in Austria in its own name and at its own expense. In the alternative, Cura Anlagen applied for the annulment of the leasing contract.

12.
ASL contended that that action should be dismissed. It argued that the combined provisions of Paragraphs 37, 79 and 82(8) of the KFG made cross-border leasing of vehicles so difficult that it was practically impossible for it to provide that service in Austria, with the result that those provisions should be set aside as contrary to the freedom to provide services and, in the alternative, to the free movement of goods.

13.
In those circumstances, the Handelsgericht Wien decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Are Article 49 et seq. EC (or alternatively Article 28 EC) to be interpreted as precluding the application of provisions of Member State A which prohibit an undertaking established in Member State A from using for more than three days, or for more than a year as the case may be, in Member State A a motor vehicle which is leased from a leasing undertaking established in Member State B and registered in Member State B in the name of the leasing undertaking established there, without obtaining a (second) registration for that motor vehicle in Member State A?'

The subject-matter and admissibility of the question referred

In relation to that question, this Court would point out that leasing constitutes a service within the meaning of Article 50 EC. It consists of an economic activity provided for consideration. The fact that that activity implies the handing over of goods by the lessor to the

lessee, in the main proceedings in this case a motor vehicle, cannot invalidate that classification since the supply relates not so much to the goods themselves as to their use by the lessee, the goods in question remaining the property of the lessor.

19.

The Court of Justice has, moreover, already held that the leasing of vehicles constitutes a supply of services within the meaning of Article 9 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth VAT Directive'), those services consisting principally in negotiating, drawing up, signing and administering contracts and in making the vehicles concerned, which remain the property of the leasing company, physically available to customers (Case C-190/95 *ARO Lease* [1997] ECR I-4383, paragraphs 11 and 18).

20.

It follows that the question referred should be regarded as concerned only with the interpretation of Articles 49 EC to 55 EC.

21.

The Austrian Government then argues that the dispute in the main proceedings concerns the interpretation and performance of a private law contract which bears no relation to the question referred.

22.

It should be noted in that respect that, pursuant to Article 234 EC, where a question on the interpretation of the Treaty or of subordinate acts of the institutions of the Community 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 (see, in particular, Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 9).

23.

In the context of that procedure for making a reference, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgment (see, in particular, *Leclerc-Siplec*, paragraph 10).

24.

Moreover, as the Advocate General has pointed out in paragraph 23 of his Opinion, it is important for a court which is asked to order the enforcement or annulment of a contract to know whether the national provisions which appear to hinder its performance are compatible with Community law or not. The question therefore appears to be relevant.

25.

Finally, the Austrian Government challenges the genuineness of the dispute in the main proceedings, which it claims is to a large extent contrived.

26.

In that respect, the Court of Justice has held that, in order to determine whether it has jurisdiction, it must examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to 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 149/82 *Robards* [1983] ECR 171, paragraph 19; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25).

27.

In this case, even if some of the information on the file might give rise to a suspicion that the situation underlying the main proceedings was contrived with a view to obtaining a decision from the Court of Justice on a question of Community law of general interest, it cannot be denied that there is a genuine contract the performance or annulment of which undeniably depends on a question of Community law.

28.

It follows from the above considerations that the question referred is admissible.

Substance

29.

According to consistent case-law, Article 49 EC precludes the application of any national legislation which without objective justification impedes a provider of services from actually exercising that freedom (see, in particular, Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 16).

30.

Article 49 EC likewise precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*Commission* v *France*, cited above, paragraph 17).

31.

However, Article 46 EC, which applies here by virtue of Article 55 EC, allows restrictions justified for reasons of public policy, public security or public health, provided that the measures taken pursuant to that article are not disproportionate to the intended objective. As an exception to a fundamental principle of the Treaty, Article 46 EC must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard (see, to that effect, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 36).

32.

Moreover, according to the settled case-law of the Court, restrictions on the freedom to provide services deriving from national measures which apply without distinction are acceptable only if those measures are justified by overriding reasons relating to the public interest and comply with the principle of proportionality, that is to say are suitable for securing the attainment of the objective which they pursue and do not go beyond what is strictly necessary in order to attain it (to that effect, see in particular Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 29).

33.

It therefore needs to be determined whether legislation such as that at issue in the main proceedings constitutes an obstacle to the freedom to provide services, and, if so, whether such an obstacle may be allowed as a derogation expressly provided for by the Treaty or justified in accordance with the case-law of the Court of Justice, by overriding reasons relating to the public interest.

34.

It should be noted, first, that the Austrian legislation at issue in the main proceedings not only prohibits an undertaking established in Austria from using a vehicle registered in another Member State in Austria beyond a certain period, but also makes the possibility of registering that vehicle in Austria, in order to escape that prohibition, subject to compliance with several conditions which it lists.

35.

It should also be noted that the dispute in the main proceedings concerns only the situation created by a three-year leasing contract concluded by a company registered in Austria with a company registered in another Member State and concerning a vehicle intended to be used essentially in Austria. This does not therefore concern simple hiring contracts made for short periods, such as the hiring of a replacement vehicle from a company established in another Member State.

36.

Essentially, therefore, the national court is asking by its question whether the provisions of the Treaty on the freedom to provide services (Articles 49 EC to 55 EC) preclude legislation of a Member State, such as that at issue in the main proceedings, which requires an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State in order to be able to use it there for more than a certain period. It also asks whether the same provisions of the Treaty preclude legislation of a Member State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State and imposing on it a certain number of conditions.

The requirement to register

37.

There is no dispute that the obligation to register in the Member State where they are used vehicles which have been leased from an undertaking established in another Member State has the effect of making cross-border leasing activities more difficult.

38.

It therefore needs to be examined whether the restriction arising from that obligation may be justified.

39.

For that purpose, it should be noted that the Finnish Government has emphasised the link which exists between the obligation to register and the payment of taxes introduced by the legislation of the Member State in whose territory the vehicle is used. It has argued in that respect that registration is necessary for implementing the taxation of vehicles, which follows the principle, generally accepted in harmonised indirect taxation, whereby goods are normally taxed in the Member State in which they are consumed, which in this case implies that vehicles must be taxed in the State in which they are actually used. The Finnish Government adds that supervision by the tax authorities would be jeopardised if it were not possible to require each vehicle taxable in principle by virtue of its use in the territory of the State in question to be registered there.

40.

It should be recalled in that respect that, save for the specific situation of vehicles which are imported into the Community temporarily and motor vehicles intended exclusively for the road transport of goods with an authorised load of 12 tonnes or more, which are not at issue in the main proceedings, the taxation of motor vehicles has not been harmonised and differs considerably from one Member State to another. Member States are therefore free to exercise their powers of taxation in that area, provided they do so in compliance with Community law. It is lawful for them to allocate those powers of taxation amongst themselves on the basis of criteria such as the territory in which a vehicle is actually used or the residence of the driver, which are various components of the territoriality principle, and to conclude agreements amongst themselves to ensure that a vehicle is subject to indirect taxation in only one of the signatory States.

41.

In that respect, registration appears to be the natural corollary of the exercise of those powers of taxation. It facilitates supervision both for the Member State of registration and for the other Member States, for which registration in one Member State constitutes proof of payment in that State of taxes on motor vehicles.

42.

Therefore, in a situation such as that at issue in the main proceedings, namely where a vehicle leased from a company established in one Member State is actually used on the road network of another Member State, the latter may impose an obligation for that vehicle to be registered in its territory.

43.

In the light of the above considerations, there is no need to examine the other justifications raised by the Austrian, Belgian, Danish and

Finnish Governments, and by the Commission, in relation to such matters as public policy and road safety.

44.

It does, however, need to be examined whether the time-limit within which a vehicle user must register the vehicle in Austria is capable of being justified.

45.

To give the national court an answer that will assist it to resolve the dispute before it, it will be sufficient to examine whether the time-limit of three days, which applies to vehicles brought into Austria by a legal person resident in that Member State, is justified, that period being the only one that is at issue in the situation giving rise to the main proceedings.

46.

Even in the absence of Community legislation on the matter and in cases where, as in the main proceedings, the obligation to register may be regarded as compatible with Articles 49 EC to 55 EC, Member States cannot impose a time-limit that is so short as to make it impossible or excessively difficult to comply with the obligations imposed, having regard to the formalities which must be completed.

47.

In the case at issue in the main proceedings, the three-day time-limit laid down by Austrian legislation appears excessively short and clearly goes beyond what is necessary to attain the objective pursued by that legislation. To that extent, therefore, it constitutes an unjustified obstacle to the freedom to provide services, as laid down in Articles 49 EC to 55 EC.

The requirement concerning the residence or place of business of the leasing undertaking, save where it accepts registration of the vehicle in the name of the lessee

48.

Paragraph 37(2) of the KFG requires a leasing undertaking which has its registered office in another Member State, such as ASL, either to have a principal place of business in Austria or to agree to authorise the lessee to register the vehicle in his name in Austria, thereby limiting its rights as owner of the vehicle.

49.

The Austrian Government argues that it is often necessary, where traffic law has been breached, to require the person in whose name the vehicle is registered to give information as to the identity of the driver at a given moment. It would be difficult to obtain such information if the person in question were established in another Member State.

50.

That requirement appears disproportionate in relation to the objective cited by the Austrian Government.

51.

As the Commission has suggested, it would be sufficient, without hindering the freedom to provide leasing services, for it to be possible to register the leased vehicle in the Member State in whose territory it is driven, in this case Austria, in the name of the leasing undertaking, while at the same time giving the particulars of the lessee who, being by definition resident in Austria, would be responsible, in some cases jointly with the leasing undertaking, for compliance with all the obligations arising from the registration and use of the vehicle.

52.

Making the lessee responsible in that way would, moreover, allow the aim pursued by the Austrian Government, as described in paragraph 49 of this judgment, to be achieved just as well if the vehicle remained registered in the Member State where the leasing undertaking is established.

The requirement concerning insurance

53.

The result of Paragraphs 37(2)(b), 59 and 61 of the KFG is that, to be capable of being registered in Austria, a vehicle leased to a person established in Austria and who uses it in that State must be insured with an insurer authorised to carry on business in Austria.

54.

Such a provision, by restricting the free choice of an insurer, hinders the freedom of vehicle leasing undertakings established in another Member State to offer their services to clients established or residing in Austria. In particular, it may force vehicle leasing undertakings bound by preferential agreements with insurers established outside Austria to conclude contracts that are less advantageous.

55.

Any possible justification for that restriction must be assessed in the light of the Community directives governing the supply of insurance services, particularly motor insurance (see, most recently, Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth Motor Insurance Directive) (OJ 2000 L 181, p. 65)), given that compliance with the obligation to insure any vehicle used on the public highway is supervised and guaranteed by the authorities of the Member State in which it is registered.

56.

As the Commission has observed, assessment of the legality of the insurance requirement in Community law depends on the meaning which the national legislation at issue in the main proceedings gives to the term 'authorised insurer'. If it is to be understood as meaning that the insurer must have its principal place of business in Austria and have 'official authorisation' in that State, as the home Member State within the meaning of the non-life insurance directives (see, in particular, Articles 4 and 5 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive) (OJ 1992 L 228, p. 1)), it must be held that the restriction goes beyond what is necessary to attain the objective pursued. That would not be the case, however, if the expression 'authorised insurer' signifies that the insurer must comply with the conditions laid down by those directives in order to offer its services in a Member State other than the one in which it is established.

The requirement concerning roadworthiness testing

57.
The wording of Paragraphs 37(2)(h) and 57a of the KFG shows that registration of a vehicle is subject to the results of a report on its roadworthiness and safety, which must establish that it is not a source of excessive pollution.
58.
In the case of cross-border car leasing, that provision requires a vehicle intended to be leased in Austria which has already satisfied the roadworthiness and environmental testing required in another Member State to undergo additional tests in Austria. That provision makes supplying vehicle leasing services in Austria from another Member State less attractive, and therefore hinders the freedom to provide services.
59.
It should also be remembered that, although road safety constitutes an overriding reason in the public interest capable of justifying the hindrance in question (Case C-55/93 *Van Schaik* [1994] ECR I-4837, paragraph 19), Member States must, when examining the roadworthiness and safety of vehicles and their environmentally-friendly quality, comply with the relevant Community provisions.
60.
In that respect, it should first be noted that Article 3(1) of Council Directive 96/96/EC of 20 December 1996 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1997 L 46, p. 1) provides that Member States are to take such measures as they deem necessary to make it possible to prove that a vehicle has passed a roadworthiness test complying with at least the provisions of that directive. Those measures are to be notified to the other Member States and to the Commission. Article 3(2) of Directive 96/96 provides that each Member State is to recognise, on the same basis as if it had itself issued the proof, the proof issued in another Member State showing that a motor vehicle registered on the territory of that other State, together with its trailer or semi-trailer, has passed a roadworthiness test complying with at least the provisions of the directive.
61.
However, Article 5 of Directive 96/96 permits Member States to impose more extensive, more frequent or stricter tests than the minimum tests laid down by Article 1 of the directive read in combination with, *inter alia*, Annex II thereto.
62.
Thus, when a vehicle has undergone roadworthiness testing in a Member State, the principle of equivalence and mutual recognition laid down by Article 3(2) of Directive 96/96 requires all the other Member States to recognise the certificate issued on that occasion, without that preventing them from requiring additional tests for the purposes of registration in their territory, provided those tests are not already covered by that certificate.
63.
In addition, as a result of the judgment in Case 50/85 *Schloh* [1986] ECR 1855 (paragraphs 13 to 16), which concerns the free movement of goods, the fact that a vehicle has been used on the public highway since the last roadworthiness test may make it justifiable, at the time when it is registered in another Member State, to verify for purposes of protecting the health and life of humans that it has not been in an accident and is in a good state of repair, provided a similar inspection is required of vehicles of national origin presented for registration in the same circumstances.
64.
It follows that, in a situation such as that at issue in the main proceedings, where a vehicle leased from a company established in one Member State has already undergone roadworthiness testing in that Member State, the authorities of a second Member State may impose additional testing on the registration of the vehicle in that State only for the purposes of verifying that the vehicle satisfies the conditions imposed on vehicles registered in that State that are not covered by the tests in the first Member State and/or, if the vehicle has in the meantime been used on the public highway, checking that its condition has not deteriorated since it was tested in the first Member State, provided similar testing is imposed where a vehicle previously tested in the second Member State is presented for registration in that State.

The requirement concerning fuel consumption tax

65.
ASL argues that, by prohibiting the use of vehicles bearing foreign registration plates, the Republic of Austria is not seeking to

safeguard the interests of road safety and insurance cover, but is in reality pursuing a fiscal aim. It argues that the consumption tax is a disguised increase in the rate of VAT, contrary to Article 12(3) of the Sixth VAT Directive, which authorises only a normal rate and two reduced rates. The consumption tax at issue in the main proceedings was introduced in order to compensate for the abolition of the increased rate of 32% which applied until 31 December 1991, in particular to the sale and rental of motor vehicles. Moreover, that tax was a percentage of the value of the vehicle.

66.

According to the Austrian Government, the aim of the disputed tax is to ensure environmentally friendly conduct in the purchase and leasing of private vehicles. Since the rate of the tax is fixed in relation to the vehicle's fuel consumption, the purchase or leasing of a vehicle with high consumption involves higher taxation than the purchase or leasing of a vehicle with low consumption.

67.

In the Commission's view, Article 49 EC precludes the levying of such a tax if it is collected in its full amount. Like ASL, it argues that the tax in question is collected at the same rate whatever the duration of use or registration of the vehicle in Austria, whereas the amortisation of the tax for a vehicle leasing undertaking varies considerably by reference to that duration. Therefore, a pro rata system, that is to say a fixing of the amount of the tax by reference to the actual duration of the leasing contract, would be more appropriate having regard to the principle of proportionality.

68.

In that regard, there can be no doubt that a consumption tax such as that at issue in the main proceedings may be intended to serve the general interest of discouraging the purchase or possession of vehicles with heavy fuel consumption.

69.

However, such a tax is contrary to the principle of proportionality in so far as the aim which it pursues might be achieved by introducing a tax proportionate to the duration of the registration of the vehicle in the State where it is used, which would ensure there was no discrimination with respect to amortisation of the tax against vehicle leasing undertakings established in other Member States.

70.

In addition, the relation between that tax and the Sixth VAT Directive has no relevance to the question of the compatibility of the Austrian legislation with the Community provisions on the freedom to provide services.

71.

In the light of the above, the answer to the Handelsgericht Wien must be that the provisions of the Treaty on the freedom to provide services (Articles 49 EC to 55 EC) preclude legislation of a Member State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State in order to be able to use it there beyond a period that is so short, in this case three days, that it makes it impossible or excessively difficult to comply with the requirements imposed. The same provisions of the Treaty preclude legislation of a Member State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State and imposing on it one or more of the following conditions:

- a requirement that the person in whose name the vehicle is registered in the Member State of use reside or have a place of business there, in so far as it obliges a leasing undertaking either to have a principal place of business in that Member State or to accept registration of the vehicle in the name of the lessee and the consequent limitation of its rights over the vehicle;

- a requirement to insure the vehicle with an authorised insurer in the Member State of use, if that requirement implies that the insurer must have its principal place of business in that Member State, as the home State within the meaning of the non-life insurance directives, and have ‘official authorisation’ there;

- a requirement of a roadworthiness test when the vehicle has already undergone such testing in the Member State where the leasing company is established, save where that requirement is aimed at verifying that the vehicle satisfies the conditions imposed on vehicles registered in the Member State of use that are not covered by the tests carried out in the Member State where the leasing company is established and/or, if the vehicle has in the meantime been used on the public highway, that its condition has not deteriorated since it was tested in that latter Member State, provided similar testing is imposed where a vehicle previously tested in the Member State of use is presented for registration in that State;

- payment, in the Member State of use, of a consumption tax the amount of which is not proportionate to the duration of the registration of the vehicle in that State.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Handelsgericht Wien by order of 10 November 1999, hereby rules:

The provisions of the EC Treaty on the freedom to provide services (Articles 49 EC to 55 EC) preclude legislation of a Member

State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State in order to be able to use it there beyond a period that is so short, in this case three days, that it makes it impossible or excessively difficult to comply with the requirements imposed. The same provisions of the Treaty preclude legislation of a Member State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State and imposing on it one or more of the following conditions:

- a requirement that the person in whose name the vehicle is registered in the Member State of use reside or have a place of business there, in so far as it obliges a leasing undertaking either to have a principal place of business in that Member State or to accept registration of the vehicle in the name of the lessee and the consequent limitation of its rights over the vehicle;

- a requirement to insure the vehicle with an authorised insurer in the Member State of use, if that requirement implies that the insurer must have its principal place of business in that Member State, as the home State within the meaning of the non-life insurance directives, and have 'official authorisation' there;

- a requirement of a roadworthiness test when the vehicle has already undergone such testing in the Member State where the leasing company is established, save where that requirement is aimed at verifying that the vehicle satisfies the conditions imposed on vehicles registered in the Member State of use that are not covered by the tests carried out in the Member State where the leasing company is established and/or, if the vehicle has in the meantime been used on the public highway, that its condition has not deteriorated since it was tested in that latter Member State, provided similar testing is imposed where a vehicle previously tested in the Member State of use is presented for registration in that State;

- payment, in the Member State of use, of a consumption tax the amount of which is not proportionate to the duration of the registration of the vehicle in that State.

C-338/00 P Volkswagen AG v Commission [2003]

JUDGMENT OF THE COURT (Sixth Chamber)

18 September 2003 (1)

(Appeal - Competition - Distribution of motor vehicles - Partitioning of the market - Article 85 of the EC Treaty (now Article 81 EC) - Regulation (EEC) No 123/85 - Whether the infringement can be attributed to the undertaking concerned - Right to a fair hearing - Duty to state reasons - Legal consequences of disclosure to the press - Effect of propriety of the notification on the calculation of the fine - Cross-appeal)

Volkswagen AG, established in Wolfsburg (Germany), represented by R. Bechtold, Rechtsanwalt, with an address for service in Luxembourg,

appellant,
APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, seeking to have that judgment set aside in part,

the other party to the proceedings being:

Commission of the European Communities,

defendant at first instance,

THE COURT (Sixth Chamber),

Judgment

1.
By application lodged at the Court Registry on 14 September 2000, Volkswagen AG brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance (Fourth Chamber) of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707 (hereinafter referred to as 'the judgment under appeal') in which the Court of First Instance dismissed in part its application for the annulment of Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 - VW) (OJ 1998 L 124, p. 60) (hereinafter referred to as 'the decision' or 'the contested decision').

The legal framework

2.
Dealership contracts for the distribution of motor vehicles are, subject to certain conditions, exempted from Article 85(1) of the EC Treaty (now Article 81(1) EC) by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16).
3.
Agreements of this kind are defined in recital 1 in the preamble to Regulation No 123/85 as being '... agreements, for a definite or an indefinite period, by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry in a defined area and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, within the contract territory'.
4.
According to recital 9 in the preamble to that regulation, '[the] restrictions imposed on the dealer's activities outside the allotted area lead to more intensive distribution and servicing efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply (Article 3, points 8 and 9) ...'.
5.
Article 1 of Regulation No 123/85 provides as follows:

'Pursuant to Article 85(3) of the Treaty it is hereby declared that subject to the conditions laid down in this Regulation Article 85(1) [of the Treaty] shall not apply to agreements to which only two undertakings are party and in which one contracting party agrees to supply within a defined territory of the common market

- only to the other party, or

- only to the other party and to a specified number of other undertakings within the distribution system,

for the purpose of resale certain motor vehicles intended for use on public roads and having three or more road wheels ...'.

6.
Article 2 of Regulation No 123/85 states that the exemption under Article 85(3) of the Treaty also applies 'where the obligation referred to in Article 1 is combined with an obligation on the supplier [not] to sell contract goods to final consumers ... in the contract territory'.
7.
Article 3 of Regulation No 123/85 provides:

'The exemption ... shall also apply where [the selective distribution agreement] is combined with an obligation on the dealer:

...

8. outside the contract territory

(a) not to maintain branches or depots for the distribution of contract goods or corresponding goods,

(b) not to seek customers for contract goods or corresponding goods;

9. not to entrust third parties with the distribution or servicing of contract goods or corresponding goods outside the contract territory;

10. to supply to a reseller:

(a) contract goods or corresponding goods only where the reseller is an undertaking within the distribution system, ...

...

11. to sell motor vehicles ... to final consumers using the services of an intermediary only if that intermediary has prior written authority to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf'.

8.
Article 4(1) of Regulation No 123/85 provides:

'Articles 1, 2 and 3 shall apply notwithstanding any obligation imposed on the dealer to:

...

(3) endeavour to sell, within the contract territory and within a specified period, such minimum quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales;

...

(8) inform customers, in a general manner, of the extent to which spare parts from other sources might be used for the repair or maintenance of contract goods or corresponding goods;

...'.

9.
Regulation No 123/85 was replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145, p. 25).
10.

The wording of Articles 1, 2 and 3 of Regulation No 1475/95 is almost identical to that of the corresponding provisions of Regulation No 123/85. Article 6(1) of Regulation No 1475/95 provides as follows:

'The exemption shall not apply where:...

(3) ... the parties agree restrictions of competition that are not expressly exempted by this Regulation; or

...

(7) the manufacturer, the supplier or another undertaking within the network directly or indirectly restricts the freedom of final consumers, authorised intermediaries or dealers to obtain from an undertaking belonging to the network of their choice within the common market contract goods or corresponding goods ... or the freedom of final consumers to resell the contract goods or corresponding goods, when the sale is not effected for commercial purposes; or

(8) the supplier, without any objective reason, grants dealers remunerations calculated on the basis of the place of destination of the motor vehicles resold or the place of residence of the purchaser; ... ...'.

Facts of the dispute and proceedings before the Court of First Instance

11.
The facts underlying the dispute are set out as follows in the judgment under appeal:

'1 The applicant is the holding company of the Volkswagen group. The group's business activities include the manufacture of motor vehicles of the Volkswagen, Audi, Seat and Skoda makes, and the manufacture of components and spare parts. ...

2 Motor vehicles of the Volkswagen and Audi makes are sold in the Community through selective distribution networks. The import into Italy of those vehicles, their spare parts and accessories, is carried out exclusively by Autogerma SpA ("Autogerma"), a company incorporated under Italian law, established in Verona (Italy), which is a wholly owned subsidiary of the applicant and which accordingly constitutes, with the applicant and Audi, one economic unit. Distribution in Italy takes place through legally and economically independent dealers, who are nevertheless contractually bound to Autogerma. [...]

8 From September 1992 and during 1993 the value of the Italian lira declined greatly in comparison with the German mark. However, the applicant did not make a proportionate increase in its sales prices in Italy. The price differences which resulted from that situation made it economically advantageous to re-export vehicles of the Volkswagen and Audi makes from Italy.

9 During 1994 and 1995 the Commission received letters from German and Austrian consumers complaining of obstacles to the purchase in Italy of new motor vehicles of the Volkswagen and Audi makes for immediate re-export to Germany or Austria.

10 By letter of 24 February 1995 the Commission informed the applicant that, on the basis of complaints from German consumers, it had concluded that the applicant or Autogerma had forced Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers by threatening to terminate their dealer contracts. In the same letter the Commission gave formal notice to the applicant to put an end to that barrier to re-exportation and to inform it, within three weeks of the date of receipt of that letter, of the measures adopted in that regard. [...]...

13 On 17 October 1995 the Commission adopted a decision ordering investigations under Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The investigations took place on 23 and 24 October 1995 ...

14 On the basis of the documents found during those investigations the Commission reached the conclusion that the applicant, Audi and Autogerma had put in place, with their Italian dealers, a market-partitioning policy. On 25 October 1996 the Commission served a statement of objections to that effect on the applicant and Audi.

15 By letter of 18 November 1996 the applicant and Audi requested access to the file. They inspected the file on 5 December 1996.

16 On 19 December 1996 Autogerma, at the express request of the applicant, sent a circular to the Italian dealers stating that exports to final users (including those through intermediaries) and to dealers belonging to the distribution network were lawful and would therefore not be penalised. The circular also indicated that the discount granted to dealers on the sale price of vehicles ordered, known

as the "margin", and payment of their bonus did not depend in any way on whether the vehicles had been sold within or outside their contract territory. [...]...

20 On 28 January 1998 the Commission adopted [the contested decision]. The decision is addressed solely to the applicant. The Commission states that the applicant is responsible for the infringement found because Audi and Autogerma are its subsidiaries and their activities were known to it. As regards the Italian dealers, the Commission states that they did not participate actively in the barriers to re-export but, as victims of the restrictive policy introduced by the manufacturers and Autogerma, were forced to consent to that policy. [...]

22 As regards the measures taken by the applicant and Audi, the Commission cites the introduction by the applicant of a "split margin system" ... The Commission also mentions the reduction by the applicant and Audi of dealers' stocks. That measure, accompanied by a policy of restricted supply, caused a considerable increase in delivery times and led some customers to cancel their orders. It also allowed Autogerma to refuse supplies requested by German dealers (cross-deliveries inside the Volkswagen distribution network). The Commission also refers to the conditions laid down by Audi and Autogerma for calculating the quarterly 3% bonus paid to dealers on the basis of the number of vehicles they had sold.

23 Amongst the penalties imposed by Autogerma on the dealers, the Commission refers to the termination of certain dealership contracts and the cancellation of the quarterly 3% bonus for sales outside the contract territory. [...]...

26 The Commission concludes that those measures, which all form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, are the result of an agreement or concerted practice and constitute an infringement of Article 85(1) of the Treaty since they represent the implementation of a market-partitioning policy. It explains that those measures are not covered by Regulation No 123/85 and Regulation No 1475/95, since no provision of those regulations exempts an agreement which aims to prevent parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network. It also states that an individual exemption cannot be granted in the present case, since the applicant, Audi and Autogerma did not notify any aspect of their agreement with the dealers, and that in any event the barriers to re-exportation are at variance with the objective of consumer protection set out in Article 85(3) of the Treaty. [...]

28 In Article 1 of the decision the Commission finds that the applicant and its subsidiaries Audi and Autogerma "have infringed Article 85(1) of the EC Treaty by entering into agreements with the Italian dealers in their distribution network in order to prohibit or restrict sales to final consumers coming from another Member State, whether in person or represented by intermediaries acting on their behalf, and to other authorised dealers in the distribution network who are established in other Member States". In Article 2 of the decision it orders the applicant to bring an end to the infringements and requires it to take, *inter alia*, the measures set out there.

29 In Article 3 of the decision the Commission imposes a fine of ECU 102 million on the applicant in view of the gravity of the infringement found. The Commission contends that the obstruction of parallel imports of vehicles by final consumers and of cross-deliveries within the dealer network hampers the objective of creating the common market, which is one of the fundamental principles of the European Community, and the infringement found is therefore particularly serious. Moreover, it points to the fact that the relevant rules have been settled for many years and the fact that the Volkswagen group has the highest market share of any motor vehicle manufacturer in the Community. The Commission also refers to documents as proof that the applicant was fully aware that its behaviour infringed Article 85 of the Treaty. It states, moreover, that the infringement lasted for more than 10 years. Lastly, the Commission took into account, as aggravating circumstances, the fact that the applicant, first, did not put an end to the measures in question even though it had received two letters from the Commission in 1995 pointing out that preventing or restricting parallel imports from Italy was an infringement of the competition rules and, second, had used the dependence of dealers on a motor vehicle manufacturer, and so caused, in this case, quite substantial turnover losses for a number of dealers. The decision explains that the applicant, Audi and Autogerma threatened more than 50 dealers that their contracts would be terminated if they continued to sell vehicles to foreign customers and that 12 dealership contracts were in fact terminated, endangering the existence of the businesses concerned.

30 The decision was sent to the applicant by letter dated 5 February 1998 and received by it on 6 February 1998. [...]...'

12.
By application lodged at the Registry of the Court of First Instance on 8 April 1998, the present appellant brought an action against that decision.
13.
In support of its application for annulment, the present appellant relied essentially on five pleas in law. The first and second pleas respectively alleged errors of fact and of law in the application of Article 85 of the Treaty. The third, fourth and fifth pleas alleged infringement of the principle of proper administration, the obligation to state reasons, and the right to a fair hearing.
14.
The present appellant also argued, by way of an alternative submission, that the fine imposed by the contested decision ought to be reduced on the ground that it was excessive.

16.
In its third plea, alleging infringement of the principle of proper administration, the present appellant criticised the Commission for having, prior to the adoption of the contested decision, publicised its assessments and its intentions in regard to the fine.
17.
In its fourth plea, alleging an inadequate statement of reasons for the contested decision, the present appellant stated that the objections raised by it and by Audi during the administrative procedure had been inadequately examined. Thus, the Commission failed, in the contested decision, to take into consideration the analysis of documents submitted in response to the statement of objections.
18.
Finally, in support of its alternative submission, alleging that the fine imposed on it was excessive, the present appellant stated that it had never intended to commit any infringements and that the documents cited in the contested decision with a view to proving the contrary (recital 214 of the decision) had been completely misinterpreted by the Commission. It also submitted that the 15% rule had been expressly laid down in 'Convenzione B' (agreement annexed to the dealership contract), which had been notified to the Commission in 1988; consequently, in accordance with Article 15(5) of Regulation No 17, no fine could be imposed on it by reason of the fact that it had applied that rule.

The judgment under appeal [...]

Infringement of the principle of proper administration by reason of disclosures to the press

26.
The Court of First Instance found, in paragraphs 280 to 282 of the judgment under appeal, that, prior to the adoption of the contested decision, a vital part of the draft decision referred to the Advisory Committee and then, for final approval, to the College of Commissioners was the subject of several leaks to the press. It also found that those disclosures to the press were not restricted to expressing the personal views of the member of the Commission responsible for competition matters regarding the compatibility with Community law of the measures under examination but also informed the public, to a high degree of precision, of the amount of the fine envisaged. The Court of First Instance formed the view that, in so proceeding, the Commission acted in a manner injurious to the dignity of the impugned undertaking and to the interests of proper administration at Community level.
27.
The Court of First Instance pursued its line of reasoning as follows:

'283 It is settled case-law that an irregularity of the type found above may lead to annulment of the decision in question if it is established that the content of that decision would have differed if that irregularity had not occurred (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 91; [Case T-43/92] *Dunlop Slazenger* v *Commission* [[1994] ECR II-441], paragraph 29). However, in the present case the applicant has not adduced such proof. There are no grounds for supposing that if the information at issue had not been disclosed the Advisory Committee or the College of Commissioners would have altered the proposed amount of the fine or the content of the decision.

284 Consequently, this part of the third plea must also be rejected. ...'

The inadequate statement of reasons for the contested decision

28.
The Court of First Instance held *inter alia* as follows:

'297 The statement of reasons for the contested decision showed, in conformity with the requirements of Article 190 of the EC Treaty (now Article 253 EC), clearly and unequivocally the Commission's reasoning and so enabled the applicant to ascertain the reasons for that decision in order to defend its rights, and the Court to review the correctness of the decision (Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 65; and [Case T-229/94] *Deutsche Bahn* v *Commission* [[1997] ECR II-1689], paragraph 96).

298 It is clearly explained in the contested decision, with regard to the various types of conduct complained of, why the Commission considered that the applicant had infringed Article 85(1) of the Treaty. The Commission's analyses have enabled the Court to exercise its power of review. By the same token, both in its application and during the proceedings, the applicant has replied to the arguments set out by the Commission in the decision in relation to the finding of an infringement, which shows that the decision supplied it with the necessary information to enable it to defend its rights.

299 Moreover, in the decision and, more specifically, in recitals 194 to 201 thereof, the Commission, as stated in paragraph 27 above, expressly replied to certain observations submitted by the applicant and Audi in response to the statement of objections. It should be

added here that the Commission did not have to reply to the applicant's detailed objections, such as those submitted in regard to its margin policy. All that was required of the Commission was to explain clearly and unequivocally, as it did in recitals 62 to 66 of the decision, why it took the view that a split margin system had been instituted (see *Siemens* v *Commission*, cited above, paragraphs 17 and 18). Likewise, the Commission gave adequate reasons for its analysis of the documents obtained by amply explaining the grounds on which it considered that those documents were of such a nature as to prove the existence of the alleged infringement, but without replying point-by-point to the different interpretations submitted by the applicant in its reply to the statement of objections. ...'

The excessive nature of the fine imposed

29.
With regard, first, to the intentional nature of the infringement, the Court of First Instance ruled in the following terms:

'334 As to the first question, it is not disputed that in the present case the Commission found that the infringement was committed intentionally and not merely negligently (recital 214 of the decision). That assessment is wholly justified. As has been found above in the context of the first plea, the applicant adopted measures whose object was to partition the Italian market and thus to hinder competition ... Moreover, it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41). In view of the existence of settled case-law holding that actions partitioning markets are incompatible with the Community competition rules ..., the applicant could not have been unaware that its conduct hindered competition.'

30.
Next, with regard to the question whether the 15% rule had been notified to the Commission and to the consequences resulting therefrom for the determination of the fine in the contested decision, the Court of First Instance ruled as follows:

'342 As to the argument that Convenzione B had been notified in 1988 and, accordingly, the Commission could not impose a fine on the applicant in respect of the 15% rule agreed in that agreement, the Court points out, first, that the prohibition laid down in Article 15(5)(a) of Regulation No 17 on the imposition of fines in respect of acts taking place "after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification" applies only in respect of agreements which have in fact been notified in accordance with the necessary formalities (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 77; [Case T-29/92] *SPO and Others* v *Commission* [[1995] ECR II-289], paragraph 342; also Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraphs 23 and 24). Next, it must be pointed out that in a letter dated 25 November 1988 (Annex 3 to the defence) the Commission informed Autogerma that the dispatch by it of Convenzione B was not a notification for the purposes of Reg. No 17.

343 Irrespective of the question whether or not the sending of Convenzione B was a notification for the purposes of Regulation No 17, the very fact that that agreement was sent to the Commission already in 1988 ought to have led the Commission to reject the view that that agreement was in itself a factor justifying an increase in the amount fixed in respect of the gravity of the infringement (recital 217 of the decision). Consequently, the period from 1988 to 1992, during which the 15% rule stipulated in Convenzione B is the only act complained of (see recital 202 of the decision) must not be taken into account when fixing the fine, even if that rule was rightly regarded as incompatible with the Treaty (see, in regard to the latter point, paragraphs 49 and 189 above).

344 On the other hand, the 15% rule could be taken into account for the purposes of fixing the fine in respect of the period from 1993 to 1996. As has been found above ..., during that period the ceiling provided by the 15% rule was combined, and thus strengthened, with other measures, in order to hinder re-exports. ... Consequently, even if it were proved that Convenzione B had been notified, it would still be necessary to find that since 1993 the application of the 15% rule fell outside the scope of the activity as set out in the text of the agreement notified to the Commission, so that, by virtue of the clear wording of Article 15(5)(a) of Regulation No 17, the exemption from fines would no longer apply. It follows that it would have been appropriate to take 1 September 1993 as the starting date of the period to be taken into account when fixing the fine ...'.

31.
Finally, the Court of First Instance found, in paragraph 346 of the judgment under appeal, that, as the duration of the infringement to be taken into account for the purpose of fixing the fine had to be reduced to a period in the order of three years and as the description of the infringement made by the Commission in order to assess the gravity of the infringement was not wholly correct, it was necessary for it, in the exercise of its unlimited jurisdiction, to vary the contested decision and to reduce the amount of the fine imposed on the present appellant.
32.
The Court of First Instance ruled in this regard as follows:

'347 However, the reduction of the fine does not necessarily have to be proportionate to the reduction in the period which the Commission had taken into account nor correspond to the sum of the percentage increases applied by the Commission in respect of the period from 1988 to August 1993, the last quarter of 1996 and 1997 (see, by analogy, *Dunlop Slazenger*, cited above, paragraph 178). The Court must carry out, in the exercise of its jurisdiction in the matter, its own assessment of the circumstances of the case in order to determine the amount of the fine (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111; Case T-148/94 *Preussag Stahl* v *Commission* [1999] ECR II-613, paragraph 728). In the present case, the highly grave nature of the infringement committed, apparent from paragraph 336 above, on the one hand, and the intensity with which the unlawful measures were implemented, as shown by the abundant correspondence discussed above in the context of the first plea, on the other hand, call for a fine which acts as a real deterrent (see Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33). In the light of those considerations, the fine imposed of ECU 102 million, which corresponded approximately, as the applicant confirmed in reply to a written question from the Court, to 0.5% of turnover achieved in 1997 by the Volkswagen group in Italy, Germany and Austria, and to 0.25% of its turnover in the European Union in the same year, is not abnormally high. Lastly, the fact that the Commission's conclusions as to the split margin system and the termination of certain dealership contracts have not been adequately proved does not reduce the highly grave nature of the infringement in question, duly established by proof of the other infringing conduct ...

348 Having regard to all the above circumstances and considerations, the Court, in the exercise of its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17 (see Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 46, and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 129), considers it proper to reduce the amount of the fine ... to EUR 90 million.'

33.
The operative part of the judgment under appeal is worded as follows:

'[The Court of First Instance hereby]

1. Annuls Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 - VW) in so far as it finds that:

(a) a split margin system and termination of certain dealership contracts by way of penalty were measures adopted in order to hinder re-exports of Volkswagen and Audi vehicles from Italy by final consumers and authorised dealers in those makes in other Member States;

(b) the infringement had not completely ceased between 1 October 1996 and the adoption of the decision;

2. Reduces the amount of the fine imposed on the applicant by Article 3 of the contested decision to EUR 90 000 000;

3. Dismisses the remainder of the application;

4. Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;

5. Orders the Commission to bear 10% of its own costs.'

The appeal

34.
By its appeal, the appellant claims that the Court should:

- set aside the judgment under appeal and declare the contested decision to be void;

- order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

35.
In its reply, the appellant states that the forms of order which it seeks are to be construed and interpreted in the light of the reasoning of the appeal, from which it follows that it is not seeking that the judgment under appeal be set aside in its entirety but only in so far as it adversely affects the appellant.
36.

The Commission claims that the Court should:

- dismiss the appeal;

- set aside the contested judgment and refer the case back to the Court of First Instance in so far as it reduced to EUR 90 million the amount of the fine imposed on the appellant without taking into account, in fixing that fine, the 15% rule laid down in 'Convenzione B' of the dealership contract concluded in 1988 for the period from 1988 to 1992;

- order the appellant to pay the costs of the proceedings before the Court of Justice and reserve to the Court of First Instance the decision on costs in the cross-appeal.

The main appeal

37.
In support of its appeal, the appellant invokes nine grounds of appeal providing as follows:

- the Court of First Instance failed to guarantee the right to a fair hearing (as a right of the defence) by using, to the appellant's detriment, complaints lodged by consumers on which the appellant had been unable to set out its views during the administrative procedure (sixth ground of appeal);

- contrary to the finding of the Court of First Instance, the contested decision is not adequately reasoned and is, by virtue of that fact, unlawful (seventh ground of appeal);

- the Court of First Instance failed to comply with its obligation to provide reasons in regard to the fine which it fixed (eighth ground of appeal); and

- the premature announcement of the draft decision by the commissioner responsible for competition matters must, in any event, render the contested decision unlawful (ninth ground of appeal). [...]

The fourth ground of appeal: Arguments of the parties

88.
In its fourth ground of appeal, the appellant challenges the finding by the Court of First Instance, in paragraph 334 of the judgment under appeal, that the infringement of which it is accused was intentional in nature. It submits in this regard that the 'fault principle', which must be respected in Community competition law, means that, in order for a sanction to be imposed, the person concerned must have acted in a manner that was objectively unlawful and must have been subjectively aware that it was unlawful. This remains the position even in regard to an undertaking, which is a legal person capable of demonstrating its intention only through the actions of natural persons that can be attributed to it.
89.
In the present case, the Commission and Court of First Instance derived the intentional nature of the infringement from statements made by persons at least some of whom were not parties directly involved, without having established whether those persons had themselves also committed any objective infringements. The mere confirmation that certain persons working for the appellant had behaved in a manner that was objectively unlawful, coupled with the affirmation, concerning other employees, that the appellant had to that extent acted intentionally, does not satisfy the requirements of the 'fault principle'. This does not mean that all the objective and subjective elements of the infringement resulting from each type of conduct need be concentrated in one and the same person. It must, however, be established, for each action, that it had the intentional character required for purposes of a fine; this was not done in the present case.
90.
Even assuming that an undertaking is responsible for the conduct of all persons acting within its sphere of influence or responsibility (see, in this regard, Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 97), it is at the very least necessary that it can be established that those persons in particular, that is to say, those who committed the act complained of, acted improperly.
91.
In a number of earlier decisions, the Commission and the Court proceeded on the basis of a normative notion of fault in finding a fault specific to the undertaking instead of simply attributing to it the fault of natural persons (see Commission Decision 82/203/EEC of 27 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.188 - Moët et Chandon (London) Ltd) (OJ 1981 L 94, p. 7, at p. 10) and Commission Decision 82/267/EEC of 6 January 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.748 - AEG-Telefunken) (OJ 1982 L 117, p. 15, at p. 27)). The fact of referring to blame specific to the undertaking itself is,

however, only recognition of an organisational fault for which the various objectively illegal activities engaged in by employees were not taken into consideration. In the present case, neither the contested decision nor the judgment under appeal, the latter confirming the former, makes it possible to identify what this fault of which the appellant is accused might be. The Commission and Court of First Instance ought, at the very least, to have demonstrated that the appellant was open to criticism for shortcomings in its organisation or for breaches of its duty of surveillance (see, in this connection, point 17 of Commission Decision 83/667/EEC of 5 December 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.671 - IPTC Belgium) (OJ 1983 L 376, p. 7) and point 21 of Commission Decision 85/79/EEC of 14 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.809 - John Deere) (OJ 1985 L 35, p. 58)).

92.

The Commission submits that the appellant's view that the acts of an employee can be attributed to an undertaking only if that employee contains in his person all the objective and subjective elements of an infringement is incompatible with the nature of competition law as the law governing undertakings or with the division of labour within their organisation.

93.

Thus, all acts of persons authorised to act on behalf of undertakings are attributable to the latter (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 97). This follows clearly from paragraph 234 of the judgment under appeal, in which the Court of First Instance confirmed the Commission's classification of the appellant's conduct, where the Commission concluded that there had been one single infringement.

Findings of the Court

94.

The Court of First Instance found, in paragraph 334 of the judgment under appeal, that the appellant had adopted measures the object of which was to partition the Italian market and that, in view of the existence of well-established case-law holding that market partitioning is incompatible with Community competition rules, it could not have been unaware that its conduct hindered competition.

95.

At the hearing, counsel for the appellant, requested by the Court to provide details on the fourth ground of appeal, stated that, in order to establish that the infringement was intentional in nature, the Commission and Court of First Instance ought to have identified the persons who had acted improperly and were therefore to be treated as responsible for the infringement committed or, at least, the person who ought to have been held responsible for the appellant's defective organisation which made such an infringement possible.

96.

It must be noted in this regard that the view supported by the appellant can have no application in Community competition law, in which infringements that have been committed give rise to fines which, under Article 15(2) of Regulation No 17, are imposed on undertakings which have participated intentionally or through negligence in the infringement. Article 15(4) of Regulation No 17, moreover, provides that decisions imposing such a fine are not of a criminal law nature.

97.

It should be added that, were the appellant's view to be upheld, this would impinge seriously on the effectiveness of Community competition law.

98.

It follows that, contrary to the appellant's argument, the Court of First Instance did not err in law in taking the view that the intentional nature of the infringement was established without demanding the identification of the persons who had acted improperly within the undertaking or who ought to have been held responsible for any defective organisation of the undertaking.

99.

The fourth ground of appeal must therefore be rejected.

The sixth ground of appeal: Arguments of the parties

106.

In its sixth ground of appeal, the appellant submits that, in paragraphs 105 to 115 of the judgment under appeal, the Court of First Instance failed to guarantee its right to a fair hearing by using, to its detriment, complaints from consumers which the Commission produced during those proceedings and on which the appellant had been unable to set out its views during the administrative procedure.

107.

The Commission, the appellant argues, identified and took into account, as against the appellant, only 15 complaints from consumers, of which the appellant was made aware during the administrative procedure when it was given access to the case-file. The appellant was given access to the other complaints only when the Commission, ordered to do so by the Court of First Instance on 12 July 1999, forwarded all of the complaints to it by letter of 10 August 1999. The appellant had no opportunity to set out its views on those complaints in writing. Nor was it in a position to submit detailed observations on those complaints or to provide details on the different individual cases at the hearing on 7 October 1999 because the time allocated to its counsel to present oral argument was limited to 30 minutes.

108.

In paragraph 105 of the judgment under appeal, the Court of First Instance used all of the correspondence and faxes to which it

referred against the appellant. The same conclusion can be drawn from paragraph 115 of that judgment, in which the Court of First Instance found that the documents mentioned in paragraphs 106 to 114 of the judgment, and which were examined in the contested decision, revealed the barriers to exports in a sufficiently representative manner. The Court of First Instance clearly regarded these complaints as being representative of the other complaints which had not been communicated to the appellant.

109.

According to the settled case-law of the Court, the right to a fair hearing, as a right of the defence, requires that the undertaking concerned be afforded the opportunity, from the stage of the administrative procedure, to make known its views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (see paragraph 311 of the judgment under appeal and the case-law cited therein). If the Commission cannot justify its decision a posteriori by relying on evidence which was not communicated to the undertaking concerned in the course of the administrative procedure, the Court of First Instance should also not be able to use such evidence against that undertaking.

110.

The Commission points out that the appellant set out its views during the hearing before the Court of First Instance on the content of the consumer complaints which it had placed on the case-file by letter of 20 August 1999. It adds that the appellant has not claimed that the Commission refused it wholly or in part access to those complaints during the administrative procedure and that the Court of First Instance could therefore not use them without infringing the right to a fair hearing.

111.

The Commission submits further that the appellant contradicts the letter of 10 December 1996 from its representative, read in conjunction with the confirmatory declaration of 5 December 1996 in which Ms Pretzell, who worked with the appellant's representative, confirmed that she had full access to the Commission's file on 5 December 1996.

112.

According to the Commission, it also follows from paragraph 115 of the judgment under appeal that the Court of First Instance based itself solely on the letters which were cited in paragraphs 106 to 114 of that judgment and which had been examined by the Commission in the contested decision. It is for that reason incorrect to allege, as the appellant does, that the Court of First Instance used as evidence all of the complaints made against the appellant.

Findings of the Court

113.

This ground of appeal is based on the premiss that it was during the proceedings before the Court of First Instance that the appellant was first afforded access to the complaints of consumers which the Commission produced in this case.

114.

That premiss is incorrect.

115.

As the Commission submits in its statement of defence, without being challenged by the appellant on this point, the appellant did have full access, during the administrative procedure, to the Commission's file, including those complaints.

116.

That being so, on the assumption that, in paragraphs 105 and 115 of the judgment under appeal, the Court of First Instance, as the appellant alleges, used not only the documents which the Commission analysed in the contested decision but also all of the complaints made against it, the appellant is in any case not entitled to submit that the Court of First Instance failed to guarantee its right to a fair hearing.

117.

The sixth ground of appeal must accordingly be rejected.

The seventh ground of appeal: Arguments of the parties

118.

In its seventh ground of appeal, the appellant submits that the Court of First Instance misappraised the essence of the duty to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC) in ruling, in paragraph 299 of the judgment under appeal, that it was sufficient for the Commission to address, in the contested decision, some of the objections raised by the appellant in response to the statement of objections. Reasoning in which the Commission, without any identifiable method, merely examines a number of the objections raised by the undertaking concerned and quite simply ignores the rest cannot assist the Commission in monitoring its own activities or persuade that undertaking that the adopted decision is well founded, nor does it enable the public to be properly informed of the grounds which led the Commission to adopt its decision, these being functions which the statement of reasons must also fulfil. The legal reasoning underlying paragraph 297 of the judgment under appeal places in question the very meaning of the administrative procedure.

119.

It is significant in this regard that, in the contested decision, the Commission did not, or practically did not, examine the objections raised by the appellant in its reply to the statement of objections relating to the split margin system and the duration of the infringement,

two points on which the Court of First Instance annulled that decision.

120.

The Commission submits that this ground is in part inadmissible and for the rest unfounded.

121.

Given that the Court of First Instance annulled the contested decision on the two points mentioned by the appellant, the Court cannot annul them anew, even if those points are vitiated by an absence of reasoning, a matter which the Court of First Instance, moreover, expressly examined and rejected in paragraphs 299 and 300 of the judgment under appeal. The appellant fails to indicate the other points in respect of which it takes the view that the contested decision suffers from an absence of reasoning such as might have resulted in its annulment, nor does it submit that the Court of First Instance ought to have annulled the decision in its entirety on the ground of an alleged absence of reasoning with regard to the two points mentioned above.

122.

The appellant, the Commission continues, distorts the content of paragraph 299 of the judgment under appeal, in which the Court of First Instance stressed that the Commission, which had in any event already satisfied its obligation to state reasons (paragraphs 297 and 298), also expressly replied to a number of the observations made by the appellant and Audi in response to the statement of objections. It cannot be inferred from that content that the Commission did not need to reply to the other objections raised following that communication and that it was simply able to ignore them. The Court of First Instance did no more than establish that the Commission had provided sufficient reasons for its assessment of the documents removed and specified the grounds on which the Commission took the view that those documents were of such a kind as to prove the existence of the infringement alleged. Furthermore, it does not in any way follow from the Court's case-law that the Commission had to reply on a point-by-point basis to the various interpretations which the appellant gave to those documents in its reply to the statement of objections.

Findings of the Court

123.

This ground of appeal consists of two limbs. In the first of these, the appellant is essentially criticising the Court of First Instance for having defined incorrectly, in paragraph 297 of the judgment under appeal, the requirements which must be satisfied by the statement of reasons for a Commission decision such as that here under challenge. In the second limb of this ground of appeal, the appellant criticises the Court of First Instance for also having erred in its appraisal of the scope of the Commission's obligation to state reasons under Article 190 of the Treaty in finding, in paragraph 299 of the judgment under appeal, that it was sufficient for the Commission to reply to only some of the objections which the appellant had raised in response to the statement of objections.

124.

With regard to the first limb of this ground of appeal, it is settled case-law that the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure in order to defend their rights and to enable the Community judicature to exercise its power of review (see, *inter alia*, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 41).

125.

It was precisely on the basis of those criteria that the Court of First Instance appraised, in paragraph 297 of the judgment under appeal, the reasons given for the contested decision. It cannot therefore be criticised for having erred in law in that regard.

126.

The first limb of the seventh ground of appeal must for that reason be rejected.

127.

With regard to the second limb of the seventh ground of appeal, although the Commission is required under Article 190 of the Treaty to set out all the circumstances of fact and law justifying the adoption of a decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative procedure (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22, and Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 55).

128.

In the present case, the Court of First Instance explained, in paragraphs 298 to 302 of the judgment under appeal, why it took the view that the contested decision was adequately reasoned, stressing moreover, in paragraph 299, that the Commission had expressly addressed a number of the observations which the appellant and Audi had raised in response to the statement of objections.

129.

In those circumstances, the statement in paragraph 299 that the Commission did not have to reply to all of the appellant's detailed objections is not in itself vitiated by an error of law.

130.

The appellant, however, submits that the Court of First Instance ought to have insisted that the Commission address, in the contested decision, at least the objections which it had raised following notification of the statement of objections and which related to the split margin system and the duration of the infringement, two points on which the Court of First Instance, for separate reasons, annulled that decision.

131.

Independently of the question whether the appellant is entitled to argue that the Court of First Instance erred in law in respect of one part of the contested decision which was annulled on separate grounds, it must be pointed out in this regard that, in paragraphs 299 and 300 of the judgment under appeal, the Court of First Instance explained why it took the view that the Commission's decision was adequately reasoned with regard to implementation of the split margin system and the duration of the infringement.

132.

In so proceeding, the Court of First Instance correctly determined, in line with the case-law cited in paragraph 127 of the present judgment, the scope of the obligation to state reasons laid down in Article 190 of the Treaty.

133.

The second limb of the seventh ground of appeal must therefore also be rejected.

134.

In the light of the foregoing, the seventh ground of appeal must be rejected in its entirety.

The eighth ground of appeal: Arguments of the parties

135.

In its eighth ground of appeal, the appellant submits that the Court of First Instance failed to satisfy the obligation to state reasons imposed on it by Article 46 in conjunction with Article 33 of the EC Statute of the Court of Justice inasmuch as it failed adequately to explain, in paragraphs 347 and 348 of the judgment under appeal, why it formed the view that a fine in the amount of EUR 90 million was justified.

136.

Findings of the Court

143.

It should be noted in this regard that, in paragraph 347 of the judgment under appeal, the Court of First Instance first of all indicated that the reduction of the fine did not necessarily have to be proportionate to the reduction in the infringement period which the Commission had taken into account or correspond to the method of calculation which it had used inasmuch as it is for the Court of First Instance itself to carry out, in the exercise of its unlimited jurisdiction in the matter, its own assessment of the circumstances of the case in order to determine the amount of the fine. After pointing out that the particularly serious nature of the infringement committed, as confirmed in paragraph 336 of the judgment under appeal, that is to say, the partitioning of the Italian market, called for a fine that would act as a real deterrent, the Court of First Instance formed the view that the level of the fine imposed on the appellant by the Commission was not abnormally high when considered against the turnover achieved in 1997 by the Volkswagen group in the three States affected by the infringement, that is to say, Italy, Germany and Austria, and in the European Union. Finally, the Court of First Instance took the view that its rejection of the Commission's conclusions regarding the split margin system and the termination of certain dealership contracts did not reduce the particularly serious nature of the infringement committed, which had been duly established by evidence of the other infringing conduct.

144.

Having regard to all of the circumstances and considerations set out in paragraph 347 of the judgment under appeal, the Court of First Instance ruled, in paragraph 348, that it was proper to reduce the amount of the fine to EUR 90 million.

145.

147.

That finding cannot, however, be applied in the present case, as the judgment under appeal was delivered in proceedings which involved the appellant alone and the Court of First Instance, when exercising its unlimited jurisdiction, is therefore not in principle bound by the method followed by the Commission in calculating the fine (see, to this effect, *Michelin* v *Commission*, cited above, paragraph 111).

148.

This first head of complaint must accordingly be rejected.

149.

With regard to the second head of complaint, suffice it to hold that, when it is itself examining the circumstances of a case in the exercise of its unlimited jurisdiction, the Court of First Instance may take into consideration, in accordance with Article 15(2) of Regulation No 17, the relationship between the amount of the fine imposed by the Commission and the turnover of the undertaking in question. In any event, in the present case, the Court of First Instance used the turnover of the Volkswagen group, not as a criterion for calculating the amount of the fine imposed on the appellant, but rather to support the finding in paragraph 347 of the judgment under appeal that that amount was not abnormally high.

150.

The second head of complaint must accordingly be rejected.

151.

In its third head of complaint, the appellant essentially disputes the proportionate nature of the amount of the fine fixed by the Court of First Instance in the light of the findings which it had made, which led it to reject two of the Commission's complaints, and of the gravity

and duration of the infringement. However, it is not for the Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law. The Court cannot therefore, at the appeal stage, examine whether the amount of the fine fixed by the Court of First Instance, in the exercise of its unlimited jurisdiction, is proportionate in relation to the gravity and duration of the infringement as established by the Court of First Instance on completion of its appraisal of the facts (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 611 to 614). In any event, it does not appear that the reasoning set out in paragraph 347 of the judgment under appeal was unreasonable or contradictory.

152.

It follows that this head of complaint must also be rejected.

153.

In the light of the foregoing, the eighth ground of appeal must be rejected in its entirety.

167.

As none of the grounds of appeal invoked by the appellant can be upheld, the main appeal must be dismissed in its entirety.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the main appeal and the cross-appeal;

2. Orders each party to bear its own costs.

C-438/05 International Transport Workers Federation v Viking Line ABP [2007]

JUDGMENT OF THE COURT (Grand Chamber)

11 December 2007 (*)

(Maritime transport − Right of establishment − Fundamental rights − Objectives of Community social policy − Collective action taken by a trade union organisation against a private undertaking − Collective agreement liable to deter an undertaking from registering a vessel under the flag of another Member State)

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 23 November 2005, received at the Court on 6 December 2005, in the proceedings

International Transport Workers' Federation,

Finnish Seamen's Union,

v

Viking Line ABP,

OÜ Viking Line Eesti,

THE COURT (Grand Chamber),

Judgment

1 This reference for a preliminary ruling concerns the interpretation first, of Article 43 EC, and secondly, of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

2 The reference has been made in connection with a dispute between the International Transport Workers' Federation ('ITF') and the Finnish Seamen's Union (Suomen Merimies-Unioni ry, 'FSU'), on the one hand, and Viking Line ABP ('Viking') and its subsidiary OÜ Viking Line Eesti ('Viking Eesti'), on the other, concerning actual or threatened collective action liable to deter Viking from reflagging one of its vessels from the Finnish flag to that of another Member State.

Legal context: Community law

3 Article 1(1) of Regulation No 4055/86 provides:

'Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

National law

4 According to the order for reference, Article 13 of the Finnish constitution, which confers on all individuals the freedom to form trade unions and freedom of association in order to safeguard other interests, has been interpreted as allowing trade unions to initiate collective action against companies in order to defend workers' interests.

5 In Finland, however, the right to strike is subject to certain limitations. Thus, according to Finland's Supreme Court, it may not be relied on, inter alia, where the strike is *contra bonos mores* or is prohibited under national law or under Community law.

The dispute in the main proceedings and questions referred

6 Viking, a company incorporated under Finnish law, is a large ferry operator. It operates seven vessels, including the *Rosella* which, under the Finnish flag, plies the route between Tallinn (Estonia) and Helsinki (Finland).

7 FSU is a Finnish union of seamen which has about 10 000 members. The crew of the *Rosella* are members of the FSU. FSU is affiliated to the ITF, which is an international federation of transport workers' unions with its headquarters in London (United Kingdom). The ITF groups together 600 unions in 140 different States.

8 According to the order for reference, one of the principal ITF policies is its 'Flag of Convenience' ('FOC') policy. The primary objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on FOC ships. ITF considers that a vessel is registered under a flag of convenience where the beneficial ownership and control of the vessel is found to lie in a State other than the State of the flag. In accordance with the ITF policy, only unions established in the State of beneficial ownership have the right to conclude collective agreements covering the vessel concerned. The FOC campaign is enforced by boycotts and other solidarity actions amongst workers.

9 So long as the *Rosella* is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages. The *Rosella* was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it by registering it in either Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those States.

10 In accordance with Finnish law, Viking gave notice of its plans to the FSU and to the crew of the *Rosella*. During meetings between the parties, FSU made clear that it was opposed to those plans.

11 On 4 November 2003, FSU sent an email to ITF which referred to the plan to reflag the *Rosella*. The email further stated that 'the *Rosella* was beneficially owned in Finland and that FSU therefore kept the right to negotiate with Viking'. FSU asked ITF to pass this information on to all affiliated unions and to request them not to enter into negotiations with Viking.

12 On 6 November 2003, ITF sent a circular ('the ITF circular') to its affiliates asking them to refrain from entering into negotiations with Viking or Viking Eesti. The affiliates were expected to follow this recommendation because of the principle of solidarity between trade unions and the sanctions which they could face if they failed to comply with that circular.

13 The manning agreement for the *Rosella* expired on 17 November 2003 and therefore FSU was, as from that date, no longer under an obligation of industrial peace under Finnish law. Consequently, it gave notice of a strike requiring Viking, on the one hand, to increase the manning on the *Rosella* by eight and, on the other, to give up its plans to reflag the *Rosella*.

14 Viking conceded the extra eight crew but refused to give up its plans to reflag.

15 FSU was still not prepared, however, to agree to a renewal of the manning agreement and, by letter of 18 November 2003, it indicated that it would only accept such renewal on two conditions: first, that Viking, regardless of a possible change of the *Rosella*'s flag, gave an undertaking that it would continue to follow Finnish law, the collective bargaining agreement, the general agreement and the manning agreement on the Rosella and, second, that the possible change of flag would not lead to any laying-off of employees on any Finnish flag vessel belonging to Viking, or to changes to the terms and conditions of employment without the consent of the employees. In press statements FSU justified its position by the need to protect Finnish jobs.

16 On 17 November 2003, Viking started legal proceedings before the employment tribunal (Finland) for a declaration that, contrary to the view of the FSU, the manning agreement remained binding on the parties. On the basis of its view that the manning agreement was at an end, FSU gave notice, in accordance with Finnish law on industrial dispute mediation, that it intended to commence strike action in relation to the *Rosella* on 2 December 2003.

17 On 24 November 2003, Viking learnt of the existence of the ITF circular. The following day it brought proceedings before the Court of First Instance of Helsinki (Finland) to restrain the planned strike action. A preparatory hearing date was set for 2 December 2003.

18 According to the referring court, FSU was fully aware of the fact that its principal demand, that in the event of reflagging the crew should continue to be employed on the conditions laid down by Finnish law and the applicable collective agreement, would render reflagging pointless, since the whole purpose of such reflagging was to enable Viking to reduce its wage costs. Furthermore, a

consequence of reflagging the *Rosella* to Estonia would be that Viking would, at least as regards the *Rosella*, no longer be able to claim State aid which the Finnish Government granted to Finnish flag vessels.

19 In the course of conciliation proceedings, Viking gave an undertaking, at an initial stage, that the reflagging would not involve any redundancies. Since FSU nevertheless refused to defer the strike, Viking put an end to the dispute on 2 December 2003 by accepting the trade union's demands and discontinuing judicial proceedings. Furthermore, it undertook not to commence reflagging prior to 28 February 2005.

20 On 1 May 2004, the Republic of Estonia became a member of the European Union.

21 Since the *Rosella* continued to run at a loss, Viking pursued its intention to reflag the vessel to Estonia. Because the ITF circular remained in force, on account of the fact that the ITF had never withdrawn it, the request to affiliated unions from the ITF in relation to the *Rosella* consequently remained in effect.

22 On 18 August 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), requesting it to declare that the action taken by ITF and FSU was contrary to Article 43 EC, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law.

23 By decision of 16 June 2005, that court granted the form of order sought by Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 43 EC and, in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC.

24 On 30 June 2005, ITF and FSU brought an appeal against that decision before the referring court. In support of their appeal they claimed, inter alia, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty and, in particular, Article 136 EC, the first paragraph of which provides that '[t]he Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'.

25 It was argued that the reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers incorporated a reference to the right to strike recognised by those legal instruments. Consequently, the trade unions had the right to take collective action against an employer established in a Member State to seek to persuade him not to move part or all of his undertaking to another Member State.

26 The question therefore arises whether the Treaty intends to prohibit trade union action where it is aimed at preventing an employer from exercising his right of establishment for economic reasons. By analogy with the Court's rulings regarding Title VI of the Treaty (Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451; and Case C-222/98 *Van der Woude* [2000] ECR I-7111), it is argued that Title III of the Treaty and the articles relating to free movement of persons and of services do not apply to 'genuine trade union activities'.

27 In those circumstances, since it considered that the outcome of the case before it depended on the interpretation of Community law, the Court of Appeal (England and Wales) (Civil Division) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'*Scope of the free movement provisions*

(1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 EC and/or Regulation No 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in … *Albany* (paragraphs 52 to 64)?

Horizontal direct effect

(2) Do Article 43 EC and/or Regulation No 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

Existence of restrictions on free movement

(3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 EC and/or Regulation No 4055/86?

(4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86?

(5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

Establishment/services

(6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company:

(a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

(b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation No 4055/86 in respect of the provision of services by it from Member State B to Member State A?

Justification

Direct discrimination

(7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 EC or Regulation No 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 EC on the basis that:

(a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

(b) the protection of workers?

The policy of [ITF]: objective justification

(8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

(9) Where:

– a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;

– the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;

– the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;

– it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;

– the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;

– the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;

– a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

(10) Would it make any difference to the answer to [Question] 9 if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?'

The questions referred: Preliminary observations

28 It must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 234 EC, it is solely for the national court before which a 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. However, the Court has regarded itself as not having jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious, inter alia, that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (see Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43).

29 In the present case, the reference for a preliminary ruling concerns the interpretation, first, of provisions of the Treaty on freedom of establishment, and secondly, of Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport.

30 However, since the question on freedom to provide services can arise only after the reflagging of the *Rosella* envisaged by Viking, and since, on the date on which the questions were referred to the Court, the vessel had not yet been re-flagged, the reference for a preliminary ruling is hypothetical and thus inadmissible in so far as it relates to the interpretation of Regulation No 4055/86.

31 In those circumstances, the questions referred by the national court can be answered only in so far as they concern the interpretation of Article 43 EC.

The first question

32 By its first question, the national court is essentially asking whether Article 43 EC must be interpreted as meaning that collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls outside the scope of that article.

33 In this regard, it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case

13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

34 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*, paragraph 19; *Bosman*, paragraph 84; and *Angonese*, paragraph 33).

35 In the present case, it must be stated, first, that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law.

36 Secondly, as FSU and ITF submit, collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking.

37 It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC.

38 This view is not called into question by the various arguments put forward by FSU, ITF and certain Member States which submitted observations to the Court to support the position contrary to that set out in the previous paragraph.

39 First of all, the Danish Government submits that the right of association, the right to strike and the right to impose lock-outs fall outside the scope of the fundamental freedom laid down in Article 43 EC since, in accordance with Article 137(5) EC, as amended by the Treaty of Nice, the Community does not have competence to regulate those rights.

40 In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law (see, by analogy, in relation to social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

41 Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

42 Next, according to the observations of the Danish and Swedish Governments, the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of Article 43 EC.

43 In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – 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 adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

44 Although 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, the exercise of that right may none the less be subject to certain restrictions. 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. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.

45 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such

as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

46 However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

47 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.

48 Finally, FSU and ITF submit that the Court's reasoning in *Albany* must be applied by analogy to the case in the main proceedings, since certain restrictions on freedom of establishment and freedom to provide services are inherent in collective action taken in the context of collective negotiations.

49 In that regard, it should be noted that in paragraph 59 of *Albany*, having found that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers, the Court nevertheless held that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the EC Treaty (now, Article 81(1) EC) when seeking jointly to adopt measures to improve conditions of work and employment.

50 The Court inferred from this, in paragraph 60 of *Albany*, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

51 The Court must point out, however, that that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty.

52 Contrary to the claims of FSU and ITF, it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.

53 Furthermore, the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991).

54 Finally, the Court has held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons (Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47; Case C-35/97 *Commission* v *France* [1998] ECR I-5325; and Case C-400/02 *Merida* [2004] ECR I-8471).

55 In the light of the foregoing, the answer to the first question must be that Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

The second question

56 By that question, the referring court is asking in essence whether Article 43 EC is such as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

57 In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

58 Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations

thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 31 and 39).

59 Such considerations must also apply to Article 43 EC which lays down a fundamental freedom.

60 In the present case, it must be borne in mind that, as is apparent from paragraphs 35 and 36 of the present judgment, the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law.

61 It follows that Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.

62 This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State (see Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 30, and *Schmidberger*, paragraphs 57 and 62).

63 The interpretation set out in paragraph 61 of the present judgment is also not called into question by the fact that the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike.

64 It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65 There is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

66 In the light of those considerations, the answer to the second question must be that Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

The third to tenth questions

67 By those questions, which can be examined together, the national court is essentially asking the Court of Justice whether collective action such as that at issue in the main proceedings constitutes a restriction within the meaning of Article 43 EC and, if so, to what extent such a restriction may be justified.

The existence of restrictions

68 The Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies or firms referred to in Article 48 EC (Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 15).

69 Furthermore, the Court has considered that, even though the provisions of the Treaty concerning freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which also comes within the definition contained in Article 48 EC. The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State (*Daily Mail and General Trust*, paragraph 16).

70 Secondly, according to the settled case-law of the Court, the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle

for the pursuit of an economic activity that includes fixed establishment in the State of registration (Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraphs 20 to 22).

71 The Court concluded from this that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Articles 43 EC to 48 EC (*Factortame and Others*, paragraph 23).

72 In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.

73 Secondly, collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

74 It follows that collective action such as that at issue in the main proceedings constitutes a restriction on freedom of establishment within the meaning of Article 43 EC.

Justification of the restrictions

75 It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).

76 ITF, supported, in particular, by the German Government, Ireland and the Finnish Government, maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.

77 In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).

78 It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

79 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

80 In the present case, it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers.

81 First, as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.

82 This would be the case, in particular, if it transpired that the undertaking referred to by the national court in its 10th question was, from a legal point of view, as binding as the terms of a collective agreement and if it was of such a nature as to provide a guarantee to

the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.

83 In so far as the exact legal scope to be attributed to an undertaking such as that referred to in the 10th question is not clear from the order for reference, it is for the national court to determine whether the jobs or conditions of employment of that trade union's members who are liable to be affected by the reflagging of the *Rosella* were jeopardised or under serious threat.

84 If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

85 In that regard, it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.

86 As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge* v *Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others* v *United Kingdom* of 2 July 2002, 2002-V, § 44).

87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have 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.

88 Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, as the national court points out, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment.

89 However, as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.

90 In the light of those considerations, the answer to the third to tenth questions must be that Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

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

1. Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

2. Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

3. Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.

That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

C-341/05 Laval v Svenska Byggnadsarbetareförbundet [2007]

JUDGMENT OF THE COURT (Grand Chamber) 18 December 2007

(Freedom to provide services – Directive 96/71/EC – Posting of workers in the construction industry – National legislation laying down terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), save for minimum rates of pay – Collective agreement for the building sector the terms of which lay down more favourable conditions or relate to other matters – Possibility for trade unions to attempt, by way of collective action, to force undertakings established in other Member States to negotiate on a case-by-case basis in order to determine the rates of pay for workers and to sign the collective agreement for the building sector)

REFERENCE for a preliminary ruling under Article 234 EC from the Arbetsdomstolen (Sweden), made by decision of 15 September 2005, received at the Court on 19 September 2005, in the proceedings

THE COURT (Grand Chamber),

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 49 EC and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

2 The reference was made in the context of proceedings between Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian law and having its registered office in Riga (Latvia), on the one hand, and Svenska Byggnadsarbetareförbundet (Swedish building and public works trade union, 'Byggnads'), Svenska Byggnadsarbetareförbundet avdelning 1, Byggettan (local branch No 1 of that trade union, 'Byggettan') and Svenska Elektrikerförbundet (Swedish electricians' trade union, 'Elektrikerna'), on the other, brought by Laval for the purposes of obtaining, first, a declaration that the collective action by Byggnads and Byggettan affecting all Laval's worksites and the Elektrikerna sympathy action consisting of blockading all electrical work being carried out is unlawful, second, an order that such action should cease, and, third, an order that the trade unions pay compensation for the loss suffered by Laval. [...]

The dispute in the main proceedings

27 It is apparent from the order of reference that Laval is a company incorporated under Latvian law, whose registered office is in Riga. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites operated by L&P Baltic Bygg AB ('Baltic'), a company incorporated under Swedish law whose entire share capital was held by Laval until the end of 2003, inter alia, for the purposes of the construction of school premises in Vaxholm.

28 Laval, which had signed, on 14 September and 20 October 2004, in Latvia, collective agreements with the Latvian building sector's trade union, was not bound by any collective agreement entered into with Byggnads, Byggettan or Elektrikerna, none of whose members were employed by Laval. Around 65% of the Latvian workers concerned were members of the building workers' trade union in their State of origin.

29 It is clear from the file that, in June 2004, contacts were established between Byggettan, on the one hand, and Baltic and Laval, on the other, and negotiations were begun with a view to Laval's signing the collective agreement for the building sector. Laval asked for wages and other terms and conditions of employment to be defined in parallel with the negotiations, so that the level of pay and terms and conditions of employment would already be fixed by the time that agreement was signed. Byggettan agreed to this request, even though, generally, the negotiation of a collective agreement needs to have been completed before discussions on wages and other terms and conditions of employment are entered into in the framework of the mandatory social truce. Byggettan refused to allow the introduction of a system of monthly wages, but did agree to Laval's proposal on the principle of an hourly wage.

30 According to the order for reference, during the negotiations held on 15 September 2004, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector in respect of the Vaxholm site, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (approximately EUR 16). That hourly wage was based on statistics on wages for the Stockholm (Sweden) region for the first quarter of 2004, relating to professionally-qualified builders and carpenters. Byggettan declared that it was prepared to take collective action forthwith in the event that Laval failed to agree to this.

31 According to the documents on the file, during the procedure before the Arbedstomstolen, Laval stated that it would pay its workers a monthly wage of SEK 13 600 (approximately EUR 1 500), which would be supplemented by benefits in kind in respect of meals, accommodation and travel amounting to SEK 6 000 (approximately EUR 660) per month.

32 If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations to Byggettan and FORA set out in paragraph 20 of this judgment. A proposal to subscribe to insurance contracts with FORA was made to Laval by way of a declaration form sent to it in December 2004.

33 Since those negotiations were not successful, Byggettan requested Byggnads to take measures to initiate the collective action against Laval announced at the meeting of 15 September 2004. Notice was given in October 2004.

34 Blockading ('blockad') of the Vaxholm building site began on 2 November 2004. The blockading consisted, inter alia, of preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.

35 At the end of November 2004, Laval spoke to the liaison office referred to in paragraph 9 above in order to obtain information on the terms and conditions of employment which it had to apply in Sweden, on whether or not there was a minimum wage and on the nature of any contributions which it had to pay. By letter of 2 December 2004, the liaison office's head of legal affairs informed Laval that it was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues, that the minimum requirements under the collective agreements also applied to foreign posted workers, and that, if a foreign employer was having to pay double contributions, the matter could be brought before the courts. In order to ascertain what provisions under the agreements were applicable, Laval had to speak to management and labour in the sector concerned.

36 At the mediation meeting arranged on 1 December 2005 and at the conciliation hearing held before the Arbetsdomstolen on 20 December 2005, Laval was requested by Byggettan to sign the collective agreement for the building sector before the issue of wages was dealt with. If Laval had accepted that proposal, the collective action would have ceased immediately, and the social truce, which would have allowed negotiations on wages to begin, would have come into effect. Laval, however, refused to sign the agreement, since it was not possible for it to know in advance what conditions would be imposed on it in relation to wages.

37 In December 2004, the collective action directed against Laval intensified. On 3 December 2004, Elektrikerna initiated sympathy action. That measure had the effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. At Christmas, the workers posted by Laval went back to Latvia and did not return to the site in question.

38 In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State. In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and on 24 March 2005 the latter was declared bankrupt.

The questions referred

39 On 7 December 2004, Laval commenced proceedings before the Arbetsdomstolen against Byggnads, Byggettan and Elektrikerna, seeking a declaration that both the blockading and the sympathy action affecting all its worksites were illegal and an order that such action should cease. It also sought an order that the trade unions pay compensation for the damage suffered. By decision of 22 December 2004, the national court dismissed Laval's application for an interim order that the collective action should be brought to an end.

40 Since it wished to ascertain whether Articles 12 EC and 49 EC and Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement, the Arbetsdomstolen decided on 29 April 2005 to make a reference to the Court of Justice for a preliminary ruling. In its order for reference, of 15 September 2005, the national court refers the following questions for a preliminary ruling:

'(1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC … for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

(2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?'

41 By order of the President of the Court of Justice of 15 November 2005, the application for a ruling to be given in this case under the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure was dismissed. [...]

The first question

51 By its first question, the national court is asking whether it is compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC, for trade unions to attempt, by means of collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as the collective agreement for the building sector, if the situation in the host country is characterised by the fact that the legislation to implement that directive has no express provision concerning the application of terms and conditions of employment in collective agreements.

52 It is clear from the order of reference that the collective action initiated by Byggnads and Byggettan was motivated by Laval's refusal to guarantee its workers posted in Sweden the hourly wage demanded by those trade unions, even though that Member State does not provide for minimum rates of pay, and Laval's refusal to sign the collective agreement for the building sector, some terms of which lay down, in relation to certain matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in that article.

53 Accordingly, the national court's first question must be understood as asking, in essence, whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The relevant provisions of Community law

54 In order to ascertain the provisions of Community law applicable to a case such as that in the main proceedings, it must be noted that, according to the settled case-law of the Court, Article 12 EC, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 57).

55 So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC (Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 32, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17). It is for that reason unnecessary to rule on Article 12 EC.

56 As regards the temporary posting of workers to another Member State so that they can carry out construction work or public works in the context of services provided by their employer, it is clear from the settled case-law of the Court that Articles 49 EC and 50 EC preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and also preclude that Member State from making the movement of staff in question subject to more restrictive conditions. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12).

57 Conversely, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established (see, in particular, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see, to that effect, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35 and Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 24).

58 In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service.

59 It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.

60 Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law (Case C-490/04 *Commission* v *Germany* [2007] ECR I-0000, paragraph19).

61 Consequently, since the facts at issue in the main proceedings, as described in the order of reference, occurred in 2004, that is to say, on a date subsequent to the expiry of the period allowed to the Member States for transposing Directive 96/71, that date being fixed for 16 December 1999, and since those facts fall within the scope of that directive, the first question must be examined with regard to the provisions of that directive interpreted in the light of Article 49 EC (Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself.

The possibilities available to the Member States for determining the terms and conditions of employment applicable to posted workers, including minimum rates of pay

62 In the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, and in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22; C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 23), it is appropriate to examine the possibilities available to the Member States for determining the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), including minimum rates of pay, which undertakings are to guarantee workers they post in the framework of the transnational provision of services.

63 It is clear from both the order for reference and the observations submitted in the course of the present proceedings that underlying the dispute is, first, as regards the determination of the terms and conditions of the employment of posted workers relating to those matters, the fact that minimum rates of pay constitute the only term of employment which, in Sweden, is not laid down in accordance with one of the means provided for in Directive 96/71 and, second, the requirement imposed on Laval to negotiate with trade unions in order to ascertain the wages to be paid to its workers and to sign the collective agreement for the building sector. [...]

71 It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.

72 It is necessary to assess further, the obligations on undertakings established in another Member State which stem from such a system for determining wages with regard to Article 49 EC.

Matters which may be covered by the terms and conditions of work applicable to posted workers

73 In order to ensure that the nucleus of mandatory rules for minimum protection are observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of

employment covering the matters listed in that provision, namely: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination. [...]

84 It is common ground, however, that those obligations were imposed without the national authorities' having had recourse to Article 3(10) of Directive 96/71. The terms of the collective agreement for the building sector in question were in fact established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.

85 It is also necessary to assess from the point of view of Article 49 EC the collective action taken by the trade unions in the case in the main proceedings, both in so far as it seeks to force a service provider established in another Member State to enter into negotiations on the wages to be paid to posted workers and in so far as it seeks to force that service provider to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those stemming from the relevant legislative provisions, while other terms cover matters not referred to in that provision.

Assessment of the collective action at issue in the case in the main proceedings from the point of view of Article 49 EC

86 As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to regulate that right.

87 In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law (see, by analogy, as regards social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; as regards direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

88 Therefore, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

89 According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC and Directive 96/71.

90 In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – 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 adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

91 Although the right to take collective action 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, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

92 Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right – which, in that Member State, covers the blockading of worksites – may be exercised unless otherwise provided by law or agreement.

93 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

94 As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

95 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

96 It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.

97 It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect (see, inter alia, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 26; Case 13/76 *Donà* [1976] ECR 1333, paragraph 20; Case 206/84 *Commission* v *Ireland* [1986] ECR 3817, paragraph 16; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 67).

98 Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

99 In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

100 The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.

101 It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community (see, inter alia, Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 17), a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37, and Case C-94/04 *Cipolla* [2006] ECR I-11421, paragraph 61).

102 The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

103 In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189,

paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-0000, paragraph 77).

104 It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

106 In the case in the main proceedings, Byggnads and Byggettan contend that the objective of the blockade carried out against Laval was the protection of workers.

107 In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108 However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

109 Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means (see *Seco and Desquenne & Giral*, paragraph 14; *Rush Portuguesa*, paragraph 18, and *Arblade and Others*, paragraph 41).

110 However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

111 In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

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

1. Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates

of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

2. Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

C-97/08 Akzo Nobel NV V Commission [2009]

JUDGMENT OF THE COURT (Third Chamber)
10 September 2009 (*)

(Appeal – Competition – Agreements, decisions and concerted practices – Article 53(1) of the EEA Agreement – Article 23(2) of Regulation (EC) No 1/2003 – Groups of undertakings – Imputability of infringements – Responsibility of a parent company for the infringement of competition rules by its subsidiaries – Decisive influence exercised by the parent company – Rebuttable presumption where the parent company has a 100% shareholding)
In Case C-97/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 27 February 2008,
Akzo Nobel NV, and others
applicants,
the other party to the proceedings being:
Commission of the European Communities,
defendant at first instance,

THE COURT (Third Chamber),

Judgment

1 By their appeal, Akzo Nobel NV ('Akzo Nobel'), Akzo Nobel Nederland BV ('Akzo Nobel Nederland'), Akzo Nobel Chemicals International BV ('Akzo Nobel Chemicals International'), Akzo Nobel Chemicals BV ('Akzo Nobel Chemicals') and Akzo Nobel Functional Chemicals BV ('Akzo Nobel Functional Chemicals') ask the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049 ('the judgment under appeal'), by which it dismissed their action for annulment of Commission Decision of 9 December 2004 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case No C.37.533 – Choline Chloride) (OJ 2005 L 190, p. 22) ('the contested decision').

2 In that decision, the Commission of the European Communities accused the addressees of a single and continuous infringement of Article 81(1) EC and, as from 1 January 1994, of Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

Community law context

3 Under Article 15(2) of Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition: 1959-1962, p. 87):

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently: (a) they infringe Article [81] (1) or Article [82] of the Treaty; or

…'

4 Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) provides:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…'

The facts

5 According to the findings of the Commission, to which the Court of First Instance referred in the judgement under appeal, the facts which gave rise to the dispute are as follows.

6 After it received a leniency application in April 1999 from an American producer, the Commission initiated an investigation into the global choline chloride industry, an investigation which lasted from 1992 until the end of 1998.

7 Choline chloride is a member of the B-complex water-soluble vitamins (Vitamin B4). It is mainly used in the animal feed industry as a feed additive. In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier either on behalf of the producer or on their own behalf, and distributors.

8 The appellants are five companies belonging to the Akzo Nobel group and they are among the producers of choline chloride. In the period concerned by the Commission investigation, Akzo Nobel the parent company of the group, held, directly or indirectly, all the shares in the other appellants. Akzo Nobel was the owner of all the shares in its subsidiaries Akzo Nobel Nederland and Akzo Nobel Chemicals International. Akzo Nobel Nederland owned all the shares in its subsidiary Akzo Nobel Chemicals, which itself held all the shares in Akzo Nobel Functional Chemicals.

9 The worldwide consolidated turnover declared by Akzo Nobel in 2003, which is the financial year immediately prior to the contested decision, was EUR 13 billion.

10 As regards the European Economic Area ('the EEA'), a cartel was implemented at two different but closely connected levels, the global level and the European level.

11 Globally, several North American and European companies, including the appellants, participated in anti-competitive activities between June 1992 and April 1994. Only the European companies, including the appellants, participated in meetings implementing a cartel at European level, which lasted from March 1994 until October 1998.

12 The Commission regarded the arrangements concluded at global and European levels as a complex and continuous single infringement concerning the EEA, in which the North American producers participated for some time and the European producers during the entire period covered by the Commission's investigation.

13 On 9 December 2004, the Commission adopted the contested decision. In Article 1 thereof, it found that a number of undertakings, including the appellants, had infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in a series of agreements and concerted practices concerning price fixing, market sharing and concerted actions against competitors in the choline choloride sector in the EEA.

14 As regards the Akzo Nobel group, the Commission decided to address the contested decision jointly and severally to all the appellants. Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals (or their legal predecessors) directly participated in the infringement. Akzo Nobel Functional Chemicals was created as a subsidiary of Akzo Nobel Chemicals in June 1999. Therefore, the Commission found that Akzo Nobel Functional Chemicals was the legal successor to its parent company as regards the majority of the activities in the choline chloride sector previously carried out by the latter and should, therefore, also be an addressee of that decision.

15 As regards, more precisely, Akzo Nobel, the Commission found that it constituted a single economic unit with the other legal persons in the Akzo Nobel group which are addressees of the contested decision and that it is that economic unit which participated in the cartel. The Commission concluded that that company was in a position to exert decisive influence over the commercial policy of its subsidiaries, in which it held, directly or indirectly, all of the shares, and that it could be assumed that it in fact did so. The Commission therefore concluded that Akzo Nobel's subsidiaries lacked commercial autonomy, which led it to address the contested decision to Akzo Nobel, notwithstanding the fact that it had not itself participated in the cartel.

16 The Commission took the view that the lack of commercial autonomy of operating companies or business units in the Akzo Nobel group was also proved by the documents produced by Akzo Nobel during the administrative procedure.

17 By basing its decision on the market share of the appellants as a whole and, in particular, on the figure mentioned in paragraph 9 of this judgment, the Commission, in Article 2 of the contested decision, imposed on the appellants jointly and severally a fine of EUR 20.99 million for the infringements set out in Article 1 thereof.

The action before the Court of First Instance and the judgment under appeal

18 In support of their action before the Court of First Instance seeking annulment of the contested decision, the applicants relied on three pleas in law.

21 As regards the substance, the applicants' first plea in law was based on the incorrect imputation of joint liability to Akzo Nobel, the holding company of the group, holding, directly or indirectly, all of the shares in its subsidiaries.

22 The applicants submitted that the decisive influence that a parent company must exercise in order to be considered liable for activities of its subsidiary must relate to the subsidiary's commercial policy in the strict sense.

23 The Commission therefore had to show, first, that the parent company had the power to direct the conduct of the subsidiary to the point of depriving it of any independence in determining its commercial course of action and, second, that it exerted that power.

24 It was clear from Community case-law that a wholly-owned subsidiary could be presumed to have carried out the instructions of its parent company. In those circumstances, in order for the Commission to be obliged to find solely the subsidiary liable, the subsidiary must determine its commercial policy largely on its own. Where that is shown to be the case, it is once again for the Commission to show that the parent company did in fact exercise a decisive influence in a specific case.

25 It followed that the organisation into units of a group of companies such as the Akzo Nobel group did not in itself suffice to make proof of the parent company's actual involvement unnecessary.

26 The applicants took the view that they had established that Akzo Nobel's subsidiaries determined their commercial policy largely on their own and had thereby rebutted the presumption relied on by the Commission. They maintained that the Commission should have established that Akzo Nobel had exercised a decisive influence over the commercial policy of the other applicants. The Commission had not satisfied that obligation because the evidence, apart from the fact of holding all the shares, on which it based its arguments to hold Akzo Nobel jointly and severally liable for the infringement, was either irrelevant or incorrect.

27 As regards the first plea in law relied on by the applicants in support of their action, the Court of First Instance examined, as a preliminary point, the question as to whether the unlawful conduct of a subsidiary could be imputed to the parent company and held as follows:

'57. It must be borne in mind, first of all, that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited).

58. It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

59. It should also be noted that, for the purpose of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Maatschappij and Others* v *Commission* ('PVC II') [1999] ECR II-931, paragraph 978).

60. In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG[-Telefunken]* v *Commission* [1983] ECR 3151, paragraph 50, and PVC II , paragraph 59 above, paragraphs 961 and 984), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* …, paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('Stora'), paragraph 29).

61. In that regard, it must be made clear that, while it is true that at paragraphs 28 and 29 of *Stora*, paragraph 60 above, the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of *AEG[-Telefunken]* v *Commission*, paragraph 60 above, is amended.

62. That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.

63. The Court must also examine, in the context of these preliminary observations, the argument central to the applicants' pleadings that the influence which the parent company is presumed to exercise because it holds the entire capital of its subsidiary relates to the latter's commercial policy in the strict sense ... That policy, in the applicants' submission, includes, for example, distribution and pricing strategy. Accordingly, so the argument goes, the parent company could rebut the presumption by showing that it is the subsidiary that manages those specific aspects of its commercial policy, without receiving instructions.

64. On that point, it should be noted that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy (see, to that effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 137, and Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 45), production and distribution activities (see, to that effect, Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 37 and 39 to 41), sales objectives, gross margins, sales costs, cash flow, stocks and marketing (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 48). However, it cannot be inferred that it is only those aspects that are covered by the concept of the commercial policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company.

65. On the contrary, it follows from that case-law, read together with the considerations set out at paragraphs 57 and 58 above, that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. It also follows that when making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case.

66. It is by reference to those considerations that the Court must ascertain whether Akzo Nobel and its subsidiaries to which the contested decision was addressed constitute a single economic entity.'

28 The Court of First Instance, in paragraphs 67 to 85, of the judgment under appeal, then examined the various pieces of evidence in the file and held that the applicants had not succeeded in rebutting the presumption that Akzo Nobel, the parent company holding 100% of the capital in its subsidiaries who were the addressees of the contested decision, exercised a decisive influence over their policies. It concluded that that company constituted, together with the other applicants, an undertaking within the meaning of Article 81 EC, and that there was no need to determine whether it had exercised an influence over their conduct. It dismissed the first plea in law relied on by the applicants in support of their action.

29 As regards the second and third pleas in law, alleging infringement of Article 23(2) of Regulation No 1/2003, in so far as the amount of the fine exceeds 10% of the turnover in 2003 by Akzo Nobel Functional Chemicals, and infringement of the obligation to state reasons concerning the attribution of joint and several liability to Akzo Nobel, the Court of First Instance dismissed them in paragraphs 90 and 91 and 94 to 96 respectively in the judgment under appeal. In paragraph 97 thereof, it therefore dismissed the action in its entirety.

Forms of order sought

30 By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal, in so far as it rejected the plea that responsibility was wrongfully imputed jointly and severally to Akzo Nobel;

– annul the contested decision, in so far as it imputes liability to Akzo Nobel, and

– order the Commission to pay all the costs of this appeal and of the proceedings before the Court of First Instance, in so far as they concern the plea raised in the appeal.

31 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

The existence of a new plea in law, submitted for the first time in the appeal

37 The Commission also submits that the single plea in law constitutes a new plea, submitted for the first time in the appeal, and is therefore inadmissible in so far as it contains points that the appellants did not raise before the Court of First Instance. By that plea, the appellants challenge the very existence of the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of its capital, whereas before the Court of First Instance they never challenged the existence of that presumption and, by attempting to rebut it, acknowledged that it was applicable to the present case. The appellants' arguments relating to the relevant object of a subsidiary's activities over which the parent company exercises decisive influence must also be rejected as inadmissible.

38 According to Article 118 of the Rules of Procedure of the Court of Justice, Article 42(2) thereof, which generally prohibits the introduction of new pleas in law in the course of the procedure, applies to the procedure before the Court of Justice on appeal from a decision of the Court of First Instance. In an appeal, the Court's jurisdiction is thus confined to review of the assessment by the Court of First Instance of the pleas argued before it (see, in particular, Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 61). To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would in effect allow that party to bring before the Court a wider case than that heard by the Court of First Instance (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 165).

39 It must be recalled, in that connection, that the appellants relied, before the Court of First Instance, on a plea in law alleging that joint and several liability was wrongly imputed to Akzo Nobel, by which they submitted that it did not exercise a decisive influence over the commercial conduct of its subsidiaries and that it did not form an economic unit with them. Therefore, the arguments relating to the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of the capital which the appellants have put forward before the Court of Justice must be regarded as an elaboration of that plea. In so far as those arguments, and the arguments relating to the relevant object of a subsidiary's activities over which the parent company exercises decisive influence, constitute additional arguments concerning the application of the rules on the imputability to Akzo Nobel of the conduct of its subsidiaries, the appellants have not altered the subject of the dispute before the Court of First Instance.

40 Accordingly, the appeal must be declared admissible.

Substance of the case

41 The appellants rely on a single plea in support of their appeal, claiming that, by rejecting the plea alleging that liability for the infringement had been wrongfully imputed to Akzo Nobel, the Court of First Instance incorrectly applied the definition of 'undertaking' within the meaning of Article 81 EC and Article 23(2) of Regulation No 1/2003. That plea consists of two separate parts.

The first part of the single plea: incorrect definition of the burden of proof on the Commission as regards the lack of autonomy of the subsidiary

– Arguments of the parties

42 The appellants submit that the Court of First Instance applied the wrong legal test in order to determine whether or not Akzo Nobel's subsidiaries acted autonomously on the market.

43 According to the appellants, it is normally for the Commission to adduce evidence of actual exercise of decisive commercial influence by the parent company on its subsidiary. However, in order to alleviate that burden of proof, the Court of Justice has established a rebuttable presumption.

44 In *Stora*, the Court expressly stated that merely holding 100% of the capital in a subsidiary does not suffice per se to establish the liability of a parent company if the exercise of decisive commercial influence over that subsidiary is disputed. In that judgment the Court thus followed the reasoning of Advocate General Mischo, set out in point 48 of his Opinion in that case, according to which, although the burden on the Commission of proving that the parent company in fact exercised decisive influence over its subsidiary's conduct is alleviated where it owns 100% of the capital in that subsidiary, something more than the extent of the shareholding must be shown, but it may be in the form of indicia.

45 Therefore, full ownership of the shareholding of the subsidiary together with the existence of additional indicia gives rise to a presumption that the subsidiary did not act autonomously on the market. The Commission cannot therefore discharge the burden of proof on it by simply referring to the fact that the parent company has a 100% shareholding in its subsidiary. It must also produce other evidence showing that the parent company in fact exercises a decisive influence over its subsidiary. The Court of First Instance has violated that principle by holding that it was sufficient for the Commission to establish that all the shareholding in the subsidiary is held by the parent company to conclude that the latter exercises a decisive influence over its commercial policy.

46 Furthermore, in two other judgments, namely Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319 and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, the Court of First Instance correctly applied the principle set out in the preceding paragraph, holding that although a 100% shareholding in its subsidiary provides a strong indication that the parent company is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to impute liability to the parent company for the conduct of its subsidiary and something more than the extent of the shareholding must be shown, but this may be in the form of indicia.

47 The appellants also criticise the Court of First Instance for having alleviated the burden of proof on the Commission and having thereby adopted a conception of the burden of proof which infringes their rights of defence. The Commission is required to adduce what they consider to be further indicia, within the meaning of the *Stora* judgment, as it is interpreted by them, at the stage of the statement of objections and not only at the decision stage. In the statement of objections the Commission's intention to hold Akzo Nobel jointly and severally liable was based solely on the fact that that company had a 100% shareholding in the companies which participated in the infringement. On the other hand, in the contested decision it was also based on alleged further indicia, within the meaning of the *Stora* judgment, which had been artificially formulated by distorting the evidence relied on by the appellants in their response to the statement of objections.

48 Finally, the appellants criticise paragraph 62 of the judgment under appeal, in which, by holding that in order to rebut the presumption concerned it must be proved that the subsidiary does not, in essence, comply with the instructions issued by the parent company, the Court of First Instance adopted an approach which means that the presumption may be rebutted only where instructions have been issued by the parent company.

49 The Commission contends that the fact that the subsidiary has a legal personality separate from that of the parent company is not sufficient to exclude the possibility of imputing its conduct to the parent company, in particular where the subsidiary does not decide independently upon its conduct on the market but carries out, in all material respects, the instructions which are given to it by the parent company. There is no need to ascertain whether the parent company has in fact used its power to influence the commercial policy of its subsidiary in a decisive manner where the parent company has a 100% shareholding in it.

50 The Court did not call that principle into question in *Stora*. It acknowledged that, where a subsidiary is wholly owned by the parent company, the latter is presumed to have exercised its power to influence the conduct of its subsidiary. According to the Commission, although the Court of Justice held, in paragraph 29 of the *Stora* judgment, that it was legitimate for the Court of First Instance to base its findings on that presumption, particularly after finding that the parent company had presented itself during the administrative procedure as the Commission's sole interlocutor concerning the infringement in question, the Court of Justice referred to that factor as a subsidiary point, as an additional argument in favour of imputing the infringement to the parent company.

51 A series of judgments of the Court of First Instance has applied that presumption, by referring to the judgment in *Stora*, without making the application of the presumption subject to the production of additional indicia. The judgments in *DaimlerChrysler* v *Commission* and *Bolloré and Others* v *Commission* do not call into question the application of that presumption. In those two judgments, the Court of First Instance conflated the concept of control over the subsidiary with that of exercising control, only the latter being presumed where all the shareholding in the subsidiary is held by the parent company. Furthermore, the additional indicia were examined when evidence adduced in order to rebut the presumption was analysed.

52 As to the argument relating to the infringement of the rights of defence, the Commission takes the view that the existence of presumptions in Community competition law is not unusual. By informing the undertaking concerned that it intended to rely on a presumption, the Commission offered that undertaking the opportunity to comment on that point and to provide it with all documents

capable of supporting its position. As it is the undertaking which has all the information relating to its internal functioning, that apportionment of the burden of proof is completely logical.

53 As regards the criticism of paragraph 62 of the judgment under appeal, the Commission contends that it is based on an incorrect reading of a sentence taken out of its context. The Court of First Instance meant that a subsidiary is an independent economic entity if it does not follow the instructions of its parent company. That is because either no instructions have been given or because the instructions have not been followed.

– Findings of the Court

54 It must be observed, as a preliminary point, that Community competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59), and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, *Dansk Rørindustri and Others* v *Commission*, paragraph 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN* v *Commission*, [2006] ECR I-6295, paragraph 25).

55 The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40).

56 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39).

57 The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 60, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *August Koehler and Others* v *Commission* [2009] ECR I-0000, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations.

58 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraphs 132 and 133; *Geigy* v *Commission*, paragraph 44; Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15; and *Stora*, paragraph 26), having regard in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 117, and *ETI and Others*, paragraph 49).

59 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

60 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraphs 136 and 137) and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see, to that effect, *AEG-Telefunken* v *Commission*, paragraph 50, and *Stora*, paragraph 29).

61 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, *Stora*, paragraph 29).

62 As the Court of First Instance rightly held in paragraph 61 of the judgment under appeal, while it is true that at paragraphs 28 and 29 of *Stora* the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned in paragraph 60 of this judgment subject to the production of additional indicia relating to the actual exercise of influence by the parent company.

63 It is clear from all those considerations that the Court of First Instance did not commit any error of law in holding that where a parent company has a 100% shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary.

64 Accordingly, since the Commission is not required, as regards the imputability of the infringement, to submit, at the stage of the statement of objections, evidence other than proof relating to the shareholding of the parent company in its subsidiaries, the appellants' argument relating to the infringement of the rights of defence cannot be accepted.

65 As regards the criticism of paragraph 62 of the judgment under appeal, it is sufficient to observe that there is nothing in that paragraph which suggests that the Court of First Instance limited the possibility of rebutting the presumption mentioned in paragraph 60 of this judgment solely to cases where instructions have been issued by the parent company. On the contrary, it is clear from paragraphs 60 and 65 of the judgment under appeal that the Court of First Instance adopted a relatively open position in that respect, holding, in particular, that it is for the parent company to put before the Court any evidence relating to the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity.

66 It follows that the first part of the single plea relied on by the appellants in support of their appeal must be dismissed as unfounded.

The second part of the single plea in law: incorrect definition of the concept of the commercial policy of the subsidiary

– Arguments of the parties

67 According to the appellants, the Court of First Instance wrongly held that aspects other than those mentioned in paragraph 64 of the judgment under appeal were covered by the commercial policy of the subsidiary over which the parent company exercises a decisive influence, and that the evidence relating to the organisational, economic and legal links between the parent company and its subsidiary are relevant in order to establish the independence of the latter.

68 Commercial policy relates to the conduct on the market and is limited to the production of goods and services that an undertaking sells on certain conditions to consumers in a given territory and at a given time. It does not include other aspects.

69 According to the appellants, extending the concept of commercial policy beyond the conduct of the subsidiary on the market would amount to introducing a strict liability regime, which is contrary to the principle of personal responsibility guaranteed by the case-law of the Court.

70 The Commission submits that the question whether the concept of commercial policy should be given a broad or narrow definition is irrelevant with regard to the issue of determining the existence of a single undertaking, for which the Court of Justice should have regard more to the economic and organisational links existing between the companies.

71 As regards the argument relating to the introduction of a strict liability regime, the Commission takes the view that there is no principle of strict liability in Community competition law, since the Commission's decisions do not impute liability to companies without its proof being established. It is not contrary to the principle of personal responsibility to hold a parent company liable for the actions of its wholly-owned subsidiary.

– Findings of the Court

72 As noted in paragraph 58 of this judgment, the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

73 It is clear, as the Advocate General pointed out in paragraphs 87 to 94 of her Opinion, that the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.

74 It also follows from paragraph 58 of this judgment that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.

75 It follows that the Court of First Instance has not committed an error of law as regards the sphere in which the parent company exercises influence over its subsidiary.

76 That conclusion is not affected by the appellants' argument relating to strict liability.

77 It must be observed in that connection that, as it is clear from paragraph 56 of this judgment, Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which, as stated in paragraph 55 of this judgment, may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.

78 Therefore, the second part of the single plea in law relied on by the appellants in support of their appeal cannot be upheld and the appeal must be dismissed in its entirety as unfounded.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Orders Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV to pay the costs.

C-413/08 P Lafarge SA v Commission [2010]

JUDGMENT OF THE COURT (Second Chamber)

17 June 2010 (*)

(Appeal – Agreements, decisions and concerted practices – Plasterboard – Distortion of the clear sense of the evidence – Burden of proof – No proper statement of reasons – Regulation No 17 – Article 15(2) – Penalty – Repeated infringement – Stage at which the deterrent effect of the fine is to be taken into account)

In Case C-413/08 P,
APPEAL under Article 56 of the Statute of the Court of Justice, brought on 18 September 2008,
Lafarge SA,

appellant,
the other parties to the proceedings being:
European Commission,

defendant at first instance,
Council of the European Union,

intervener at first instance,
THE COURT (Second Chamber),

Judgment

1 By its appeal, Lafarge SA ('Lafarge') seeks the setting aside of the judgment of 8 July 2008 of the Court of First Instance of the European Communities (now 'the General Court') in Case T-54/03 *Lafarge* v *Commission* ('the judgment under appeal'), by which it dismissed Lafarge's application for annulment of Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 – Plasterboard) (OJ 2005 L 166, p. 8; 'the contested decision').

Legal context

2 Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provided:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81] (1) or Article [82] of the Treaty; or [...]

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

3 The Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3; 'the 1998 Guidelines') states in its preamble:

'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. …

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

4 In the terms of Section 1, entitled 'Basic amount', of the 1998 Guidelines:

'The basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17.

A. *Gravity*

[...] It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

Generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law. [...]'

5 Under Section 2 of the 1998 Guidelines, the basic amount may be increased where there are aggravating circumstances such as repeated infringement of the same type by the same undertaking or undertakings.

Facts

6 In the judgment under appeal, the General Court summarised the factual background to the dispute in the following terms:

'1 The applicant … is a French undertaking active on a worldwide level in the building materials sector. It owns 99.99% of the capital of Lafarge Gypsum International SA ("Lafarge Plâtres"), which manufactures and markets various plaster based products including plasterbroad.

2 Four main producers are active in the plasterboard sector in Europe: BPB PLC [("BPB")], Gebrüder Knauf Westdeutsche Gipswerke KG ("Knauf"), Gyproc Benelux NV ("Gyproc") and Lafarge Plâtres.

3 On the basis of information received, on 25 November 1998 the Commission carried out unannounced inspections at the premises of eight undertakings operating in the plasterboard sector, including Lafarge Plâtres at l'Isle-sur-la-Sorgue (France) and Lafarge in Paris (France). On 1 July 1999, it pursued its investigations at the premises of two other undertakings.

4 The Commission then sent requests for information under Article 11 of Regulation No 17… to the various undertakings concerned, including, on 21 September 1999, Lafarge. Lafarge replied thereto on 29 October 1999.

5 On 18 April 2001, the Commission initiated the administrative procedure and adopted a statement of objections which it addressed to BPB, Knauf, Lafarge, Etex SA and Gyproc. …[...]…

8 On 27 November 2002, the Commission adopted the [contested] decision.

9 The operative part of the [contested] decision states:

"Article 1

BPB … , the Knauf Group, … Lafarge … and Gyproc … have infringed Article 81(1) [EC] by participating in a set of agreements and concerted practices in the plasterboard business.

The duration of the infringement was as follows:

(a) BPB …: from 31 March 1992, at the latest, to 25 November 1998

(b) [the] Knauf [Group]: from 31 March 1992, at the latest, to 25 November 1998

(c) … Lafarge …: from 31 August 1992, at the latest, to 25 November 1998

(d) Gyproc …: from 6 June 1996, at the latest, to 25 November 1998 [...]…

Article 3

In respect of the infringement referred to in Article 1, the following fines are imposed on the following undertakings:

(a) BPB …: EUR 138.6 million

(b) … Knauf …: EUR 85.8 million

(c) … Lafarge …: EUR 249.6 million

(d) Gyproc …: EUR 4.32 million [...]"

10 The Commission found in the [contested] decision that the undertakings concerned participated in a single and continuous agreement which was manifested in the following conduct constituting agreements or concerted practices:

– the representatives of BPB and Knauf met in London (United Kingdom) in 1992 and expressed the common desire to stabilise the plasterboard markets in Germany, the United Kingdom, France and the Benelux;

– the representatives of BPB and Knauf established, as from 1992, information exchange arrangements, to which Lafarge and subsequently Gyproc acceded, relating to their sales volumes on the German, French, United Kingdom and Benelux plasterboard markets;

– the representatives of BPB, Knauf and Lafarge exchanged information, on various occasions, prior to price increases on the United Kingdom market;

– in view of particular developments on the German market, the representatives of BPB, Knauf, Lafarge and Gyproc met at Versailles (France) in 1996, Brussels (Belgium) in 1997 and The Hague (Netherlands) in 1998 with a view to sharing out or at least stabilising the German market;

– the representatives of BPB, Knauf, Lafarge and Gyproc exchanged information on various occasions and concerted their action on the application of price increases on the German market between 1996 and 1998.

11 For the purpose of calculating the amount of the fine, the Commission applied the methods set out in [the 1998] Guidelines … .

12 In fixing the starting amount of the fines, determined according to the gravity of the infringement, the Commission initially considered that the undertakings concerned had committed an infringement which was very serious by its very nature in so far as the aim of the practices at issue was to put an end to the price war and to stabilise the market through exchanges of confidential information. The Commission also considered that the practices at issue had had an impact on the market, because the undertakings in question represented almost all plasterboard supply and the various manifestations of the cartel had been put into practice in a market which, in addition, was highly concentrated and oligopolistic. As regards the geographic extent of the relevant market, the Commission considered that the cartel had covered the four main European Community markets, namely Germany, the United Kingdom, France and the Benelux.

13 Considering, next, that there was a considerable disparity between the undertakings concerned, the Commission took a differentiated approach, relying for that purpose on the sales turnover for the product concerned on the relevant markets during the last complete year of the infringement. On that basis, the starting amount of the fines was set at EUR 80 million for BPB, EUR 52 million for Knauf and Lafarge and EUR 8 million for Gyproc.

14 In order to ensure that the fine had a sufficiently deterrent effect having regard to the size and global resources of the undertakings, the starting amount of the fine imposed on Lafarge was increased by 100%, becoming EUR 104 million.

15 In order to take account of the duration of the infringement, the starting amount was then increased by 65% for BPB and Knauf, by 60% for Lafarge and by 20% for Gyproc, the infringement being classified by the Commission as of long duration in the case of Knauf, Lafarge and BPB and of medium duration in the case of Gyproc.

16 In respect of aggravating circumstances, the basic amount of the fines imposed on BPB and Lafarge was increased by 50% on account of repeated infringement.

17 Next, the Commission reduced by 25% the fine imposed on Gyproc on account of attenuating circumstances, in that it had acted as a destabilising element helping to limit the impact of the cartel on the German market and it was absent from the United Kingdom market.

18 Finally, the Commission reduced the amount of the fines by 30% for BPB and by 40% for Gyproc, pursuant to Section D.2 of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; "the Leniency Notice"). Accordingly, the final amount of the fines imposed was EUR 138.6 million for BPB, EUR 85.8 million for Knauf, EUR 249.6 million for Lafarge and EUR 4.32 million for Gyproc.'

The judgment under appeal

7 Lafarge brought an action for annulment of the contested decision by application lodged at the Registry of the General Court on 14 February 2003. In the alternative, it requested the General Court to reduce the fine imposed on it.

8 By the judgment under appeal, the General Court dismissed that action in its entirety.

Forms of order sought by the parties

9 By its appeal, Lafarge claims that the Court should:
– set aside the judgment under appeal;
– grant the form of order sought, primarily, at first instance by annulling the contested decision in so far as it imposed a fine on Lafarge;
– in the alternative, set aside, in part, the judgment under appeal;
– grant the form of order sought, in the alternative, at first instance by reducing the amount of the fine imposed on Lafarge by the contested decision; and
– order the Commission to pay the costs.

10 The Commission contends that the Court should:
– dismiss the appeal; and
– order the appellant to pay the costs.

The appeal

11 In support of the form of order it seeks, Lafarge raises six grounds of appeal, the first and primary of which seeks the setting aside of the judgment under appeal in its entirety and the five others, in the alternative, seek the setting aside, in part, of that judgment.

The first ground of appeal, alleging distortion of the clear sense of the evidence

Arguments of the parties

12 Lafarge complains that the General Court distorted the clear sense of the evidence in that it systematically referred to the 'overall context' to establish each of the actions held to be infringements. In particular, it submits that such distortion is clear from the statements in the judgment under appeal as regards the circumstances surrounding the system of exchange of information (paragraphs 270 and 271 of the judgment under appeal), the exchange of information specific to the United Kingdom (point 303 of the judgment under appeal), the price rises in the United Kingdom for the period prior to 7 September 1996 (paragraph 324 of the judgment under appeal), the existence of an agreement to stabilise the German market (paragraphs 398 and 402 of the judgment under appeal) and the price rises in Germany in 1994 and 1995 (paragraphs 426 and 430 of the judgment under appeal).

13 The General Court is alleged to have relied on an overall context, whereas its existence is not established and can be established only on the basis of other infringing conduct which is, itself, thus characterised by the General Court only on the basis of that same 'overall context'. The General Court's reasoning is therefore said to be circular.

14 The Commission contends that Lafarge does not indicate, in most of the cases, which evidence was distorted and does not show the errors of appraisal which led the General Court to such distortion. In any event, the Commission contends, the General Court cannot be accused of having referred to a general context which was not established or of having based its decision on circular reasoning, given that it undertook a meticulous examination of various items of evidence.

Findings of the Court

....24 The first ground of appeal must, accordingly, be rejected as being in part inadmissible and in part unfounded.

25 In those circumstances, the appellant's alternative grounds of appeal must be examined.

The second ground of appeal, alleging breach of the rules on the burden of proof, of the principle of the presumption of innocence and of the in dubio pro reo principle (the principle that the accused be given the benefit of the doubt)

Arguments of the parties

26 The appellant complains that the General Court infringed the rules on the burden of proof, the principle of the presumption of innocence and the *in dubio pro reo* principle in concluding that the Commission had established to the requisite legal standard that Lafarge's participation in the infringement went back to 31 August 1992. In the regard, the appellant submits that, according to the Court's settled case-law the Court must satisfy itself that the general principles of Community law and the rules of procedure applicable to the burden of proof and the taking of evidence have been complied with. In addition, the burden of proving an infringement and its duration lies on the Commission.

27 In this case, the General Court decided, in paragraphs 507, 508 and 510 of the judgment under appeal, that the Commission had established, to the requisite legal standard, Lafarge's participation in the infringement dating from 31 August 1992, since Lafarge stated neither the exact date that its participation started nor the circumstances which led it to engage in an anti-competitive exchange of information. By so doing, the General Court is alleged to have reversed the burden of proof. Such reversal of the burden of proof is also claimed to amount to an infringement of the presumption of innocence and of the *in dubio pro reo* principle.

28 The Commission denies Lafarge's allegations and argues that the General Court merely decided that the evidence referred to in paragraphs 503, 507 and 512 of the judgment under appeal is sufficient to prove Lafarge's participation in the infringement from the middle of 1992, but that Lafarge could have adduced evidence to the contrary, which it failed to do.

Findings of the Court

29 It is clear from the Court's settled case-law that it is for the party or the authority alleging an infringement of the competition rules to prove it and that it is for the undertaking or association of undertakings raising a defence against a finding of an infringement of those rules to demonstrate that the conditions for applying the rule on which such defence is based are satisfied, so that the authority will then have to resort to other evidence (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 78).

30 Even if the burden of proof rests, according to those principles, on the Commission or on the undertaking or association concerned, the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied (see, *Aalborg Portland and Others* v *Commission*, paragraph 79).

31 It is clear from paragraph 515 of the judgment under appeal that the General Court considered that the Commission had established to the requisite legal standard that BPB had informed Lafarge, at the latest at the end of August 1992, of the agreement between BPB and Knauf on the exchange of information and that, on that occasion, Lafarge had adhered to that agreement. To reach that conclusion the General Court relied, first, on a number of statements by BPB (paragraph 503 et seq. of the judgment under appeal) and, second, on the fact that Lafarge's market share on the main European markets was described in terms of absolute value and as a percentage in tables held by BPB since 1991 (paragraph 512 of the judgment under appeal).

32 Therefore, by stating, in paragraph 508 of the judgment under appeal, that Lafarge had confined itself to emphasising the lack of detail in BPB's statements without however providing the exact date or circumstances which led it to engage in such an exchange of

information, the General Court decided, applying the Court's case-law referred to in paragraphs 29 and 30 of the present judgment, that the evidence presented by the Commission was of such a kind as to require the other party to provide an explanation or justification, failing which it was permissible to conclude that the Commission had satisfied its obligations as regards the burden of proof. The General Court thus confined itself to stating that Lafarge had failed to adduce evidence in support of its allegation that its adherence to the agreement to exchange information was necessarily later than June 1993, and even at the start of 1994.

33 It follows that the General Court did not infringe the rules on the burden of proof.

34 Since the complaints alleging breach of the presumption of innocence and of the *in dubio pro reo* principle are based on the alleged reversal of the burden of proof, they must also be rejected.

35 Accordingly, the second ground of appeal is unfounded. [...]

The fifth ground of appeal, alleging errors in law and failure to state reasons as regards increasing the fine for repeated infringement

56 This ground of appeal divides into two parts.

The second part, relating to the existence of repeated infringement without the first finding of infringement having become definitive

– Arguments of the parties

77 Lafarge claims that the General Court infringed a general principle common to the laws of the Member States as well as the principle of legal certainty and the principle that offences and penalties be strictly defined by law, when it found that the Commission was entitled to increase the amount of the fine for repeated infringement even though the decision establishing a previous infringement for similar facts had not become definitive at the time of the facts covered in the contested decision.

78 It submits that under the criminal laws of the Member States, a person is generally considered to be a repeat infringer only if, after he has been convicted definitively for a previous infringement, he commits another. One of the essential elements of repeated infringement is a definitive finding of infringement which requires the exhaustion of legal remedies by the time the second infringement is committed. In the present case, the Commission relied on Decision 94/815 for its finding that Lafarge was a repeat infringer. Lafarge however brought an action for annulment of that decision and the General Court delivered its judgment on 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491. Since Lafarge did not appeal against it, that judgment became definitive two months after its notification to Lafarge. The practices covered in the contested decision ended, according to the Commission, in November 1998. Accordingly, at that date, Lafarge had not been the subject of a finding of infringement which had become definitive, since Decision 94/815 was not definitive as the General Court had not yet ruled on that action for annulment.

79 In addition, Lafarge maintains that the General Court also erred in law and, furthermore, failed in its duty to state properly the reasons for its decision by stating, in paragraph 737 of the judgment under appeal, that the Commission's power to find, in a decision, that there had been repeated infringement even in the absence of the earlier decision finding an infringement having become definitive is justified by the recommencement of the time-limits for bringing an action for annulment against the second decision where, after the adoption of that decision, the earlier decision is annulled. In actual fact, it submits, no provision of Community law provides for such recommencement of the time-limit. Lafarge submits that that error should entail the annulment of the judgment under appeal, since it is contrary to the principles of legal certainty and the sound administration of justice to encumber the person concerned with the burden of vindicating its right, where that right has been violated by an incorrect definition of the meaning of repeated infringement.

Findings of the Court

92 As regards the complaint alleging breach of the general principle of legal certainty, it is important to point out that Lafarge confined itself to pleading such a breach, without showing how precisely that principle had been infringed.

93 In that regard, the General Court stated, in paragraph 720 of the judgment under appeal, that Section 2 of the 1998 Guidelines, entitled 'Aggravating circumstances', establishes a non-exhaustive list of the circumstances which can lead to an increase in the basic amount of the fine, such as repeated infringement. What is precisely referred to, in the terms of Section 2, is 'repeated infringement of the

same type by same undertaking or undertakings' without any requirement for the decision establishing the infringement to be 'definitive' being mentioned. It is settled case-law that the Commission's Guidelines ensure legal certainty for the undertakings concerned by defining the method which the Commission has imposed on itself in order to set the amount of fines imposed under Article 15(2) of Regulation No 17 (see Case C-266/06 P *Evonik Degussa* v *Commission and Council* [2008] ECR I-81, paragraph 53).

94 As regards the complaint of alleged breach of the general principle that offences and penalties be strictly defined, it is appropriate to recall that that principle requires the law to define clearly offences and the penalties sanctioning them (*Evonik Degussa* v *Commission and Council*, paragraph 39). According to the case-law of the European Court of Human Rights, the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the information provided by settled, published case-law (see, to that effect, its judgment of 27 September 1995 in *G* v *France*, Series A No 325-B, § 25). In addition, the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see the judgment of 25 February 1992 in *Margareta and Roger Andersson* v *Sweden*, Series A No 226, § 75).

95 It is important to note in that regard that, although Article 15(2) of Regulation No 17 leaves the Commission a wide discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Second, the exercise of that discretion is also limited by rules of conduct which the Commission has imposed on itself in the Leniency Notice and Guidelines. In addition, the Commission's known and accessible administrative practice is fully subject to review by the Courts of the European Union, the settled and published case-law of which specifies the undefined concepts which Article 15(2) of Regulation No 17 could contain. A prudent trader, if need be by taking legal advice, can foresee in a sufficiently precise manner the method and order of magnitude of the fines which he incurs for a given line of conduct, and the fact that that trader cannot know in advance precisely the level of the fines which the Commission will impose in each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis (see, to that effect, *Evonik Degussa* v *Commission and Council*, paragraphs 50 to 55).

96 In the light of all the foregoing considerations, the second part of the fifth ground of appeal must be rejected.

97 It follows that the fifth ground of appeal must be rejected in its entirety. [...]

111 It follows from the foregoing considerations that the appeal must be dismissed in its entirety.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Lafarge SA to pay the costs.

T-321/05 AstraZeneca v Commission [2010]

JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

1 July 2010 (*)

(Competition – Abuse of dominant position – Market in anti-ulcer medicines – Decision finding an infringement of Article 82 EC – Market definition – Significant competitive constraints – Abuse of procedures relating to supplementary protection certificates for medicinal products and of marketing authorisation procedures for medicinal products – Misleading representations – Deregistration of marketing authorisations – Obstacles to the marketing of generic medicinal products and to parallel imports – Fines)

AstraZeneca AB, AstraZeneca plc,

applicants,

v

European Commission, defendant,

APPLICATION for annulment of Commission Decision C(2005) 1757 final of 15 June 2005 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 – AstraZeneca),

THE GENERAL COURT (Sixth Chamber, Extended Composition),

Judgment

Background to the dispute

1 Astra AB was a company incorporated under Swedish law established in Södertälje (Sweden) and was the parent company of a pharmaceutical group including, inter alia, AB Hässle and Astra Hässle AB, two wholly-owned subsidiaries established in Mölndal (Sweden). With effect from 6 April 1999, Astra merged with Zeneca Group plc to form AstraZeneca plc, the second applicant in this case, a holding company established in London (United Kingdom). As a result of that merger, Astra, which was wholly owned by AstraZeneca plc, acquired the name AstraZeneca AB, the first applicant in this case, and became a research and development, marketing and production company. The companies which belonged to the Astra group and those now in the AstraZeneca plc group will be called 'AZ'. However, in so far as AstraZeneca plc and AstraZeneca AB are being referred to in their capacity as parties to these proceedings, they will be called together 'the applicants'.

2 AZ is a pharmaceutical group active, worldwide, in the sector of inventing, developing and marketing innovative products. Its business is focused on a number of pharmaceutical areas including, in particular, that of gastrointestinal conditions. In that regard, one of the major products marketed by AZ is known as 'Losec', a brand name used in most European markets for that omeprazole product.

3 On 12 May 1999, Generics (UK) Ltd and Scandinavian Pharmaceuticals Generics AB ('the complainants') lodged a complaint pursuant to Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) against Astra, by which they complained of AZ's conduct aimed at preventing them from introducing generic versions of omeprazole on a number of European Economic Area (EEA) markets.

4 By decision of 9 February 2000, adopted pursuant to Article 14(3) of Regulation No 17, the European Commission ordered AZ to submit to investigations at its premises in London and Södertälje. In 2002 and 2003, AZ also replied to three requests for information pursuant to Article 11 of Regulation No 17.

5 On 25 July 2003, the Commission adopted a decision to initiate the procedure. On 29 July 2003, the Commission sent a statement of objections to AZ, to which it replied on 3 December 2003. A meeting was held on 29 January 2004 to discuss certain evidence submitted by AZ in its reply to the statement of objections. AZ also submitted various documents, including, inter alia, the memoranda of 27 January and 11 February 2004, in order to address issues raised by the Commission at the abovementioned meeting. On 13 February 2004, AZ provided the Commission with materials relating to the second alleged abusive course of conduct.

6 A hearing took place on 16 and 17 February 2004. On 26 February 2004, the Commission sent AZ a request for information, pursuant to Article 11 of Regulation No 17, relating to the issue of dominance. AZ replied to the request on 12 March 2004. On 23 November 2004, the Commission offered AZ the opportunity to comment on a number of factual elements and considerations which had not been included in the statement of objections. AZ provided its observations on those matters by letter of 21 January 2005.

7 On 15 June 2005, the Commission adopted a decision relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 – AstraZeneca) ('the contested decision'), by which it found that AstraZeneca AB and AstraZeneca plc had committed two abuses of a dominant position, in breach of Article 82 EC and Article 54 of the EEA Agreement.

8 The first alleged abuse consisted of a pattern of allegedly misleading representations made before the patent offices in Germany, Belgium, Denmark, Norway, the Netherlands and the United Kingdom, and before the national courts in Germany and Norway (Article 1(1) of the contested decision). The second alleged abuse consisted of the submission of requests for deregistration of the marketing authorisations for Losec capsules in Denmark, Norway and Sweden combined with the withdrawal from the market of Losec capsules and the launch of Losec MUPS tablets in those three countries (Article 1(2) of the contested decision).

9 The Commission imposed on the applicants jointly and severally a fine of EUR 46 million and on AstraZeneca AB a fine of EUR 14 million (Article 2 of the contested decision).

Procedure and forms of order sought by the parties

19 At the hearing on 26 and 27 November 2008, the parties presented oral argument and replied to questions put by the Court.

20 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

21 The EFPIA contends that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

22 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

23 By their action, the applicants call in question the lawfulness of the contested decision as regards the definition of the relevant market, the assessment of the dominant position, the first abuse of a dominant position, the second abuse of a dominant position and the amount of the fines imposed. The Court will examine in turn the pleas put forward by the applicants in the context of each of these issues.

24 As a preliminary point, the Court notes, first of all, that the applicants have submitted an application for confidential treatment in respect of a large quantity of information relating, inter alia, to documentary evidence of conduct which, according to the Commission, amounts to an abuse of a dominant position.

25 The Court grants that application for confidential treatment in so far as the information in question does not appear in the non-confidential version of the contested decision, which is published on the internet site of the Directorate-General for Competition of the Commission and which is therefore accessible to the public. However, the application for confidential treatment must be dismissed in so far as it concerns information which appears in the non-confidential version of the contested decision. That information has in any event lost any confidential character it may have had, because it has been accessible to the public (see, to that effect, Case T-99/04 *AC-*

Treuhand v *Commission* [2008] ECR II-1501, paragraph 19).

26 The Court notes, next, that, at the hearing, the applicants expressed reservations about the Commission's use of a document submitted on 24 November 2008, which included, first, graphs reproducing, according to the Commission, data contained in tables annexed to the contested decision and, second, extracts from the application and from the annexes to the pleadings submitted by the parties in the course of the written procedure.

27 In this regard, the document submitted by the Commission a few days prior to the hearing essentially reproduces information which was already in the documents before the Court. That is true of the graphs set out at pages 2 to 8, 10 to 16 and 18 to 24 of that document, which reproduce the data presented in the tables annexed to the contested decision, and also the extracts from the application and the annexes to the pleadings cited in the document. The use made by the Commission of that document at the hearing therefore forms part of the oral presentation of the arguments previously expounded during the written procedure before the Court. Accordingly, the reservations expressed by the applicants on those points must be disregarded. The position is different as regards the graphs set out at pages 26 to 32 of the aforementioned document, which contain information relating to a price differential in percentage terms, which do not appear in tables 24 to 30 in the Annex to the contested decision to which those figures refer. To the extent that the graphs contain more information than is contained in the tables to which they refer, the document submitted by the Commission must be declared inadmissible on that point and the Court will not take account of those data in its findings.

A – *Relevant product market*

28 In the contested decision, the Commission found in essence that antihistamines ('H2 blockers') did not exercise significant competitive constraints over proton pump inhibitors ('PPIs') and that, consequently, the relevant product market was composed exclusively of the latter. The Commission based that finding on a series of considerations which took account of the features of competition in the pharmaceutical sector and which concerned, principally, the intrinsic features of the products, their therapeutic uses, the continuous increase of PPI sales at the expense of H2 blockers, price factors, and 'natural' events which occurred in Germany and the United Kingdom.

29 The applicants contest the soundness of the Commission's definition of the relevant market and put forward, to that effect, two pleas in law. The first plea in law alleges a manifest error of assessment as to the relevance of the gradual nature of the increase in use of PPIs at the expense of H2 blockers. The second plea in law alleges various inconsistencies and errors of assessment.

1. *Preliminary observations*

30 It should be borne in mind, first of all, that, as is apparent inter alia from paragraph 2 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5; 'the Notice on market definition'), the definition of the relevant market is carried out, in the context of the application of Article 82 EC, in order to define the boundaries within which it must be assessed whether a given undertaking is able to behave, to an appreciable extent, independently of its competitors, its customers and, ultimately, consumers (see, to that effect, Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 37).

31 According to settled case-law, for the purposes of investigating the possibly dominant position of an undertaking, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products; those possibilities of competition must also be assessed in the light of the competitive conditions and of the structure of supply and demand (*Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 30 above, paragraph 37; Cases T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 54; and T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 91). As is apparent inter alia from paragraph 7 of the Notice on market definition, the relevant product market therefore comprises all those products or services which are regarded as substitutable by consumers, by reason of the products' characteristics, their prices and their intended use.

32 Next, it follows from settled case-law that, although as a general rule the Community judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Court cannot substitute its own assessment of matters of fact for the Commission's (see Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 87 and 88 and the case-law cited).

33 However, while the Community judicature recognises that the Commission has a margin of assessment in economic or technical matters, that does not mean that it must decline to review the Commission's interpretation of economic or technical data. In order to take due account of the parties' arguments, the Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, in relation to control of concentrations, Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39; see also, to that effect, *Microsoft* v *Commission*, paragraph 32 above, paragraph 89).

c) Findings of the Court

The burden of proof

474 The Court notes, as a preliminary point, that the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission (*Microsoft* v *Commission*, paragraph 32 above, paragraph 688). It is therefore incumbent on the Commission to adduce evidence capable of demonstrating the existence of the circumstances constituting an infringement.

475 In this respect, any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.

476 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which is one of the fundamental rights which, according to the case-law of the Court of Justice, reaffirmed in Article 6(2) EU, are general principles of Community law. Given the nature of the infringements in question and the nature and degree of gravity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, by analogy, judgment of 12 September 2007 in Case T-36/05 *Coats Holdings and Coats* v *Commission*, not published in the ECR, paragraphs 68 to 70 and the case-law cited).

477 Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement. However, it is not necessary for the Commission to adduce such evidence in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, and whose various elements are able to reinforce each other, meets that requirement (see, to that effect and by analogy, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraphs 179, 180 to 275, and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 62 and 63 and the case-law cited).

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition) hereby:

1. Annuls Article 1(2) of Commission Decision C(2005) 1757 final of 15 June 2005 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 – AstraZeneca) in so far as it finds that AstraZeneca AB and AstraZeneca plc infringed Article 82 EC and Article 54 of the EEA Agreement by requesting the deregistration of the Losec capsule marketing authorisations in Denmark and Norway in combination with the withdrawal from the market of Losec capsules and the launch of Losec MUPS tablets in those two countries, inasmuch as it was found that those actions were capable of restricting parallel imports of Losec capsules in those countries;

2. Sets the fine imposed by Article 2 of that decision jointly and severally on AstraZeneca AB and AstraZeneca plc at EUR 40 250 000 and the fine imposed by that article on AstraZeneca AB at 12 250 000 euros;

3. Dismisses the remainder of the application;

[...]

ENGEL AND OTHERS v. THE NETHERLANDS [1976]

(Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72)
JUDGMENT
STRASBOURG
8 June 1976

In the case of Engel and others,
The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

MM. H. MOSLER, President,
A. VERDROSS,
M. ZEKIA,
J. CREMONA,
G. WIARDA,
P. O'DONOGHUE,
Mrs. H. PEDERSEN,
MM. T. VILHJÁLMSSON,
S. PETREN,
A. BOZER,
W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
M. D. EVRIGENIS

and also Mr. M.-A. EISSEN, Registrar, and Mr. H. PETZOLD, Deputy Registrar,
Having deliberated in private on 30 and 31 October 1975, from 20 to 22 January and from 26 to 30 April 1976,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case of Engel and others was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission") and by the Government of the Kingdom of the Netherlands (hereinafter referred to as "the Government"). The case originated in five applications against the Kingdom of the Netherlands which were lodged with the Commission in 1971 by Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul, all Netherlands nationals.

2. Both the Commission's request, to which was attached the report provided for in Article 31 (art. 31) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), and the application of the Government were lodged with the registry of the Court within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 8 October 1974, the latter on 17 December. They referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). Their purpose is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 5, 6, 10, 11, 14, 17 and 18 (art. 5, art. 6, art. 10, art. 11, art. 14, art. 17, art. 18) of the Convention.

3. On 15 October 1974, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. G.J. Wiarda, the elected judge of Netherlands nationality, and Mr. H. Mosler, Vice-President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. A. Verdross, Mr. M. Zekia, Mr. P. O'Donoghue, Mr. T. Vilhjálmsson and Mr. R. Ryssdal (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Mosler assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the delegates of the Commission regarding the procedure to be followed. By an Order of 31 October 1974, he decided that the Government should file a memorial within a time-limit expiring on 14 February 1975 and that the delegates should be entitled to file a memorial in reply within two months of receipt of the Government's memorial. On 22 January 1975, he extended the time-limit granted to the Government until 1 April.

The Government's memorial was received at the registry on 1 April, that of the delegates on 30 May 1975.

5. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 30 June 1975 that the oral hearings should open on 28 October.

6. At a meeting held in private on 1 October 1975 in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise(d) serious questions affecting the interpretation of the Convention ...". At the same time, it took note of the intention of the Commission's delegates to be assisted during the oral procedure by Mr. van der Schans, who had represented the applicants before the Commission; it also authorised Mr. van der Schans to speak in Dutch (Rules 29 para. 1 in fine and 27 para. 3).

7. On 27 October 1975, the Court held a preparatory meeting to consider the oral stage of the procedure. At this meeting it compiled two lists of requests and questions which were communicated to the persons who were to appear before it. The documents thus requested were lodged by the Commission on the same day and by the Government on 21 November 1975.

8. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 28 and 29 October 1975.

There appeared before the Court:

- for the Government:
  Mr. C.W. VAN SANTEN, Deputy Legal Adviser
  at the Ministry of Foreign Affairs, *Agent*;
  Mr. C.W. VAN BOETZELAER VAN ASPEREN, Permanent
  Representative of the Netherlands to the Council of Europe,
  Substitute Agent;
  Mr. E. DROOGLEEVER FORTUIJN, Solicitor
  for the Government,
  Mr. R.J. AKKERMAN, Official
  at the Ministry of Defence,
  Mr. W. BREUKELAAR, Official
  at the Ministry of Justice,
  Mr. J.J.E. SCHUTTE, Official
  at the Ministry of Justice,
  Mr. A.D. BELINFANTE, Professor
  at the University of Amsterdam, *Advisers*;
- for the Commission:
  Mr. J.E.S. FAWCETT, *Principal Delegate*,
  Mr. F. ERMACORA, *Delegate,*
  Mr. E. VAN DER SCHANS, who had represented the applicants
  before the Commission, assisting the delegates under Rule 29 para. 1, second sentence.

The Court heard addresses by Mr. Fawcett, Mr. Ermacora and Mr. van der Schans for the Commission and by Mr. van Santen, Mr. Droogleever Fortuijn and Mr. Belinfante for the Government, as well as their replies to questions put by the Court.

9. On 30 October, the Commission produced various documents which its representatives had mentioned during the oral hearings.

10. On the instructions of the Court, the Registrar requested the Commission, on 3 and 13 November 1975, to supply it with details on a particular point of the case; these were furnished on 4 and 14 November.

AS TO THE FACTS

11. The facts of the case may be summarised as follows:

12. All applicants were, when submitting their applications to the Commission, conscript soldiers serving in different non-commissioned ranks in the Netherlands armed forces. On separate occasions, various penalties had been passed on them by their respective commanding officers for offences against military discipline. The applicants had appealed to the complaints officer (beklagmeerdere) and finally to the Supreme Military Court (Hoog Militair Gerechtshof) which in substance confirmed the decisions challenged but, in two cases, reduced the punishment imposed.

THE SYSTEM OF MILITARY DISCIPLINARY LAW IN THE NETHERLANDS

13. The disciplinary law concerning the Netherlands Army, applicable at the time of the measures complained of in this case, was set out in the Military Discipline Act of 27 April 1903 (Wet op de Krijgstucht - hereinafter referred to as "the 1903 Act"), the Regulations on

Military Discipline of 31 July 1922 (Reglement betreffende de Krijgstucht), the Military Penal Code of 27 April 1903 (Wetboek van Militair Strafrecht) and the Army and Air Force Code of Procedure in its version of 9 January 1964 (Rechtspleging bij de Land-en Luchtmacht).

This system of law has evolved during the course of the years. In particular, certain provisions of the 1903 Act, applied in the present case, have been repealed or amended by an Act of 12 September 1974, which came into force on 1 November 1974.

14. Alongside disciplinary law, there exists in the Netherlands a military criminal law. Proceedings under the latter are held at first instance before a court martial (Krijgsraad) and subsequently, if appropriate, before the Supreme Military Court on appeal.

The account that follows relates solely to military disciplinary law which, like military criminal law, applies equally to conscript servicemen, such as the applicants, and to volunteers.

Military disciplinary offences

15. Offences against military discipline are defined in Article 2 of the 1903 Act as being:

"1. all acts not included in any criminal legislation which are contrary to any official order or regulation or inconsistent with military discipline and order;

2. such criminal acts as fall within the jurisdiction of the military judge, insofar as they are inconsistent with military discipline and order but at the same time of such trivial nature that the matter can be dealt with in proceedings other than criminal proceedings."

The Regulations on Military Discipline of 31 July 1922 set out the basic principles of military discipline (Section 15 para. 2). Under Section 16 para. 1, the question whether or not the conduct of a member of the armed forces is consistent with military discipline and order must be answered by reference to the general considerations set out in the first part of those Regulations.

Sections 17 to 26 list - by way of example, as stated in Section 16 para. 2 - offences against military discipline, such as membership of extremist organisations, non-observance of secrecy, possession and distribution of objectionable writings, showing discontentment, failure to perform military duties, absence without leave, incorrect or disorderly behaviour, disrespect for property, failure to give assistance, neglect of hygiene and cleanliness, failure to perform watch and patrol duties, etc.

Several of these acts and omissions constitute at the same time criminal offences punishable under the Military Penal Code, for example, absence without leave for one day or more (Article 96), disobedience to a military order (Article 114) and distribution of objectionable writings (Article 147).

Under Article 8 of the Army and Air Force Code of Procedure the competent officer imposes a disciplinary penalty if he considers that the person concerned is guilty of an offence that can be dealt with outside criminal proceedings.

Military disciplinary penalties and measures

16. At the relevant time, the provisions on the various penalties that could be imposed on persons having committed disciplinary offences were contained in Articles 3 to 5 of the 1903 Act.

The nature of the penalties depended on the rank of the offender. Thus, Article 3-A provided for reprimand, "light arrest (licht arrest) of at most 14 days" and "strict arrest (streng arrest) of at most 14 days" as the principal disciplinary punishments for officers. As regards non-commissioned officers, Article 4-A provided, inter alia, for reprimand, restrictions to camp during the night, "light arrest of at most 21 days", "aggravated arrest (verzwaard arrest) of at most 14 days" and "strict arrest of at most 14 days". Ordinary servicemen were, under Article 5-A, subject, broadly speaking, to the same punishments as non-commissioned officers, with the additional possibility for privates of "committal to a disciplinary unit" (plaatsing in een tuchtklasse). All ranks of servicemen could, under paragraph B of each of the above Articles, also suffer loss of wages as "supplementary punishment".

17. Under the 1903 Act the manner of execution of disciplinary punishments also varied according to rank.

18. Execution of light arrest was governed by Article 8:

"Light arrest shall be carried out:

A. By officers:

1. on land: in their dwellings, tent or barracks or, when bivouacking, in the place designated by the commanding officer;

2. ...

B. By non-commissioned officers and ordinary servicemen:

1. on land: in their barracks, base or dwellings or, when in quarters, camping or bivouacking, in the place designated by the commanding officer;

2. ...Servicemen undergoing light arrest are not excluded from performing their duties."

The effect of this provision was that any serviceman under light arrest, irrespective of rank, had usually to remain in his dwelling during off-duty hours if he lived outside the barracks; otherwise he was confined to barracks.

Officers and non-commissioned officers normally lived outside, whereas ordinary servicemen were as a rule obliged to live within, the barracks. In practice, ordinary servicemen had for some time enjoyed a degree of freedom of movement in the evenings between five o'clock and midnight and at weekends. They often made use of this to stay with their families but this did not mean that they were no longer required to live in barracks.

By reason of the above, an ordinary serviceman, unlike an officer or non-commissioned officer, was in general not able to serve light arrest at home, and he thereby lost the privilege of returning to his family home during off-duty hours. Conscripts permitted to live outside the barracks were in the same situation: under Article 123 of the Rules for Internal Service in the Royal Army (Reglement op de Inwendige Dienst der Koninklijke Landmacht), the permission was suspended, inter alia, in the case of disciplinary arrest; however, this provision, deemed contrary to the 1903 Act, disappeared in 1974.

A serviceman under light arrest at the barracks was allowed visits, correspondence and the use of the telephone; he could move freely about the barracks outside duty hours, being able for instance to visit the camp cinema, canteen and other recreation facilities.

19. The execution of aggravated arrest, which applied only to non-commissioned officers and ordinary servicemen, was governed by Article 9 of the 1903 Act. Those concerned continued to perform their duties but for the rest of the time had to remain, in the company of other servicemen undergoing a similar punishment, in a specially designated but unlocked place. The offender might receive visits if he had the company commander's written permission. Unlike a person under light arrest, he could not move freely about the barracks so as to visit the cinema, canteen or recreation facilities. As far as possible, ordinary servicemen had to be separated from their fellows (afzondering) during the night.

20. The execution of strict arrest was governed by Article 10 of the 1903 Act. The period of arrest, covering both duty and off-duty hours, was served by officers in a similar manner to light arrest, that is they usually remained at home, whereas non-commissioned officers and ordinary servicemen were locked in a cell. All ranks were excluded from the performance of their normal duties.

21. Execution of what at the time was the most severe form of disciplinary penalty, committal to a disciplinary unit (plaatsing in een tuchtklasse), which applied only to privates, was governed by Articles 18 and 19 of the 1903 Act. This punishment consisted of submitting the offender to a stricter discipline than normal by sending him to an establishment which was specially designated for that purpose (Article 18). According to Article 19, service in a disciplinary unit was imposed for a period, determined when the penalty was pronounced, of from three to six months. In this respect alone did it differ from committal to a punishment unit (plaatsing in een strafklasse), a supplementary punishment which, under Article 27 of the Military Penal Code, could be imposed on a serviceman, in the context of criminal proceedings, for a period of from three months to two years.

Committal to a disciplinary unit, when it was ordered towards the end of military service, generally delayed the individual's return to civil life. Its execution was governed by a Decree of 14 June 1971 (Besluit straf-en tuchtklassen voor de krijgsmacht) which concerned both committals to a punishment unit and, in principle (Article 57), committal to a disciplinary unit. Those undergoing such punishment were removed from their own unit and placed in a special, separate group; their movements were restricted, they carried out their military service under constant supervision and emphasis was placed on their education (Articles 17, 18 and 20).

The units were divided into three sections. Offenders as a rule passed thirty days in each of the first two, but these periods could be prolonged or shortened according to their conduct (Articles 26 and 27). As far as possible, they spent their nights separated from each

other (afgezonderd - Article 28). In the first section, they were allowed to receive visits twice a month and to study during off-duty hours (Article 29). In the second, they also enjoyed a degree of freedom of movement on Saturdays and Sundays and at least twice a week could visit the canteen and/or recreation facilities in the evening after duty (Article 30). In the third, the regime was appreciably less strict (Article 31).

22. Under Article 20 of the 1903 Act, a serviceman on whom the punishment of committal to a disciplinary unit had been imposed might, on that ground, be placed under arrest after sentence had been passed and held in custody until he arrived at the establishment where the punishment was to be served. It seems that any of the three forms of arrest outlined above could be employed under the terms of this text.

No provision existed in military disciplinary law to limit or fix in advance or otherwise control the duration of this interim custody, or to provide for the possibility of deducting the period of such custody from the time to be spent in the disciplinary unit.

23. Disciplinary penalties imposed on a serviceman could be taken into account when, for example, the question of his promotion arose. On the other hand they were not entered on his criminal record and, according to the information obtained by the Court at the hearing on 28 October 1975, had no effects in law on civil life.

24. As the result of the Act of 12 September 1974, both the range of disciplinary punishments available and the manner in which they are to be enforced have been made the same for all ranks of servicemen. Strict arrest and committal to a disciplinary unit are abolished. Even before its entry into force (1 November 1974), these punishments had ceased to be imposed in practice, following a ministerial instruction.

While reprimand, light arrest and aggravated arrest remain, the maximum period during which any arrest may be imposed is now fourteen days, and aggravated arrest is henceforth also applicable to officers (Articles 3, 8 and 9 of the 1974 Act). Aggravated arrest today constitutes the severest form of disciplinary punishment. Three further penalties have been introduced by the 1974 Act: extra duties of between one and two hours a day, compulsory presence overnight in the barracks or quarters, and a fine.

Military disciplinary procedure

25. Articles 39 to 43 of the 1903 Act state who may impose disciplinary punishments. This is normally the commanding officer of the individual's unit. He investigates the case and hears the serviceman accused (Article 46 of the 1903 Act) and questions witnesses and experts if that proves necessary.

For each offence committed the officer chooses which of the various punishments available under the law should be applied. "When determining the nature and severity of disciplinary punishments", he shall be "both just and severe", shall have "regard to the circumstances in which the offence was committed as well as to the character and customary behaviour of the accused" and shall base his decision "on his own opinion and belief" (Article 37 of the 1903 Act).

26. Article 44 of the 1903 Act provides that any superior who has sufficient indication to suppose that a subordinate has committed a severe offence against military discipline is entitled, if necessary, to give notice of his provisional arrest (voorlopig arrest); the subordinate is obliged to comply immediately with that notification. Provisional arrest is usually served in the same way as light arrest, but, if required either in the interest of the investigation or in order to prevent disorder, it is served in a similar way to aggravated or, as was the case prior to the 1974 Act, strict arrest. The serviceman concerned is as a rule excluded from performing his duty outside the place where he is confined. Article 45 stipulates that provisional arrest shall not last longer than 24 hours and Article 49 states that the hierarchical superior of the officer imposing provisional arrest may set it aside after hearing the latter. The period of such provisional arrest may be deducted in whole or in part from the punishment imposed.

27. Under Article 61 of the 1903 Act the serviceman on whom a disciplinary penalty has been imposed may challenge before the complaints officer his punishment or the grounds thereof unless it has been imposed by a military court. The complaints officer is the hierarchical superior of the officer giving the initial decision rather than a specialist, but he is usually assisted by a colleague who is a lawyer, especially in cases (before the 1974 Act) of committal to a disciplinary unit.

The complaint must be submitted within four days; if the complainant is under arrest he may on request consult other persons named by him (maximum of three), unless the commanding officer considers their presence to be inadvisable (Article 62).

The complaints officer must examine the case as soon as possible; he questions witnesses and experts to the extent he thinks necessary and hears the complainant and the punishing officer. He then gives a decision which must be accompanied by reasons and communicated to the complainant and the punishing officer (Article 65).

28. Appeal against the decision imposing a disciplinary punishment has no suspensive effect although the Minister of Defence may defer the execution of such punishment on account of special circumstances. Article 64 of the 1903 Act provided an exception in the case of committal to a disciplinary unit; the serviceman's appeal did not, however, entail the suspension or termination of any interim custody imposed under Article 20.

29. If the punishment has not been quashed by the complaints officer, the complainant may appeal within four days to the Supreme Military Court (Article 67 of the 1903 Act).

30. The composition of this Court and its functioning are regulated by the "Provisional Instructions" on the Supreme Military Court (Provisionele Instructie voor het Hoog Militair Gerechtshof) promulgated on 20 July 1814 but since amended several times. Under Article 1 the Court shall be established at The Hague and shall be composed of six members: two civilian jurists - one of whom is the Court's President - and four military officers. A State Advocate for the Armed Forces (advocaat-fiscaal voor de Krijgsmacht) and a Registrar are attached to the Court.

The civilian members (Article 2 of the "Provisional Instructions") must be Justices of the Supreme Court (Hoog Raad) or Judges of the Court of Appeal (Gerechtshof) at The Hague and Articles 11, 12, 13 and 15 of the Judicature Act (Wet op de Rechterlijke Organisatie) of 18 April 1827, providing, inter alia, for tenure of office and grounds for discharge, are applicable to them. They are appointed by the Crown upon the joint recommendation of the Ministers of Justice and of Defence; their term of office is equal to that of the Justices of the Supreme Court or the Judges of a Court of Appeal.

The military members of the Court (Article 2 (a) of the "Provisional Instructions"), who must be not less than 30 nor more than 70 years of age, are likewise appointed by the Crown upon the joint recommendation of the Ministers of Justice and of Defence. They may also be dismissed in a similar manner. In theory, therefore, they are removable without observance of the strict requirements and legal safeguards laid down regarding the civilian members by the Judicature Act. According to the Government, the appointment of the military members of the Court is normally the last in their service career; they are not, in their functions as judges on the Court, under the command of any higher authority and they are not under a duty to account for their acts to the service establishment.

On assuming office, all members of the Court must swear an oath that obliges them, inter alia, to be just, honest and impartial (Article 9 of the "Provisional Instructions"). It is true that the military judges on the Court remain members of the armed forces and as such bound by their oath as officers, which requires them, among other things, to obey orders from superiors. This latter oath, however, also enjoins obedience to the law, including in general the statutory provisions governing the Supreme Military Court and, in particular, the oath of impartiality taken by the judges.

31. Cases are never dealt with by a single judge but only by the Court as a body. The Court is required to examine cases as soon as possible and to hear the applicant and, if necessary, the punishing officer, the complaints officer and any witness or expert whose evidence it may wish to obtain (Article 56 of the "Provisional Instructions"). The Court reviews the decision of the complaints officer both in regard to the facts and to the law; in no case has it jurisdiction to increase the penalty (Article 58).

Whereas in criminal cases the Court's hearings are public (Article 43 of the "Provisional Instructions" and paragraph 14 above), it sits in camera in disciplinary cases. On the other hand the judgment is pronounced at a public session; it must be accompanied by reasons and is communicated to the complaints officer, the punishing officer and the appellant serviceman (Article 59).

32. At the time of the measures complained of in this case, no provision in law was made for the legal representation of the complainant. Nevertheless, as a report by the acting Registrar of the Supreme Military Court, dated 23 December 1970, explains, the Court in practice granted legal assistance in certain cases where it was expected that the person concerned would not be able himself to cope with the special legal problems raised in his appeal. This applied particularly to cases where the Convention was invoked. The assistance was, however, limited to such legal matters.

The position altered in 1973: under a ministerial instruction of 7 November 1973 (Regeling vertrouwensman - KL), a serviceman accused of a disciplinary offence may have the services of a "trusted person" (vertrouwensman) at all stages of the proceedings and even of a lawyer if the matter comes before the Supreme Military Court (Articles 1, 17 and 18 of the instruction).

FACTS RELATING TO THE INDIVIDUAL APPLICANTS

Mr. Engel

33. In March 1971, Mr. Engel was serving as a sergeant in the Netherlands Army. He in fact lived at home during off-duty hours. The applicant was a member of the Conscript Servicemen's Association (Vereniging van Dienstplichtige Militairen - V.V.D.M.) which was

created in 1966 and aims at safeguarding the interests of conscripts. It was recognised by the Government for taking part in negotiations in this field and its membership included about two-thirds of all conscripts.

Mr. Engel was a candidate for the vice-presidency of the V.V.D.M. and on 12 March he submitted a request to his company commander for leave of absence on 17 March in order to attend a general meeting in Utrecht at which the elections were to be held. He did not, however, mention his candidature.

Subsequently he became ill and stayed home under the orders of his doctor who gave him sick leave until 18 March and authorised him to leave the house on 17 March. On 16 March, the company commander had a talk with the battalion commander and it was agreed that no decision should be taken regarding the above-mentioned request pending further information from the applicant who had given no notice of his absence or return. However, on the following day a check was made at the applicant's home and it was discovered that he was not there. In fact, he had gone to the meeting of the V.V.D.M. where he had been elected vice-president.

34. On 18 March Mr. Engel returned to his unit and on the same day his company commander punished him with four days' light arrest for having been absent from his residence on the previous day.

The applicant considered this penalty a serious interference with his personal affairs in that it prevented him from properly preparing himself for his doctoral examination at the University of Utrecht which had been fixed for 24 March. According to the applicant, he had made several attempts on 18 March to speak to an officer on this point but without success. Believing that under the army regulations non-commissioned officers were allowed to serve their light arrest at home, he left the barracks in the evening and spent the night at home. However, the next day his company commander imposed a penalty of three days' aggravated arrest on him for having disregarded his first punishment.

The applicant, who had just been informed that, with effect from 1 April 1971, he had been demoted to the rank of private, again left the barracks in the evening and went home. He was arrested on Saturday 20 March by the military police and provisionally detained in strict arrest for about two days, by virtue of Article 44 of the 1903 Act (paragraph 26 above). On Monday 22 March his company commander imposed a penalty of three days' strict arrest for having disregarded his two previous punishments.

35. The execution of these punishments was suspended by ministerial decision in order to permit the applicant to take his doctoral examination which he passed on 24 March 1971. Moreover, on 21, 22 and 25 March Mr. Engel complained to the complaints officer about the penalties imposed on him by the company commander. On 5 April the complaints officer decided, after having heard the parties, that the first punishment of four days' light arrest should be reduced to a reprimand, the second punishment of three days' aggravated arrest to three days' light arrest, and the third punishment of three days' strict arrest to two days' strict arrest. In the last two cases the decision was based on the fact that the previous punishment(s) had been reduced and that the applicant had obviously been under considerable stress owing to his forthcoming examination. The complaints officer further decided that Mr. Engel's punishment of two days' strict arrest should be deemed to have been served from 20 to 22 March, during his provisional arrest.

36. On 7 April 1971 the applicant appealed to the Supreme Military Court against the decision of the complaints officer relying, inter alia, on the Convention in general terms. The Court heard the applicant and obtained the opinion of the State Advocate for the Armed Forces. On 23 June 1971, that is about three months after the date of the disciplinary measures in dispute, the Court confirmed the contested decision. It referred to Article 5 para. 1 (b) (art. 5-1-b) of the Convention and held that the applicant's detention had been lawful and had been imposed in order to secure the fulfilment of an obligation prescribed by law. The system under the 1903 Act and the applicable Regulations required in fact that every serviceman should submit to and co-operate in maintaining military discipline. This obligation could be enforced by imposing disciplinary punishments in accordance with the procedure prescribed by the above Act. In these circumstances, the applicant's punishment of two days' strict arrest had been justified in order to secure the fulfilment of that obligation.

The applicant had not received the assistance of a legally trained person at any stage in the proceedings against him; perusal of the file in the case does not reveal if he asked for such assistance.

Mr. van der Wiel

37. Mr. van der Wiel, at the time of his application to the Commission, was serving as a corporal in the Netherlands Army. On the morning of 30 November 1970 he was about four hours late for duty. His car had broken down during his weekend leave and he had had it repaired before returning to his unit instead of taking the first train. On these grounds, the acting company commander, on the same day, imposed a penalty of four days' light arrest on the applicant. The following day he revised the above grounds to include a reference that the applicant had not previously requested the commander's leave of absence.

38. On 2 December, the applicant complained about his punishment to the complaints officer invoking, inter alia, Articles 5 and 6 (art. 5, art. 6) of the Convention. In this respect he alleged that he had been deprived of his liberty by a decision which, contrary to the requirements of Article 5 (art. 5), had not been taken by a judicial authority; that furthermore his case had not been heard by an independent and impartial tribunal (Article 6 para. 1) (art. 6-1); that he did not have adequate time and facilities for the preparation of his defence (Article 6 para. 3 (b)) (art. 6-3-b), and that he did not have legal assistance (Article 6 para. 3 (c)) (art. 6-3-c).

39. On 18 December, following the rejection by the complaints officer of his complaint on 16 December, the applicant appealed to the Supreme Military Court. On 17 March 1971, the Court heard the applicant, who was assisted by a lawyer, Sergeant Reintjes, and obtained the opinion of the State Advocate for the Armed Forces. The Court then quashed the complaints officer's decision but confirmed the punishment of four days' light arrest imposed on the applicant on the original grounds stated on 30 November 1970.

The Court first found that Article 6 (art. 6) of the Convention was not applicable in a case where neither the determination of a criminal charge nor the determination of civil rights and obligations was in question. The Court referred to the definition of military disciplinary offences contained in Article 2 of the 1903 Act (paragraph 15 above) and concluded therefrom that disciplinary proceedings clearly did not fall within the scope of Article 6 (art. 6). Nor was there any substance in the applicant's argument that, since a conscripted man had not volunteered to come within the jurisdiction of the military authorities, any disciplinary measure imposed upon him in fact had a criminal character.

As regards the complaints based on Article 5 (art. 5), the Court first held that four days' light arrest did not constitute "deprivation of liberty". In the alternative, the Court further stated that the disputed punishment was meant to "secure the fulfilment of (an) obligation prescribed by law", within the meaning of Article 5 para. 1 (b) (art. 5-1-b).

40. At first and second instance in the proceedings Mr. van der Wiel had not received any legal assistance, and during the proceedings before the Supreme Military Court the legal assistance granted to him had, in line with the practice described above at paragraph 32, been restricted to the legal aspects of the case.

Mr. de Wit

41. Mr. de Wit, at the time of his application to the Commission, was serving as a private in the Netherlands Army. On 22 February 1971, he was sentenced to committal to a disciplinary unit for a period of three months by his company commander on the grounds that, on 11 February 1971, he had driven a jeep in an irresponsible manner over uneven territory at a speed of about 40 to 50 km. per hour; that he had not immediately carried out his mission, namely to pick up a lorry at a certain place, but that he had only done so after having been stopped, asked about his orders and summoned to execute them at once; that, in view of his repeatedly irregular behaviour and failure to observe discipline, he had previously been warned about the possibility of being committed to a disciplinary unit.

On 25 February, the applicant complained about his punishment to the complaints officer alleging, inter alia, violations of the Convention. On 5 March, the complaints officer heard the applicant who was assisted by Private Eggenkamp, a lawyer and member of the central committee of the V.V.D.M., such assistance having been granted by reason of the fact that the applicant had invoked the Convention. The complaints officer also examined six witnesses, including one, namely Private de Vos, on the applicant's behalf, and then confirmed the punishment while altering slightly the grounds stated therefore. He rejected the allegations under the Convention, referring to a judgment of the Supreme Military Court dated 13 May 1970.

On 11 March, the applicant appealed to the Supreme Military Court against that decision. In accordance with Article 64 of the 1903 Act, the applicant's successive appeals had the effect of suspending execution of his punishment (paragraph 28 above). The Court heard the applicant and his above-mentioned legal adviser and obtained the opinion of the State Advocate for the Armed Forces. On 28 April 1971, the Court, without mentioning the applicant's previous behaviour, reduced the punishment to twelve days' aggravated arrest, which sentence was executed thereafter. It considered that, in the circumstances, the committal to a disciplinary unit for three months was too heavy a penalty.

42. The applicant alleges that in his case the calling of two other witnesses on his behalf, namely Privates Knijkers and Dokestijn, was prevented at every juncture. He also complains that the legal assistance granted to him had been restricted to the legal aspects of his case.

Mr. Dona and Mr. Schul

43. Mr. Dona was serving as a private in the Netherlands Army at the time of his application to the Commission. As editor of a journal called "Alarm", published in stencilled form by the V.V.D.M. at the General Spoor barracks at Ermelo, he had collaborated in particular in the preparation of no. 8 of that journal dated September 1971. Acting in pursuance of the "Distribution of Writings Decree", a ministerial

decree of 21 December 1967, the commanding officer of the barracks provisionally prohibited the distribution of this number, whose contents he considered inconsistent with military discipline.

On 28 September, two officers met in commission on the instructions of the commanding officer in order to hold an enquiry into the appearance of the said number. The applicant, among others, was heard by the commission.

On 8 October 1971, the applicant was sentenced by his competent superior to three months' committal to a disciplinary unit for having taken part in the publication and distribution of a writing tending to undermine discipline. The decision was based on Article 2 para. 2 of the 1903 Act, read in conjunction with the first paragraph of Article 147 of the Military Penal Code which provides:

"Any person who, by means of a signal, sign, dumb show, speech, song, writing or picture, endeavours to undermine discipline in the armed forces or who, knowing the tenor of the writing or the picture, disseminates or exhibits it, posts it up or holds stocks of it for dissemination, shall be liable to a term of imprisonment not exceeding three years."

Entitled "The law of the strongest" (Het recht van de sterkste), the article objected to in no. 8 of "Alarm" alluded to a demonstration that had taken place at Ermelo on 13 August 1971 on the initiative of the executive committee of the V.V.D.M. According to Mr. van der Schans, the demonstration was terminated almost at once since the demonstrators had promptly returned to their quarters following the promise by the commanding officer that, if they did so, no disciplinary sanctions would ensue. Nevertheless, a few soldiers were allegedly transferred soon afterwards for having participated in the incident.

The passages in the article which gave rise to the disciplinary punishment of 8 October 1971 read as follows:

(a) "There happens to be a General Smits who writes to his 'inferiors' 'I will do everything to keep you from violating the LAW'! But this very General is responsible for the transfers of Daalhuisen and Duppen. Yet, as you know, measures are never allowed to be in the nature of a disguised punishment. How devoted to the law the General is - as long as it suits him";

(b) "... in addition to ordinary punishments, the army bosses have at their disposal a complete series of other measures - of which transfer is only one - to suppress the soldiers. That does not come to an end by questions in Parliament - that makes them at most more careful. That only comes to an end when these people, who can only prove their authority by punishment and intimidation, have to look for a normal job."

44. The decision ordering the applicant's committal to a disciplinary unit referred to the extracts quoted above. Furthermore, the decision took into account some aggravating circumstances: Mr. Dona had collaborated in the publication of no. 6 of the journal, which had likewise been prohibited under the "Distribution of Writings Decree" by reason of its objectionable contents; in addition, he had taken part in the demonstrations at Ermelo and had, in particular, published in connection therewith a pamphlet, for which he received on 13 August 1971 a punishment of strict arrest.

45. Mr. Schul, a private in the Netherlands Army at the time of his application to the Commission, was also an editor of the journal "Alarm". The facts regarding his case are identical to those of Mr. Dona's except that his punishment initially amounted to four months' committal to a disciplinary unit owing to the additional aggravating circumstance of his participation in the publication of an "Information Bulletin" for new recruits the distribution of which had been prohibited by reason of its negative content.

46. As early as 8 October 1971, the two applicants announced their intention to complain about their punishment. According to them, they were then asked to refrain from any further publication while proceedings were pending against them. The Government maintain that they were only requested not to publish other articles tending to undermine military discipline. The applicants replied before the Court that they had not the slightest intention to write such articles and that they had emphasised this on 28 September 1971 before the commission of enquiry. According to the report of the latter, Mr. Dona had declared that it was not at all his aim to write articles that he expected to be prohibited, and Mr. Schul is recorded as saying: "When we produce pamphlets of this kind, it is not our intention that they should be prohibited. The intention is that they should be read. The risk of their being prohibited is great."

Be that as it may, the applicants refused to give the undertaking requested and they were thereupon both placed under aggravated arrest in accordance with Article 20 of the 1903 Act.

47. The applicants complained about their punishment to the complaints officer who on 19 October confirmed it, while in the case of Mr. Dona slightly modifying the grounds. He rejected the applicants' submissions, including those concerning Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention. In connection with Articles 5 and 6 (art. 5, art. 6), he referred to a decision of the Supreme Military Court delivered on 13 May 1970. The complaints officer also specified that the applicants should remain in interim custody in accordance with Article 20 of the 1903 Act.

48. The applicants appealed to the Supreme Military Court, Mr. Schul on 21 October and Mr. Dona on the next day, invoking Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention.

Pursuant to Article 64 of the 1903 Act, the successive complaints and appeals by the applicants suspended their committal to a disciplinary unit but not their interim custody (paragraph 28 above).

On 27 October 1971, the Court ordered release of the applicants after they had promised to accept the Court's judgment on the merits of the case, to comply therewith in the future and, while proceedings were pending against them, to refrain from any activity in connection with the compilation and distribution of written material the contents of which could be deemed to be at variance with military discipline. According to the applicants, this undertaking was given only in extremis as there was no legal remedy available to terminate their interim custody.

Like Mr. de Wit, the applicants had been assisted before the Court by Private Eggenkamp who was, however, able only to deal with the legal aspects of their case (paragraphs 41-42 above).

49. On 17 November 1971 the Supreme Military Court confirmed Mr. Dona's committal to a disciplinary unit for three months, reduced Mr. Schul's committal from four to three months and modified slightly the grounds for punishment in both cases. The Court rejected as being ill-founded the applicants' allegations. Making mention in both cases of their previous conduct and convictions, the Court recalled particularly that they had previously participated in the publication and distribution of writings that were prohibited on the basis of the decree of 21 December 1967 (paragraphs 44-45 above). When fixing the punishment, the Court deemed these factors to be indicative of their general behaviour.

The Court then dealt with the applicants' allegations under Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention, and also rejected them.

As regards Article 5 (art. 5), the Court held that the obligation to serve in a disciplinary unit did not constitute "deprivation of liberty". In the alternative, adopting reasoning similar to that contained in its decision on Mr. Engel's appeal (paragraph 36 above), the Court found that the disputed punishments had been justified under Article 5 para. 1 (b) (art. 5-1-b).

On the issue of Article 6 para. 1 (art. 6-1), the Court considered that the disciplinary proceedings relating to the publication of the journal "Alarm" had involved the determination neither of any "civil right", such as freedom of expression, nor of any "criminal charge"; on the latter point, the Court based its decision on reasons similar to those given in the decision on Mr. van der Wiel's appeal (paragraph 39 above).

The applicants also contended that the measures taken against them interfered with their freedom of expression. In this respect, the Court relied on paragraph 2 of Article 10 (art. 10-2); in its opinion, the restrictions objected to had been necessary in a democratic society for the prevention of disorder within the field governed by Article 147 of the Military Penal Code.

Finally, the applicants maintained that their interim custody had been inconsistent with Article 5 para. 1 (c) (art. 5-1-c) of the Convention and claimed compensation on this account under Article 5 para. 5 (art. 5-5). The Court held that it had no competence to examine and decide such a claim.

50. A few days after the dismissal of their appeals, Mr. Dona and Mr. Schul were sent to the Disciplinary Barracks (Depot voor Discipline) at Nieuwersluis in order to serve their punishment. They were not allowed to leave this establishment during the first month; moreover, they were both locked up in a cell during the night.

51. Apart from the particular facts relating to Mr. Dona and Mr. Schul, there was in the background a pattern of conflict between the Government and the V.V.D.M. In mid-August 1971, for instance, there had occurred the demonstration at Ermelo mentioned above at paragraph 43. The applicants also cite the fact that prior to their punishment, and in particular between 1 January and 20 October 1971, the Minister of Defence had decreed a great number of prohibitions on publications by the V.V.D.M. Furthermore, other servicemen, as editors of sectional journals of the Association, had been punished in criminal or in disciplinary proceedings - by aggravated arrest, fines and, in one case, military detention (Article 6 para. 3 of the Military Penal Code) - for writing or distributing publications considered as likely to undermine military discipline within the meaning of Article 147 of the Military Penal Code.

Since a ministerial instruction, dated 19 November 1971, and thus subsequent to the measures presently complained of, all cases involving a possible infringement of Article 147 of the Military Penal Code have had to be submitted to the military criminal courts (paragraph 14 above) and not to the disciplinary authorities. The "Distribution of Writings Decree" of 21 December 1967, mentioned above at paragraph 43, was repealed on 26 November 1971.

PROCEDURE BEFORE THE COMMISSION

52. The applications were lodged with the Commission on 6 July 1971 by Mr. Engel, on 31 May 1971 by Mr. van der Wiel and Mr. de Wit, on 19 December 1971 by Mr. Dona and on 29 December 1971 by Mr. Schul. On 10 February 1972, the Commission decided to join the applications in accordance with the then Rule 39 of its Rules of Procedure.

In common with each other, the applicants complained that the penalties imposed on them constituted deprivation of liberty contrary to Article 5 (art. 5) of the Convention, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of Article 6 (art. 6) and that the manner in which they were treated was discriminatory and in breach of Article 14 read in conjunction with Articles 5 and 6 (art. 14+5, art. 14+6).

Mr. Engel also alleged a separate breach of Article 5 (art. 5) in connection with his provisional arrest and a breach of Article 11 (art. 11) on the particular facts of his case.

For their part, Mr. Dona and Mr. Schul contended that their interim custody had been in disregard of Article 5 (art. 5) and that the punishment imposed on them for having published and distributed articles deemed to undermine military discipline had contravened Articles 10, 11, 14, 17 and 18 (art. 10, art. 11, art. 14, art. 17, art. 18).

Furthermore, all five applicants claimed compensation.

The applications were declared admissible by the Commission on 17 July 1972 except that the complaint submitted by Mr. Engel under Article 11 (art. 11) was rejected as being manifestly ill-founded (Article 27 para. 2) (art. 27-2).

In answer to certain objections made by the respondent Government during the examination of the merits, the Commission decided on 29 May 1973 not to reject under Article 29 (art. 29) two heads of complaint raised by Mr. Engel, Mr. Dona and Mr. Schul on 21 June 1972 in support of their respective applications.

53. In its report of 19 July 1974 the Commission expressed the opinion:

- that the punishments of light arrest objected to by Mr. Engel and Mr. van der Wiel did not amount to deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention (eleven votes, with one abstention);

- that the other disciplinary punishments complained of by Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul had infringed Article 5 para. 1 (art. 5-1) since none of the sub-paragraphs of this provision justified them (conclusion following from a series of votes with various majorities);

- that there had also been violation of Article 5 para. 4 (art. 5-4) in that the appeals by the four above-mentioned applicants against these same punishments had not been "decided speedily" (eleven votes, with one abstention);

- that Mr. Engel's provisional arrest under Article 44 of the 1903 Act had, for its part, contravened Article 5 para. 1 (art. 5-1) since it had exceeded the period specified under Article 45 of the said Act (eleven votes, with one member being absent);

- that Article 6 (art. 6) was not applicable to any of the disciplinary proceedings concerned (ten votes against one, with one member being absent);

- that in the cases of Mr. Dona and Mr. Schul no breach either of Article 5 (art. 5) of the Convention in respect of their interim custody (Article 20 of the 1903 Act) or of Articles 10, 11, 17 or 18 (art. 10, art. 11, art. 17, art. 18) of the Convention had been established (such conclusions following from several votes with various majorities);

- that no violation of Article 14, whether read in conjunction with Articles 5, 6, 10 or 11 (art. 14+5, art. 14+6, art. 14+10, art. 14+11), had occurred in this case (conclusion following from several votes with various majorities).

The report contains five separate opinions.

AS TO THE LAW

54. As the Government, Commission and applicants concurred in thinking, the Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Articles 1 and 14 (art. 1, art. 14) that "everyone within (the) jurisdiction" of the Contracting States is to enjoy "without discrimination" the rights and freedoms set out in Section I. Article 4 para. 3 (b) (art. 4-3-b), which exempts military service from the prohibition against forced or compulsory labour, further confirms that as a general rule the guarantees of the Convention extend to servicemen. The same is true of Article 11 para. 2 (art. 11-2) in fine, which permits the States to introduce special restrictions on the exercise of the freedoms of assembly and association by members of the armed forces.

Nevertheless, when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.

55. Having established these preliminary points, the Court will examine successively, Article by Article, each of the complaints raised by all or certain of the five applicants.

I. ON THE ALLEGED VIOLATIONS OF ARTICLE 5 (art. 5)

A. On the alleged violation of paragraph 1 of Article 5 (art. 5-1) taken alone

56. The applicants all submit that the disciplinary penalty or penalties, measure of measures pronounced against them contravened Article 5 para. 1 (art. 5-1), which provides:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

1. On the right to liberty in the context of military service

57. During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations.

Military discipline, nonetheless, does not fall outside the scope of Article 5 para. 1 (art. 5-1). Not only must this provision be read in the light of Articles 1 and 14 (art. 1, art. 14) (paragraph 54 above), but the list of deprivations of liberty set out therein is exhaustive, as is shown by the words "save in the following cases". A disciplinary penalty or measure may in consequence constitute a breach of Article 5 para. 1 (art. 5-1). The Government, moreover, acknowledge this. 58. In proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol no. 4) (P4-2). This is clear both from the use of the terms "deprived of his liberty", "arrest" and "detention", which appear also in paragraphs 2 to 5, and from a comparison between Article 5 (art. 5) and the other normative provisions of the Convention and its Protocols.

59. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 para. 3 (b) (art. 4-3-b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 (art. 5) either.

Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 (art. 5) requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 (art. 5) when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.

2. On the existence of deprivations of liberty in the present case

60. It is on the basis of these premises that the Court will examine whether there has occurred in the present case one or more instances of deprivation of liberty. In the Government's main submission, the question calls for a negative reply as regards all the disputed penalties and measures (paragraphs 15-19 of the memorial, and oral arguments), whereas in the Commission's view light arrest alone raises no problem under Article 5 para. 1 (art. 5-1) (paragraphs 67-76 of the report).

61. No deprivation of liberty resulted from the three and four days' light arrest awarded respectively against Mr. Engel (paragraphs 34-36 above, second punishment) and Mr. van der Wiel (paragraphs 37-39 above). Although confined during off-duty hours to their dwellings or to military buildings or premises, as the case may be, servicemen subjected to such a penalty are not locked up and continue to perform their duties (Article 8 of the 1903 Act and paragraph 18 above). They remain, more or less, within the ordinary framework of their army life.

62. Aggravated arrest differs from light arrest on one point alone: in off-duty hours, soldiers serve the arrest in a specially designated place which they may not leave in order to visit the canteen, cinema or recreation rooms, but they are not kept under lock and key (Article 9-B of the 1903 Act and paragraph 19 above). Consequently, neither does the Court consider as a deprivation of liberty the twelve days' aggravated arrest complained of by Mr. de Wit (paragraph 41 above).

63. Strict arrest, abolished in 1974, differed from light arrest and aggravated arrest in that non-commissioned officers and ordinary servicemen served it by day and by night locked in a cell and were accordingly excluded from the performance of their normal duties (Article 10-B of the 1903 Act and paragraph 20 above). It thus involved deprivation of liberty. It follows that the provisional arrest inflicted on Mr. Engel in the form of strict arrest (Article 44 of the 1903 Act; paragraphs 26, 34 and 35 above) had the same character despite its short duration (20-22 March 1971).

64. Committal to a disciplinary unit, likewise abolished in 1974 but applied in 1971 to Mr. Dona and Mr. Schul, represented the most severe penalty under military disciplinary law in the Netherlands. Privates condemned to this penalty following disciplinary proceedings were not separated from those so sentenced by way of supplementary punishment under the criminal law, and during a month or more they were not entitled to leave the establishment. The committal lasted for a period of three to six months; this was considerably longer than the duration of the other penalties, including strict arrest which could be imposed for one to fourteen days. Furthermore, it appears that Mr. Dona and Mr. Schul spent the night locked in a cell (Articles 5, 18 and 19 of the 1903 Act, Royal Decree of 14 June 1971 and paragraphs 21 and 50 above). For these various reasons, the Court considers that in the circumstances deprivation of liberty occurred.

65. The same is not true of the measure that, from 8 October until 3 November 1971, preceded the said committal, since Mr. Dona and Mr. Schul served their interim custody in the form of aggravated arrest (Article 20 of the 1903 Act; paragraphs 22, 46, 48 and 62 above).

66. The Court thus comes to the conclusion that neither the light arrest of Mr. Engel and Mr. van der Wiel, nor the aggravated arrest of Mr. de Wit, nor the interim custody of Mr. Dona and Mr. Schul call for a more thorough examination under paragraph 1 of Article 5 (art. 5-1).

The punishment of two days' strict arrest inflicted on Mr. Engel on 7 April 1971 and confirmed by the Supreme Military Court on 23 June 1971 coincided in practice with an earlier measure: it was deemed to have been served beforehand, that is from 20 to22 March 1971, by the applicant's period of provisional arrest (paragraphs 34-36 above, third punishment).

On the other hand, the Court is required to determine whether the last-mentioned provisional arrest, as well as the committal of Mr. Dona and Mr. Schul to a disciplinary unit, complied with Article 5 para. 1 (art. 5-1).

3. On the compatibility of the deprivations of liberty found in the present case with paragraph 1 of Article 5 (art. 5-1)

67. The Government maintained, in the alternative, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit and the provisional arrest of Mr. Engel satisfied, respectively, the requirements of sub-paragraph (a) and of sub-paragraph (b) of Article 5 para. 1 (art. 5-1-a, art. 5-1-b) (paragraphs 21-23 of the memorial); they did not invoke sub-paragraphs (c) to (f) (art. 5-1-c, art. 5-1-d, art. 5-1-e, art. 5-1-f).

68. Sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a) permits the "lawful detention of a person after conviction by a competent court".

The Court, like the Government (hearing on 29 October 1975), notes that this provision makes no distinction based on the legal character of the offence of which a person has been found guilty. It applies to any "conviction" occasioning deprivation of liberty pronounced by a "court", whether the conviction is classified as criminal or disciplinary by the internal law of the State in question.

Mr. Dona and Mr. Schul were indeed deprived of their liberty "after" their conviction by the Supreme Military Court. Article 64 of the 1903 Act conferred a suspensive effect upon their appeals against the decisions of their commanding officer (8 October 1971) and the complaints officer (19 October 1971), a fact apparently overlooked bythe Commission (paragraph 85 and Appendix IV of the report) but which the Government have rightly stressed (paragraph 21 of the memorial). Consequently, their transfer to the disciplinary barracks at Nieuwersluis occurred only by virtue of the final sentences imposed on 17 November 1971 (paragraphs 28, 48 and 50 above).

It remains to be ascertained that the said sentences were passed by a "competent court" within the meaning of Article 5 para. 1 (a) (art. 5-1-a).

The Supreme Military Court, whose jurisdiction was not at all disputed, constitutes a court from the organisational point of view. Doubtless its four military members are not irremovable in law, but like the two civilian members they enjoy the independence inherent in the Convention's notion of a "court" (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, para. 78, and paragraph 30 above).

Furthermore, it does not appear from the file in the case (paragraphs 31-32 and 48-49 above) that Mr. Dona and Mr. Schul failed to receive before the Supreme Military Court the benefit of adequate judicial guarantees under Article 5 para. 1 (a) (art. 5-1-a), an autonomous provision whose requirements are not always co-extensive with those of Article 6 (art. 6). The guarantees afforded to the two applicants show themselves to be "adequate" for the purposes of Article 5 para. 1 (a) (art. 5-1-a) if account is taken of "the particular nature of the circumstances" under which the proceedings took place (above-cited judgment of 18 June 1971, Series A no. 12, pp. 41-42, para. 78). As for Article 6 (art. 6), the Court considers below whether it was applicable in this case and, if so, whether it has been respected.

Finally, the penalty inflicted was imposed and then executed "lawfully" and "in accordance with a procedure prescribed by law". In short, it did not contravene Article 5 para. 1 (art. 5-1).

69. The provisional arrest of Mr. Engel for its part clearly does not come within the ambit of sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a).

The Government have derived argument from sub-paragraph (b) (art. 5-1-b) insofar as the latter permits "lawful arrest or detention" intended to "secure the fulfilment of any obligation prescribed by law".

The Court considers that the words "secure the fulfilment of any obligation prescribed by law" concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration (Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.

In fact, Mr. Engel's provisional arrest was in no way designed to secure the fulfilment in the future of such an obligation. Article 44 of the 1903 Act, applicable when an officer has "sufficient indication to suppose that a subordinate has committed a serious offence against military discipline", refers to past behaviour. The measure thereby authorised is a preparatory stage of military disciplinary proceedings and is thus situated in a punitive context. Perhaps this measure also has on occasions the incidental object or effect of inducing a member of the armed forces to comply henceforth with his obligations, but only with great contrivance can it be brought under sub-

paragraph (b) (art. 5-1-b). If the latter were the case, this sub-paragraph could moreover be extended to punishments stricto sensu involving deprivation of liberty on the ground of their deterrent qualities. This would deprive such punishments of the fundamental guarantees of sub-paragraph (a) (art. 5-1-a).

The said measure really more resembles that spoken of in sub- paragraph (c) of Article 5 para. 1 (art. 5-1-c) of the Convention. However in the present case it did not fulfil one of the requirements of that provision since the detention of Mr. Engel from 20 to 22 March 1971 had not been "effected for the purpose of bringing him before the competent legal authority" (paragraphs 86-88 of the report of the Commission).

Neither was Mr. Engel's provisional arrest "lawful" within the meaning of Article 5 para. 1 (art. 5-1) insofar as it exceeded - by twenty-two to thirty hours according to the information provided at the hearing on 28 October 1975 - the maximum period of twenty-four hours laid down by Article 45 of the 1903 Act.

According to the Government, the complaints officer redressed this irregularity after the event by deeming to have been served in advance, that is from 20 to 22 March 1971, the disciplinary penalty of two days' strict arrest imposed by him on the applicant on 5 April 1971 and confirmed by the Supreme Military Court on 23 June 1971. However, it is clear from the case-law of the European Court that the reckoning of a detention on remand (Untersuchungshaft) as part of a later sentence cannot eliminate a violation of paragraph 3 of Article 5 (art. 5-3), but may have repercussions only under Article 50 (art. 50) on the basis that it limited the loss occasioned (Stögmüller judgment of 10 November 1969, Series A no. 9, pp. 27, 36 and 39-45; Ringeisen judgments of 16 July 1971 and 22 June 1972, Series A no. 13, pp. 20 and 41-45, and no. 15, p. 8, para. 21; Neumeister judgment of 7 May 1974, Series A no. 17, pp. 18-19, paras. 40-41). The Court sees no reason to resort to a different solution when assessing the compatibility of Mr. Engel's provisional arrest with paragraph 1 of Article 5 (art. 5-1).

In conclusion, the applicant's deprivation of liberty from 20 to 22 March 1971 occurred in conditions at variance with this paragraph.

B. On the alleged violation of Articles 5 para. 1 and 14 (art. 14+5-1) taken together

70. In the submission of the applicants, the disputed penalties and measures also contravened Article 5 para. 1 read in conjunction with Article 14 (art. 14+5-1) which provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

71. Since certain of the said penalties and measures did not involve any deprivation of liberty (paragraphs 61, 62 and 65 above), the discrimination alleged in their connection does not give rise to any problem with regard to Article 14 (art. 14), in that it did not affect the enjoyment of the right set forth in Article 5 para. 1 (art. 5-1). The same does not apply to Mr. Engel's provisional arrest, nor to the committal of Mr. Dona and Mr. Schul to a disciplinary unit (paragraphs 63 and 64 above).

72. Mr. Engel, Mr. Dona and Mr. Schul complain in the first place of distinctions in treatment between servicemen. According to Articles 10 and 44 of the 1903 Act, provisional arrest imposed in the form of strict arrest was served by officers in their dwellings, tent or quarters whereas non-commissioned officers and ordinary servicemen were locked in a cell (paragraph 20 above). As for committal to a disciplinary unit, privates alone risked this punishment (Articles 3 to 5 of the 1903 Act and paragraphs 16 and 21 above).

A distinction based on rank may run counter to Article 14 (art. 14). The list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment"). Besides, the word "status" (in French "situation") is wide enough to include rank. Furthermore, a distinction that concerns the manner of execution of a penalty or measure occasioning deprivation of liberty does not on that account fall outside the ambit of Article 14 (art. 14), for such a distinction cannot but have repercussions upon the way in which the "enjoyment" of the right enshrined in Article 5 para. 1 (art. 5-1) is "secured". The Court, on these two points, does not subscribe to the submissions of the Government (paragraph 40, first sub-paragraph, of the Commission's report), but rather expresses its agreement with the Commission (ibid., paragraphs 133-134).

The Court is not unaware that the respective legislation of a number of Contracting States seems to be evolving, albeit in various degrees, towards greater equality in the disciplinary sphere between officers, non-commissioned officers and ordinary servicemen. The Netherlands Act of 12 September 1974 offers a striking example of this tendency. In particular, by abolishing strict arrest and committal to a disciplinary unit, this Act has henceforth put an end to the distinctions criticised by Mr. Engel, Mr. Dona and Mr. Schul.

In order to establish whether the said distinctions constituted discrimination contrary to Articles 5 and 14 (art. 14+5) taken together, regard must nevertheless be had to the moment when they were in existence. The Court will examine the question in the light of its judgment of 23 July 1968 in the "Belgian Linguistic" case (Series A no. 6, pp. 33-35, paras. 9-10).

The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission's report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.

At the time in question, the distinctions attacked by the three applicants had their equivalent in the internal legal system of practically all the Contracting States. Based on an element objective in itself, that is rank, these distinctions could have been dictated by a legitimate aim, namely the preservation of discipline by methods suited to each category of servicemen. While only privates risked committal to a disciplinary unit, they clearly were not subject to a serious penalty threatening the other members of the armed forces, namely reduction in rank. As for confinement in a cell during strict arrest, the Netherlands legislator could have had sufficient reason for not applying this to officers. On the whole, the legislator does not seem in the circumstances to have abused the latitude left to him by the Convention. Furthermore, the Court does not consider that the principle of proportionality, as defined in its previously cited judgment of 23 July 1968 (Series A no. 6, p. 34, para. 10, second sub-paragraph in fine), has been offended in the present case.

73. Mr. Engel, Mr. Dona and Mr. Schul in the second place object to inequalities of treatment between servicemen and civilians. In point of fact, even civilians subject by reason of their occupation to a particular disciplinary system cannot in the Netherlands incur penalties analogous to the disputed deprivations of liberty. However, this does not result in any discrimination incompatible with the Convention, the conditions and demands of military life being by nature different from those of civil life (paragraphs 54 and 57 above).

74. The Court thus finds no breach of Articles 5 para. 1 and 14 (art. 14+5-1) taken together.

C. On the alleged violation of Article 5 para. 4 (art. 5-4)

75. In addition to paragraph 1 of Article 5 (art. 5-1), the applicants invoke paragraph 4 (art. 5-4) which provides:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

76. This question arises only for the committal of Mr. Dona and Mr. Schul to a disciplinary unit. Mr. Engel did not raise it, even from the factual aspect, as regards his provisional arrest; as for the other penalties or measures challenged, they had not "deprived" anyone "of his liberty by arrest or detention" (paragraphs 61-66 above).

77. The Court recalls that the committal of Mr. Dona and Mr. Schul to a disciplinary unit ensued from their "conviction by a competent court", within the meaning of Article 5 para. 1 (a) (art. 5-1-a) (paragraph 68 above). While "Article 5 para. 4 (art. 5-4) obliges the Contracting States to make available ... a right of recourse to a court" when "the decision depriving a person of his liberty is one taken by an administrative body", "there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings". "In the latter case", as for example, "where a sentence of imprisonment is pronounced after 'conviction by a competent court' (Article 5 para. 1 (a) of the Convention) (art. 5-1-a)", "the supervision required by Article 5 para. 4 (art. 5-4) is incorporated in the decision" (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 40-41, para. 76). The Court, like the Government (paragraph 21 of the memorial), thus concludes that there was no breach of Article 5 para. 4 (art. 5-4) in the case of Mr. Dona and Mr. Schul.

II. ON THE ALLEGED VIOLATIONS OF ARTICLE 6 (art. 6)

A. On the alleged violation of Article 6 (art. 6) taken alone

78. The five applicants allege violation of Article 6 (art. 6) which provides:

"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."

79. For both the Government and the Commission, the proceedings brought against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul involved the determination neither of "civil rights and obligations" nor of "any criminal charge".

Led thus to examine the applicability of Article 6 (art. 6) in the present case, the Court will first investigate whether the said proceedings concerned "any criminal charge" within the meaning of this text; for, although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law.

1. On the applicability of Article 6 (art. 6)

(a) On the existence of "any criminal charge"

80. All the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person's criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees.

It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification? This problem, the importance of which the Government acknowledge, was rightly raised by the Commission; it particularly occurs when an act or omission is treated by the domestic law of the respondent State as a mixed offence, that is both criminal and disciplinary, and where there thus exists a possibility of opting between, or even cumulating, criminal proceedings and disciplinary proceedings.

81. The Court has devoted attention to the respective submissions of the applicants, the Government and the Commission concerning what they termed the "autonomy" of the concept of a "criminal charge", but does not entirely subscribe to any of these submissions (report of the Commission, paragraphs 33-34, paragraphs 114-119 and the separate opinion of Mr. Welter; memorial of the Government, paragraphs 25-34; memorial of the Commission, paragraphs 9-16, paragraphs 14-17 of Annex I and paragraphs 12-14 of Annex II; verbatim report of the hearings on 28 and 29 October 1975).

In the Neumeister judgment of 27 June 1968, the Court has already held that the word "charge" must be understood "within the meaning of the Convention" (Series A no. 8, p. 41, para. 18, as compared with the second sub-paragraph on p. 28 and the first sub-paragraph on p. 35; see also the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110).

The question of the "autonomy" of the concept of "criminal" does not call for exactly the same reply.

The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only.

82. Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given "charge" vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as "criminal" within the meaning of Article 6 (art. 6).

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government.

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, mutatis mutandis, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine).

83. It is on the basis of these criteria that the Court will ascertain whether some or all of the applicants were the subject of a "criminal charge" within the meaning of Article 6 para. 1 (art. 6-1).

In the circumstances, the charge capable of being relevant lay in the decision of the commanding officer as confirmed or reduced by the complaints officer. It was undoubtedly this decision that settled once and for all what was at stake, since the tribunal called upon to give a ruling, that is the Supreme Military Court, had no jurisdiction to pronounce a harsher penalty (paragraph 31 above).

84. The offences alleged against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul came within provisions belonging to disciplinary law under Netherlands legislation (the 1903 Act and Regulations on Military Discipline), although those to be answered for by Mr. Dona and Mr. Schul (Article 147 of the Military Penal Code), and perhaps even by Mr. Engel and Mr. de Wit (Articles 96 and 114 of the said Code according to Mr. van der Schans, hearing on 28 October 1975), also lent themselves to criminal proceedings. Furthermore, all the offences had amounted, in the view of the military authorities, to contraventions of legal rules governing the operation of the Netherlands armed forces. From this aspect, the choice of disciplinary action was justified.

85. The maximum penalty that the Supreme Military Court could pronounce consisted in four days' light arrest for Mr. van der Wiel, two days' strict arrest for Mr. Engel (third punishment) and three or four months' committal to a disciplinary unit for Mr. de Wit, Mr. Dona and Mr. Schul.

Mr. van der Wiel was therefore liable only to a light punishment not occasioning deprivation of liberty (paragraph 61 above).

For its part, the penalty involving deprivation of liberty that in theory threatened Mr. Engel was of too short a duration to belong to the "criminal" law. He ran no risk, moreover, of having to undergo this penalty at the close of the proceedings instituted by him before the Supreme Military Court on 7 April 1971, since he had already served it from 20 to 22 March (paragraphs 34-36, 63 and 66 above).

On the other hand, the "charges" against Mr. de Wit, Mr. Dona and Mr. Schul did indeed come within the "criminal" sphere since their aim was the imposition of serious punishments involving deprivation of liberty (paragraph 64 above). The Supreme Military Court no doubt sentenced Mr. de Wit to twelve days' aggravated arrest only, that is to say, to a penalty not occasioning deprivation of liberty (paragraph 62 above), but the final outcome of the appeal cannot diminish the importance of what was initially at stake.

The Convention certainly did not compel the competent authorities to prosecute Mr. de Wit, Mr. Dona and Mr. Schul under the Military Penal Code before a court martial (paragraph 14 above), a solution which could have proved less advantageous for the applicants. The Convention did however oblige the authorities to afford them the guarantees of Article 6 (art. 6).

(b) On the existence of a "determination" of "civil rights"

86. Three of the five applicants allege, in the alternative, that the proceedings instituted against them concerned the "determination" of "civil rights": Mr. Engel characterises as "civil" his freedom of assembly and association (Article 11) (art. 11), Mr. Dona and Mr. Schul their freedom of expression (Article 10) (art. 10).

87. Article 6 (art. 6) proves less exacting for the determination of such rights than for the determination of "criminal charges"; for, while paragraph 1 (art. 6-1) applies to both matters, paragraphs 2 and 3 (art. 6-2, art. 6-3) protect only persons "charged with a criminal offence". Since Mr. Dona and Mr. Schul were the subject of "criminal charges" (paragraph 85 in fine above), Article 6 (art. 6) applied to them in its entirety. The Court considers it superfluous to see whether paragraph 1 (art. 6-1) was relevant on a second ground, since the question is devoid of any practical interest.

As for Mr. Engel, who had not been "charged with a criminal offence" (paragraph 85 above, third sub-paragraph), the proceedings brought against him were occasioned solely by offences against military discipline, namely having absented himself from his home on 17 March 1971 and subsequently having disregarded the penalties imposed on him on the following two days. In these circumstances, there is no need to give any ruling in the present case as to whether the freedom of assembly and association is "civil".

88. In short, it is the duty of the Court to examine under Article 6 (art. 6) the treatment meted out to Mr. de Wit, Mr. Dona and Mr. Schul, but not that complained of by Mr. Engel and Mr. van der Wiel.

2. On compliance with Article 6 (art. 6)

89. The Supreme Military Court, before which appeared Mr. de Wit, Mr. Dona and Mr. Schul, constitutes an "independent and impartial tribunal established by law" (paragraphs 30 and 68 above) and there is nothing to indicate that it failed to give them a "fair hearing". For its part, the "time" that elapsed between the "charge" and the final decision appears "reasonable". It did not amount to six weeks for Mr. Dona and Mr. Schul (8 October - 17 November 1971) and hardly exceeded two months for Mr. de Wit (22 February - 28 April 1971). Furthermore, the sentence was "pronounced publicly".

In contrast, the hearings in the presence of the parties had taken place in camera in accordance with the established practice of the Supreme Military Court in disciplinary proceedings (paragraph 31 above). In point of fact, the applicants do not seem to have suffered on that account; indeed the said Court improved the lot of two of their number, namely Mr. Schul and, to an even greater extent, Mr. de Wit. Nevertheless, in the field it governs Article 6 para. 1 (art. 6-1) requires in a very general fashion that judicial proceedings be conducted in public. Article 6 (art. 6) of course makes provision for exceptions which it lists, but the Government did not plead, and it does not emerge from the file, that the circumstances of the case amounted to one of the occasions when the Article allows "the press and the public (to be) excluded". Hence, on this particular point, there has been violation of paragraph 1 of Article 6 (art. 6-1).

90. Mr. Dona and Mr. Schul complain that the Supreme Military Court took account of their participation in the publication, prior to no. 8 of "Alarm", of two writings whose distribution had only been provisionally forbidden under the "Distribution of Writings Decree" and for which they had never been prosecuted (paragraph 49 above). The Supreme Military Court, it is alleged, thereby disregarded the presumption of innocence proclaimed by paragraph 2 of Article 6 (art. 6-2) (report of the Commission, paragraph 45, antepenultimate sub-paragraph).

In reality, this clause does not have the scope ascribed to it by the two applicants. As its wording shows, it deals only with the proof of guilt and not with the kind or level of punishment. It thus does not prevent the national judge, when deciding upon the penalty to impose on an accused lawfully convicted of the offence submitted to his adjudication, from having regard to factors relating to the individual's personality.

Before the Supreme Military Court Mr. Dona and Mr. Schul were "proved guilty according to law" as concerns the offences there alleged against them (no. 8 of "Alarm"). It was for the sole purpose of determining their punishment in the light of their character and previous record that the said Court also took into consideration certain similar, established facts the truth of which they did not challenge. The Court did not punish them for these facts in themselves (Article 37 of the 1903 Act and the memorial filed by the Government with the Commission on 24 August 1973).

91. Mr. de Wit, Mr. Dona and Mr. Schul do not deny that sub-paragraph (a) of paragraph 3 of Article 6 (art. 6-3-a) has been complied with in their regard and they are evidently not relying upon sub-paragraph (e) (art. 6-3-e). On the other hand, they claim not to have enjoyed the guarantees prescribed by sub-paragraphs (b), (c) and (d) (art. 6-3-b, art. 6-3-c, art. 6-3-d).

Their allegations, however, prove far too vague to lead the Court to conclude that they did not "have adequate time and facilities for the preparation of (their) defence" within the meaning of sub-paragraph (b) (art. 6-3-b).

Then again, each of the three applicants has had the opportunity "to defend himself in person" at the various stages of the proceedings. They have furthermore received the benefit before the Supreme Military Court and, in Mr. de Wit's case, before the complaints officer, of "legal assistance of (their) own choosing", in the form of a fellow conscript who was a lawyer in civil life. Mr. Eggenkamp's services were, it is true, limited to dealing with the legal issues in dispute. In the circumstances of the case, this restriction could nonetheless be reconciled with the interests of justice since the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them. Consequently, no interference with the right protected by sub-paragraph (c) (art. 6-3-c) emerges from the file in this case.

Neither does the information obtained by the Court, in particular on the occasion of the hearings on 28 and 29 October 1975, disclose any breach of sub-paragraph (d) (art. 6-3-d). Notwithstanding the contrary opinion of the applicants, this provision does not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words "under the same conditions", is a full "equality of arms" in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6 (art. 6). Article 65 of the 1903 Act and Article 56 of the "Provisional Instructions" of 20 July 1814 place the prosecution and the defence on an equal footing: witnesses for either party are summoned only if the complaints officer or the Supreme Military Court deems it necessary. As concerns the way in which this legislation was applied in the present case, the Court notes that no hearing of witnesses against the accused occurred before the Supreme Military Court in the case of Mr. de Wit, Mr. Dona and Mr. Schul and that it does not appear from the file in the case that these applicants requested the said Court to hear witnesses on their behalf. Doubtless Mr. de Wit objects that the complaints officer heard only one of the three witnesses on his behalf allegedly proposed by him, but this fact in itself cannot justify the finding of a breach of Article 6 para. 3 (d) (art. 6-3-d).

B. On the alleged violation of Articles 6 and 14 (art. 14+6) taken together

92. According to the applicants, the disciplinary proceedings of which they complain did not comply with Articles 6 and 14 (art. 14+6) taken together since they were not attended by as many guarantees as criminal proceedings brought against civilians (report of the Commission, paragraph 37).

Whilst military disciplinary procedure is not attended by the same guarantees as criminal proceedings brought against civilians, it offers on the other hand substantial advantages to those subject to it (paragraph 80 above). The distinctions between these two types of proceedings in the legislation of the Contracting States are explicable by the differences between the conditions of military and of civil life. They cannot be taken as entailing a discrimination against members of the armed forces, within the meaning of Articles 6 and 14 (art. 14+6) taken together.

C. On the alleged violation of Articles 6 and 18 (art. 18+6) taken together

93. According to Mr. Dona and Mr. Schul, the decision to take disciplinary rather than criminal proceedings against them had the result, or even the aim, of depriving them of the benefit of Article 6 (art. 6). The choice made by the competent authorities allegedly had an arbitrary nature that cannot be reconciled with Article 18 (art. 18) (report of the Commission, paragraph 53).

The Court's conclusions on the applicability and observance of Article 6 (art. 6) in the case of these two applicants (paragraphs 85 and 89-91 above) make it unnecessary for it to rule on this complaint.

III. ON THE ALLEGED VIOLATIONS OF ARTICLE 10 (art. 10)

A. On the alleged violation of Article 10 (art. 10) taken alone

94. Mr. Dona and Mr. Schul allege violation of Article 10 (art. 10) which provides:

"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 (art. 10) 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."

The complaint, as declared admissible by the Commission, concerns solely the disciplinary punishment undergone by the applicants after 17 November 1971 for having collaborated in the publication and distribution of no. 8 of "Alarm". It does not relate to the prohibition under the "Distribution of Writings Decree" of this number, of no. 6 of "Alarm" and of the "Information Bulletin" for new recruits nor to the strict arrest imposed on the applicants on 13 August 1971 for their participation in distributing a pamphlet during the incidents at Ermelo (paragraphs 43-45 above).

95. The disputed penalty unquestionably represented an "interference" with the exercise of the freedom of expression of Mr. Dona and Mr. Schul, as guaranteed by paragraph 1 of Article 10 (art. 10-1). Consequently, an examination under paragraph 2 (art. 10-2) is called for.

96. The penalty was without any doubt "prescribed by law", that is by Articles 2 para. 2, 5-A-8º, 18, 19 and 37 of the 1903 Act, read in conjunction with the Article 147 of the Military Penal Code. Even in regard to the part played by the accused in the editing and distribution, prior to no. 8 of "Alarm", of writings prohibited by the military authorities, the punishment was based on the 1903 Act (paragraph 90 above) and not on the "Distribution of Writings Decree". The Court thus does not have to consider the applicants' submissions on the validity of this decree (report of the Commission, paragraph 45, fifth sub-paragraph).

97. To show that the interference at issue also met the other conditions of paragraph 2 of Article 10 (art. 10-2), the Government pleaded that the measures taken in this case were "necessary in a democratic society", "for the prevention of disorder". They relied on Article 10 para. 2 (art. 10-2) only with reference to this requirement.

98. The Court firstly emphasises, like the Government and the Commission that the concept of "order" as envisaged by this provision, refers not only to public order or "ordre public" within the meaning of Articles 6 para. 1 and 9 para. 2 (art. 6-1, art. 9-2) of the Convention and Article 2 para. 3 of Protocol no. 4 (P4-2-3): it also covers the order that must prevail within the confines of a specific social group. This is so, for example, when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole. It follows that the disputed penalties met this condition if and to the extent that their purpose was the prevention of disorder within the Netherlands armed forces.

Mr. Dona and Mr. Schul admittedly maintain that Article 10 para. 2 (art. 10-2) takes account of the "prevention of disorder" only in combination with the "prevention of crime". The Court does not share this view. While the French version uses the conjunctive "et", the English employs the disjunctive "or". Having regard to the context and the general system of Article 10 (art. 10), the English version provides a surer guide on this point. Under these conditions, the Court deems it unnecessary to examine whether the applicants' treatment was aimed at the "prevention of crime" in addition to the "prevention of disorder".

99. It remains to be seen whether the interference with the freedom of expression of Mr. Dona and Mr. Schul was "necessary in a democratic society", "for the prevention of disorder".

100. Of course, the freedom of expression guaranteed by Article 10 (art. 10) applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings. Article 147 of the Netherlands Military Penal Code (paragraph 43 above) is based on this legitimate requirement and does not in itself run counter to Article 10 (art. 10) of the Convention.

The Court doubtless has jurisdiction to supervise, under the Convention, the manner in which the domestic law of the Netherlands has been applied in the present case, but it must not in this respect disregard either the particular characteristics of military life (paragraph 54 in fine above), the specific "duties" and "responsibilities" incumbent on members of the armed forces, or the margin of appreciation that Article 10 para. 2 (art. 10-2), like Article 8 para. 2 (art. 8-2), leaves to the Contracting States (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, para. 93, and Golder judgment of 21 February 1975, Series A no. 18, p. 22).

101. The Court notes that the applicants contributed, at a time when the atmosphere in the barracks at Ermelo was somewhat strained, to the publication and distribution of a writing the relevant extracts from which are reproduced above (paragraphs 43 and 51 above). In these circumstances the Supreme Military Court may have had well-founded reasons for considering that they had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted. There was thus no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part. Consequently, it does not appear that its decision infringed Article 10 para. 2 (art. 10-2).

B. On the alleged violation of Articles 10 and 14 (art. 14+10) taken together

102. Mr. Dona and Mr. Schul allege a dual breach of Articles 10 and 14 (art. 14+10) taken together. They stress that a civilian in the Netherlands in a comparable situation does not risk the slightest penalty. In addition, they claim to have been punished more severely than a number of Netherlands servicemen, not belonging to the V.V.D.M., who had also been prosecuted for writing or distributing material likely to undermine military discipline.

103. On the first question, the Court emphasises that the distinction at issue is explicable by the differences between the conditions of military and of civil life and, more specifically, by the "duties" and "responsibilities" peculiar to members of the armed forces in the field of freedom of expression (paragraphs 54 and 100 above). On the second question, the Court points out that in principle it is not its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must, just like the Contracting States, respect the independence of those courts. Such a decision would actually become discriminatory in character if it were to depart from others to the point of constituting a denial of justice or a manifest abuse, but the information supplied to the Court does not permit a finding of this sort.

C. On the alleged violation of Article 10 taken with Articles 17 and 18 (art. 17+10, art. 18+10)

104. Mr. Dona and Mr. Schul further claim that, contrary to Articles 17 and 18 (art. 17, art. 18), the exercise of their freedom of expression was subject to "limitation to a greater extent than is provided for" in Article 10 (art. 10) and for a "purpose" not mentioned therein.

This complaint does not support examination since the Court has already concluded that the said limitation was justified under paragraph 2 of Article 10 (art. 10-2) (paragraphs 96-101 above).

IV. ON THE ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

105. According to Mr. Dona and Mr. Schul, after their cases, many conscripts who were members of the V.V.D.M. incurred penalties for having written and/or distributed publications tending to undermine discipline, within the meaning of Article 147 of the Military Penal Code. In their submission, these were systematic measures calculated to impede the functioning of the V.V.D.M., thereby infringing Article 11 (art. 11) of the Convention which provides:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

106. The Court may take into consideration only the case of the two applicants and not the situation of other persons or of an association not having authorised them to lodge an application with the Commission in their name (De Becker judgment of 27 March 1962, Series A no. 4, p. 26 in fine, and Golder judgment of 21 February 1975, Series A no. 18, p. 19, para. 39 in fine).

107. Insofar as Mr. Dona and Mr. Schul rely also upon their own freedom of association, the Court finds that they were not punished by reason either of their membership of the V.V.D.M. or of their participation in its activities, including preparation and publication of the journal "Alarm". While the Supreme Military Court punished them, it was only because it considered that they had made use of their freedom of expression with a view to undermining military discipline.

108. In view of the absence of any interference with the right of the two applicants under paragraph 1 of Article 11 (art. 11-1), the Court does not have to consider paragraph 2 (art. 11-2), or Articles 14, 17 and 18 (art. 14, art. 17, art. 18).

V. ON THE APPLICATION OF ARTICLE 50 (art. 50)

109. Under Article 50 (art. 50) of the Convention, if the Court finds "that a decision or measure taken" by any authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said (State) allows only partial reparation to be made for the consequences of this decision or measure", the Court "shall if necessary afford just satisfaction to the injured party".

The Rules of Court specify that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision, the Court shall reserve it in whole or in part and shall fix the further procedure" (Rule 50 para. 3, first sentence, read in conjunction with Rule 48 para. 3).

110. At the hearing on 29 October 1975, the Court, pursuant to Rule 47 bis, invited those appearing before it to present observations on the question of the application of Article 50 (art. 50) in the present case.

It emerges from the reply of the Commission's principal delegate that the applicants make no claim for compensation for material damage. However, they expect to be granted just satisfaction should the Court find failure to comply with the requirements of the Convention in one or more instances, but they do not for the moment indicate the amount of their claim were such satisfaction to take the form of financial compensation.

On their side the Government, through their Agent, declared that they left this point completely to the discretion of the Court.

111. The question of the application of Article 50 (art. 50) of the Convention does not arise in the case of Mr. van der Wiel, or for those complaints of Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul which the Court has not retained. On the other hand, it does arise for the breach of Article 5 para. 1 (art. 5-1) in the case of Mr. Engel and of Article 6 para. 1 (art. 6-1) in that of Mr. de Wit, Mr. Dona and Mr. Schul (paragraphs 69 and 89 above). The information supplied by the Commission's principal delegate shows however that the question is not ready for decision; it is therefore appropriate to reserve the question and to fix the further procedure in connection therewith.

FOR THESE REASONS, THE COURT,

1. Holds, unanimously, that Article 5 (art. 5) was not applicable to the light arrest of Mr. Engel (second punishment) and of Mr. van der Wiel;

2. Holds, by twelve votes to one, that it was also not applicable to the aggravated arrest of Mr. de Wit, or to the interim aggravated arrest of Mr. Dona and Mr. Schul;

3. Holds, by eleven votes to two, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit did not violate Article 5 para. 1 (art. 5-1);

4. Holds, by nine votes to four, that the whole period of Mr. Engel's provisional strict arrest violated Article 5 para. 1 (art. 5-1), since no justification is to be found for it in any sub-paragraph of this provision;

5. Holds, by ten votes to three, that apart from that it violated Article 5 para. 1 (art. 5-1) insofar as it exceeded the period of twenty-four hours stipulated by Article 45 of the Netherlands Military Discipline Act of 27 April 1903;

6. Holds, unanimously, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit and Mr. Engel's provisional arrest did not violate Articles 5 para. 1 and 14 (art. 14+5-1) taken together;

7. Holds, by twelve votes to one, that there has been no breach of Article 5 para. 4 (art. 5-4) as regards the committal of Mr. Dona and Mr. Schul to a disciplinary unit;

8. Holds, by eleven votes to two, that Article 6 (art. 6) was not applicable to Mr. Engel on the ground of the words "criminal charge";

9. Holds, unanimously, that it was also not applicable to this applicant on the ground of the words "civil rights and obligations";

10. Holds, unanimously, that neither was it applicable to Mr. van der Wiel;

11. Holds, by eleven votes to two, that there was a breach of Article 6 para. 1 (art. 6-1) in the case of Mr. de Wit, Mr. Dona and Mr. Schul insofar as hearings before the Supreme Military Court took place in camera;

12. Holds, unanimously, that there was no breach of Article 6 para. 2 (art. 6-2) in the case of Mr. Dona and Mr. Schul;

13. Holds, unanimously, that there was no breach of Article 6 para. 3 (b) (art. 6-3-b) in the case of Mr. de Wit, Mr. Dona and Mr. Schul;

14. Holds, by nine votes to four, that there was no breach of Article 6 para. 3 (c) (art. 6-3-c) in the case of these three applicants;

15. Holds, by nine votes to four, that there was no breach of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. de Wit;

16. Holds, by twelve votes to one, that there was no breach of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. Dona and Mr. Schul;

17. Holds, unanimously, that there was no breach of Articles 6 and 14 (art. 14+6) taken together in the case of Mr. de Wit, Mr. Dona and Mr. Schul;

18. Holds, unanimously, that there is no need to rule on the complaint based by Mr. Dona and Mr. Schul on the alleged violation of Articles 6 and 18 (art. 18+6) taken together;

19. Holds, unanimously, that there was no breach of Article 10 (art. 10) taken alone or together with Articles 14, 17 or 18 (art. 14+10, art. 17+10, art. 18+10) in the case of Mr. Dona and Mr. Schul;

20. Holds, unanimously, that there was no breach of Article 11 (art. 11) in the case of Mr. Dona and Mr. Schul;

21. Holds, unanimously, that the question of the application of Article 50 (art. 50) does not arise in the case of Mr. van der Wiel, or for those of the complaints of Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul which the Court has not herein retained (items 1 to 3, 6 to 10 and 12 to 20 above);

22. Holds, by twelve votes to one, that the question is not yet ready for decision as regards the breaches found in the case of Mr. Engel (Article 5 para. 1, items 4 and 5 above) (art. 5-1) and in the case of Mr. de Wit, Mr. Dona and Mr. Schul (Article 6 para. 1, item 11 above) (art. 6-1);

Accordingly,

(a) reserves the whole of the question of the application of Article 50 (art. 50) as it arises for these four applicants;

(b) invites the Commission's delegates to present in writing, within one month from the delivery of this judgment, their observations on the said question;

(c) decides that the Government shall have the right to reply in writing to those observations within a month from the date on which the Registrar shall have communicated them to the Government;

(d) reserves the further procedure to be followed on this aspect of the case.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this eighth day of June, one thousand nine hundred and seventy-six.

LE COMPTE, VAN LEUVEN AND DE MEYERE v. BELGIUM [1981]

(Application no. 6878/75; 7238/75)
JUDGMENT
STRASBOURG
23 June 1981

In the case of Le Compte, Van Leuven and De Meyere,
The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. WIARDA, President,
Mr. R. RYSSDAL,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. THÓR VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr. E. GARCIA de ENTERRIA,
Mr. M. SØRENSEN,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir VINCENT EVANS,
Mr. R. MACDONALD,
Mr. A. VANWELKENHUYZEN, ad hoc judge,

and also Mr. M.-A. EISSEN, Registrar, and Mr. H. PETZOLD, Deputy Registrar,
Having deliberated in private from 26 to 28 November 1980 and then on 29 and 30 January and 27 May 1981,
Delivers the following judgment, which was adopted on the last-mentioned date:
PROCEDURE

1. The case of Le Compte, Van Leuven and De Meyere was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Kingdom of Belgium ("the Government"). The case originated in two applications against that State lodged with the Commission in 1974 and 1975 by three Belgian nationals, Dr. Herman Le Compte, Dr. Frans Van Leuven and Dr. Marc De Meyere, under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The Commission ordered the joinder of the applications on 10 March 1977.

2. Both the Commission's request and the Government's application were lodged with the registry of the Court within the period of three months laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47) - the former on 14 March 1980 and the latter on 23 April 1980. The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the Kingdom of Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46); the application referred to Article 48 (art. 48). The purpose of the request and the application is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 6 and 11 (art. 6, art. 11).

3. Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality, was called upon to sit as an ex officio member of the Chamber of seven judges to be constituted (Article 43 of the Convention) (art. 43). However, by letter dated 21 March 1980, he declared that he withdrew pursuant to Rule 24 par. 2 of the Rules of Court. On 9 April, the Government appointed as ad hoc judge Mr. A. Vanwelkenhuyzen, Professor at the Free University of Brussels (Article 43 of the Convention and Rule 23 par. 1) (art. 43).

On 29 April, Mr. G. Balladore Pallieri, the President of the Court and an ex officio member of the Chamber (Rule 21 par. 3 (b)), drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. G. Wiarda, Mr. R. Ryssdal, Sir Gerald Fitzmaurice, Mrs. D. Bindschedler-Robert and Mr. L. Liesch (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 23 May 1980,

he decided that the Agent should have until 15 August 1980 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar.

The Government's memorial was received at the registry on 20 August 1980. On 22 October, the Secretary to the Commission informed the Registrar that the Delegates would reply thereto at the hearings; he also transmitted to the Registrar the observations of the applicants' lawyer on the Commission's report.

5. On 1 October 1980, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President of the Court directed on 7 October that the oral proceedings should open on 25 November.

7. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 25 November; Mr. Wiarda, then Vice-President of the Court, presided as Mr. Balladore Pallieri was unable to attend. The Court had held a preparatory meeting immediately before the hearings opened. Sir Vincent Evans, the judge elected on 29 September 1980 to replace Sir Gerald Fitzmaurice, sat in the latter's stead (Rule 2 par. 3 of the Rules of Court).

There appeared before the Court:

- for the Government
  Mr. J. NISET, Legal Adviser
  at the Ministry of Justice, *Agent*,
  Mr. J. M. NELISSEN GRADE, *Counsel*,
  MR. J. PUTZEYS
  MR. S. GEHLEN, lawyers
  for the Ordre des médecins (Medical Association),
  Mr. F. VERHAEGEN, adviser
  at the Ministry of Public Health,
  Mr. F. VINCKENBOSCH, secrétaire d'administration
  at the Ministry of Public Health, *Advisers*;
- for the Commission
  Mr. G. SPERDUTI,
  MR. M. MELCHIOR, *Delegates*,
  MR. J. BULTINCK, the applicant's lawyer
  before the Commission, assisting the Delegates (Rule 29
  par. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. Nelissen Grade for the Government and by Mr. Sperduti, Mr. Melchior and Mr. Bultinck for the Commission, as well as their replies to questions put by the Court. It requested those appearing to produce various documents; these were supplied by the Commission on 25 November 1980 and 26 January 1981.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCE OF THE CASE

A. Dr. Le Compte

8. Dr. Herman Le Compte, a Belgian national born in 1929 and resident at Knokke-Heist, is a medical practitioner.

1. The suspension ordered in 1970

9. On 28 October 1970, the West Flanders Provincial Council of the Ordre des médecins (Medical Association), which sits in Bruges, ordered that Dr. Le Compte's right to practise medicine be suspended for six weeks. The ground was that he had given to a Belgian newspaper an interview considered by the Council to amount to publicity incompatible with the dignity and reputation of the profession. The applicant lodged an objection (opposition) against this decision, which had been given in absentia, but it was confirmed by the Provincial Council on 23 December 1970, the applicant again having failed to appear.

Dr. Le Compte thereupon referred the matter firstly to the Appeals Council of the Ordre des médecins, which, on 10 May 1971, held his appeal to be inadmissible, and secondly to the Court of Cassation, on 7 April 1972, the latter declared his appeal on a point of law inadmissible, on the ground that it had been filed without the assistance of a lawyer entitled to practise before that Court.

The order suspending Dr. Le Compte's right to practise became effective on 20 May 1972 but he did not comply with it. For this reason, on 20 February 1973, the Furnes criminal court (tribunal correctionnel) sentenced him, pursuant to Article 31 of Royal Decree no. 79 of 10 November 1967 on the Ordre des médecins, to imprisonment and a fine.

This decision was confirmed on 12 September 1973 by the Ghent Court of Appeal; a appeal by Dr. Le Compte on a point of law was dismissed by the Court of Cassation on 25 June 1974.

2. The suspension ordered in 1971

10. Concurrently with the foregoing proceedings, which are not in issue in the present case (see paragraph 36 below), further proceedings were in progress. In fact, on 30 June 1971 the Provincial Council of the Ordre des médecins had, by a decision rendered in absentia, ordered another suspension, for three months, of the applicant's right to practise: the Council stated that he had publicised in the press the above-mentioned decisions of the disciplinary organs of the Ordre and his criticisms of those organs, such conduct constituting contempt of the Ordre.

11. Dr. Le Compte had appealed to the Appeals Council of the Ordre which had confirmed this decision although without upholding the allegation of contempt. He had then referred the matter to the Court of Cassation, where he relied on the same grounds.

He contended in the first place that compulsory membership of the Ordre des médecins, without which no one may practise medicine and subjection to the jurisdiction of its disciplinary organs were contrary to the principle of freedom of association, which is guaranteed by Article 20 of the Belgian Constitution and Article 11 (art. 11) of the Convention.

The Court rejected this plea in the following terms:

"... compulsory entry on the register of an ordre which, like the Ordre des médecins, is a public-law institution having the function of ensuring the observance of the medical profession's rules of professional conduct and the maintenance of the reputation, standards of discretion, probity and dignity of its members cannot be regarded as incompatible with freedom of association, as guaranteed by Article 20 of the Constitution; ... the appellant does not allege that the rule which he is challenging goes beyond the bounds of the restrictions authorised by Article 11 par. 2 (art. 11-2) of the Convention, for example for the protection of health."

The applicant also alleged a violation of Articles 92 and 94 of the Constitution: the first provides that the courts of law shall have exclusive jurisdiction to determine disputes over civil rights and the second prohibits the establishment of extraordinary tribunals for the purpose of resolving such disputes. He pointed out that the decision complained of had nonetheless been taken by a disciplinary organ, set up by Royal Decree no. 79, and that it had given a ruling on a civil right, namely the right to practise medicine.

The Court of Cassation replied that "disciplinary proceedings and the imposition of disciplinary sanctions are, in principle, unrelated to the disputes over which exclusive jurisdiction is reserved to the courts of law by Article 92 of the Constitution". The Court added that, since the Councils of the Ordre des médecins did not have jurisdiction to determine such disputes, "they are not extraordinary tribunals whose establishment is prohibited by Article 94". Finally, the Court observed that section 1 par. 8 (a) of the Act of 31 March 1967 (see paragraph 20 below) empowered the Crown "to reform and adapt the legislation governing the practice of the various branches of medicine" and that "the legislature was referring, inter alia, to the Act of 25 July 1938 establishing the Ordre des médecins, which Act conferred disciplinary powers on the Councils of the Ordre".

Lastly, Dr. Le Compte alleged that there had been a violation of Article 6 par. 1 (art. 6-1) of the Convention. He argued that the decision complained of had been given without any public inquiry and by a tribunal composed of medical practitioners, which could not be regarded as impartial since the kind of conduct of which he was accused might harm his colleagues.

The Court of Cassation confined itself to pointing out that Article 6 par. 1 (art. 6-1) did not apply to disciplinary proceedings.

Accordingly, by judgment of 3 May 1974, the appeal was dismissed.

12. Dr. Le Compte did not comply with the order suspending his right to practise medicine, which became final following the Court of Cassation's judgment. On that account he was sentenced by the Bruges criminal court on 16 September and 15 October 1974 to terms

of imprisonment and fines. He lodged an appeal against the first decision and an objection against the second, which had been rendered in absentia.

13. Since that time, a number of further proceedings have been instituted, both disciplinary, for the publicity given by the applicant to his dispute with the Ordre, and criminal, for his refusal to comply with the measures imposed by its Councils.

One of the disciplinary proceedings resulted in Dr. Le Compte's being struck off the register of the Ordre with effect from 26 December 1975. In this connection he lodged a further application (no. 7496/76) with the Commission on 6 May 1976; that application, which the Commission declared admissible on 4 December 1979, is not relevant for the examination of the present case.

The criminal proceedings, at first instance, led to prison sentences and to fines.

B. Dr. Van Leuven and Dr. De Meyere

14. Dr. Frans Van Leuven and Dr. Marc De Meyere are medical practitioners, born in 1931 and 1940, respectively. Both of them reside at Merelbeke and are Belgian nationals.

15. On 20 January 1973, thirteen medical practitioners practising in and around Merelbeke filed a complaint to the effect that these two applicants had committed breaches of the rules of professional conduct; it was alleged, in particular, that they had systematically limited their fees to the amounts reimbursed by the Social Security, even when on emergency duty, and had distributed without charge to private houses a fortnightly magazine called Gezond in which general practitioners were held up to ridicule. On 14 March 1973, the applicants were heard by the Bureau of the Provincial Council of the Ordre. They admitted that they had limited the fees charged to their own clients but not the fees charged when they were on emergency duty. In addition, they pointed out that they were not the publishers of Gezond and they denied that they had lampooned their colleagues in its pages.

16. On 19 March 1973, another medical practitioner lodged a further complaint against the applicants; he alleged that, two days after their appearance before the Bureau of the Provincial Council, they had put up in the waiting rooms of the Merelbeke medical centre a notice informing the public of the first complaint and the reasons therefore. On 23 May 1973, the Bureau of the Provincial Council heard the applicants in connection with the second complaint. They declared that they were entitled to provide the public with information about the situation, especially as it was already a matter of common knowledge.

17. The East Flanders Provincial Council of the Ordre des médecins, which sits in Ghent, summoned Dr. Van Leuven and Dr. De Meyere to answer several allegations.

On 24 October 1973, it directed that their right to practise medicine be suspended for a period of one month for having charged fees limited to the amounts reimbursed by the Social Security, for having contributed to the magazine Gezond and for having made therein public utterances judged offensive to their colleagues. In addition, Dr. Van Leuven was reprimanded for his behaviour when appearing before the Bureau of the Provincial Council on 14 March 1973. These various decisions were based on Articles 6 par. 2 and 16 of Royal Decree no. 79.

The Provincial Council considered, on the other hand, that the posting in the waiting rooms of the medical centre of a notice judged contrary to the rules of professional conduct did not warrant a disciplinary sanction, bearing in mind that the notice had been removed following a request from the Bureau.

18. The applicants appealed to the Appeals Council.

On 24 June 1974, the latter declared the appeal admissible and upheld the Provincial Council's decision insofar as it had found established the allegations relating to the charging of fees limited to the amounts reimbursed by the Social Security and the contribution to the magazine Gezond. For the rest, the Appeals Council set aside the decision challenged and, after taking into account the complaint regarding the notice in the waiting rooms and joining it with the two other complaints, directed that the right of Dr. Van Leuven and Dr. De Meyere to practise medicine be suspended for a period of fifteen days.

19. On 25 April 1975, the Court of Cassation ruled against the applicants, who had appealed on a point of law.

The Court rejected the ground of appeal based on breach of Article 11 (art. 11) of the Convention; it considered that the functions of the Ordre des médecins "are by no means unrelated to the protection of health and that compulsory entry ... on the register of an Ordre of this kind does not exceed the restrictions on freedom of association which are necessary for the protection of health".

The Court in addition declared inadmissible, for want of legal interest, the ground of appeal to the effect that the limitation of fees to the amounts reimbursed by the Social Security was in conformity with both the law and the rules of professional conduct for medical practitioners; the Court found that the suspension had in fact also been imposed as a sanction for other disciplinary offences.

II. THE ORDRE DES MEDECINS

20. The ordre des médecins, which was established by an Act of 25 July 1938, was re-organised by Royal Decree no. 79 of 10 November 1967. This Decree was made under the Act of 31 March 1967 "investing the King with certain powers with a view to ensuring economic revival, acceleration of regional reconversion and a stable, balanced budget". The Act enabled the Crown, acting by Decrees in Council, to take "all appropriate steps ... to further the quality and ensure satisfactory provision of health care through reform and adaptation of the legislation governing the practice of the various branches of medicine" (section 1 par. 8 (a)); it specified that such Decrees could "repeal supplement, amend or replace existing legal provisions" (section 3).

21. Article 2 of Royal Decree no. 79 provides that "the Ordre des médecins shall include all physicians, surgeons and obstetricians who are permanently resident in Belgium and entered on the register of the Ordre for the Province where they have their permanent residence" and that "in order to practise medicine in Belgium, every medical practitioner" - whether Belgian or foreign - "must be entered on the register of the Ordre".

Military doctors, however, are only obliged to be entered on the register if they practise outside their military duties.

22. Alongside the Ordre des médecins, there exist in Belgium private associations formed to protect the professional interests of medical practitioners. The most important of these associations are consulted and invited to take part in collective negotiations when the Government are considering the adoption of decisions affecting those interests, to propose candidates for nomination as members of certain organs and to appoint their representatives on others, and to take various measures themselves.

A. Organs

23. The Ordre des médecins "shall enjoy civil personality in public law" (Article 1, third paragraph, of Royal Decree no. 79). It comprises three kinds of organs, namely Provincial Councils, Appeals Councils and the National Council.

1. Provincial Councils

24. The Provincial Councils (of which there are ten) consist of a number, which is always even and is fixed by the Crown, of members and substitute members who are medical practitioners of Belgian nationality elected for six years by doctors entered on the register of the Ordre. There are also an assessor and a substitute assessor who are judges of first instance courts appointed for six years by the Crown; the assessor has a consultative status (Articles 5 and 8 par. 1 of Royal Decree no. 79).

The Council's functions are defined by Article 6 of Royal Decree no. 79 in the following terms:

"1º to keep the register of the Ordre. They may refuse or defer entry on the register if the person applying has been guilty either of an act of such seriousness as would cause the name of a member of the Ordre to be struck off the register or of serious misconduct damaging the reputation or dignity of the profession.

If the medical commission ... has decided and notified the Ordre that a medical practitioner no longer fulfils the conditions required for practising medicine or that it is necessary, for reasons of physical or mental disability, to place a restriction on the practise by him of medicine, the relevant Provincial Council shall, in the first case, remove the practitioner's name from the register and, in the second case, make the maintenance of his name thereon subject to observance of the restriction ordered.

A practitioner's name may also be removed from the register at his own request.

Reasons must be given for any decision refusing or deferring entry on the register, removing a practitioner's name therefrom or making its maintenance thereon subject to restrictive conditions;

2º to ensure observance of the rules of professional conduct for medical practitioners and the upholding of the reputation, standards of discretion, probity and dignity of the members of the Ordre. They shall to this end be responsible for disciplining misconduct committed by their registered members in or in connection with the practice of the profession and serious misconduct committed outside the realm of professional activity, whenever such misconduct is liable to damage the reputation or dignity of the profession;

3º to give, of their own motion or on request, the members of the Ordre advice on matters of professional conduct ...; such advice shall be submitted to the National Council for approval ...;

4º to notify the relevant authorities of any acts involving illegal practice of medicine of which the Councils have knowledge;

5º to act, at the joint request of those concerned, as final arbitrator in disputes regarding the fees claimed by a medical practitioner from his client ...;

6º to reply to all requests for advice emanating from courts of law in connection with disputes as to fees;

7º to settle the annual subscription ... including the amount fixed by the National Council for each registered member."

25. The Provincial councils are distinct from the medical commissions which have been set up, outside the Ordre, in each Province and are composed in addition to medical and pharmaceutical practitioners of members of the paramedical professions and of officials of the Ministry of Public Health (Article 36 of Royal Decree no. 78). These commissions have two functions. The first is general and consists of "proposing to the authorities any measures designed to make a contribution to public health" and of "ensuring that practitioners ... (and) members of the paramedical professions collaborate effectively in the implementation of the measures laid down by the authorities for the purpose of preventing or combating diseases subject to quarantine or communicable diseases". The second, specific function comprises various responsibilities: "checking and ... approving practitioners' diplomas"; "withdrawing approval or making its continuance in force subject to the acceptance by the person concerned of (certain) restrictions"; "ensuring that the practice of medicine (is conducted) in accordance with the laws and regulations"; "detecting and ... reporting to the prosecuting authority cases of illegal practice"; assessing the demand for emergency services and supervising their operation; "informing interested parties, whether acting in public or private capacity, of decisions taken" as regards a practitioner's exercise of his profession; "advising the organs of the Ordres concerned of allegations of professional misconduct against practitioners"; "supervising public sales where medicines are involved" (Article 37).

2. The Appeals Councils

26. The two Appeals Councils - one of which uses the French and the other the Dutch language - have their seat "in the Greater Brussels area". They are each composed of ten medical practitioners of Belgian nationality (five members and five substitute members) elected for six years by the Provincial Councils from among persons other than their own members, and ten Court of Appeal judges (five members and five substitute members) appointed by the Crown for the same length of time. From among these judges, the Crown designates the Chairman, who has a casting vote, and the member who is to act as rapporteur (Article 12 par. 1 and 2 of Royal Decree no. 79).

The Appeals Councils hear appeals from decisions given by the Provincial Councils on matters of registration or discipline. They deal, as the body of first and final instance, with claims concerning the regularity of elections to the Provincial Councils, the Appeals Councils and the National Council. They also decide cases on which the Provincial Councils have not given a ruling within the prescribed time-limit. Finally, they settle any dispute between Provincial Councils regarding a practitioner's place of permanent residence (Article 13).

3. The National Council

27. The National Council comprises twenty persons (ten members and ten substitute members) of Belgian nationality who are respectively elected by each of the Provincial Councils from among medical practitioners entered on its register, and twelve persons (six members and six substitute members) appointed by the Crown from among medical practitioners nominated in lists of three candidates by the medical faculties in the country. The National Council is presided over by a judge of the Court of Cassation chosen by the Crown and consists of two sections - one French-speaking, the other Dutch-speaking - each of which elects from among its number a Vice-President (Article 14).

The National Council formulates "those general principles and those rules concerning the morality, reputation, standards of discretion, probity and devotion to duty essential for practice of the profession which constitute the code of professional conduct for medical practitioners"; these principles and rules may be made compulsory by Royal Decrees in Council (a draft code failed to receive Royal approval). It keeps up to date a list of those disciplinary decisions given by the Provincial and Appeals Councils which are no longer open to appeal. It gives reasoned opinions "on general matters, on problems of principle and on the rules of professional conduct". It settles the amount of the subscription medical practitioners are asked to pay to the Ordre. More generally, it takes "all steps necessary for the achievement of the aims of the Ordre" (Article 15).

B. Procedure in disciplinary matters

28. In the procedure relating to disciplinary and registration matters, which is primarily governed by the Royal Decree of 6 February 1970 "regulating the organisation and working of the Councils of the Ordre des médecins", the contending parties are always heard. There may be three stages: a ruling at first instance by the Provincial Council, a ruling at final instance by the Appeals Council and a review by the Court of Cassation of the legality of the decisions and the observance of formal requirements.

1. Before the organs of the Ordre

29. The procedure begins before the Provincial Council which "acts either on its own initiative, or at the request of the National Council, the Minister responsible for public health, the procureur du Roi or the medical commission, or on complaint by a medical practitioner or a third party" (Article 20 par. 1, first sub-paragraph, of Royal Decree no. 79). The procedure continues before the Appeals Council if it has been seised either by the practitioner concerned, or by the Provincial Council's assessor, or by the President of the National Council acting jointly with one of the Vice-Presidents; an appeal has suspensive effect (Article 21).

30. Investigation of the matter necessarily involves the participation of a member of the judiciary: before the Provincial Council, for the purposes of the initial investigation, this will be the assessor; before the Appeals Council, for the purposes, if need be, of a supplementary investigation, it will be the Council member acting as rapporteur (see paragraphs 24 and 26 above). Furthermore, the Provincial Council member who acted as rapporteur may always be heard by the Appeals Council (Articles 7 par. 1, 12 par. 2 and 20 of Royal Decree no. 79).

31. Before the Provincial and Appeals Councils, the proceedings are conducted in private (Article 24 par. 1, sub-paragraph 3, of Royal Decree no. 79 and Article 19 of the Royal Decree of 6 February 1970). The medical practitioner concerned has the right to be informed as soon as possible of the opening of an inquiry against him (Article 24 of the Royal Decree of 6 February 1970); the procedure further provides for time-limits and formalities allowing him to have adequate time and facilities for the preparation of his defence (Articles 25 and 31); in addition, it contains guarantees concerning the use of languages (Articles 36 to 39).

The practitioner is also entitled to challenge the members of the organ hearing his case; he appears in person and may be assisted by one or more counsel who, like himself, may inspect the case-file (Articles 26, 31 and 40 to 43).

32. The Provincial and Appeals Councils are bound to deliver their ruling within a reasonable time, to preserve the secrecy of their deliberations and to give reasons for their decision. The person concerned must be promptly informed of the decision and of any appeal which may have been entered. Decisions are taken by simple majority. However, a two-thirds majority is required for striking a practitioner off the register of the Ordre or for his suspension for more than a year. The same rule applies to Appeals Council decisions ordering a sanction where the Provincial Council has imposed none or increasing the severity of the sanction imposed by the Provincial Council (Article 25 in fine of Royal Decree no. 79, Articles 4, 12, 26, 32 and 33 of the Royal Decree of 6 February 1970). The sanctions which may be imposed by the Provincial Councils - and also, if appropriate, the Appeals Councils - are "warning, censure, reprimand, suspension of the right to practise medicine for a period not exceeding two years and striking off the register of the Ordre" (Article 16 of Royal Decree no. 79).

2. Before the Court of Cassation

33. Under Article 23 of Royal Decree no. 79, "final decisions of the Provincial Councils or the Appeals Councils may be referred to the Court of Cassation either by the Minister responsible for public health, or by the President of the National Council acting jointly with one of the Vice-Presidents, or by the practitioner concerned, on the ground of contravention of the law" - the latter term being understood in a wide sense - "or of non-observance of a formal requirement which is either a matter of substance or laid down on pain of nullity". The Court will have before it the complete case-file (decisions at first instance and on appeal, memorials and final submissions of the parties, including a detailed statement of the facts); however, it cannot verify the findings of fact made by the Councils of the Ordre, unless it is alleged that there has been a breach of the rules of evidence. The Court does not have jurisdiction to rectify factual errors on the part of the Appeals Councils or to examine whether the sanction is proportionate to the fault.

An appeal to the Court of Cassation on a point of law has suspensive effect.

3. Notification of the decision

34. Decisions in a disciplinary matter which have become final are notified to the Minister of Public Health; the most important ones (striking off the register of the Ordre or suspension of the right to practise) are also notified to the medical commission and to the procureur général attached to the Court of Appeal (Article 27 of Royal Decree no. 79 and Article 35 of the Royal Decree of 6 February 1970).

PROCEEDINGS BEFORE THE COMMISSION

35. Dr. Le Compte applied to the Commission on 28 October 1974, Dr. Van Leuven and Dr. De Meyere on 21 October 1975.

All three applicants claimed that the obligation to join the Ordre des médecins and to be under the jurisdiction of its disciplinary organs contravened Article 11 (art. 11) of the Convention, taken alone or in conjunction with Article 17 (art. 17+11). They further alleged that during the course of the disciplinary proceedings they had not had the benefit of the guarantees laid down by Article 6 (art. 6) and that the sanctions imposed on them were calculated to prevent them from disseminating information and ideas, thereby violating Article 10 (art. 10).

36. On 6 October 1976 and 10 March 1977 respectively, the Commission declared the applications admissible save on two points: it rejected for non-exhaustion of domestic remedies (Article 27 par. 3) (art. 27-3) the complaints made by all three applicants under Article 10 (art. 10) and the complaints made by Dr. Le Compte in connection with the decision given by the West Flanders Provincial Council on 28 October 1970 (see paragraph 9 above).

On 10 March 1977, the Commission ordered the joinder of the applications in pursuance of Rule 29 of its Rules of Procedure.

In its report of 14 December 1979 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- unanimously, that there had been no breach of Article 11 par. 1 (art. 11-1) of the Convention since the Ordre des médecins did not constitute an association;

- by eight votes to three, that Article 6 par. 1 (art. 6-1) was applicable to the proceedings which led to the disciplinary measures imposed on the applicants;

- that Article 6 par. 1 (art. 6-1) had been violated in that the applicants did not receive a "public hearing" (eight votes to three) before an "impartial tribunal" (seven votes to four).

The report contains three separate opinions, two of which are dissenting.

FINAL SUBMISSIONS MADE TO THE COURT

37. In their memorial, the Government submitted:

"[May it please the Court] to hold that the facts of the present case do not disclose any breach by the Belgian State of its obligations under the European Convention on Human Rights."

AS TO THE LAW

I. THE COMPLAINT MADE INITIALLY CONCERNING ARTICLE 10 (art. 10)

38. Initially, Dr. Le Compte, Dr. Van Leuven and Dr. De Meyere relied on Article 10 (art. 10) as well as on Articles 6 par. 1, 11 and 17 (art. 6-1, art. 11, art. 17): they maintained that the disciplinary sanctions imposed on them by the Provincial and Appeals Councils were designed to prevent them from disseminating information and ideas. In so doing, they were attacking the actual content of the decisions affecting them and not the procedure leading thereto or the obligation to join the Ordre des médecins. Accordingly, this was not merely a further legal submission or argument adduced in support of their claims under Articles 6 par. 1, 11 and 17 (art. 6-1, art. 11, art. 17), but a separate complaint. Having been rejected by the Commission for non-exhaustion of domestic remedies (see paragraph 36 above), this complaint goes beyond the ambit of the case referred to the Court (see, inter alia, the Schiesser judgment of 4 December 1979, Series A no. 34, p. 17, par. 41).

II. THE ALLEGED VIOLATION OF ARTICLE 6 par. 1 (art. 6-1)

39. The applicants claimed that they were victims of violations of Article 6 par. 1 (art. 6-1), which reads as follows:

"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."

40. Having regard to the submissions of those appearing before the Court, the first question for decision is whether this paragraph is applicable; the majority of the Commission affirmed that it was, but this was disputed by the Government.

A. The applicability of Article 6 par. 1 (art. 6-1)

41. Article 6 par. 1 (art. 6-1) applies only to the determination of "civil rights and obligations or of any criminal charge" (in the French text: "contestations sur [des] droits et obligations de caractère civil" and "bien-fondé de toute accusation en matière pénale"). As the Court has found on several occasions, certain cases (in the French text: "causes") are not comprised within either of these categories and thus fall outside the Article's scope (see, for example, the Lawless judgment of 1 July 1961, Series A no. 3, p. 51, par. 12; the Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, par. 23; the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 40, par. 108).

42. Thus, as the Government rightly emphasised with reference to the Engel judgment of 8 June 1976, disciplinary proceedings as such cannot be characterised as "criminal"; nevertheless, this may not hold good for certain specific cases (Series A no. 22, pp. 33-36, par. 80-85).

Again, disciplinary proceedings do not normally lead to a contestation (dispute) over "civil rights and obligations" (ibid., p. 37, par. 87 in fine). However, this does not mean that the position may not be different in certain circumstances. The Court has not so far had to resolve this issue expressly; in the König case, which was cited by the Commission and the Government, the applicant was complaining solely of the duration of proceedings which he had instituted before administrative courts after an administrative body had withdrawn his authorisation to run his clinic and then his authorisation to practise medicine (judgment of 28 June 1978, Series A no. 27, p. 8, par. 18, and p. 28, par. 85; see also above-mentioned Engel judgment, pp. 36-37, par. 87, first sub-paragraph).

43. In the present case, it is necessary to determine whether Article 6 par. 1 (art. 6-1) applied to the whole or part of the proceedings that took place before the Provincial and Appeals Councils, which are disciplinary organs, and subsequently before the Court of Cassation, a judicial body.

At least after the admissibility decisions of 6 October 1976 and 10 March 1977, the Government, the Commission and the applicants scarcely discussed this issue other than in the context of the words "contestations" (disputes) over "civil rights and obligations". The Court considers that it too should take this as its starting-point.

1. The existence of "contestations" (disputes) over "civil rights and obligations"

44. In certain respects, the meaning of the words "contestations" (disputes) over "civil rights and obligations" has been clarified in the Ringeisen judgment of 16 July 1971 and the König judgment of 28 June 1978.

According to the first of these judgments, the phrase in question covers "all proceedings the result of which is decisive for private rights and obligations", even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity; the character "of the legislation which governs how the matter is to be determined" and of the "authority" which is invested with jurisdiction in the matter are of little consequence (Series A no. 13, p. 39, par. 94).

The very notion of "civil rights and obligations" lay at the heart of the König case. The rights at issue included the right "to continue his professional activities" as a medical practitioner "for which he had obtained the necessary authorisations". In the light of the circumstances of that case, the Court classified this right as private, and hence as civil for the purposes of Article 6 par. 1 (art. 6-1) (loc. cit., pp. 29-32, par. 88-91 and 93-95).

The ramifications of this line of authority are again considerably extended as a result of the Golder judgment of 21 February 1975. The Court concluded that "Article 6 par. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (Series A no. 18, p. 18, par. 36). One consequence of this is that Article 6 par. 1 (art. 6-1) is not applicable solely to proceedings which are already in progress: it may also be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 par. 1 (art. 6-1).

45. In the present case, a preliminary point needs to be resolved: can it be said that there was a veritable "contestation" (dispute), in the sense of "two conflicting claims or applications" (oral submissions of counsel for the Government)?

Conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning; besides, it has no counterpart in the English text of Article 6 par. 1 (art. 6-1) ("In the determination of his civil rights and obligations"; cf. Article 49 (art. 49): "dispute").

Even if the use of the French word "contestation" implies the existence of a disagreement, the evidence clearly shows that there was one in this case. The Ordre des médecins alleged that the applicants had committed professional misconduct rendering them liable to sanctions and they denied those allegations. After the competent Provincial Council had found them guilty of that misconduct and ordered their suspension from practice – decisions that were taken in absentia in the case of Dr. Le Compte (West Flanders) and after hearing submissions on issues of fact and of law from Dr. Van Leuven and Dr. De Meyere in their cases (East Flanders) -, the applicants appealed to the Appeals Council. They all appeared before that Council where, with the assistance of lawyers, they pleaded amongst other things Articles 6 par. 1 and 11 (art. 6-1, art. 11). In most respects their appeals proved unsuccessful, whereupon they turned to the Court of Cassation relying once more, inter alia, on the Convention (see paragraphs 10-11 and 15-19 above).

46. In addition, it must be shown that the "contestation" (dispute) related to "civil rights and obligations", in other words that the "result of the proceedings" was "decisive" for such a right (see the above-mentioned Ringeisen judgment).

According to the applicants, what was at issue was their right to continue to exercise their profession; they maintained that this had been recognised to be a "civil" right in the König judgment of 28 June 1978 (loc. cit., pp. 31-32, paragraphs 91 and 93).

According to the Government, the decisions of the Provincial and Appeals Councils had but an "indirect effect" in the matter. It was argued that these organs, unlike the German administrative courts in the König case, did not review the lawfulness of an earlier measure withdrawing the right to practise but had instead to satisfy themselves that breaches of the rules of professional conduct, of a kind justifying disciplinary sanctions, had actually occurred. A "contestation" (dispute) over the right to continue to exercise the medical profession was said to have arisen, if at all, "at a later stage", that is when Dr. Le Compte, Dr. Van Leuven and Dr. De Meyere contested before the Court of Cassation the lawfulness of the measures imposed on them. The Government further submitted that this right was not "civil" and invited the Court not to follow the decision which it took in this respect in the König judgment.

47. As regards the question whether the dispute related to the above-mentioned right, the Court considers that a tenuous connection or remote consequences do not suffice for Article 6 par. 1 (art. 6-1), in either of its official versions ("contestation sur", "determination of"): civil rights and obligations must be the object - or one of the objects - of the "contestation" (dispute); the result of the proceedings must be directly decisive for such a right.

Whilst the Court agrees with the Government on this point, it does not agree that in the present case there was not this kind of direct relationship between the proceedings in question and the right to continue to exercise the medical profession. The suspensions ordered by the Provincial Council on 30 June 1971 (Dr. Le Compte) and on 24 October 1973 (Dr. Van Leuven and Dr. De Meyere) were to deprive them temporarily of their rights to practise. That right was directly in issue before the Appeals Council and the Court of Cassation, which bodies had to examine the applicants' complaints against the decisions affecting them.

48. Furthermore, it is by means of private relationships with their clients or patients that medical practitioners in private practice, such as the applicants, avail themselves of the right to continue to practise; in Belgian law, these relationships are usually contractual or quasi-contractual and, in any event, are directly established between individuals on a personal basis and without any intervention of an essential or determining nature by a public authority. Accordingly, it is a private right that is at issue, notwithstanding the specific character of the medical profession – a profession which is exercised in the general interest - and the special duties incumbent on its members.

The Court thus concludes that Article 6 par. 1 (art. 6-1) is applicable; as in the König case (see the above-mentioned judgment, p. 32, par. 95), it does not have to determine whether the concept of "civil rights" extends beyond those rights which have a private nature.

49. Two members of the Commission, Mr. Frowein and Mr. Polak, emphasised in their dissenting opinion that the present proceedings did not concern a withdrawal of the authorisation to practise, as did the König case, but a suspension for a relatively short period - three months for Dr. Le Compte and fifteen days for Dr. Van Leuven and Dr. de Meyere. These members maintained that a suspension of this kind did not impair a civil right but was to be regarded as no more than a limitation inherent therein.

The Court is not convinced by this argument, which the Government adopted as a further alternative plea in paragraph 19 of their memorial. Unlike certain other disciplinary sanctions that might have been imposed on the applicants (warning, censure and reprimand -

see paragraph 32 above), the suspension of which they complained undoubtedly constituted a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right (see, mutatis mutandis, the above-mentioned Golder judgment, p. 13, par. 26); in the "contestations" (disputes) contemplated by Article 6 par. 1 (art. 6-1) the actual existence of a "civil" right may, of course, be at stake but so may the scope of such a right or the manner in which the beneficiary may avail himself thereof.

50. Since the dispute over the decisions taken against the applicants has to be regarded as a dispute relating to "civil rights and obligations", it follows that they were entitled to have their case (in French: "cause") heard by "a tribunal" satisfying the conditions laid down in Article 6 par. 1 (art. 6-1) (see the above-mentioned Golder judgment, p. 18, par. 36).

51. In fact, their case was dealt with by three bodies – the Provincial Council, the Appeals Council and the Court of Cassation. The question therefore arises whether those bodies met the requirements of Article 6 par. 1 (art. 6-1).

(a) The Court does not consider it indispensable to pursue this point as regards the Provincial Council. Whilst Article 6 par. 1 (art. 6-1) embodies the "right to a court" (see paragraph 44 above), it nevertheless does not oblige the Contracting States to submit "contestations" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system. To this extent, the Court accepts that the arguments of the Government and of Mr. Sperduti in his separate opinion are correct.

(b) Once the Provincial Council had imposed on Dr. Le Compte, Dr. Van Leuven and Dr. De Meyere a temporary ban on the exercise of their profession, they appealed to the Appeals Council which thus had to determine the dispute over the right in question.

According to the Government, the Appeals Council nevertheless did not have to meet the conditions contained in Article 6 par. 1 (art. 6-1) since an appeal on a point of law against its decision lay to the Court of Cassation and that Court's procedure certainly did satisfy those conditions.

The Court does not agree. For civil cases, just as for criminal charges (see the Deweer judgment of 27 February 1980, Series A no. 35, pp. 24-25, par. 48), Article 6 par. 1 (art. 6-1) draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to "civil rights and obligations". Hence, the "right to a court" (see the above-mentioned Golder judgment, p. 18, par. 36) and the right to a judicial determination of the dispute (see the above-mentioned König judgment, p. 34, par. 98 in fine) cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault (see paragraph 33 above). It follows that Article 6 par. 1 (art. 6-1) was not satisfied unless its requirements were met by the Appeals Council itself.

2. The existence of "criminal charges"

52. When deciding on the admissibility of the applications, the Commission stated that the organs of the Ordre had not been required to determine criminal charges; the same point is made at paragraph 67 of the Commission's report.

53. The Court considers it superfluous to determine this issue, which was scarcely touched on by those appearing before it: as in the König case (see the above-mentioned judgment, pp. 32-33, p par. 96), those of the Article 6 (art. 6) rules which the applicants alleged were violated apply to both civil and criminal matters.

B. Compliance with Article 6 par. 1 (art. 6-1)

54. Having regard to the conclusion at paragraph 51 above, it has to be established whether in the exercise of their jurisdiction both the Appeals Council and the Court of Cassation met the conditions laid down by Article 6 par. 1 (art. 6-1), the former because it alone fully examined measures affecting a civil right and the latter because it conducted a final review of the lawfulness of those measures. It is therefore necessary to examine whether each of them in fact constituted a "tribunal" which was "established by law", "independent" and "impartial", and afforded the applicants a "public hearing".

55. Whilst the Court of Cassation, notwithstanding the limits on its jurisdiction (see paragraphs 33 and 51 above), obviously has the characteristics of a tribunal, it has to be ascertained whether the same may be said of the Appeals Council. The fact that it exercises judicial functions (see paragraph 26 above) does not suffice. According to the Court's case-law (the above-mentioned Neumeister judgment, p. 44; the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, par. 78; the above-mentioned Ringeisen judgment, p. 39, par. 95), use of the term "tribunal" is warranted only for an organ which satisfies a series of further

requirements - independence of the executive and of the parties to the case, duration of its members' term of office, guarantees afforded by its procedure - several of which appear in the text of Article 6 par. 1 (art. 6-1) itself. In the Court's opinion, subject to the points mentioned below, those requirements were satisfied in the present cases.

56. Since it was set up under the Constitution (Article 95), the Court of Cassation is patently established by law. As for the Appeals Council, the Court notes, as did the Commission and the Government, that, like each of the organs of the Ordre des médecins, it was established by an Act of 25 July 1938 and re-organised by Royal Decree no. 79 of 10 November 1967, made under an Act of 31 March 1967 investing the King with certain powers (see paragraph 20 above).

57. There can be no doubt as to the independence of the Court of Cassation (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 19, par. 35). The Court, in company with the Commission and the Government, is of the opinion that this also applies to the Appeals Council. It is composed of exactly the same number of medical practitioners and members of the judiciary and one of the latter, designated by the Crown, always acts as Chairman and has a casting vote. Besides, the duration of a Council member's term of office (six years) provides a further guarantee in this respect (see paragraph 26 above).

58. The Court of Cassation raises no problem on the issue of impartiality (see the above-mentioned Delcourt judgment, p. 19, par. 35).

The Appeals Council, so the Commission stated in its opinion, did not, in the particular circumstances, constitute an impartial tribunal: whilst the legal members were to be deemed neutral, the medical members had, on the other hand, to be considered as unfavourable to the applicants since they had interests very close to those of one of the parties to the proceedings.

The Court does not agree with this argument concerning the Council's composition. The presence - already adverted to - of judges making up half the membership, including the Chairman with a casting vote (see paragraph 26 above), provides a definite assurance of impartiality and the method of election of the medical members cannot suffice to bear out a charge of bias (cf., mutatis mutandis, the above-mentioned Ringeisen judgment, p. 40, par. 97).

Again, the personal impartiality of each member must be presumed until there is proof to the contrary; in fact, as the Government pointed out, none of the applicants exercised his right of challenge (see paragraph 31 above).

59. Under the Royal Decree of 6 February 1970, all publicity before the Appeals Council is excluded in a general and absolute manner, both for the hearings and for the pronouncement of the decision (see paragraphs 31 and 34 above).

Article 6 par. 1 (art. 6-1) of the Convention does admittedly provide for exceptions to the rule requiring publicity - at least in respect of the trial of the action -, but it makes them subject to certain conditions. However, there is no evidence to suggest that any of these conditions was satisfied in the present case. The very nature both of the misconduct alleged against the applicants and of their own complaints against the Ordre was not concerned with the medical treatment of their patients. Consequently, neither matters of professional secrecy nor protection of the private life of these doctors themselves or of patients were involved; the Court does not concur with the Government's argument to the contrary. Furthermore, there is nothing to indicate that other grounds, amongst those listed in the second sentence of Article 6 par. 1 (art. 6-1), could have justified sitting in camera; the Government, moreover, did not rely on any such ground.

Dr. Le Compte, Dr. Van Leuven and Dr. de Meyere were thus entitled to have the proceedings conducted in public. Admittedly, neither the letter nor the spirit of Article 6 par. 1 (art. 6-1) would have prevented them from waiving this right of their own free will, whether expressly or tacitly (cf. the above-mentioned Deweer judgment, p. 26, par. 49); conducting disciplinary proceedings of this kind in private does not contravene the Convention, provided that the person concerned consents. In the present case, however, the applicants clearly wanted and claimed a public hearing. To refuse them such a hearing was not permissible under Article 6 par. 1 (art. 6-1), since none of the circumstances set out in its second sentence existed.

60. The public character of the proceedings before the Belgian Court of Cassation cannot suffice to remedy this defect. In fact, the Court of Cassation "shall not take cognisance of the merits of cases" (Article 95 of the Constitution and Article 23 of Royal Decree no. 79); this means that numerous issues arising in "contestations" (disputes) concerning "civil rights and obligations" fall outside its jurisdiction (see paragraphs 33 and 51 above). On the issues of this nature arising in the present case, there was neither a public hearing nor a decision pronounced publicly as required by Article 6 par. 1 (art. 6-1).

61. To sum up, the applicants' case (in French: "cause") was not heard publicly by a tribunal competent to determine all the aspects of the matter. In this respect, there was, in the particular circumstances, a breach of Article 6 par. 1 (art. 6-1).

III. THE ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

62. The applicants alleged a breach of Article 11 (art. 11), which reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

In the applicants' submission, the obligation to join the Ordre des médecins (see paragraph 21 above) inhibited freedom of association - which implied freedom not to associate - and went beyond the limits of the restrictions permitted under paragraph 2 of Article 11 (art. 11-2); furthermore, so they contended, the very existence of the Ordre had the effect of eliminating freedom of association.

63. In its report, the Commission expressed the unanimous opinion, corresponding in substance to the Government's contention, that the Ordre, by virtue of its legal nature and specifically public function, was not an association within the meaning of Article 11 par. 1 (art. 11-1).

64. The Court notes firstly that the Belgian Ordre des médecins is a public-law institution. It was founded not by individuals but by the legislature; it remains integrated within the structures of the State and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the relevant legislation a form of public control over the practice of medicine. Within the context of this latter function, the Ordre is required in particular to keep the register of medical practitioners. For the performance of the tasks conferred on it by the Belgian State, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law (prerogatives exorbitantes du droit commun) and, in this capacity, employs processes of a public authority (see paragraphs 20-34 above).

65. Having regard to these various factors taken together, the Ordre cannot be considered as an association within the meaning of Article 11 (art. 11). However, there is a further requirement: if there is not to be a violation, the setting up of the Ordre by the Belgian State must not prevent practitioners from forming together or joining professional associations. Totalitarian régimes have resorted - and resort - to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses (see the Collected Edition of the "Travaux Préparatoires)), vol. II, pp. 116-118).

The Court notes that in Belgium there are several associations formed to protect the professional interests of medical practitioners and which they are completely free to join or not (see paragraph 22 above). In these circumstances, the existence of the Ordre and its attendant consequence - that is to say, the obligation on practitioners to be entered on the register of the Ordre and to be subject to the authority of its organs - clearly have neither the object nor the effect of limiting, even less suppressing, the right guaranteed by Article 11 par. 1 (art. 11-1).

66. There being no interference with the freedom safeguarded by paragraph 1 of Article 11 (art. 11-1), there is no reason to examine the case under paragraph 2 (art. 11-2) or to determine whether the Convention recognises the freedom not to associate.

IV. THE APPLICATION OF ARTICLE 50 (art. 50)

67. At the hearings, the applicants' lawyer asked the Court, in the event of its finding a breach of the Convention, to afford his clients just satisfaction under Article 50 (art. 50). He added, however, that he was "not yet in a position to establish the exact amount of any damages, in view of the possibility of compensation, if only partial, being granted under Belgian law".

The Government made no submissions regarding the application of Article 50 (art. 50).

68. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the question should be referred back to the Chamber under Rule 50 par. 4 of the Rules of Court.

FOR THESE REASONS, THE COURT

1. Holds by fifteen votes to five that Article 6 par. 1 (art. 6-1) of the Convention was applicable in the present case;

2. Holds by sixteen votes to four that there has been a breach of the said provision in that the applicants' case was not heard publicly by a tribunal competent to determine all the aspects of the matter;

3. Holds unanimously that there has been no violation of Article 6 par. 1 (art. 6-1) as regards the applicants' other complaints, and no violation of Article 11 (art. 11);

4. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision:

(a) accordingly, reserves the whole of the said question;

(b) refers the said question back to the Chamber under Rule 50 par. 4 of the Rules of Court.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-third day of June, one thousand nine hundred and eighty-one.

ÖZTÜRK v. GERMANY [1984]

(Application no. 8544/79)
JUDGMENT
STRASBOURG
21 February 1984
In the Öztürk case,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 48 of the Rules of Court* and composed of the following judges:

Mr. G. Wiarda, President,
Mr. R. Ryssdal,
Mr. J. Cremona,
Mr. Thór Vilhjálmsson,
Mr. W. Ganshof van der Meersch,
Mrs. D. Bindschedler-Robert,
Mr. D. Evrigenis,
Mr. L. Liesch,
Mr. F. Gölcüklü,
Mr. F. Matscher,
Mr. J. Pinheiro Farinha,
Mr. E. García de Enterría,
Mr. L.-E. Pettiti,
Mr. B. Walsh,
Sir Vincent Evans,
Mr. R. Macdonald,
Mr. C. Russo,
Mr. R. Bernhardt,

and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,
Having deliberated in private on 21 September 1983 and 25 January 1984,
Delivers the following judgment, which was adopted on the last-mentioned date:
PROCEDURE

1. The present case was referred to the Court by the Government of the Federal Republic of Germany ("the Government") and the European Commission of Human Rights ("the Commission"). The case originated in an application (no. 8544/79) against that State lodged with the Commission on 14 February 1979 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr. Abdulbaki Öztürk.

2. The Government's application and the Commission's request were lodged with the registry of the Court within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47) - the application on 13 September and the request on 15 October 1982. The application, which referred to Article 48 (art. 48), invited the Court to hold that there had been no violation. The purpose of the request was to obtain a decision as to whether or not there had been a breach by the respondent State of its obligations under Article 6 § 3 (e) (art. 6-3-e).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 (art. 43) of the Convention), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 1 October 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. M. Zekia, Mr. F. Matscher, Mr. J. Pinheiro Farinha and Mr. E. García de Enterría (Article 43 in fine (art. 43) of the Convention and Rule 21 § 4). Subsequently, Mr. Thór Vilhjálmsson and Mr. W. Ganshof van der Meersch, substitute judges, took the place of Mr. Zekia and Mr. Garcia de Enterria, who were prevented from taking part in the consideration of the case (Rules 22 § 1 and 24 § 1).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Deputy Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 19 October 1982, he decided that the Agent should have until 31 January 1983 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of transmission of the Government's memorial to them by the Registrar.

Following an extension of the first-mentioned time-limit granted to the Government on 18 January 1983, the latter's memorial was received at the registry on 24 February. On 10 March, the Secretary to the Commission informed the Registrar that the Delegates would present their own observations at the hearings.

5. After consulting, through the Deputy Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 4 May that the oral proceedings should open on 25 May.

6. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Chamber had held a preparatory meeting; it had authorised the Agent and the advocates of the Government and the person assisting the Delegates of the Commission to use the German language (Rule 27 §§ 2 and 3).

There appeared before the Court:
- for the Government
Mrs. I. Maier, Ministerialdirigentin
at the Federal Ministry of Justice, *Agent*,
Mr. E. Göhler, Ministerialrat
at the Federal Ministry of Justice, *Adviser*;
- for the Commission
Mr. S. Trechsel,
Mr. G. Sperduti, *Delegates*,
Mr. N. Wingerter, the applicant's lawyer
before the Commission, assisting the Delegates (Rule 29 § 1, second sentence, of the Rules of Court).

The Court heard addresses by Mrs. Maier for the Government and by Mr. Trechsel, Mr. Sperduti and Mr. Wingerter for the Commission, as well as their replies to its questions. The Commission supplied the Registrar with certain documents that the Registrar had requested on the instructions of the President.

7. At the close of deliberations held on 27 May, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

Having taken due note of the agreement of the Agent of the Government and the concurring opinion of the Delegates, the Court decided on 21 September that the proceedings should continue without re-opening the oral procedure (Rule 26).

8. On 4 October, the Agent of the Government transmitted to the Registrar two documents and her replies to two questions that Judge Ganshof van der Meersch had put to her at the hearings.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr. Öztürk, a Turkish citizen born in 1934, is resident at Bad Rappenau-Heinsheim in the Federal Republic of Germany.

He arrived in the Federal Republic in 1964 and works in the motor-car industry. After passing the necessary test, he was issued with a German driving licence on 7 May 1969.

In 1978, he estimated his net monthly income at approximately DM 2,000.

10. On 27 January 1978 in Bad Wimfen, the applicant drove his car into another car which was parked, causing about DM 5,000's worth of damage to both vehicles. The owner of the other car reported the accident to the Neckarsulm police.

On arriving at the scene of the accident, the police, by means of a notice written in Turkish, informed the applicant, amongst other things, of his rights to refuse to make any statement and to consult a lawyer. He availed himself of these rights, and a report (Verkehrs-Ordnungswidrigkeiten-Anzeige) was thereupon transmitted by the police to the Heilbronn administrative authorities (Landratsamt).

11. By decision of 6 April 1978, the Heilbronn administrative authorities imposed on Mr. Öztürk a fine (Bussgeld) of DM 60 for causing a traffic accident by colliding with another vehicle as a result of careless driving ("Ausserachtlassen der erforderlichen Sorgfalt im Strassenverkehr"); in addition he was required to pay DM 13 in respect of fees (Gebühr) and costs (Auslagen).

The decision was based on section 17 of the Regulatory Offences Act of 24 May 1968, in its consolidated version of 1 January 1975 (Gesetz über Ordnungswidrigkeiten - "the 1968/1975 Act"; see paragraph 18 below), on section 24 of the Road Traffic Act (Strassenverkehrsgesetz) and on Regulations 1 § 2 and 49 § 1, no. 1, of the Road Traffic Regulations (Strassenverkehrs-Ordnung). Regulation 1 § 2 reads as follows:

"Every road-user (Verkehrsteilnehmer) must conduct himself in such a way as to ensure that other persons are not harmed or endangered and are not hindered or inconvenienced more than is unavoidable in the circumstances."

Regulation 49 § 1, no. 1, specifies that anyone who contravenes Regulation 1 § 2 is guilty of a "regulatory offence" (Ordnungswidrigkeit). Under section 24 sub-section 2 of the Road Traffic Act, such an offence gives rise to liability to a fine.

12. On 11 April 1978, the applicant, who was represented by Mr. Wingerter, lodged an objection (Einspruch) against the above-mentioned decision (section 67 of the 1968/1975 Act); he stated that he was not waiving his right to a public hearing before a court (section 72).

The public prosecutor's office (Staatsanwaltschaft) attached to the Heilbronn Regional Court (Landgericht), to which the file had been transmitted on 5 May, indicated six days later that it had no objection to a purely written procedure; it further stated that it would not be attending the hearings (sections 69 and 75).

13. Sitting in public on 3 August 1978, the Heilbronn District Court (Amtsgericht) heard Mr. Öztürk, who was assisted by an interpreter, and then three witnesses. Immediately thereafter, the applicant withdrew his objection. The Heilbronn administrative authorities' decision of 6 April 1978 accordingly became final (rechtskräftig).

14. The District Court directed that the applicant should bear the court costs and his own expenses. On 12 September 1978, the District Court Cashier's Office (Gerichtskasse) fixed the costs to be paid by Mr. Öztürk at DM 184.70, of which DM 63.90 represented interpreter's fees.

15. On 4 October, the applicant entered an appeal (Erinnerung) against the bill of costs with regard to the interpreter's fees. He relied on Article 6 (art. 6) of the Convention and referred to the Commission's report of 18 May 1977 in the case of Luedicke, Belkacem and Koç. At the time, that case was pending before the Court, which delivered its judgment on the merits on 28 November 1978 (Series A no. 29).

The District Court dismissed the appeal on 25 October. It noted that the obligation to bear the interpreter's fees was grounded on Article 464 (a) of the Code of Criminal Procedure (Strafprozessordnung) and section 46 of the 1968/1975 Act (see paragraphs 21 and 35 below). Relying on a 1975 decision by the Cologne Court of Appeal, it held that this obligation was compatible with Article 6 § 3 (e) (art. 6-3-e) of the Convention. According to the District Court, the above-mentioned opinion of the Commission did not alter matters since, unlike a judgment of the Court; it was not binding on the States.

16. According to undisputed evidence adduced by the Government, the court costs, including the interpreter's fees, were paid by an insurance company with which Mr. Öztürk had taken out a policy.

II. THE RELEVANT LEGISLATION

A. The 1968/1975 Act

17. The purpose of the 1968/1975 Act was to remove petty offences from the sphere of the criminal law. Included in this category were contraventions of the Road Traffic Act. Under section 21 of the Road Traffic Act (in its former version), commission of such contraventions had given rise to liability to a fine (Geldstrafe) or imprisonment (Haft). Section 3 no. 6 of the Act of 24 May 1968 (Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten) classified them as "Ordnungswidrigkeiten" and henceforth made them punishable only by fines not considered to be criminal by the legislature (Geldbussen).

The 1968/1975 Act had been foreshadowed in the Federal Republic by two enactments: the Act of 25 March 1952 on "regulatory offences" (Gesetz über Ordnungswidrigkeiten) and, to a certain extent, the Economic Crime Act of 26 July 1949 (Wirtschaftsstrafgesetz).

1. General provisions

18. Section 1 sub-section 1 of the 1968/1975 Act defines a "regulatory offence" (Ordnungswidrigkeit) as an unlawful (rechtswidrig) and reprehensible (vorwerfbar) act, contravening a legal provision which makes the offender liable to a fine (Geldbusse). The fine cannot be less than DM 5 or, as a general rule, more than DM 1,000 (section 17 sub-section 1). The amount of the fine is fixed in each case by reference to the seriousness of the offence, the degree of misconduct attributable to the offender and, save for minor (geringfügig) offences, the offender's financial circumstances (section 17 sub-section 3).

If the act constitutes both a "regulatory" and a criminal offence, only the criminal law is applicable; however, if no criminal penalty is imposed, the act may be punished as a "regulatory offence" (section 21).

2. The prosecuting authorities

19. Ordnungswidrigkeiten are to be dealt with by the administrative authorities (Verwaltungsbehörde) designated by law, save in so far as the 1968/1975 Act confers the power of prosecution of such offences on the public prosecutor and their judgment and sentencing on the courts (sections 35 and 36). Where an act has come before him as a criminal matter, the public prosecutor may also treat the act as a "regulatory offence" (section 40).

20. The administrative authorities will remit the matter to the public prosecutor if there is reason to suppose that a criminal offence has been committed; he will refer the matter back to them if he does not take proceedings (section 41). In the case of a "regulatory offence" having a close connection with a criminal offence in respect of which the public prosecutor has instituted proceedings, the prosecutor may extend the criminal proceedings to cover the "regulatory offence" as long as the administrative authorities have not fixed any fine (section 42).

The public prosecutor's decision to treat or not to treat an act as a criminal offence is binding on the administrative authorities (section 44).

3. Procedure in general

21. Subject to the exceptions laid down in the 1968/1975 Act, the provisions of the ordinary law governing criminal procedure, and in particular the Code of Criminal Procedure, the Judicature Act (Gerichtsverfassungsgesetz) and the Juvenile Courts Act (Jugendgerichtsgesetz), are applicable by analogy (sinngemäss) to the procedure in respect of "regulatory offences" (section 46 sub-section 1). The prosecuting authorities (see paragraph 19 above) have the same rights and duties as the public prosecutor in a criminal matter unless the 1968/1975 Act itself states otherwise (section 46 sub-section 2). Nevertheless, various measures permissible in criminal matters may not be ordered in respect of "regulatory offences", notably arrest, interim police custody (vorläufige Festnahme) or seizure of mail or telegrams (section 46 sub-section 3). The taking of blood samples and other minor measures, within the meaning of Article 81 (a) § 1 of the Code of Criminal Procedure, remain possible.

22. The prosecution of "regulatory offences" lies within the discretion (pflichtgemässes Ermessen) of the competent authority; so long as the case is pending before it, the competent authority may terminate the prosecution at any time (section 47 sub-section 1).

Once the case has been brought before a court (see paragraphs 27-28 below), power to decide on a stay of proceedings rests with the court; any such decision requires the agreement of the public prosecutor and is final (section 47 sub-section 2).

23. As regards the judicial stage (if any) of the proceedings (see paragraphs 28-30 below), section 46 sub-section 7 of the 1968/1975 Act attributes jurisdiction in the matter to divisions (Abteilungen) of the District Courts and to chambers (Kammern; Senate) of the Courts of Appeal (Oberlandesgerichte) and of the Federal Court of Justice (Bundesgerichtshof).

4. Preliminary procedure

24. Investigations (Erforschung) into "regulatory offences" are a matter for the police authorities. In this connection, the police authorities enjoy discretionary powers (pflichtgemässes Ermessen); save in so far as the 1968/1975 Act provides otherwise, they have the same rights and duties as in the prosecution of criminal offences (section 53 sub-section 1).

25. Prior to any decision being taken, the person concerned (Betroffener) has to be given the opportunity of commenting, before the competent authorities, on the allegation made against him (section 55).

In the case of a minor (geringfügig) offence, the administrative authorities may give the person concerned a warning (Verwarnung) and impose on him an admonitory fine (Verwarnungsgeld) which, save for any exception laid down under the applicable law, may range from

DM 2 to 20 (section 56 sub-section 1). However, sanctions of this kind are possible only if the person concerned consents and pays the fine immediately or within one week (section 56 sub-section 2).

26. If necessary, the administrative authorities will designate an officially appointed lawyer to act for the person concerned in the proceedings before them (section 60).

Measures taken by the administrative authorities during the preliminary procedure can in principle be challenged before the courts (section 62).

5. The administrative decision imposing a fine

27. Save in so far as the 1968/1975 Act provides otherwise - as in the case of the matter being settled by payment of an admonitory fine -, a "regulatory offence" is punishable by an administrative decision imposing a fine (Bussgeldbescheid; section 65).

The person concerned may lodge an objection (Einspruch) within one week (section 67). Unless they withdraw their decision, the administrative authorities will then forward the file to the public prosecutor who will submit it to the competent District Court (sections 69 sub-section 1 and 68) and thereupon assume the function of prosecuting authority (section 69 sub-section 2).

6. Judicial stage (if any) of the procedure

28. Under section 71, if the District Court finds the objection admissible (section 70) it will, unless the 1968/1975 Act states otherwise, examine the objection in accordance with the provisions applicable to an "Einspruch" against a penal order (Strafbefehl): in principle, it will hold a hearing and deliver a judgment (Urteil) which may impose a heavier sentence (Article 411 of the Code of Criminal Procedure).

However, its ruling may take the form of an order (Beschluss) if the District Court considers that a hearing is not necessary and provided the public prosecutor or the person concerned does not object (section 72 sub-section 1). In that event, it may, inter alia, acquit the person concerned, settle the amount of a fine or terminate the prosecution, but not increase the penalty (section 72 sub-section 2).

29. The person concerned has the option of attending hearings but is not bound to do so unless the District Court so directs (section 73 sub-sections 1 and 2); he may be represented by a lawyer (section 73 sub-section 4).

The public prosecutor's office may attend the hearing; if the District Court considers the presence of an official from that office to be appropriate, it will inform the latter accordingly (section 75 sub-section 1).

The District Court will give the administrative authorities the opportunity to set out the matters which, in their view, are of importance for the decision to be given; they may address the Court at the hearing, if they so wish (section 76 sub-section 1).

30. Subject to certain exceptions, section 79 allows an appeal on points of law (Rechtsbeschwerde) to be brought against a judgment or an order issued pursuant to section 72; save in so far as the 1968/1975 Act states otherwise, in determining the appeal the court concerned will follow, by analogy, the provisions of the Code of Criminal Procedure relating to cassation proceedings (Revision).

7. Administrative procedure and criminal procedure

31. The administrative authorities' classification of an act as a "regulatory offence" is not binding on the court ruling on the objection (Einspruch); however, it can apply the criminal law only if the person concerned has been informed of the change of classification and enabled to prepare his defence (section 81 sub-section 1). Once this condition has been satisfied, either by the court of its own motion or at the public prosecutor's request, the person concerned acquires the formal status of an accused (Angeklagter, section 81 sub-section 2) and the subsequent proceedings fall outside the scope of the 1968/1975 Act (section 81 sub-section 3).

8. Enforcement of decisions imposing a fine

32. A decision imposing a fine is enforceable once it has become final (sections 89 and 84). Unless the 1968/1975 Act states otherwise, enforcement of a decision taken by the administrative authorities is governed by the Federal Act or the Land Act, as the case may be, on enforcement in administrative matters (Verwaltungs-Vollstreckungsgesetze) (section 90 sub-section 1). When the decision is one taken by a court, certain relevant provisions of, inter alia, the Code of Criminal Procedure are applicable (section 91).

33. If, without having established (dargetan) his inability to pay, the person concerned has not paid the fine in due time, the court may, at the request of the administrative authorities or, where the fine was imposed by a court decision, of its own motion order coercive imprisonment (Erzwingungshaft - section 96 sub-section 1). The resultant detention does not replace payment of the fine in the manner of an Ersatzfreiheitsstrafe under the criminal law, but is intended to compel payment. The period of detention may not exceed six weeks for one fine and three months for several fines (section 96 sub-section 3). Implementation of the detention order is governed, inter alia, by the Code of Criminal Procedure (section 97).

9. Interpretation and other costs

34. As far as the costs of the administrative procedure are concerned, the competent authorities apply by analogy certain provisions of the Code of Criminal Procedure (section 105).

35. Under section 109, the person concerned has to bear the costs of the court proceedings if he withdraws his "Einspruch" or if the competent court rejects it.

The costs in question are made up of the expenses and fees of the Treasury (Article 464 (a) § 1, first sentence, of the Code of Criminal Procedure). These fees and expenses are listed in the Court Costs Act (Gerichtskostengesetz) which in turn refers, inter alia, to the Witnesses and Experts (Expenses) Act (Gesetz über die Entschädigung von Zeugen und Sachverständigen). Section 17 sub-section 2 of the last-mentioned Act provides that "for the purposes of compensation, interpreters shall be treated as experts".

Interpretation costs (Dolmetscherkosten) are thus included in the costs of judicial proceedings. However, as far as criminal proceedings - and criminal proceedings alone - are concerned, the German legislature amended the schedule (Kostenverzeichnis) to the Court Costs Act following the Luedicke, Belkacem and Koç judgment of 28 November 1978 (see paragraph 15 above; see also Resolution DH (83) 4 of 23 March 1983 of the Committee of Ministers of the Council of Europe). According to no. 1904 in this schedule, henceforth no charge is to be made for "the sums due to interpreters and translators engaged in criminal proceedings in order to translate, for an accused who is deaf or dumb or not conversant with the German language, the statements or documents which the accused needs to understand for his defence" (Act of 18 August 1980).

36. Under the terms of section 109 of the 1968/1975 Act, the question of payment of the costs of the proceedings, including the interpretation costs, only arises once the withdrawal or dismissal of the objection has become final. The person concerned may never be required to make an advance payment in respect of the costs concerned.

B. Road traffic fines

37. The Road Traffic Act, the Road Traffic Regulations and the Road Traffic Licence and Vehicle Conformity Regulations (Strassenverkehrs-Zulassungs-Ordnung) contain lists of "regulatory offences" punishable by fine (section 24 of the Road Traffic Act).

In the case of a "regulatory offence" committed in gross (grob) and persistent (beharrlich) violation of the duties incumbent on a driver, the administrative authorities or, where an objection has been lodged, the court may at the same time disqualify the person concerned from holding a driving licence (Fahrverbot) for a period of one to three months (section 25 of the Road Traffic Act). According to the Government, in 1982 such a measure was taken in 0.5 per cent of cases.

38. The Länder have co-operated together to adopt rules (Verwaltungsvorschriften) establishing a uniform scale of fines (Bussgeldkatalog) for the various road traffic "regulatory offences"; legally, these rules are binding on the administrative authorities empowered to impose fines but not on the courts.

Section 26 (a) of the Road Traffic Act, which was inserted in the Act of 28 December 1982 but which has not yet been implemented, provides that the Minister of Transport shall issue such rules with the agreement of the Bundesrat and in the form of a Decree (Rechtsverordnung).

39. Under section 28 of the Road Traffic Act, a fine imposed for contravention of the road traffic regulations may in some specified cases be entered on a central traffic register (Verkehrszentralregister) if it exceeds a certain level (DM 39 at the time of the facts in issue, DM 79 as from 1 July 1982); on the other hand, no mention of it is included in the judicial criminal records (Bundeszentralregister). The entry must be deleted after a maximum of two years, unless further entries have been made in the meantime (section 29).

Only certain authorities have access to this register, notably for the purposes of a criminal prosecution or a prosecution for a road traffic "regulatory offence" (section 30).

40. According to undisputed evidence supplied by the Government, the 1968/1975 Act in practice plays a particularly important role in the area of road traffic; thus, it was said that 90 per cent of the fines imposed in 1982 concerned road traffic offences.

The Government stated that each year in the Federal Republic of Germany there were 4,700,000 to 5,200,000 decisions imposing a fine (Geldbusse) and 15,500,000 to 16,000,000 warnings accompanied by a fine (Verwarnungsgelder). The statistics of the Länder on Road Traffic Act offences were said to show that in 1982 fines exceeding DM 200 and DM 500 came to 1.5 per cent and 0.1 per cent respectively of the total, as compared with 10.8 per cent for fines of between DM 101 and DM 200, 39.4 per cent for fines of between DM 41 and DM 100 and 48.2 per cent for fines of DM 40 or less.

43.4 per cent of road traffic offences consisted of contraventions of a prohibition on stopping or parking, approximately 17.1 per cent of speeding, 6.5 per cent of non-observance of traffic lights and 5.9 per cent of illegal overtaking. Other offences totalled less than 4 per cent by category. The offences covered by Regulation 1 § 2 of the Road Traffic Regulations, the provision applied in Mr. Öztürk's case (see paragraph 11 above), amounted to approximately 2.8 per cent.

41. Despite the absence of statistics in this connection, the Government estimated that 10 to 13 per cent of the five million or so fines imposed each year concerned foreigners. Of the 4,670,000 foreigners living in the Federal Republic, approximately 2,000,000 possessed a motor vehicle.

PROCEEDINGS BEFORE THE COMMISSION

42. In his application of 14 February 1979 to the Commission (no. 8544/79), Mr. Öztürk complained of the fact that the Heilbronn District Court had ordered him to bear the interpreter's fees; he relied on Article 6 § 3 (e) (art. 6-3-e) of the Convention.

43. The Commission declared the application admissible on 15 December 1981.

In its report of 12 May 1982 (Article 31 (art. 31) of the Convention), the Commission expressed the opinion, by eight votes to four, that there had been a violation of Article 6 § 3 (e) (art. 6-3-e).

The report contains two dissenting opinions.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

44. At the close of the hearings on 25 May 1983, the Government requested the Court "to hold that the Federal Republic of Germany has not violated the Convention".

AS TO THE LAW

45. Under the terms of Article 6 (art. 6) of the Convention:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing by an independent and impartial tribunal ...

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: [...]...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

In the applicant's submission, the Heilbronn District Court had acted in breach of Article 6 § 3 (e) (art. 6-3-e) in ordering him to pay the costs incurred through recourse to the services of an interpreter at the hearing on 3 August 1978.

I. APPLICABILITY OF ARTICLE 6 § 3 (e) (art. 6-3-e)

46. According to the Government, Article 6 § 3 (e) (art. 6-3-e) is not applicable in the circumstances since Mr. Öztürk was not "charged with a criminal offence". Under the 1968/1975 Act, which "decriminalised" petty offences, notably in the road traffic sphere, the facts alleged against Mr. Öztürk constituted a mere "regulatory offence" (Ordnungswidrigkeit). Such offences were said to be distinguishable

from criminal offences not only by the procedure laid down for their prosecution and punishment but also by their juridical characteristics and consequences.

The applicant disputed the correctness of this analysis. Neither was it shared by the Commission, which considered that the offence of which Mr. Öztürk was accused was indeed a "criminal offence" for the purposes of Article 6 (art. 6).

47. According to the French version of Article 6 § 3 (e) (art. 6-3-e), the right guaranteed is applicable only to an "accusé". The corresponding English expression (person "charged with a criminal offence") and paragraph 1 of Article 6 (art. 6-1) ("criminal charge"/"accusation en matière pénale") - this being the basic text of which paragraphs 2 and 3 (art. 6-2, art. 6-3) represent specific applications (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 30, § 56) - make it quite clear that the "accusation" ("charge") referred to in the French wording of Article 6 § 3 (e) (art. 6-3-e) must concern a "criminal offence" (see, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30).

Under German law, the misconduct committed by Mr. Öztürk is not treated as a criminal offence (Straftat) but as a "regulatory offence" (Ordnungswidrigkeit). The question arises whether this classification is the determining factor in terms of the Convention.

48. The Court was confronted with a similar issue in the case of Engel and others, which was cited in argument by the representatives. The facts of that case admittedly concerned penalties imposed on conscript servicemen and treated as disciplinary according to Netherlands law. In its judgment delivered on 8 June 1976 in that case, the Court was careful to state that it was confining its attention to the sphere of military service (Series A no. 22, p. 34, § 82). The Court nevertheless considers that the principles set forth in that judgment (ibid., pp. 33-35, §§ 80-82) are also relevant, mutatis mutandis, in the instant case.

49. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.

By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (see, mutatis mutandis, the above-mentioned Engel and others judgment, ibid., p. 33, § 80) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

50. Having thus reaffirmed the "autonomy" of the notion of "criminal" as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the "regulatory offence" committed by the applicant was a "criminal" one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment (ibid., pp. 34-35, § 82). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States.

51. Under German law, the facts alleged against Mr. Öztürk - non-observance of Regulation 1 § 2 of the Road Traffic Regulations - amounted to a "regulatory offence" (Regulation 49 § 1, no. 1, of the same Regulations). They did not fall within the ambit of the criminal law, but of section 17 of the Ordnungswidrigkeitengesetz and of section 24 sub-section 2 of the Road Traffic Act (see paragraph 11 above). The 1968/1975 legislation marks an important step in the process of "decriminalisation" of petty offences in the Federal Republic of Germany. Although legal commentators in Germany do not seem unanimous in considering that the law on "regulatory offences" no longer belongs in reality to criminal law, the drafting history of the 1968/1975 Act nonetheless makes it clear that the offences in question have been removed from the criminal law sphere by that Act (see Deutscher Bundestag, Drucksache V/1269 and, inter alia, the judgment of 16 July 1969 by the Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, vol. 27, pp. 18-36).

Whilst the Court thus accepts the Government's arguments on this point, it has nonetheless not lost sight of the fact that no absolute partition separates German criminal law from the law on "regulatory offences", in particular where there exists a close connection between a criminal offence and a "regulatory offence" (see paragraph 20 above). Nor has the Court overlooked that the provisions of the ordinary law governing criminal procedure apply by analogy to "regulatory" proceedings (see paragraph 21 above), notably in relation to the judicial stage, if any, of such proceedings.

52. In any event, the indications furnished by the domestic law of the respondent State have only a relative value. The second criterion stated above - the very nature of the offence, considered also in relation to the nature of the corresponding penalty - represents a factor of appreciation of greater weight.

In the opinion of the Commission - with the exception of five of its members - and of Mr. Öztürk, the offence committed by the latter was criminal in character.

For the Government in contrast, the offence in question was beyond doubt one of those contraventions of minor importance - numbering approximately five million each year in the Federal Republic of Germany - which came within a category of quite a different order from that of criminal offences. The Government's submissions can be summarised as follows. By means of criminal law, society endeavoured to safeguard its very foundations as well as the rights and interests essential for the life of the community. The law on Ordnungswidrigkeiten, on the other hand, sought above all to maintain public order. As a general rule and in any event in the instant case, commission of a "regulatory offence" did not involve a degree of ethical unworthiness such as to merit for its perpetrator the moral value-judgment of reproach (Unwerturteil) that characterised penal punishment (Strafe). The difference between "regulatory offences" and criminal offences found expression both in procedural terms and in relation to the attendant penalties and other legal consequences.

In the first place, so the Government's argument continued, in removing "regulatory offences" from the criminal law the German legislature had introduced a simplified procedure of prosecution and punishment conducted before administrative authorities save in the event of subsequent appeal to a court. Although general laws on criminal procedure were in principle applicable by analogy, the procedure laid down under the 1968/1975 Act was distinguishable in many respects from criminal procedure. For example, prosecution of Ordnungswidrigkeiten fell within the discretionary power of the competent authorities and the 1968/1975 Act greatly limited the possibilities of restricting the personal liberty of the individual at the stage of the preliminary investigations (see paragraphs 21, 22 and 24 above).

In the second place, instead of a penal fine (Geldstrafe) and imprisonment the legislature had substituted a mere "regulatory" fine (Geldbusse - see paragraph 17 above). Imprisonment was not an alternative (Ersatzfreiheitsstrafe) to the latter type of fine as it was to the former and no coercive imprisonment (Erzwingungshaft) could be ordered unless the person concerned had failed to pay the sum due without having established his inability to pay (see paragraph 33 above). Furthermore, a "regulatory offence" was not entered in the judicial criminal records but solely, in certain circumstances, on the central traffic register (see paragraph 39 above).

The reforms accomplished in 1968/1975 thus, so the Government concluded, reflected a concern to "decriminalise" minor offences to the benefit not only of the individual, who would no longer be answerable in criminal terms for his act and who could even avoid all court proceedings, but also of the effective functioning of the courts, henceforth relieved in principle of the task of dealing with the great majority of such offences.

53. The Court does not underestimate the cogency of this argument. The Court recognises that the legislation in question marks an important stage in the history of the reform of German criminal law and that the innovations introduced in 1968/1975 represent more than a simple change of terminology.

Nonetheless, the Court would firstly note that, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.

In addition, misconduct of the kind committed by Mr. Öztürk continues to be classified as part of the criminal law in the vast majority of the Contracting States, as it was in the Federal Republic of Germany until the entry into force of the 1968/1975 legislation; in those other States, such misconduct, being regarded as illegal and reprehensible, is punishable by criminal penalties.

Moreover, the changes resulting from the 1968/1975 legislation relate essentially to procedural matters and to the range of sanctions, henceforth limited to Geldbussen. Whilst the latter penalty appears less burdensome in some respects than Geldstrafen, it has nonetheless retained a punitive character, which is the customary distinguishing feature of criminal penalties. The rule of law infringed by the applicant has, for its part, undergone no change of content. It is a rule that is directed, not towards a given group possessing a special status - in the manner, for example, of disciplinary law -, but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature.

The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6 (art. 6). There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. In this connection, a number of Contracting States still draw a distinction, as did the Federal Republic at the time when the Convention was opened for the signature of the Governments, between the most serious offences (crimes), lesser offences (délits) and petty offences (contraventions), whilst qualifying them all as criminal offences. Furthermore, it would be contrary to the object and purpose of Article 6 (art. 6), which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article (art. 6) a whole category of offences merely on the ground of regarding them as petty. Nor does the Federal Republic deprive the presumed perpetrators of Ordnungswidrigkeiten of this right since it grants them the faculty - of which the applicant availed himself - of appealing to a court against the administrative decision.

54. As the contravention committed by Mr. Öztürk was criminal for the purposes of Article 6 (art. 6) of the Convention, there is no need to examine it also in the light of the final criterion stated above (at paragraph 50). The relative lack of seriousness of the penalty at stake (see paragraph 18 above) cannot divest an offence of its inherently criminal character.

55. The Government further appeared to consider that the applicant did not have the status of a person "charged with a criminal offence" because the 1968/1975 Act does not provide for any "Beschuldigung" ("charge") and does not employ the terms "Angeschuldigter" ("person charged") or "Angeklagter" ("the accused"). On this point, the Court would simply refer back to its well-established case-law holding that "charge", for the purposes of Article 6 (art. 6), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect" (see, as the most recent authorities, the Foti and others judgment of 10 December 1982, Series A no. 56, p. 18, § 52, and the Corigliano judgment of the same date, Series A no. 57, p. 13, § 34). In the present case, the applicant was "charged" at the latest as from the beginning of April 1978 when the decision of the Heilbronn administrative authorities was communicated to him (see paragraph 11 above).

56. Article 6 § 3 (e) (art. 6-3-e) was thus applicable in the instant case. It in no wise follows from this, the Court would want to make clear, that the very principle of the system adopted in the matter by the German legislature is being put in question. Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6) (see, mutatis mutandis, the above-mentioned Deweer judgment, Series A no. 35, p. 25, § 49, and the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 23, first sub-paragraph).

II. COMPLIANCE WITH ARTICLE 6 § 3 (e) (art. 6-3-e)

57. Invoking the above-cited Luedicke, Belkacem and Koç judgment of 28 November 1978 (see paragraphs 15 and 35 above), the applicant submitted that the decision whereby the Heilbronn District Court had made him bear the costs incurred in having recourse to the services of an interpreter at the hearing on 3 August 1978 was in breach of Article 6 § 3 (e) (art. 6-3-e).

The Commission's opinion was to the same effect. The Government, for their part, maintained that there had been no violation, but concentrated their arguments on the issue of the applicability of Article 6 § 3 (e) (art. 6-3-e), without discussing the manner in which the Court had construed this text in 1978.

58. On the basis of the above-cited judgment, the Court finds that the impugned decision of the Heilbronn District Court violated the Convention: "the right protected by Article 6 § 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him the payment of the costs thereby incurred" (Series A no. 29, p. 19, § 46).

III. APPLICATION OF ARTICLE 50 (art. 50)

59. At the hearings on 25 May 1983, counsel for the applicant sought, as just satisfaction for his client, reimbursement of the interpretation costs of DM 63.90 and payment of the lawyer's costs incurred before the Convention institutions; as to the amount of these costs, he stated that he left the matter to the judgment of the Court.

The Agent of the Government did not feel herself bound to give an immediate reply to this claim; she indicated that she would, if need be, agree to a purely written procedure.

60. The Court considers that the question is not yet ready for decision and should therefore be reserved (Rule 50 § 3). The Court delegates to its President power to fix the further procedure.

FOR THESE REASONS, THE COURT

1. Holds, by thirteen votes to five, that Article 6 § 3 (e) (art. 6-3-e) of the Convention was applicable in the instant case;

2. Holds, by twelve votes to six, that there has been breach of the said Article (art. 6-3-e);

3. Holds, unanimously, that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) delegates to the President of the Court power to fix the further procedure.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-first day of February, one thousand nine hundred and eighty-four.

BARBERÀ, MESSEGUÉ AND JABARDO v. SPAIN [1988]

(Application no. 10590/83)
JUDGMENT
STRASBOURG
6 December 1988

[...]8. The three applicants are Spanish nationals born in 1951, 1947 and 1955, respectively. Mr Francesc-Xavier Barberà Chamarro and Mr Antonino Messegué Mas are serving long sentences at Lérida Prison no. 2 (Lleida-2) and Barcelona Prison respectively and have the benefits of the open system. Mr Ferrán Jabardo García is at present living in Gironella in Barcelona Province.

I. THE CIRCUMSTANCES OF THE CASE

A. Origin of the proceedings against the applicants

1. Killing of Mr Bultó

At about 3 p.m. on 9 May 1977, Mr José María Bultó Marqués, a 77-year-old Catalan businessman, was at his brother-in-law's house in Barcelona in the company of his brother-in-law and his own sister, Mrs Pilar Bultó Marqués, when two men entered the flat under the pretext of being gas-board employees. They seized and held the maid, thus enabling other persons to enter. The latter threatened Mr Bultó with guns and shut him in a room, where they fixed an explosive device to his chest. They demanded a ransom of five hundred million pesetas from him, to be handed over within twenty-five days, and gave him instructions on how to pay it, saying that on payment he would be told how to remove the device safely. They then left the premises and departed in waiting cars. 10. Mr Bultó returned home in his car. Shortly before 5 p.m., the device exploded, killing him instantly.[...]

3. Arrest of Mr Martínez Vendrell and proceedings against him

14. In the course of their investigations into the killing of Mr Bultó, the police arrested Mr Jaime Martínez Vendrell, aged 63, and four other persons on 4 March 1979. They were placed in police custody and held incommunicado, in accordance with the anti-terrorist legislation then in force (see paragraph 46 below). Unassisted by a lawyer, Mr Martínez Vendrell was questioned at the police station during his custody there and on 11 March 1979 made a statement containing, in substance, the following: Until 1974 he had been a leading member of a Catalan nationalist organisation, the "Front Nacional de Catalunya", and from 1967 on had taken part in the creation and training of armed groups, with the object of fighting for the independence of the Catalan nation. In 1968, he had met three young men including a certain "Thomas", whom he identified as the applicant Messegué, and in late 1969 had begun their theoretical and practical military training. In 1973, he had established another group of young men, one of whom he identified as the applicant Barberà. Subsequently, several people, including "Thomas", had purchased weapons in Germany; they had brought them into Spain via France and hidden them in dumps known to them alone. In 1976, three groups had been established, one of which was commanded by "Thomas". The group members gave up all outside activities and were paid by the organisation. A network of flats and radio transmitters had been created later to allow contact between the groups. In February 1977, Mr Martínez Vendrell had been informed that an explosive device had been produced, which could be attached to a person's body and subsequently defused on payment of an agreed ransom. The mechanical part of this device could have been designed by "Thomas" (Messegué) and another activist, and the electronic part by Mr Barberà and another person. "Thomas" and someone else had later shown the device to Mr Martínez Vendrell. In April 1977, they had revealed to him that the first victim chosen was Mr José María Bultó. Two days after the killing, he had met the commando leaders and had learned that eleven people had taken part in the operation and that Mr Barberà and Mr Messegué had attached the device to the victim's chest.

15. When Mr Martínez Vendrell was brought before Barcelona investigating judge no. 6, in the presence and with the assistance of counsel, he amended his statement. In particular, he said that the bomb "might have" been made by the persons stated, but that he did not know the names of those who had carried out the attack on Mr Bultó.

16. These statements were sent to central investigating judge no. 1 in Madrid, who reopened file no. 46/1977 on 15 March 1979. On the next day he charged Mr Martínez Vendrell with murder and with possession of arms and explosives, and ordered him to be held in custody on remand. In a further decision on the same day he charged six others, including Mr Barberà and Mr Messegué, with murder, criminal damage and uttering forged documents, and issued a warrant for their arrest. As none of the six could be found, the proceedings continued solely against the co-defendants in custody.

17. During the investigation and again at the hearing, Mr Martínez Vendrell retracted his statement to the investigating judge as far as the identification of Barberà and Messegué was concerned. On 17 June 1980, the first section of the Criminal Division of the Audiencia Nacional sentenced him to one year and three months' imprisonment for assisting armed gangs. It set aside the original charges, however, noting among other things that he had expressed disapproval when at the end of April 1977 he had been told of the proposed operation against Mr Bultó; that the preparations had occurred without his knowledge; and that he had only learned of the victim's death through press reports. It also ordered his immediate release because the period of the sentence had already been spent in custody on remand.

18. Following an appeal on points of law by Mr Bultó's son, acting both as a "private prosecutor" and as a party claiming civil damages, the Supreme Court quashed the judgment of the Audiencia Nacional on 10 April 1981. On the same day, it sentenced Mr Martínez Vendrell to twelve years and one day's imprisonment for aiding and abetting a murder and ordered him to pay five million pesetas in damages to the victim's heirs. It held that the influence he exerted on those who committed the crime was sufficiently great to amount to aiding and abetting and went far beyond merely assisting armed gangs; admittedly, he had made it clear that he was opposed to the crime, but he had done nothing to prevent it. A warrant was consequently issued - on 24 April 1981, according to the applicants - for Mr Martínez Vendrell's arrest. Mr Martínez Vendrell has not so far been found by the police and has therefore not yet served his sentence. [...]

B. Arrest of the applicants and criminal proceedings against them

19. The three applicants were arrested with other persons on 14 October 1980 and charged with belonging to the terrorist organisation E.PO.CA. Among items found at their homes were radio transmitters and receivers, a variety of implements, electronic equipment, publications of left-wing nationalist parties, files on leading politicians and businessmen, and books on topography, electronics and the chemistry of explosives. Section 2 of Law no. 56 of 4 December 1978 on the suppression of terrorism, as renewed by Royal Legislative Decree no. 19 of 23 November 1979, was applied to their case (see paragraph 46 below). This authorised the police to hold suspects in custody for longer than the normal period of seventy-two hours, with leave from the investigating judge. The applicants were moreover held incommunicado and not allowed to have the assistance of a lawyer. While in custody they signed a statement in which they admitted having taken part in Mr Bultó's murder either as principals or as accessories; their account differed from Mr Martínez Vendrell's, however. Furthermore, the police discovered stocks of arms and explosives at places indicated by Mr Barberà and Mr Messegué.

20. On 23 October 1980, the persons held in custody appeared before Barcelona investigating judge no. 8, who questioned them - without any defence lawyer being present in the case of Mr Barberà and Mr Jabardo. They retracted their confessions to the police and two of them - Jabardo and Messegué - complained of being subjected to physical and psychological torture while in police custody. 21. On 24 October 1980, the resulting documents were sent to central investigating judge no. 1 for inclusion in file no. 46/1977. On 12 January 1981, the latter judge charged the applicants and two other persons with murder and assisting armed gangs. He then sent letters rogatory to Barcelona for further inquiries to be made. Barcelona investigating judge no. 10 served the charges on the applicants and examined them on 22 January; they confirmed the statements they had made to investigating judge no. 8 and again alleged that their confessions had been obtained by means of torture. They were not, however, confronted with the prosecution witnesses or Mr Martínez Vendrell, who was then at liberty. Mr Barberà instructed an advocate and an attorney in Barcelona on 22 December 1980, but the central investigating judge in Madrid did not record these appointments until 20 January 1981. Mr Messegué and Mr Jabardo did not instruct lawyers until 21 February 1981; the investigation had been completed on 16 February. [...]

1. The proceedings before the Audiencia Nacional

22. The case was then committed for trial to the first section of the Criminal Division of the Audiencia Nacional. By an order of 13 March 1981, the court instructed the public prosecutor and the private prosecutor to make their interim submissions. They argued that the facts amounted to murder, possession of arms and explosives and forging identity documents; as evidence they offered the examination of the defendants, the hearing of eye-witnesses and the production of the entire case-file; no mention was made of Mr Martínez Vendrell. The file was sent to the attorney acting for Mr Jabardo on 27 May and to the ones acting for Mr Barberà and Mr Messegué on 1 June. Each of the defendants conducted his defence separately with counsel of his own choosing. All the defendants declared their innocence and offered to produce similar evidence, including, in Barberà and Messegué's case, the statement made by Mr Martínez Vendrell retracting the one he had made to the police implicating Mr Barberà and Mr Messegué in the murder. Mr Messegué had been transferred to Madrid but he and his counsel managed to get him returned to Barcelona in order to prepare his defence.

23. By an order made on 27 October 1981, the court - on this occasion composed of Mr de la Concha (the presiding judge), Mr Barnuevo and Mr Infante - admitted the evidence offered and set the case down for trial on 12 January 1982. It also ordered that the accused should be brought to Madrid and appointed Mr Obregón Barreda and Mr Martínez Valbuena of the third section as additional judges to bring the number in the first section to five in view of the heavy sentences being sought (Article 145 para. 2 of the Code of Criminal Procedure). On 10 December 1981, defence counsel (all of whom were members of the Barcelona Bar) applied for the trial to take place in Barcelona on account of the needs of the defence and witnesses' travel difficulties. Subsequently, a Catalan senator wrote

to the court requesting it to at least postpone the transfer to Madrid until after Christmas. On 18 December 1981, the Audiencia Nacional, presided over by Mr Pérez Lemaur, who was sitting with Mr Barnuevo and Mr Bermúdez de la Fuente, refused the first application and confirmed that the hearing would be held in Madrid on 12 January 1982.

24. On the day before the trial, counsel for the defendants met the presiding judge of the first section of the Criminal Division (Mr de la Concha), in order to prepare for the hearing and discuss the possibility of an adjournment, as the applicants were still in prison in Barcelona. The presiding judge assured them that the defendants' transfer was imminent and that the trial could therefore go ahead. The applicants stated that they left Barcelona on the evening of 11 January and arrived in Madrid at four o'clock the following morning, when the hearing was due to commence at 10.30; they said that they were in very poor shape after travelling more than 600 kilometres in a prison van. According to the Government, the journey took ten hours at most. That same morning of 12 January 1982, the presiding judge had to leave Madrid suddenly as his brother-in-law had been taken ill. As senior judge of the Division, Mr Pérez Lemaur took his place. In accordance with the legislation in force, so the Government asserted, the parties were not warned either of this substitution or of the replacement of Mr Infante - who no longer belonged to the first section - by Mr Bermúdez de la Fuente.

25. The trial was held on the appointed day in a high-security courtroom; in particular, the defendants appeared in a glass cage and were kept in handcuffs for most of the time. The record makes no mention of any protest by them, except as regards certain exhibits which were not produced in court. The court agreed to admit in evidence a number of documents submitted by the defence. When examined by the private prosecutor in regard to matters in their statements to the police, the accused again denied any participation in the murder and again complained of being subjected to torture while they were in custody.

26. The public prosecutor offered for examination the three witnesses who had been present at the time of the crime: the sister and brother-in-law of Mr Bultó, and their housemaid. The sister and the maid were very old and could not come to Madrid but the prosecutor asked that their statements to the police on the day after the crime should be taken into account. Mr Bultó's brother-in-law gave evidence in court but did not recognise any of the applicants. The only documentary evidence produced by the public prosecutor was a copy of the file on the investigation.

27. For its part, the defence, with the court's leave, called ten witnesses; some of them, who were arrested at the same time as the defendants, alleged that they too had been subjected to brutality while in police custody. All the parties agreed to treat the documentary evidence as if it had been produced (por reproducida - see paragraph 40 below).

29. On 15 January 1982, the first section of the Criminal Division of the Audiencia Nacional sentenced Mr Barberà and Mr Messegué to thirty years' imprisonment for murdering Mr Bultó; it also sentenced Mr Barberà to six years and one day's imprisonment for unlawful possession of arms and to three months' imprisonment and a fine of thirty thousand pesetas for uttering forged documents, and Mr Messegué to six years and one day's imprisonment for possessing explosives. Mr Jabardo was sentenced to twelve years and one day's imprisonment for aiding and abetting a murder.

2. Proceedings in the Supreme Court

30. The applicants appealed on points of law, relying on Articles 14 (right of all Spaniards to equality before the law), 17 (right to liberty and security of person) and 24 (right to effective judicial protection) of the Constitution. They described the circumstances of their arrest and custody and pointed out that when they were questioned by the police they did not have the assistance of lawyers and had not been informed of their rights; they had made confessions only because use had been made of coercion, threats and ill-treatment (see paragraphs 19-20 above). They also claimed that there was no evidence to rebut the presumption that they were innocent of Mr Bultó's murder, as the physical violence to which they had been subjected rendered their confessions invalid. Moreover, there was no connection between the facts found by the Audiencia Nacional and the evidence adduced before it, and its judgment did not explain how it had arrived at its decision.

The applicants also criticised the Audiencia Nacional for not having determined all the issues raised in the defence submissions (Article 851 para. 3 of the Code of Criminal Procedure - see paragraph 43 below): it had ignored their allegations that their statements to the police were invalid and had given no indication of the evidential value it attached to those statements, having regard to the material produced during the trial. Mr Messegué submitted, moreover, that he was implicated solely by confessions extracted by force from Mr Martínez Vendrell, who had later retracted them before the judge; the Audiencia Nacional had again not expressed an opinion as to their validity.

Furthermore, the Audiencia Nacional had made an error of fact in assessing the evidence (Article 849 para. 2 of the Code of Criminal Procedure - see paragraph 42 below), because there was no conclusive evidence to refute their protestations of innocence before the judge. Referring to Article 24 para. 2 of the Constitution (see paragraph 36 below), which enshrines the principle of the presumption of

innocence, and to the Supreme Court's case-law on the subject, the applicants asserted that not only had the evidence been wrongly evaluated but no such evidence in fact existed.

They further submitted that the Audiencia Nacional had not indicated its reasons for holding that the facts had been established, as required by Supreme Court precedents, even though the main defence submission had been that there was no evidence. There could only be one explanation for this, namely that the court had allowed itself to be influenced by the defendants' alleged confessions to the police, which had been obtained in clear breach of the fundamental rights guaranteed in Articles 3 and 17 of the Constitution.

Mr Jabardo also criticised the Audiencia Nacional for not having sought during the hearing to inquire further into the facts. He said that the only prosecution witness who had given evidence in court had not recognised the defendants and that important evidence was lacking, such as identification and the confrontation of witnesses and accused or a reconstruction of the events. Lastly, he pointed to a discrepancy between the judgment of 17 June 1980 convicting Mr Martínez Vendrell (see paragraph 17 above) and the judgment given in the instant case on 15 January 1982 (see paragraph 29 above); in his submission, this discrepancy showed that he, Mr Jabardo, could not have taken part directly in the attack on Mr Bultó.

31. On 27 December 1982, the Supreme Court dismissed the appeals of Mr Barberà and Mr Messegué.

As to the validity of the confessions obtained by the police, including Mr Martínez Vendrell's, it noted that the alleged defects related solely to the findings of fact and accordingly did not give rise to the procedural irregularity complained of, which related only to points of law.

The court said the following about the presumption of innocence (translated from the French translation provided by the Government):

"The evidence offered by the public prosecutor, the private prosecutor and the defence includes, as written evidence, the complete file on the investigation, containing: (a) the statement made to the judge by Mr Jaime Martínez Vendrell, assisted by his lawyer (doc. no. 572 in the file), in which he confirmed the following facts from his first statement to the police: the defendants Barberà Chamarro and Messegué Mas were members of an armed group designed to be the nucleus of a revolutionary army to free the Catalan nation; they were very closely associated with Mr Martínez Vendrell, particularly Mr Messegué; they had been thoroughly trained in urban guerrilla tactics; they lived 'freed from all external obligations', being paid by the organisation to devote all their energies to its work, in accommodation provided by the organisation; they communicated with each other by means of transmitters and used false identity documents and assumed names; Mr Messegué was in charge of one of the direct-action groups which, together with others, formed an organised unit or brigade; both men had important positions in the organisation and had received training such that they 'might have' constructed the explosive device (Mr Barberà the electronic component and Mr Messegué the mechanical component) used for the 'business operations and in particular the one of which Mr Bultó Marqués was the victim - Mr Martínez Vendrell did not know the identity of or the methods used by the persons forming the groups which took part in that operation'; (b) finding of fact in the Audiencia Nacional's judgment of 17 June 1980 in the same case (doc. no. 138 in the file), confirmed unchanged in the Supreme Court's judgment of 10 April 1981 convicting Mr Jaime Martínez Vendrell: 'At an unspecified date at the beginning of that year (he is referring to 1977) three of the young men whom he saw most frequently and whom the defendant (Mr Martínez Vendrell) knew to be heads of armed groups told him they considered that the time had come to go into action and that they were contemplating operations to finance the members of the groups. They told him that they had adjustable explosive devices which could be fixed to the skin of selected victims so that the latter would be obliged to pay the money asked for in order to avoid the risk of an explosion entailed by removing a device without the instructions and equipment in the possession of those who had put it in place. At the end of April, two of these group leaders told him that they were thinking of a businessman, Mr José María Bultó Marqués, on whom to use this device for the first time'; (c) the statement made to the judge by Mr Francisco Javier Barberà Chamarro, assisted by his lawyer (doc. no. 903): he admitted being a member of the Catalan National Liberation Army, working together with Mr Martínez Vendrell, being in possession of arms and knowing of the existence of stocks of arms; (d) the statement made to the judge by Mr Antonino Messegué Mas, assisted by his lawyer (doc. no. 906): he belonged to the armed organisation, had been trained in urban guerrilla tactics by Mr Martínez Vendrell and knew of the existence of a stock of explosives; (e) the official report on a search of the flat at no. 1 Pinos Street, Hospitalet de Llobregat (doc. no. 890), and from the file on the investigation a statement by Mrs Dolores Tubau Molas (doc. no. 904) to the effect that the defendant Barberà Chamarro lived in the flat with other activists and that there were found there (inter alia) a transmitter, electronic equipment, lathes, tools and files containing press cuttings and information about a number of prominent people, and books on topography, the chemistry of explosives, and electronics; (f) the official report on a search of the flat at no. 27 Parlamento Street, Barcelona (doc. no. 892), occupied by Mr Antonino Messegué Mas and Mrs Concepción Durán Freixa (statement in doc. no. 908) and where a transmitter and receiver, medicines, wigs and stiff paper of the type used for national identity cards and for driving licences were seized; (g) the official report on the discovery of an arms dump and two radio transmitters at three places indicated by the defendant Barberà (doc. no. 882); (h) the official report on the discovery of an explosives dump indicated by Mr Messegué and the destruction of the explosives on the spot (docs. nos. 833 and 899). The mere existence of this evidence, irrespective of its implications and the way in which it is assessed, is sufficient to rebut the presumption of innocence relied on by the defendants Barberà Chamarro and Messegué Mas, and we therefore reject grounds five and four respectively of their appeals; the facts established in paragraph 1 of the recital finding that they were directly and immediately

involved in the homicidal operation must consequently be confirmed in toto. The description of the facts as murder under Article 406 para. 3 of the Criminal Code with an aggravating circumstance under Article 10 para. 6, which was allegedly incorrectly applied according to Barberà's sixth ground of appeal and Messegué's fifth ground of appeal, was therefore correct and their appeals under section 849(1) of the Procedure Act must therefore be dismissed."

3. Proceedings in the Constitutional Court

32. The three convicted men appealed to the Constitutional Court alleging a violation of Articles 17 para. 3 (right of everyone arrested to be informed of the reasons for his arrest and to be assisted by a lawyer), 24 para. 2 (right to a fair trial and to be presumed innocent) and 14 (right of all Spaniards to equality before the law) of the Constitution (see paragraphs 30 above and 36 below).

33. On 20 April 1983, the Constitutional Court declared the appeal (recurso de amparo) inadmissible as being manifestly ill-founded. As regards the presumption of innocence it gave the following reasons for its order (auto):

"As the assessment of the evidence lies within the exclusive jurisdiction of the judges and courts, the Constitutional Court cannot find a violation of this provision unless there has been a failure to produce a minimum of evidence against the accused. In the instant case, however, this minimum of evidence was produced, namely in the statements made with the assistance of a lawyer to the investigating judge, the official reports on the searches made and on the real evidence discovered and in the facts as established in another judgment. The Constitutional Court cannot therefore review the criminal courts' assessment of the evidence."

34. In March 1984, the applicants were transferred from Carabanchel Prison in Madrid to Lérida Prison (Lleida-2). In September, the Audiencia Nacional granted Mr Jabardo parole. Since January 1987, Mr Barberà and Mr Messegué have been held in an open prison. [...]

PROCEEDINGS BEFORE THE COMMISSION

47. In their applications of 22 July 1983 to the Commission (nos. 10588/83-10590/83) Mr Barberà, Mr Messegué and Mr Jabardo complained that they had not had a fair trial before an independent and impartial tribunal; they alleged in particular that they were convicted on no evidence except their confessions, which had been extracted by torture, and they relied on Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. [...]

FINAL SUBMISSIONS TO THE COURT

49. In their memorial of 6 May 1987, the applicants asked the Court "to declare that Spain [had] violated Article 6 para. 1 (art. 6-1) of the Convention inasmuch as [their] right to a fair trial was infringed in the instant case". In the event of the Court not so holding, they also asked it to "rule on a violation of Article 6 para. 2 (art. 6-2) on the ground that they [had been] convicted without any evidence".

50. The Government, in their memorial of 4 June 1987, requested the Court "to examine the proceedings leading to the applicants' conviction in their entirety or each of the steps in the proceedings separately; to rule on the objections that domestic remedies [had] not been exhausted; and to declare that the provisions of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the European Convention on Human Rights [had] not been violated in the instant case and that consequently the facts which [had given] rise to the proceedings [did] not disclose any violation by Spain of its obligations under the Convention".

AS TO THE LAW

51. The applicants claimed that they were the victims of breaches of Article 6 (art. 6), which provides:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

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: [...].

(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; [...]

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

B. The right to a fair trial

60. In the applicants' submission, the change in the membership of the trial court was not an isolated incident but was closely bound up with and was to be taken into account in regard to the way the trial at first instance was conducted, in particular the circumstances of the defendants' transfer to Madrid, the security measures taken during the hearing, the "surprising" rapidity of the trial and the passive attitude of the public prosecutor. These, they claimed, were all factors which justified the conclusion that the court was already convinced of the applicants' guilt and regarded the hearing of 12 January 1982 as a pure formality. At the time, however, the court - they submitted - could only have reached such a view on the basis of confessions extracted by the police, because the investigating judge had not made any attempt to clarify the facts. The applicants also criticised the way in which the evidence was presented to the court, alleging that the principles of adversarial proceedings and of equality of arms had not been observed. They complained, among other things, that they had not been able to have the witness Mr Martínez Vendrell examined.Mr Barberà and Mr Jabardo said additionally that they had not been assisted by a lawyer during their first appearance before the investigating judge.

61. Spain's declaration recognising the right of individual petition (Article 25 of the Convention) (art. 25) took effect on 1 July 1981. The terms of that declaration prevent the Court from examining the phase prior to 1 July 1981 in itself but not from looking at the proceedings as a whole in order to assess their fairness (see, in particular and mutatis mutandis, the Milasi judgment of 25 June 1987, Series A no. 119, p. 37, para. 31). [...]

64. As regards the applicants' complaint relating to the brevity of their trial, the Government objected that in their appeals on points of law to the Supreme Court the applicants failed to rely on paragraphs 1, 3 and 4 of Article 850 of the Code of Criminal Procedure. The Court notes, however, that these provisions deal with eventualities which did not occur in the instant case - refusal of procedural orders needed to establish the facts and refusal to hear a witness's reply to relevant questions or to allow such questions to be put. Moreover, the Government submitted before the Commission, and again before the Court, that counsel for the accused should have formally objected to the allegedly humiliating treatment of their clients and to any other alleged irregularity during the trial. They did not, however, state what legal basis there was for such an objection; accordingly, they have failed to indicate sufficiently clearly the existing remedies which the applicants failed to exhaust (see, inter alia, the Bozano judgment previously cited, Series A no. 111, p. 19, para. 46, and paragraph 56 above).

65. As regards the complaints relating to the taking of evidence, the Court agrees with the Commission (decision of 11 October 1985 on admissibility) that the applicants validly raised them in substance in the national courts; they relied in particular on Article 24 of the Spanish Constitution, which essentially corresponds to Article 6 (art. 6) of the Convention (see paragraphs 30, 32 and 36 above).

66. Each ground of the preliminary objection must therefore be rejected.

2. The merits of the complaints at issue

67. The applicants claimed to be victims of a clear violation of paragraph 1 of Article 6 taken in conjunction with paragraphs 2 and 3 (d) (art. 6-1, art. 6-2, art. 6-3-d).

The Court recalls that the guarantees in paragraphs 2 and 3 (d) (art. 6-2, art. 6-3-d) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1) (see, inter alia, the Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29); it will therefore have regard to them when examining the facts under paragraph 1 (art. 6-1).

68. As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (see the same judgment, p. 15, para. 33, second paragraph in fine). The Court must, however, determine - and in this it agrees with the Commission - whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 para. 1 (art. 6-1). For this purpose it will consider in turn the various grounds of complaint before it (see paragraph 60 above).

(a) Transfer of the accused to Madrid

69. On 11 January 1982, that is to say the day before the opening of the hearing before the Audiencia Nacional, the applicants were still in Barcelona Prison. They did not leave for Madrid until the evening of 11 January. They arrived early in the morning of the following day after a journey of more than 600 kilometres in a prison van, although the hearing was due to start at 10.30 a.m. (see paragraph 24 above). The fact, relied on by the Government, that the applicants had asked to be in Barcelona with their families and friends for Christmas (see paragraph 23 above) cannot justify such a late transfer, because the Christmas festivities end on 6 January in Spain.

70. Mr Barberà, Mr Messegué and Mr Jabardo thus had to face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance. Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel.

(b) Replacement of the presiding judge and another judge

71. On the very day of the hearing, Mr de la Concha, the presiding judge of the first section of the Criminal Division of the Audiencia Nacional, had to leave because his brother-in-law had been taken ill; and one of the other judges mentioned in the order of 27 October 1981 (see paragraph 23 above), Mr Infante, was also unable to sit as he was no longer a member of the relevant section of the court. They were replaced by Mr Pérez Lemaur, the presiding judge of the third section, and by Mr Bermúdez de la Fuente, a member of the first section (see paragraph 24 above).

72. Neither the applicants nor their lawyers were given notice of these changes, particularly the change of presiding judge (see paragraph 24 above). Mr Pérez Lemaur, together with Mr Barnuevo and Mr Bermúdez de la Fuente, had admittedly taken a purely procedural decision on 18 December 1981 (see paragraph 23 above), but the defence lawyers could not infer from that that he would also be sitting on the trial court, bearing in mind in particular the preparatory meeting which they had had with Mr de la Concha on the previous day (see paragraphs 24 and 59 above). They were therefore taken by surprise. They could legitimately fear that the new presiding judge was unfamiliar with an unquestionably complex case, in which the investigation file - which was of crucial importance for the final result - ran to 1,600 pages. This is so even though Mr Barnuevo, the reporting judge (see paragraphs 23 and 41 above), remained in his post throughout the entire proceedings: Mr Pérez Lemaur had not taken part in the preparatory meeting on 11 January 1982; the case in fact proceeded without a full hearing of the evidence; the deliberations were due to take place immediately after the hearing, or at the latest on the following day (see paragraph 41 above); and the Audiencia Nacional had to give its decision - and did in fact do so - within three days (see paragraphs 25, 29 and 41 above).

(c) Conduct of the trial of 12 January 1982 and taking of evidence

73. The hearing, with the five accused present, began on the morning of 12 January 1982 and ended the same evening. The Commission was surprised at its brevity in view of the complexity of the case, the considerable time that had elapsed since the occurrence of the facts and the protestations of innocence made by the defendants to the judges concerned. The applicants emphasised the public prosecutor's passive attitude.

The Government contended that the length of a hearing depended on the nature and circumstances of the case, and on the attitude of the parties; in the instant case, the length was determined by the time needed to take evidence and to hear argument. There were two reasons why this whole procedure took only one day: the hearing was the last stage of proceedings after two earlier stages of investigation and interim submissions; and then, by adopting the "por reproducida" procedure, the prosecution and the defence agreed to admit the file on the investigation in evidence without requiring the 1,600 pages to be read out in court.

74. The Court concludes from these submissions that there was in the instant case a direct link between the length of the trial and the more important problem of taking evidence during the trial. It will accordingly look at them together.

75. It should be noted firstly that although under Spanish legislation it is to a certain extent left to the initiative of the parties to offer and present evidence, this does not absolve the court of first instance from its duty of ensuring that the requirements of Article 6 (art. 6) of the Convention are complied with (see, inter alia and mutatis mutandis, the Goddi judgment of 9 April 1984, Series A no. 76, p. 12, para. 31).
76. In criminal cases, the whole matter of the taking and presentation of evidence must be looked at in the light of paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) of the Convention (see paragraph 67 above).

77. Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the

burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him. According to the Government, this is the purpose of the intermediate stage of the proceedings when parties make their interim submissions and indicate the evidence which they propose to tender (see paragraph 40 above). In its interim submissions in the instant case, the public prosecutor gave his version of the facts and defined them in legal terms. He also listed the evidence he sought to have admitted, including the 1,600 page investigation file, the bulk of which did not concern the defendants; however, he did not specify in detail the particular evidence on which he based his account of the facts in relation to the defendants (see paragraph 22 above), and this made the defence's task more difficult.

78. Paragraph 1 of Article 6 taken together with paragraph 3 (art. 6-1, art. 6-3), also requires the Contracting States to take positive steps, in particular to inform the accused promptly of the nature and cause of the accusation against him, to allow him adequate time and facilities for the preparation of his defence, to secure him the right to defend himself in person or with legal assistance, and to enable him 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. The latter right not only entails equal treatment of the prosecution and the defence in this matter (see, mutatis mutandis, the Bönisch judgment of 6 May 1985, Series A no. 92, p. 15, para. 32), but also means that the hearing of witnesses must in general be adversarial. In addition, the object and purpose of Article 6 (art. 6), and the wording of some of the sub-paragraphs in paragraph 3 (art. 6-3), show that a person charged with a criminal offence "is entitled to take part in the hearing and to have his case heard" in his presence by a "tribunal" (see the Colozza judgment of 12 February 1985, Series A no. 89, p. 14, para. 27, and p. 16, para. 32). The Court infers, as the Commission did, that all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument. It will ascertain whether this was done in the instant case.

(i) Questioning of the accused

79. The hearing of 12 January 1982 began with the questioning of the applicants. In reply to questions from the public prosecutor, the private prosecutor and the defence lawyers, they denied any part in the murder of Mr Bultó. In doing so, they challenged all the evidence to the contrary, including their own confessions to the police, which they said were obtained by means of torture (see paragraph 25 above).

(ii) Examination of witnesses

80. Only one of the three eye-witnesses summoned to appear by the prosecution, Mr Bultó's brother-in-law, actually gave evidence at the trial, and he did not recognise the applicants. The public prosecutor asked, however, that account should be taken of the statements made to the police by the other two (see paragraph 26 above); as these statements did not incriminate the accused, the defence raised no objection. The ten witnesses called by the defence were meant to establish that the defendants had been ill-treated, so that the confessions obtained by the police would be declared inadmissible, and to testify to the good civic behaviour of Mr Barberà, Mr Messegué and Mr Jabardo (see paragraph 27 above). The evidence of the various witnesses was heard in circumstances that complied with the requirements of Article 6 para. 1 taken in conjunction with paragraph 3 (d) (art. 6-1, art. 6-3-d), because the witnesses were examined at a public hearing under an adversarial procedure (see paragraph 78 above).

(iii) Documentary evidence

81. In their interim submissions the prosecution (public and private) and the defence had requested that, respectively, all or some of the documents in the investigation file should be read out at the trial. Mr Barberà and Mr Messegué sought also to have read out Mr Martínez Vendrell's statements withdrawing or modifying parts of his previous statement to the police implicating them in the murder (see paragraphs 15 and 17 above). During the hearing, however, the parties agreed to dispense with having the file read out. The use of the "por reproducida" procedure had the consequence that much of the evidence was admitted without being exposed to public scrutiny.

82. The Government stated that there was nothing to prevent counsel for the applicants from requesting that certain documents from the investigation file or indeed the whole file should be read out at the trial (see paragraph 40 above). As they had not done this, they had waived their right to do so. According to the Court's established case-law, waiver of the exercise of a right guaranteed by the Convention - in so far as it is permissible - must be established in an unequivocal manner (see, inter alia, the Colozza judgment previously cited, Series A no. 89, p. 14, para. 28). While the use of the "por reproducida" procedure showed that the defence accepted that the contents of the file need not be read out in public, it cannot be inferred from this that it agreed not to challenge the said contents even where the prosecution relied on them and, in particular, on the statements of certain witnesses; the grounds subsequently relied on by the defence before the Supreme Court and the Constitutional Court confirm this (see paragraphs 30 and 32 above).

83. By means of the "por reproducida" procedure, all the documents in the investigation file were included in the proceedings at the trial. The Court must, however, have regard to those evidential elements which were relevant to the proceedings against the applicants in order to determine whether they had been procured in such a way as to guarantee a fair trial.

84. In Spain the adversarial nature of criminal proceedings extends, as the Government pointed out, to the investigation stage: the Code of Criminal Procedure enables an accused, with the assistance of his advocate, to intervene in respect of steps affecting him, as regards both his own and the prosecution's evidence or measures taken by the investigating judge (see paragraph 39 above). The Court notes, however, that in this case the investigation had commenced well before the applicants' arrest on 14 October 1980. They obviously could not have played any part in it before then. On 22 December 1980, in Barcelona, Mr Barberà appointed an advocate and an attorney in order to take part in the proceedings, but the appropriate judge in Madrid did not record this until 20 January 1981, after the applicants had been charged and less than a month before the completion of the investigation on 16 February 1981; as for Mr Messegué and Mr Jabardo, they instructed defence lawyers five days after the latter date (see paragraphs 21-22 above). Other than when their evidence was taken in Barcelona on 22 January 1981 (see paragraph 21 above), the applicants did not intervene at any stage of the investigation. In addition, the short time left prevented them in practice from submitting evidence on the basis of a proper understanding of the case before the investigation was completed. The public prosecutor did not submit any evidence at the time either. Furthermore, the accused and their lawyers were in Barcelona, the city where the killing had taken place and where the witnesses lived, whereas the investigating judge performed his duties in Madrid. This caused real practical problems both for the witnesses and for the judge. In particular, almost all the procedural steps had to be carried out by letters rogatory in Barcelona (see paragraphs 11, 15, 20 and 21 above). Thus the deficiencies at the trial stage were not compensated by procedural safeguards during the investigation stage.

85. The evidence in the file included firstly (in chronological order) the statements made by Mr Martínez Vendrell, who was the first person to incriminate the applicants (see paragraph 14 above) and was referred to as the principal indirect witness by the Delegate of the Commission. It may seem regrettable that it was not possible to ensure his presence at the trial on 12 January 1982, when the defence could have examined him on an adversarial basis. The respondent State cannot, however, be held responsible for that failure, as, when Mr Martínez Vendrell was searched for by the police after the Supreme Court had upheld his conviction on 10 April 1981 (the relevant warrant was issued on 24 April 1981), he could not be found (see paragraph 18 above).

Accordingly, the Audiencia Nacional had before it only the written text of Mr Martínez Vendrell's statements. The first statement implicated the applicants directly in the murder of Mr Bultó (see paragraph 14 above), but, as the Government themselves accepted, was not admissible evidence under Spanish law because it had been obtained by the police during his ten days in custody and without even a minimum of constitutional safeguards. Nevertheless, it appeared in the file. It was in fact the basis for the second statement, which was entered in the file by an investigating judge in Barcelona in the presence of an advocate and in which Mr Martínez Vendrell withdrew part of his previous confession (see paragraph 15 above). Mr Barberà and Mr Messegué were charged only on 16 March 1979, after the investigating judge in Madrid had been sent the statements (see paragraph 16 above). Before that, they had no standing to intervene in the proceedings against Mr Martínez Vendrell and therefore could not examine him or have him examined; the same applied subsequently during the latter's trial, since they could not then be found (see paragraph 17 above).

86. The evidence of Mr Martínez Vendrell, who had been set free on 17 June 1980, would have been of crucial importance, as was noted by the Supreme Court in its judgment of 27 December 1982 (see paragraph 31 above). The Court observes that the central investigating judge did not even attempt to hear Mr Martínez Vendrell's evidence after the arrest of the applicants on 14 October 1980, not only to confirm his identification of them but also to compare his successive statements with theirs and arrange a confrontation with the applicants. Admittedly, the latter could also have requested an opportunity to examine him; but this does not exonerate the judge, having regard in particular to the specific circumstances referred to in paragraph 84 above. In the end, the applicants never had an opportunity to examine a person whose evidence - which was vital, as is clear from the Supreme Court's judgment of 27 December 1982 (see paragraph 31 above) - had been taken in their absence and was deemed to have been read out at the trial (see, mutatis mutandis, the Unterpertinger judgment previously cited, Series A no. 110, p. 15, para. 31): by the time the file was forwarded to the defence on 27 May 1981 for it to propose its evidence, Mr Martínez Vendrell had absconded (see paragraphs 18 and 22 above).

87. The statements made by the accused themselves constituted another important item of evidence. When they made their confessions to the police, they had already been charged (see paragraph 16 above) but did not have the assistance of a lawyer, although they do not appear to have waived their right to one. Accordingly, these confessions, which were moreover obtained during a long period of custody in which they were held incommunicado (see paragraph 19 above), give rise to reservations on the part of the Court. They were nevertheless appended to the police report and were pivotal in the questioning of the defendants by the investigating judges in Barcelona and by the private prosecutor at the hearing on 12 January 1982. The defence, however, tried to challenge them by claiming that the police had extracted them by torture.

When Mr Barberà and Mr Jabardo made their first statements to the investigating judge in Barcelona, they likewise did not have any legal assistance - whether of their own choosing or assigned by the court (Article 6 para. 3 (c) of the Convention) (art. 6-3-c) - and the file does not show that they had agreed to do without it. The appointment of counsel was not recorded until 20 January 1981 for Mr Barberà, after

he had been charged for the second time, and not until 21 February for Mr Messegué and Mr Jabardo, after the investigation had been completed (see paragraphs 16 and 21 above).

The Court also notes that the central investigating judge in Madrid never heard evidence from the defendants in person - even after the temporary transfer of one of them to the capital - despite the obvious contradictions in their successive statements (see paragraphs 21-22 above); he proceeded by way of letters rogatory.

88. The weapons, other items and documents found at the applicants' homes, and subsequently at the places indicated by Mr Barberà and Mr Messegué, were not produced in court at the trial, although they were relied upon by the prosecution as evidence. That being so, the defence was unable to challenge their identification or relevance in a fully effective manner; after entering an objection on this point before the Audiencia Nacional, counsel for the defence appealed to the Supreme Court and the Constitutional Court (see paragraphs 25, 30 and 32 above).

(d) Conclusion

89. Having regard to the belated transfer of the applicants from Barcelona to Madrid, the unexpected change in the court's membership immediately before the hearing opened, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing. Consequently, there was a violation of Article 6 para. 1 (art. 6-1).

II. ARTICLE 6 PARA. 2 (art. 6-2) OF THE CONVENTION

90. Mr Barberà and Mr Messegué also claimed to be victims of a failure to apply the presumption of innocence, stating that they were convicted solely on the basis of their confessions to the police and that the Audiencia Nacional showed signs of bias against them. Relying on the terms of the judgments of the Supreme Court and the Constitutional Court, the Government stated that the Audiencia Nacional had in fact had other evidence before it.

91. The presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty. In this case, it does not appear from the evidence that during the proceedings, and in particular the trial, the Audiencia Nacional or the presiding judge had taken decisions or attitudes reflecting such an opinion. The Court therefore does not find a violation of Article 6 para. 2 (art. 6-2) of the Convention.

FOR THESE REASONS, THE COURT

5. Holds by ten votes to eight that there has been a breach of Article 6 para. 1 (art. 6-1);

6. Holds unanimously that there has been no breach of Article 6 para. 2 (art. 6-2);

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 December

VAN DE HURK v. THE NETHERLANDS [1994]

(Application no. 16034/90)
JUDGMENT
STRASBOURG
19 April 1994

In the case of Van de Hurk v. the Netherlands*,
The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr S.K. Martens,
Mr I. Foighel,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Mr F. Bigi,
Mr G. Mifsud Bonnici,
Mr J. Makarczyk,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,
Having deliberated in private on 24 November 1993 and 22 March 1994,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 February 1993 and by the Netherlands Government ("the Government") on 11 March 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 16034/90) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Netherlands national, Mr Cornelis Petrus Maria van de Hurk, on 1 December 1989. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993, in the presence of the Registrar, the Vice-President of the Court, Mr R. Bernhardt, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Pekkanen, Mr A.N. Loizou, Mr J.M. Morenilla, Mr F. Bigi, Mr G. Mifsud Bonnici and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr I. Foighel, substitute judge, replaced Mr Pettiti, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's representative and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 30 June 1993 and the Government's memorial on 8 July 1993. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. In accordance with the decision of the President, who had given the applicant leave to use the Dutch language (Rule 27 para. 3), the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:
- for the Government

Mr K. de Vey Mestdagh, Ministry of Foreign Affairs, *Agent*,
Mr J.L. de Wijkerslooth de Weerdesteijn, Landsadvocaat,
Counsel,

Mr B.M.J. van der Meulen,
Mr Th.G.M. Simons, Ministry of Justice, *Advisers*;
- for the Commission
Mr L. Loucaides, *Delegate*;
- for the applicant
Mr Th.J.H.M. Linssen, advocaat en procureur,
Mr R.M. van Male, advocaat en procureur, *Counsel*.

The Court heard addresses by Mr Loucaides, Mr de Wijkerslooth de Weerdesteijn, Mr Linssen and Mr van Male and replies to questions put by some of its members.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant is a Netherlands national born in 1945. He lives at Geffen in the province of Noord-Brabant, where he is a dairy farmer.

7. The applicant owned a cowshed in which there were originally 90 stands for milch cows and cows in calf as well as 63 stands for calves and heifers. In the years 1981, 1982 and 1983 the numbers of milch cows and cows in calf were 90, 96 and 102, respectively; the quantities of milk produced by the applicant in those years were 475,952, 445,571 and 488,026 kilograms.

8. After the Ordinance no. J 1731 on the Additional Levy (Beschikking Superheffing) of 18 April 1984, Staatscourant (Government Gazette) 79 -"the 1984 Ordinance"- was published on 19 April 1984, the applicant was allocated a reference quantity (that is a quantity of milk in excess of which an additional levy is payable - see paragraph 23 below) of 445,813 kilograms.

9. On 29 June 1984 the applicant filed a claim for a larger levy-free quantity of milk under Article 11 of the 1984 Ordinance (see paragraph 27 below) with the Head of the District Office of the Board for the Implementation of Agricultural Measures (districtsbureauhouder van de Stichting tot Uitvoering van Landbouwmaatregelen) of the province of Noord-Brabant. He stated that he had entered into obligations to invest in increasing the number of cow stands for milch cows and cows in calf as early as January 1984. These investments related to a new shed for heifers and bulls, the construction of which would release 40 stands in the existing shed for milch cows and cows in calf. The number of such stands would thus be raised from 90 to 130, an increase of more than 25%. The total cost of building the new shed and adapting the existing one came to more than NLG 100,000.

10. The Head of the District Office of the Board for the Implementation of Agricultural Measures forwarded the applicant's claim to the Director of Agriculture and Food Supply (directeur voor de landbouw en voedselvoorziening) of the province of Noord-Brabant (see paragraph 28 below). The latter rejected it on 1 November 1984, on the ground that the applicant had failed to show "that it had always been his intention to increase the number of stands for milch cows as stated in his claim".

11. On 27 November 1984 the applicant filed an objection to this decision with the Minister of Agriculture and Fisheries (see paragraph 30 below), arguing at length that he had in fact been planning such an increase for a long time.

12. The Minister of Agriculture and Fisheries dismissed the applicant's objection on 11 November 1985, on the ground that "it appeared from the facts and circumstances stated in the objection and from information obtained officially from other sources (ambtelijk overig ingewonnen informatie)" that the number of stands for milch cows and cows in calf had been increased from 118 to 130 (i.e. by 12 or approximately 10%). The increase thus fell well short of the minimum of 25% required by the 1984 Ordinance (see paragraph 27 below).

13. The applicant appealed to the Industrial Appeals Tribunal (College van Beroep voor het Bedrijfsleven) ("the Tribunal" - see paragraph 31 below) on 3 December 1985. He maintained that the number of stands had been increased by 40 and argued that the Minister had erred in considering that the cowshed had originally contained 118 stands.

14. In addition, by a letter which reached the registry of the Tribunal on 30 December 1986, Mr van de Hurk applied to the President of the Tribunal (see paragraph 35 below) for an interim measure to the effect that, pending the Tribunal's judgment, he should not be required to pay the additional levy for 1984-85 and the following milk years and that he should be paid back the additional levy he had already paid in respect of milk production which had not exceeded the reference quantity claimed on the basis of 28 new stands.

15. After a public hearing, the President of the Tribunal, in a letter dated 10 February 1987, asked the Minister to indicate whether he was prepared to reconsider his decision. By a letter dated 3 April 1987 the Minister replied that he saw no reason to do so and that the interim measure requested by the applicant should be refused. The Minister discussed the question of the increase in the number of stands and maintained his previous position. He submitted in the alternative that the applicant's investments referable to that increase fell

short of the required minimum of NLG 100,000. The Minister estimated that the total investment had been worth NLG 176,608.27 and the price per square metre of the new shed had been NLG 197.23; calculating on the basis of the surface taken up in the old shed by the new stands for milch cows and cows in calf, he concluded that the amount involved in the increase had been NLG 48,406.65 at the most.

16. The applicant set out his objections in a letter dated 18 May 1987. He argued firstly that the Minister was estopped from using this argument, which had never been invoked as a reason for rejecting the applicant's original claim; in the alternative, the Minister's calculations were wrong. He claimed, with reference to a list of the costs concerned drawn up by his accountant, that his total investment had in fact been NLG 215,183.22, and criticised the method of calculation used by the Minister. In his view, 65% of the total investment was referable to cow stands in the new shed for heifers, of which 90% replaced similar stands in the old shed that were now to be used for milch cows and cows in calf; the sum relating to the relevant increase was therefore NLG 125,882.

17. On 7 July 1987 the President of the Tribunal gave a decision refusing the interim measure requested, holding that it was not prima facie likely that the Tribunal itself would overturn the Minister's decision. In his view, the Minister had not erred in rejecting the applicant's claim. The President did not find it necessary to address the question of the increase in the number of stands for milch cows and cows in calf, since he accepted the Minister's alternative argument concerning the applicant's investment. He rejected the applicant's submission that the Minister was estopped from relying on that ground, holding that section 51 of the 1954 Industrial Appeals Act (Wet administratieve rechtspraak bedrijfsorganisatie, Staatsblad (Official Bulletin) 1954, 416, as amended - "the 1954 Act") entitled him to supplement his arguments while the applicant had not only had sufficient possibility of replying to the Minister's alternative submission but had in fact done so. Accepting the method of calculation used by the Minister and the total investment submitted by the applicant, the President arrived at a figure of NLG 55,440 referable to the increase in the number of stands in the old cowshed, and that figure was insufficient.

18. By a letter of 25 September 1987 to the registrar of the Tribunal the applicant stated that he wished to continue the proceedings. Commenting on the President's decision, he discussed extensively his own method of calculation. Like the Minister, he took as his starting-point the investment involved in building the new shed for heifers. Starting from the figure which he gave before the President - NLG 215,183.22 (see paragraph 16 above) - he calculated a price per square metre of NLG 240. On that basis he arrived at a figure of NLG 125,882 for the investment referable to the increase in the number of cow stands for milch cows and cows in calf in the existing cowshed. In the alternative, if the Minister's calculations were to be followed, he submitted that the Minister had based them on incorrect premises; if applied correctly, the Minister's method resulted in a figure referable to the extension of stands for milch cows and cows in calf of NLG 91,200, which was sufficient since the applicant had carried out the physical work involved in building the new cowshed himself (see paragraph 27 below).

19. The Minister filed a written statement in reply on 21 November 1988. A public hearing was held on 19 April 1989, during which the applicant again contested the Minister's method of calculation and argued that, should the Tribunal accept it nevertheless, the price per square metre calculated by the Minister was in any case too low; it was not NLG 240 - the Minister's figure - but NLG 342.85.

20. The Tribunal delivered its judgment on the merits on 16 June 1989. Adopting the same approach as the President, it did not decide whether the increase in the number of cow stands had been sufficient; indeed, it explicitly declined to address this point. It likewise accepted the Minister's method of calculation; applying it to the figures submitted by the applicant in response to the decision of its President (a price per square metre of NLG 240, the new stands covering a surface of 330 square metres), the Tribunal arrived at an investment of NLG 79,200 referable to the increase in the number of stands. The Tribunal refused to consider the price per square metre put forward by the applicant at the hearing, on grounds of belatedness, holding:

"The applicant's statement first made at the hearing to the effect that the price per square metre is in reality NLG 342.85 will not be taken into account in reviewing the decision appealed against, in view of the rule laid down in Article 6 para. 2 of the Ordinance, amongst other things."

Accordingly, concluding that the applicant's investments fell short of the minimum required, the Tribunal rejected the applicant's appeal.

II. RELEVANT EUROPEAN ECONOMIC COMMUNITY LAW AND DOMESTIC LAW AND PRACTICE

A. European Economic Community regulations

21. There had been surpluses of milk and milk products for some considerable time. By 1984, according to the preamble of Council Regulation (EEC) no. 856/84, "quantities of milk delivered [were] increasing at a rate such that disposal of surpluses [was] imposing financial burdens and market difficulties which [jeopardised] the very future of the common agricultural policy".

22. Amending an earlier regulation which had not proved sufficiently effective, Council Regulation (EEC) no. 856/84 (OJ (Official Journal) no. L 90 of 1 April 1984, p. 10) was adopted by the Council of the European Communities in response to these structural surpluses.

23. The Council of the European Communities decided that for an initial period of five years the quantity of milk every dairy farmer would be allowed to produce should be limited to a fixed amount (the "reference quantity"). To this end they introduced a system under which dairy farmers had to pay a penalty or "additional levy" on milk delivered in excess of their allotted quantities. It was left to the States themselves to share out their guaranteed quantities within their jurisdictions according to a formula prescribed by Council Regulation (EEC) no. 857/84 (OJ no. L 90 of 1 April 1984, p. 13).

24. Under Article 189 of the EEC Treaty, Council Regulations (EEC) no. 856/84 and (EEC) no. 857/84 were binding in their entirety and directly applicable in all member States of the European Communities. They entered into force on 1 April 1984.

B. Implementation of Council Regulations (EEC) no. 856/84 and (EEC) no. 857/84 in the Netherlands

1. Substantive provisions

25. Under section 13 paras. 1-2 of the Agriculture Act (Landbouwwet), the Minister of Agriculture, Nature Conservancy and Fisheries (minister voor landbouw, natuurbeheer en visserij) is empowered to issue an ordinance (beschikking) imposing a levy on the production, supply and processing of agricultural produce. Such an ordinance may be adopted, inter alia, to give effect to regulations, guidelines, decisions and recommendations of the EEC in so far as they relate to its common agricultural policy.

26. Council Regulations (EEC) no. 856/84 and (EEC) no. 857/84 were implemented by the 1984 Ordinance. This Ordinance was given retroactive effect to 1 April 1984, that being the date of entry into force of the EEC regulations.

27. Dairy farmers who had assumed obligations in connection with investments (investeringsverplichtingen) after 1 September 1981 but before 1 March 1984 could claim a larger reference quantity, calculated according to a formula given in the 1984 Ordinance, if certain conditions were fulfilled. Such an increased reference quantity was available, inter alia, to dairy farmers who could prove that they had entered into financial obligations to increase the number of their cow stands (for milch cows or cows in calf) by at least 25% to more than 60 (Article 11 of the 1984 Ordinance). The amount required to be invested was at least NLG 100,000, or 90% of that figure if the farmer could prove that he himself had contributed sufficiently to the physical work involved to make up the difference.

2. Procedural provisions

28. A person claiming an increased reference quantity on the basis of Article 11 of the 1984 Ordinance had until 1 August 1984 to file his claim with the Head of the District Office of the Board for the Implementation of Agricultural Measures, who would forward it to the provincial Director of Agriculture and Food Supply (Articles 6 para. 1, 7 para. 1 of the 1984 Ordinance). The Director gave a decision after consulting an advisory panel.

29. Such a claim had to be accompanied by a statement setting out the arguments and documentary evidence. According to Article 6 para. 2 of the 1984 Ordinance:

"A claim as referred to in the first paragraph shall be reasoned. It shall include a statement supported by evidence as to the various grounds of the claim referred to in Articles 11, 11b, 11c, 12 and 13.

The claim shall not be admissible if ... the rules laid down in this paragraph have not been complied with."

30. In the event of his claim being rejected, the claimant had thirty days within which to file an objection (bezwaarschrift) to the Director's decision with the Minister (Article 7 paras. 2-3 of the 1984 Ordinance).

C. The Industrial Appeals Tribunal

31. An appeal against the decision of the Minister lay within thirty days to the Tribunal (section 46 of the Agriculture Act).

32. The Tribunal is a judicial body set up under the 1954 Act. It was instituted initially to hear appeals against decisions and acts by various economic regulatory bodies, but gradually its jurisdiction has been extended to include certain decisions of central government and other independent government bodies under specialist legislation. According to the "Guidelines for making provision for appeals to

the Industrial Appeals Tribunal" (Richtlijnen voor het openstellen van beroep op het College van Beroep voor het Bedrijfsleven) of 24 June 1986, Government Gazette 1986, 124, the Tribunal should in principle be the competent court with regard to "legislation of a socio-economic nature".

Section 5 of the 1954 Act gave the Tribunal competence to review such acts and decisions for compliance with legislation of a general nature and general principles of good governance (algemene beginselen van behoorlijk bestuur), to check whether there had been any abuse of authority and to determine whether in weighing up the interests at stake, the government body concerned had acted reasonably in deciding as it had.

33. The judges of the Tribunal are appointed for life by the Crown. They must have the same qualifications as Court of Appeal judges (section 9 of the 1954 Act). They take the same oath and receive the same salary as Court of Appeal judges and are subject to the same rules and procedure as regards supervision and dismissal (sections 11 and 12 of the 1954 Act).

Tribunal judges may not have any other official position, nor may they hold any position in private enterprise or in any association of employers or employees (section 10 of the 1954 Act).

34. The proceedings before the Tribunal are public. At the material time, they normally comprised written proceedings (an application filed by an appellant, a memorial in reply submitted by the government body concerned, and possibly - if the President consented - additional memorials) followed by an oral hearing (sections 29 et seq. of the 1954 Act).

Section 51 allowed both the government body and the applicant to "alter their claim or their defence and the grounds advanced in support, until the close of the hearing, unless the Tribunal [was] of the opinion that such a change place[d] the opponent at an unreasonable disadvantage".

35. Under section 65 of the 1954 Act the applicant could apply for interim measures to the President of the Tribunal. He could do so both before and after filing an appeal on the merits. The President would give a decision as soon as possible, having heard the government body concerned or at least offered it the opportunity to be heard.

36. The Tribunal, against whose judgment there was no further appeal, was empowered to overrule the decision appealed against and to provide for the consequences of such reversal; in particular, it could order the government body concerned to make, retract or alter a decision or to act or refrain from acting in a certain way. The judgment might include an order to pay a penalty in the event of non-compliance (section 58 of the 1954 Act). The Tribunal could also order the body to pay compensation for any damage suffered by the appellant as a result of the decision or act appealed against (section 60). To the extent that the judgment ordered payment of a sum of money, it could be executed in accordance with the rules pertaining to the execution of judgments of the courts in civil cases (section 62).

37. Sections 74 and 75 of the 1954 Act provided as follows:

Section 74

"1. If in Our opinion the consequences of a judgment [i.e. of the Industrial Appeals Tribunal] are contrary to the general interest, We may, on the recommendation of those of Our ministers whom it concerns, decide that it shall not be followed or shall not be followed in its entirety.

2. Pending the taking of a decision under the preceding paragraph, We may, on the recommendation of those of Our ministers whom it concerns, suspend the judgment in whole or in part for a length of time to be determined by Us. Even after prolongation, suspension may not be for longer than one year.

3. A decision as referred to in the first paragraph may only be taken within two months of the judgment or, if the judgment is suspended within that period, within the length of time determined for the suspension. A decision as referred to in the second paragraph may only be taken within two months of the judgment.

4. Our decisions shall be published in the Official Bulletin.

5. The first two paragraphs shall not apply in so far as the decision awards compensation or partial compensation or orders the payment of costs.

6. ..."

Section 75

"1. If We decide that the judgment shall not be followed or shall not be followed in its entirety, the Industrial Appeals Tribunal may, at the request of the person concerned, retry the case taking due notice of Our Decision or order the government body concerned to pay compensation for all or part of the damage suffered by the appellant as a consequence of the fact that the judgment is not followed or not followed in its entirety.

2-4. ..."

The expressions "We", "Our" and "Us" in the above sections referred to the fact that the decisions under section 74 took the form of a royal decree (Koninklijk besluit), that is a decree signed by the Monarch and the Minister responsible. Since such a decree can only be adopted on the initiative and the (political) responsibility of a Minister, it was effectively the Minister who had the power to issue a decision under section 74 paras. 1-2. Following customary Netherlands terminology, the present judgment will refer to the Monarch and the Minister together as "the Crown".

38. No use was ever made of the powers under sections 74 and 75 of the 1954 Act. The above-mentioned Guidelines (see paragraph 32 above) stated explicitly that new laws conferring jurisdiction on the Tribunal should declare the 1954 Act applicable except for sections 74 and 75. Before the Guidelines were drawn up, the Minister of Justice replied as follows to a question from the Council of State (Raad van State):

"In my opinion, it is in principle never necessary to declare sections 74 and 75 applicable by analogy. At the time, these two provisions were included in the Act as a matter of prudence, which may be explained by the circumstance that more than thirty years ago the legislature had little idea of the way in which administrative judicial procedure would develop. No use has ever been made of the Crown's powers under section 74. One might even venture to suggest that the scheme of sections 74 and 75 has become a dead letter." (Kamerstukken (Parliamentary Documents) II 1984-1985, 18798, A-C, p. 10)

39. The 1954 Act remained in force until 1 January 1994. On that date a General Administrative Code (Algemene Wet Bestuursrecht) came into force, laying down new uniform rules of administrative-law procedure.

At the same time the 1954 Act was replaced by the Industrial Organisation (Administrative Jurisdiction) Act (Wet bestuursrechtspraak bedrijfsorganisatie). Under section 19 of that Act, the new uniform rules laid down in the General Administrative Code also govern the procedure of the Tribunal.

There is no provision in either the Code or the Act empowering any executive authority to interfere with the binding force of a judgment.

PROCEEDINGS BEFORE THE COMMISSION

40. In his application (no. 16034/90) lodged with the Commission on 1 December 1989, the applicant alleged a violation of Article 6 para. 1 (art. 6-1) of the Convention on three counts.

Firstly, his case had not been dealt with by an "independent and impartial" tribunal, since the Crown and thus the Minister could decide that a judgment of the Tribunal should not be implemented or suspend its execution.

Secondly, he claimed that he had not been afforded a "fair hearing" by the Tribunal since it had disregarded his arguments while allowing the Minister to make further submissions at a later stage and had, moreover, deviated from the issue originally addressed by his objection to the Minister's decision (the number of cow stands) by ruling only on the sum he had invested.

Thirdly, he alleged that in its judgment the Tribunal had not, or not sufficiently, dealt with various arguments which he had advanced.

41. On 8 January 1992 the Commission declared the application admissible.

In its report of 10 December 1992 (made under Article 31) (art. 31), the Commission expressed the opinion, by twelve votes to five, that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention.

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 PARA. 1 (art. 6-1)

42. According to Article 6 para. 1 (art. 6-1) of the Convention,

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent ... tribunal ..."

43. The present case concerns the "determination of civil rights and obligations" so that Article 6 para. 1 (art. 6-1) is applicable; indeed, this was not disputed.

A. "Independent tribunal"

44. The applicant alleged that his case had not been determined by an "independent tribunal" as required by Article 6 para. 1 (art. 6-1) of the Convention, since section 74 of the 1954 Act allowed the Crown to decide that judgments of the Tribunal should not be implemented. The Government contested this allegation, whereas the Commission accepted it.

45. In the Court's opinion, the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal", as is confirmed by the word "determination" ("qui décidera") (compare the following judgments: Benthem v. the Netherlands, 23 October 1985, Series A no. 97, p. 17, para. 40; H. v. Belgium, 30 November 1987, Series A no. 127, p. 34, para. 50; and Belilos v. Switzerland, 29 April 1988, Series A no. 132, p. 29, para. 64). This power can also be seen as a component of the "independence" required by Article 6 para. 1 (art. 6-1).

46. The applicant, while admitting that the Government in defending cases before the Industrial Appeals Tribunal never referred to their powers under section 74 of the 1954 Act, maintained that the mere existence of that power impaired that tribunal's independence, since it clearly influenced its decisions. This, he alleged, was shown by the fact - which as such was not denied by the Government - that of the many thousands of appeals lodged with the Tribunal by dairy farmers concerning the application of the 1984 Ordinance only a very limited proportion - no more than 2% - had been successful. It was suggested by the applicant that in deciding these cases the Tribunal had borne in mind the possibility of the Crown exercising its powers under section 74.

47. The Court finds that there is nothing in the information at its disposal to indicate that the mere existence of the Crown's powers under section 74 had any influence on the way the Tribunal handled and decided the cases which came before it. In particular, no significance can be attributed to the low success rate of appeals against decisions taken under the 1984 Ordinance. Whether or not the requirements of Article 6 (art. 6) have been met cannot be assessed with reference to the applicant's chances of success alone, since this provision does not guarantee any particular outcome (see, inter alia and mutatis mutandis, the Costello-Roberts v. the United Kingdom judgment of 25 March 1993, Series A no. 247-C, p. 62, para. 40).

48. In the Government's view, the existence of the Crown's powers under section 74 was no obstacle to classifying the Industrial Appeals Tribunal as a "tribunal", since section 74 did not confer upon the Crown the power to overturn the Tribunal's judgments as regards their reasoning, but merely the possibility of blocking their consequences if they ran counter to the general interest. In addition, section 74 of the 1954 Act was in any event a dead letter. They emphasised that no use had ever been made of that provision and that it was due to be repealed when the new General Administrative Code entered into force on 1 January 1994.

49. As to the first argument, the Court, while accepting that section 74 may be construed as suggested by the Government, points out that for an individual litigant it is the consequences of litigation - the operative provisions of a judgment - which are of importance; the actual content of his civil rights and obligations is determined by those provisions.

50. Nor can it be accepted that section 74 had lost all legal significance. Like the Commission, the Court cannot disregard the fact that section 74 was still law at the time of the events complained of and for several years thereafter. There was nothing to prevent the Crown (in the person of the Minister of Agriculture, Nature Conservancy and Fisheries) from availing itself of the powers thereby conferred upon it had it considered such a course of action necessary or desirable in view of what it might perceive as the general interest (see, mutatis mutandis, the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, p. 24, para. 48, and the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, p. 11, para. 23).

51. In this context the Government appear to contend, moreover, that had the Crown ever made use of its powers under section 74, the individual concerned could have sought review of the resulting decision in the civil courts.

In the absence of any clear statutory provision and of any domestic case-law on this issue - the Crown never having made use of the said powers - the Court is unable to verify the existence and effectiveness of such a remedy.

52. It follows that at the material time section 74 of the 1954 Act, which remained in force until 1 January 1994, allowed the Minister partially or completely to deprive a judgment of the Tribunal of its effect to the detriment of an individual party. One of the basic attributes of a "tribunal" was therefore missing.

A defect of this nature may, however, be remedied by the availability of a form of subsequent review by a judicial body that affords all the guarantees required by Article 6 (art. 6) (see, as recent authorities and mutatis mutandis, the following judgments: 24 August 1993, Nortier v. the Netherlands, Series A no. 267, p. 16, para. 36; 25 November 1993, Holm v. Sweden, Series A no. 279-A, p. 16, para. 33).

53. The Government maintained that such a review was in fact available.

Firstly, section 75 of the 1954 Act allowed for the possibility of a retrial by the Industrial Appeals Tribunal itself. The Government pointed out that - since the original judgment remained binding, at any rate in so far as it established that the originally impugned decision of the government body was unlawful - such a retrial would necessarily lead to a judgment ordering the government body to pay damages and stressed that paragraph 5 of section 74 made it clear that the Crown had no power to set aside judgments requiring the government body to pay damages.

In the second place, the Government suggested that since the Convention was directly applicable in the Netherlands, the applicant could - under well-established principles of Netherlands law (see the Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, p. 22, para. 57) - have taken his case to the civil courts on the ground that the Industrial Appeals Tribunal could not be considered an independent tribunal within the meaning of Article 6 (art. 6) of the Convention.

54. The Court is not convinced by these arguments.

As to the first remedy, the Court notes that section 75 of the 1954 Act did not allow the Tribunal to depart from the Crown's decision under section 74. To that extent the possibility of a retrial can hardly be considered an effective remedy within the meaning of the case-law referred to in paragraph 52 above. Moreover, although it is true that section 75 allowed for compensation in the event of the Crown's using its powers under section 74, compensation cannot be equated with advantages obtained under an original judgment of the Industrial Appeals Tribunal ordering a government body to take a specific decision in favour of the party seeking review.

As to the second remedy, its effectiveness is open to doubt. The Government themselves have stated that, on the few occasions when the question was addressed by the civil courts, it was held that the Tribunal "[afforded] sufficient guarantees of judicial review" (see the Oerlemans judgment referred to above, ibid.).

55. There has accordingly been a violation of Article 6 para. 1 (art. 6-1) in that the applicant's civil rights and obligations were not "determined" by a "tribunal".

B. Fairness of proceedings

56. The applicant complained that while Article 6 para. 2 of the 1984 Ordinance required him to produce all his arguments and his evidence at the outset, his opponent - the Minister - had been able to change his arguments to suit his position as the case evolved. The rejection by the Director of Agriculture and Food Supply of the applicant's initial request for a larger reference quantity of milk was based on the consideration that he had failed to show "that it had always been his intention to increase the number of stands for milch cows"; the Minister's dismissal of his objection was grounded on an alleged insufficient increase in the number of cow stands for milch cows and cows in calf. Before the Tribunal, however, the Minister had based his case on the allegation that his investments had fallen short of the figure required. Accordingly there was a violation of the principle of "equality of arms" enshrined in Article 6 para. 1 (art. 6-1) of the Convention.

57. Firstly, this complaint overlooks the fact that section 51 of the 1954 Act meets the requirement of "equality of arms" in that it allows both parties to the proceedings before the Industrial Appeals Tribunal to "alter their claim or their defence and the grounds advanced in support" (see paragraph 34 above). Furthermore, the complaint does not take into account the fact that, although in the proceedings before the Industrial Appeals Tribunal the Minister, making use of the opportunity afforded him under section 51, did indeed base his case on new arguments which differed from those on which he had founded his original refusal of the applicant's request, the applicant was allowed to submit, inter alia, a report by his accountant as well as counter-arguments. Therefore, not only did the applicant have a genuine opportunity to respond (see the Ruiz-Mateos v. Spain judgment of 23 June 1993, Series A no. 262, p. 25, para. 63) but he actually did so. No breach of the principle of "equality of arms" is therefore established.

58. With reference to the fact that the Tribunal had refused to consider the price per square metre referable to the increase in the number of cow stands for milch cows and cows in calf which he had submitted at its hearing, the applicant claimed further that his case had not been dealt with "fairly".

59. The effect of Article 6 para. 1 (art. 6-1) is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see the Kraska v. Switzerland judgment of 19 April 1993, Series A no. 254-B, p. 49, para. 30). It has to be determined whether this condition was satisfied in the instant case.

60. The Tribunal based its assessment on the price per square metre provided by the applicant himself previously, in his written pleadings, and which followed from calculations on which the applicant had relied in the proceedings before the President of the Tribunal (see paragraphs 16 and 18 above). It chose to apply to this figure a method of calculation different from that advocated by the applicant and thereby arrived at a result which was not favourable to him. It is not for the Court to criticise this choice; as a general rule, the assessment of the facts is within the province of the national courts (see, as the most recent authority, the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, pp. 18-19, para. 31).

It is true that the Tribunal refused to consider the applicant's new figure. However, he only produced it at the latest possible stage, namely at the oral hearing after the Minister had responded in writing to his written pleadings.

Given these circumstances, the refusal of the Tribunal to consider the applicant's new figure does not constitute a violation of Article 6 para. 1 (art. 6-1).

61. The applicant lastly brought forward a series of grievances which may be summarised as a complaint that in its judgment the Industrial Appeals Tribunal did not, or not sufficiently, deal with various arguments advanced by him.

Article 6 para. 1 (art. 6-1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. Nor is the European Court called upon to examine whether arguments are adequately met.

Making a general assessment, the Court does not find that the judgment of the Industrial Appeals Tribunal is insufficiently reasoned. Consequently no violation of Article 6 para. 1 (art. 6-1) is established in this respect either.

II. APPLICATION OF ARTICLE 50 (art. 50)

62. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of the decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

63. The applicant claimed a total of NLG 622,137 for loss of business, in addition to compensation for the levy-free quantity which in his contention had been wrongly denied him and the value of which at 1 July 1993 he put at NLG 397,952. The total claimed thus came to NLG 1,020,089. He submitted extensive and detailed calculations based on the situation which would have existed had the extra reference quantity in fact been allowed.

64. This claim is based on the assumption that the judgment of the Tribunal would have been favourable to the applicant had the alleged violations of Article 6 para. 1 (art. 6-1) not taken place. However, it is by no means clear that the outcome of the case would have been different in the absence of the violation found (see paragraph 55 above). The Court therefore agrees with the Delegate of the Commission and the Government that the applicant's claim under this head must be dismissed.

B. Costs and expenses

65. The applicant did not receive legal aid before either the Commission or the Court. He claimed reimbursement of lawyer's fees "directly connected with the present proceedings" (which the Court takes to mean the Strasbourg proceedings). Up to the hearing, they

were estimated to have amounted to 200 hours at NLG 265 an hour for counsel's fees, i.e. a total of NLG 53,000, excluding value-added tax; the travel and accommodation expenses incurred through attendance at the hearing itself would have to be added.

The Delegate of the Commission considered that the applicant was entitled to reimbursement of expenses incurred in presenting his case before the Convention institutions. The Government considered the amount of time spent on the case "unreasonable".

66. It is reiterated that legal costs are only recoverable in so far as they relate to the violation found (see, inter alia, the Pham Hoang v. France judgment of 25 September 1992, Series A no. 243, p. 24, para. 46). Although the applicant also alleged a lack of fairness in the proceedings, he concentrated on the question in respect of which a violation has been found. The Court therefore finds it reasonable to award the applicant a sum of NLG 35,000 together with any value-added tax that may be chargeable.

67. No particulars were provided regarding travel and accommodation expenses. However, the Court finds it reasonable to award the applicant an amount equal to that which would have been due to him under the legal aid scheme to cover these costs for himself and his representative, namely FRF 6,336.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been a violation of Article 6 para. 1 (art. 6-1) in that the applicant's civil rights and obligations were not "determined" by a "tribunal" within the meaning of that provision;

2. Holds unanimously that there has been no violation of Article 6 para. 1 (art. 6-1) as regards the requirements of fairness of proceedings;

3. Holds by eight votes to one that the respondent State is to pay to the applicant, within three months, 35,000 (thirty-five thousand) Netherlands guilders, together with any value-added tax which may be chargeable, in respect of costs and expenses, to which is to be added 6,336 (six thousand three hundred and thirty-six) French francs to be converted into Netherlands currency at the rate of exchange applicable on the date of delivery of this judgment;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English* and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 April 1994.

McGONNELL v. THE UNITED KINGDOM [2000]

(Application no. 28488/95)
JUDGMENT
STRASBOURG
8 February 2000

In the case of McGonnell v. the United Kingdom,
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Mr J.-P. Costa, *President*,
Mr P. Kūris,
Mrs F. Tulkens,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mrs H.S. Greve, *judges*,
Sir John Laws, ad hoc *judge*,
and Mrs S. Dollé, *Section Registrar*,
Having deliberated in private on 28 September 1999, 25 January and 1 February 2000,
Delivers the following judgment, which was adopted on the last-mentioned date:
PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 4 December 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. The case originated in an application (no. 28488/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 by a British national, Mr Richard James Joseph McGonnell ("the applicant"), on 29 June 1995.

3. The Commission's request referred to former Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 of the Convention.

4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 § 4 thereof read in conjunction with Rule 100 § 1 and Rule 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.

5. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within that Section included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Articles 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, Acting President of the Section and President of the Chamber (Rules 12 and 26 § 1 (a)). The other members designated to complete the Chamber were Mr P. Kūris, Mrs F. Tulkens, Mr W. Fuhrmann, Mr K. Jungwiert and Mrs H.S. Greve (Article 26 § 1 (b)).

Subsequently Sir Nicolas Bratza, who had taken part in the Commission's examination of the case, withdrew from sitting in the Chamber (Rule 28). The United Kingdom Government ("the Government") accordingly appointed Sir John Laws to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. In accordance with Rule 59 § 2, the Chamber decided, on 8 June 1999, to hold a hearing which took place in public in the Human Rights Building, Strasbourg, on 28 September 1999.

There appeared before the Court:

(a) *for the Government*
Mrs S. Langrish, Foreign and Commonwealth Office *Agent*,
Sir Sidney Kentridge QC,
Mr D. Anderson QC, *Counsel*,
Mr G. Rowland QC, Attorney-General for Guernsey,
Mr R. Clayton, Home Office,
Mr P. Jenkins, Lord Chancellor's Department,
Mrs C. Davidson, Lord Chancellor's Department,

Mr M. Birt QC, Attorney-General for Jersey,
Ms M. Gray, *Advisers*;

(b) *for the applicant*
Mr B. Emmerson,
Ms J. Simor, *Counsel*,
Mr R.A. Perrot, *Advocate*.

The Court heard addresses by Mr Emmerson and Sir Sidney Kentridge.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The planning background

7. The applicant bought the Calais Vinery, Calais Lane, St Martin's in 1982. A number of planning applications were made to permit residential use of the land in the ensuing years. The applications were all refused, an appeal being dismissed by the Royal Court in July 1984. In 1986 or 1987 the applicant moved into a converted packing shed on his land.

8. In 1988 the applicant, through an advocate, made representations to a planning inquiry which was considering the draft Detailed Development Plan no. 6 (DDP6). In his report to the President of the Island Development Committee (IDC), the inspector set out the arguments led by the applicant's advocate and by the advocate for the IDC, and concluded that a dwelling on the applicant's site would be an intrusion into the agricultural/horticultural hinterland. He supported the IDC's proposed zoning of the land as an area reserved for agricultural purposes and in which development was generally prohibited.

9. The President of the IDC submitted DDP6, in draft, to the President of the States of Deliberation on 22 May 1990.

10. The States of Deliberation, presided over by Mr Graham Dorey, the Deputy Bailiff, debated and adopted DDP6 on 27 and 28 June 1990. The zoning of the applicant's land was not changed.

11. A retrospective application for planning permission to convert the packing shed into a dwelling was rejected by the IDC on 11 July 1991 as the IDC was bound to take into account DDP6, according to which the site was zoned as a Developed Glasshouse Area where residential development was not allowed.

12. On 27 March 1992 the applicant was convicted by the Magistrates' Court on his guilty plea of changing the use of the shed without permission, contrary to section 14(1)(a) of the Island Development (Guernsey) Law 1966 ("the 1966 Law"). He was fined 100 pounds sterling, with ten days' imprisonment in default.

13. On 15 February 1993 the IDC applied for permission under Section 37(1)(h) of the 1966 Law itself to carry out the necessary works to remedy the breach of the planning legislation. The application was adjourned in Ordinary Court by the Deputy Bailiff on 25 February 1993 for a date to be fixed. The Deputy Bailiff was also unwilling to hear the matter on the ground of having dealt with the applicant when he was Her Majesty's Procureur.

14. A further application on the applicant's behalf for permission to continue living in the shed was dismissed by the IDC on 18 May 1993, and a request for the section 37(1)(h) proceedings to be adjourned was dismissed by the Bailiff on 20 May 1993. On 25 June 1993 the Royal Court comprising the Bailiff and three Jurats granted the IDC's application under Section 37(1)(h).

B. The particular facts of the case

15. On 10 August 1993 the applicant's current representative made a formal application for change of use on behalf of the applicant, together with a request that continued occupation be permitted pending determination of the expected appeal against an expected refusal. The application was rejected by the IDC on 26 October 1994 in the following terms:

"I have to inform you that ... the Committee decided to reject your proposal for the following reason which is based on the considerations which the Committee is bound to take into account under the provisions of section 17 of the Island Development (Guernsey) Laws 1966-1990:–

(a) Detailed Development Plan no. 6, as approved by the States.

The site is located within a Developed Glasshouse Area and the Committee's written statement of policy makes no provision for the form of development proposed. I enclose for your information a copy of the written statement of policy. ..."

16. On 6 June 1995 the Royal Court, comprising the Bailiff, by then Sir Graham Dorey, and seven Jurats, heard the applicant's appeal. The applicant's representative accepted that the written statement provided for no development other than "Developed Glasshouse" in the area, but submitted that there were nevertheless reasons in the case to permit the change of use: the external appearance of the building would not change and there would be no future prejudice to the horticultural use of the land, such that it was unreasonable for the IDC to take an unduly narrow view of what it allowed under the DDP. The Bailiff then summed up the applicant's complaints to the Jurats, instructing them that the ultimate burden of proof was on the IDC to satisfy the Jurats that the IDC's decision was reasonable. The appeal was dismissed unanimously. The decision recites the grounds of appeal, but gives no reasons.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The Court has been referred to one recent official document relating to the Constitution of Guernsey generally. It is the States of Guernsey Administrative and Accounting Guidelines, issued in 1991 as a manual of reference and best practice for the information and guidance of civil servants. It has forewords by the then Bailiff and President of the States, Sir Charles Frossard, and by the States Supervisor, Mr F.N. Le Cheminant. The section dealing with the Constitution and law of Guernsey is taken from a pamphlet by a former Bailiff, and the part dealing specifically with the position of the Bailiff reads as follows:

"The Bailiff is the Island's chief citizen and representative.

The Bailiff is appointed by the Sovereign by Letters Patent under the Great Seal of the Realm and holds office during Her Majesty's Pleasure subject to a retiring age of seventy years. He is President of the States of Election, President of the States of Deliberation, President of the Royal Court, President of the Court of Appeal and head of the Administration.

The Bailiff, as President of the States of Deliberation, is entitled to speak on any matter and has no original vote but he has a casting vote if the Members are equally divided. In general, the Bailiff uses his voice to ensure a further investigation of questions on which the States are in doubt. He places measures before the States at the request of the States Committees but he can also on his own initiative place any matter before the assembly.

He is, with the Lieutenant-Governor, a channel of communication between the Privy Council and the Secretary of State for the Home Department on the one hand and on the other, the Island authorities; and in a number of questions, as the head of the Administration of the Island, he would be expected to guide the Island authorities.

He has been relieved of some of his administrative responsibilities by the appointment of the States Advisory and Finance Committee which is in the nature of a co-ordinating committee with advisory powers but the Bailiff may, in his own discretion, lay before the States any matter which he has previously referred to the Committee providing that he gives the Committee an opportunity to acquaint the States with its views.

While the Bailiff is responsible for arranging the business to come before the States, he is not in a position to refuse to place before the States any question of business if so requested by Members or Committees of the States. The assembly looks to the Bailiff for advice on matters affecting the Constitution of the Island.

In the course of insular legislation or in discussions arising from communications from the Privy Council or the Home Department, it is the duty of the Bailiff to represent the views of the Island in constitutional matters.

In the event of differences between the Crown and the States it is the historical duty of the Bailiff to represent the views of the people of the Island."

18. The Bailiff is the senior judge of the Royal Court. In the modern era, he has usually occupied the offices of Her Majesty's Comptroller, Her Majesty's Procureur (Solicitor-General and Attorney-General respectively) and, since 1970, Deputy Bailiff, before finally becoming Bailiff. In his judicial capacity, the Bailiff is the professional judge (with the lay Jurats) in the Royal Court, and is *ex officio* President of the Guernsey Court of Appeal. In his non-judicial capacity, the Bailiff is President of the States of Election, of the States of Deliberation, of four States committees (the Appointments Board, the Emergency Council, the Legislation Committee and the Rules of

Procedure Committee), and he plays a role in communications between the island authorities and the government of the United Kingdom and the Privy Council. Where the Bailiff presides in his non-judicial capacity, he has a casting, but not an original, vote.

19. The States of Election elects people to fill the vacancies which occur amongst the twelve Jurats. Jurats sit as lay members of the Royal Court. It is their function to determine the issues of fact referred to them, and to decide whether or not to allow an appeal. They also sit on certain of the States committees, either because a committee mandate requires the election of a Jurat or by reason of abilities or interests personal to them. Jurats are not, however, eligible to sit on the States Committee for Home Affairs, the Gambling Control Committee or any States committee which administers legislation the provisions of which include a right of appeal to the Royal Court against a decision of that committee.

20. The States of Deliberation exercises its legislative power in Guernsey in the form of Laws and Ordinances. In practice, a "Billet d'Etat" is laid before the States, generally by one or other of the States committees. Having passed through the States of Deliberation, Projets de Loi (draft laws) are scrutinised by the Home Office and other relevant departments of the United Kingdom government before being submitted to the Privy Council in London for royal assent. Ordinances do not need royal assent and are made under the States of Deliberation's limited common-law powers, or under powers delegated to the States by Guernsey laws or Acts of the United Kingdom parliament applicable to Guernsey.

21. The States of Deliberation is not divided on party political lines; members of the States are elected as individuals, and vote in all matters according to their consciences. All members are of equal importance, and there are no time-limits on the length of speeches or debates generally. The States is scheduled to meet twelve times each calendar year. Sittings usually last one or two days.

22. The States committees conduct the government of Guernsey. There are some fifty States committees, to which specific administrative tasks are given by statute or delegated by the States of Deliberation. Each committee is directly accountable to the States of Deliberation.

23. None of the States committees has legal supremacy over the others, although the Advisory and Finance Committee is the most important. It oversees Treasury matters and examines all proposals and reports which are to be placed before the States of Deliberation. The committees, each of which has a Chief Officer or Chief Executive, are supported by a professional civil service of some 1,800 staff.

24. The Appointments Board, one of the States committees, appoints officials to fill certain offices in the States' service when those offices become vacant. With limited exceptions, it appoints at the level of Senior Officer Grade 8 or above. The offices include the States Supervisor and other senior civil servants such as senior medical personnel, the Prison Governor and the Chief Officer of Police. It has never appointed a Chief Executive of the IDC. The Appointments Board met twenty-four times in the ten years prior to 31 December 1998.

25. The Emergency Council has the power to declare a state of emergency, to make emergency regulations where the population or a substantial portion of it risks being deprived of the essentials of life, and to make other essential arrangements in the case of hostile attack by a foreign power. It has met three times in the last ten years. On none of those occasions was a state of emergency declared.

26. The Legislation Committee, which meets about once a month, reviews and revises the Projets de Loi, reviews and drafts Ordinances and, in certain cases, orders that an Ordinance shall come into force pending consideration by the States of Deliberation. The latter function has been used on sixteen occasions in the last ten years.

27. The Rules of Procedure Committee considers the Rules of Procedure in relation to assemblies of the States of Deliberation, receives representations from the States and makes representations to the States for amendments to the Rules. It has met twenty-five times in the last fifteen years.

28. The Bailiff's role in communications between the island authorities and the government of the United Kingdom and Privy Council arises from his historical function of representing the views of the islanders to the Crown. The Bailiff represents a States committee's views outside the island when specifically requested to do so, and in accordance with a clear mandate. Representations are generally on behalf of the smaller committees. Examples of this function are the Bailiff's involvement in negotiating the level of fees payable in respect of Guernsey students attending higher education institutions in the United Kingdom, and in requesting the government to ensure that Heathrow Airport should have slots for aircraft from regional airports such as Guernsey.

29. The States Supervisor, the Chief Officer of the Advisory and Finance Committee, is the committee's senior adviser on policy, and is also head of the Guernsey civil service. He liaises with other senior civil servants in relation to all proposals for legislation and other major administrative items submitted by the various committees to the States of Deliberation and comments on them for the benefit of the

Advisory and Finance Committee's deliberations on them. He also gives guidance to the Chief Officers of other committees and attends meetings of those committees where appropriate.

30. Section 14(1)(a) of the Island Development (Guernsey) Law 1966 provides:

"A person shall not, without the permission in writing in that behalf of the Committee, carry out development of any land."

Section 17(a) provides:

"In exercising its powers under the provisions of the last preceding section the Committee shall take into account the Strategic and Corporate Plan when approved by the States and any relevant Detailed Development Plans when so approved."

31. In the case of *Bordeaux Vineries Ltd v. States Board of Administration* (4 August 1993), a challenge was made to the participation of the Bailiff as a judge in the Royal Court in an action against the States Board of Administration, one of the major States committees. The Court of Appeal noted that the then Bailiff, at first instance, had held:

"Insofar as the constitutional position is concerned ... my first duty is to the Crown in all matters, and I do not espouse causes of the States. ... The point has been raised as to my casting vote ... the vote is to be cast constitutionally. The way I defined that was to vote against any proposition before the States and only if that vote impinged on my conscience would I contemplate any other course."

In connection with the existence of an appeal to it, the Court of Appeal noted:

"... the decision upon a submission that the Bailiff ... is disqualified by interest from hearing any matter should in the first place be made by the Bailiff ... From that decision an appeal lies to this Court."

As to the participation of the Bailiff, the Court of Appeal found that:

"... the Bailiff is invested by law with duties in the Royal Court and in the States. The consequence of this dual function is that he has on occasion to take part in the exercise by the court of jurisdiction over the States. I do not think that on these occasions his responsibility in the States disqualifies him from discharging his responsibility in this Court. He can properly discharge both responsibilities because although he is a member of the States his special position there means he is not responsible for the decisions of the States or the acts of its agencies ..."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr McGonnell applied to the Commission on 29 June 1995.

33. The Commission declared the application (no. 28488/95) partly admissible on 22 January 1998. In its report of 20 October 1998 (former Article 31 of the Convention)[1], it expressed, by twenty-five votes to five, the opinion that there had been a violation of Article 6 § 1 of the Convention.

FINAL SUBMISSIONS TO THE COURT by the government

34. The Government's principal written submission was that the application should be declared inadmissible pursuant to Article 35 of the Convention. In the alternative, they submitted that there was no violation of Article 6 § 1 of the Convention.

35. In their oral submissions, the Government contended that the complaint under Article 6 did not give rise to a violation of the Convention. In their final observations, they maintained that an appeal was available in respect of the constitutional position of the Bailiff, and was not taken.

THE LAW

I. alleged violation of article 6 § 1 of the convention

36. The applicant claimed that he did not have the benefit of the guarantees of Article 6 § 1 of the Convention at the hearing of his case before the Royal Court of Guernsey on 6 June 1995. The relevant part of Article 6 provides:

"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. ..."

37. The Government contested the claim. The Commission upheld it.

A. The Government's preliminary objection

Alleged non-exhaustion of domestic remedies

38. The Government contended that the complaint concerning the alleged lack of independence and impartiality of the Royal Court in the applicant's case should be declared inadmissible for failure to exhaust domestic remedies, pursuant to Article 35 of the Convention, which states:

"1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

In the Government's submission, it would have been open to the applicant to appeal to the Guernsey Court of Appeal in respect of any alleged lack of independence and impartiality on the part of the Royal Court. They pointed to the case of *Bordeaux Vineries Ltd v. States Board of Administration* (see paragraph 31 above) in which the Court of Appeal found that an appeal lay to it against a decision by the Bailiff on whether he was disqualified by interest from hearing any matter. They noted that the jurisdiction of the European Court to declare an application inadmissible for failure to exhaust domestic remedies, even when such arguments were rejected by the Commission, was not in doubt. They claimed that there was no reason why the exercise of the jurisdiction should depend on the Commission having given detailed consideration to the point.

39. The applicant contended that the Government were estopped from raising an objection of non-exhaustion, among other reasons because they had stated before the Commission's admissibility decision that "the Government concedes that it was not reasonably practicable for the applicant to have addressed any of his complaints to another authority". He considered that in any event no domestic remedy had been available to him, as the *Bordeaux Vineries* case had decided that the Bailiff's functions as President of the States did not preclude him from sitting as a judge in actions against the States.

40. The Court notes that the Government's submissions were not raised before the Commission. The Government are therefore estopped from relying on them (see, among many other authorities, the Vasilescu v. Romania judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1074, § 34).

B. Applicability of Article 6

41. The parties agreed that Article 6 § 1 of the Convention was applicable to the proceedings in the present case, and the Court so finds.

C. Waiver

42. The Government claimed that where a legally represented applicant had failed to raise an objection to the tribunal when it was open to him to do so, he must – even if the application was admissible – be deemed to have waived his right to object to the independence and impartiality of that tribunal.

43. The applicant submitted that the Government's submissions were a mere repetition of their submissions as to non-exhaustion of domestic remedies, and that they should be dismissed for the same reason. He considered that the Government had not, in any event, established a waiver.

44. The Court recalls that in the context of a complaint concerning the absence of a public hearing in civil proceedings, it has held that "a waiver must be made in an unequivocal manner and must not run counter to any important public interest" (see the Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66). No express waiver was made in the present case. The question, as in the Håkansson and Sturesson case, is whether there was a tacit one. The answer to the question whether the applicant ought to have taken up his complaint with either the Bailiff at the hearing on 6 June 1995, or on appeal with the Court of Appeal, depends on what was reasonable in the circumstances of the case. In assessing that reasonableness, the Court notes first that in the *Bordeaux Vineries* case referred to by the Government, the Court of Appeal found that there was no structural conflict between the Bailiff's duties in the Royal Court and in the States of Deliberation.

Secondly, the Court notes that the argument of waiver was made for the first time before the Court: it was not raised before the Commission either prior or subsequent to the Commission's decision on admissibility.

45. Given the clear statement of the Court of Appeal in the *Bordeaux Vineries* case that the Bailiff's constitutional functions in connection with the States do not impinge on his judicial independence, and the fact that a domestic challenge was not only not pursued by the applicant in the domestic proceedings, but was not raised by the Government until a late stage of the Convention proceedings, the Court finds that the applicant's failure to challenge the Bailiff in Guernsey cannot be said to have been unreasonable, and cannot amount to a tacit waiver of his right to an independent and impartial tribunal.

D. Compliance with Article 6 § 1

46. The applicant pointed to the non-judicial functions of the Bailiff, contending that they gave rise to such close connections between the Bailiff as a judicial officer and the legislative and executive functions of government that the Bailiff no longer had the independence and impartiality required by Article 6. As specific examples, the applicant pointed to three matters which were not referred to before the Commission. They are the facts that the Bailiff is invariably appointed from the office of the Attorney-General, that he acts as Lieutenant-Governor of the island when that office is vacant, and that the Bailiff who sat in the present case had also presided over the States of Deliberation when DDP6, the very act which was at issue in the applicant's later case, was adopted. He also claimed that the Royal Court gave inadequate reasons for its judgment.

47. The Government recalled that the Convention does not require compliance with any particular doctrine of separation of powers. They maintained that whilst the Bailiff has a number of positions on the island, they cannot give rise to any legitimate fear in a reasonably well-informed inhabitant of Guernsey of a lack of independence or impartiality because the positions do not involve any real participation in legislative or executive functions. In particular, they underlined that when the Bailiff presides over the States of Deliberation or one of the four States committees in which he is involved, his participation is not that of an active member, but rather he is an independent umpire, who ensures that the proceedings run smoothly without taking part in or expressing approval or disapproval of the matters under discussion. In connection with the reasons for the Royal Court's judgment, the Government considered that the Bailiff's summing-up, taken together with the decision of the Jurats, gave sufficient reasons to comply with Article 6 of the Convention.

48. The Court recalls that in its Findlay v. the United Kingdom judgment (25 February 1997, *Reports* 1997-I, p. 281, § 73) it found that:

"in order to establish whether a tribunal can be considered as 'independent', regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence ...

As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect ...

The concepts of independence and objective impartiality are closely linked ..."

49. In the present case, too, the concepts of independence and objective impartiality are closely linked, and the Court will consider them together.

50. The Court first observes that there is no suggestion in the present case that the Bailiff was subjectively prejudiced or biased when he heard the applicant's planning appeal in June 1995. It has not been alleged that the Bailiff's participation as Deputy Bailiff in the adoption of DDP6 in 1990 gives rise to actual bias on his part: the applicant stated that it was not possible to ascertain whether there was actual bias because of the Bailiff's various functions, but he did not contend that the Bailiff was subjectively biased or prejudiced.

51. The Court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the Court is faced solely with the question whether the Bailiff had the required "appearance" of independence, or the required "objective" impartiality.

52. In this connection, the Court notes that the Bailiff's functions are not limited to judicial matters, but that he is also actively involved in non-judicial functions on the island. The Court does not accept the Government's analysis that when the Bailiff acts in a non-judicial capacity he merely occupies positions rather than exercising functions: even a purely ceremonial constitutional role must be classified as

a "function". The Court must determine whether the Bailiff's functions in his non-judicial capacity were, or were not, compatible with the requirements of Article 6 as to independence and impartiality.

53. The Court observes that the Bailiff in the present case had personal involvement with the planning matters at the heart of the applicant's case on two occasions. The first occasion was in 1990, when, as Deputy Bailiff, he presided over the States of Deliberation at the adoption of DDP6. The second occasion was on 6 June 1995, when he presided over the Royal Court in the determination of the applicant's planning appeal.

54. The Court recalls that in the case of Procola v. Luxembourg, four of the five members of the *Conseil d'Etat* had carried out both advisory and judicial functions in the same case (judgment of 28 September 1995, Series A no. 326, p. 16, § 45).

55. The participation of the Bailiff in the present case shows certain similarities with the position of the members of the *Conseil d'Etat* in the Procola case. First, in neither case was any doubt expressed in the domestic proceedings as to the role of the impugned organ. Secondly, and more particularly, in both cases a member, or members, of the deciding tribunal had been actively and formally involved in the preparatory stages of the regulation at issue. As the Court has noted above, the Bailiff's non-judicial constitutional functions cannot be accepted as being merely ceremonial. With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. In the present case, in addition to the chairing role as such, the Deputy Bailiff could exercise a casting vote in the event of even voting and, as the Bailiff stated in the *Bordeaux Vineries* case, there was no obligation on him to exercise his casting vote against a proposition before the States where that vote impinged on his conscience (see paragraph 31 above). Moreover, the States of Deliberation in Guernsey was the body which passed the regulations at issue. It can thus be seen to have had a more direct involvement with them than had the advisory panel of the *Conseil d'Etat* with the regulations at issue in the Procola case (judgment cited above, p. 12, § 25).

56. The Court also notes that in the De Haan case, the judge who presided over the Appeals Tribunal was called upon to decide on an objection for which he himself was responsible. In that case, notwithstanding an absence of prejudice or bias on the part of the judge, the Court found that the applicant's fears as to the judge's participation were objectively justified (see the De Haan v. the Netherlands judgment of 26 August 1997, *Reports* 1997-IV, pp. 1392-93, §§ 50-51).

57. The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, and it is therefore unnecessary for the Court to look into the other aspects of the complaint.

58. It follows that there has been a breach of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

60. The applicant requested the Court to award a "just and appropriate sum in compensation". In early correspondence he referred to the sum of 50,000 pounds sterling (GBP). The Government considered that there was no reason to award any sum in respect of pecuniary or non-pecuniary damage.

61. The Court finds that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered. No specific claim for pecuniary damage has been made, and the Court finds none.

B. Costs and expenses

62. The applicant has submitted bills totalling GBP 20,913.90 (exclusive of value-added tax – "VAT"). The Government have not commented on them.

63. The Court awards the applicant the sum of GBP 20,913.90, together with any VAT which may be payable.

C. Default interest

64. According to the information available to the Court, the statutory rate of interest applicable in England and Wales at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, GBP 20,913.90 (twenty thousand nine hundred and thirteen pounds sterling ninety pence), together with any value-added tax that may be chargeable;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 8 February 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

JUSSILA v. FINLAND [2006]

(Application no. 73053/01)
JUDGMENT
STRASBOURG
23 November 2006

In the case of Jussila v. Finland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr B. Zupančič,
Mr P. Lorenzen,
Mr L. Caflisch,
Mr L. Loucaides,
Mr I. cabral barreto,
Mr V. Butkevych,
Mr J. Casadevall,
Mr M. Pellonpää,
Mr K. Traja,
Mr M. Ugrekhelidze,
Mrs A. Mularoni,
Mrs E. fura-sandström,
Ms L. Mijović,
Mr D. Spielmann,
Mr J. Šikuta, *judges*,
and Mr E. Fribergh, *Registrar*,

Having deliberated in private on 5 July and 25 October 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 73053/01) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Mr Esa Jussila ("the applicant"), on 21 June 2001.

2. The applicant, who had been granted legal aid, was represented by Mr Pirkka Lappalainen, a lawyer practising in Nokia. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged that he did not receive a fair hearing in the proceedings in which a tax surcharge was imposed as he was not given an oral hearing.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 9 November 2004 it was declared partly admissible by a Chamber of that Section, composed of Judges Bratza, Pellonpää, Casadevall, Maruste, Traja, Mijović and Šikuta, together with the Section Registrar Mr M. O'Boyle. The Chamber joined to the merits the question of the applicability of Article 6 of the Convention. On 14 February 2006 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Mr C.L. Rozakis, who was unable to attend the deliberations on 25 October 2006, was replaced by Mr I. Cabral Barreto, substitute judge (Rule 24 § 3). Mr A. Kovler, who was likewise unable to attend those deliberations, was replaced by Mrs E. Fura-Sandström, substitute judge (Rule 24 § 3).

6. The applicant and the Government each filed written observations on the merits. The parties replied in writing to each other's observations.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 5 July 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr a. kosonen of the Ministry for Foreign Affairs, *Agent*,
Mrs l. halila,
Mr p. pykönen, *Advisers*;

(b) *for the applicant*
Mr p. lappalainen, member of the Bar, *Counsel*.

The Court heard addresses by Mr Kosonen and Mr Lappalainen and their replies to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1949 and lives in Tampere, Finland.

9. On 22 May 1998 the Häme Tax Office (*verotoimisto, skattebyrån*) requested the applicant, who ran a car repair shop, to submit his observations regarding some alleged errors in his value added tax (VAT) declarations (*arvonlisävero, mervärdesskatt*) for the fiscal years 1994 and 1995.

10. On 9 July 1998 the Tax Office found that there were deficiencies in the applicant's book-keeping in that, for instance, receipts and invoices were inadequate. The Tax Office made a reassessment of the VAT payable basing itself on the applicant's estimated income, which was higher than the income he had declared. It ordered him to pay, *inter alia*, tax surcharges (*veronkorotus, skatteförhöjning*) amounting to ten per cent of the reassessed tax liability (the additional tax surcharges levied on the applicant totalled 1,836 Finnish Marks (FIM), corresponding to 308.80 euros (EUR)).

11. The applicant appealed to the Uusimaa County Administrative Court (*lääninoikeus, länsrätten*) (which later became the Helsinki Administrative Court; *hallinto-oikeus, förvaltningsdomstolen*). He requested an oral hearing and that the tax inspector as well as an expert appointed by the applicant be heard as witnesses. On 1 February 2000 the Administrative Court took an interim decision inviting written observations from the tax inspector and after that an expert statement from an expert chosen by the applicant. The tax inspector submitted her statement of 13 February 2000 to the Administrative Court. The statement was further submitted to the applicant for his observations. On 25 April 2000 the applicant submitted his own observations on the tax inspector's statement. The statement of the expert chosen by him was dated and submitted to the court on the same day.

12. On 13 June 2000 the Administrative Court held that an oral hearing was manifestly unnecessary in the matter because both parties had submitted all the necessary information in writing. It also rejected the applicant's claims.

13. On 7 August 2000 the applicant requested leave to appeal renewing at the same time his request for an oral hearing. On 13 March 2001 the Supreme Administrative Court refused him leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Assessment and imposition of tax surcharges

14. Section 177 (1) of the Value-Added Tax Act (*arvonlisäverolaki, mervärdesskattelagen*; Act no. 1501/1993) provides that if a person obliged to pay taxes has failed to pay the taxes or clearly paid an insufficient amount of taxes or failed to give required information to the tax authorities, the Regional Tax Office (*verovirasto, skatteverket*) must assess the amount of unpaid taxes.

15. Section 179 provides that a tax assessment may be conducted where a person has failed to make the required declarations or has given false information to taxation authorities. The taxpayer may be ordered to pay unpaid taxes or taxes that have been wrongly refunded to the person.

16. Section 182 provides, *inter alia*, that a maximum tax surcharge of 20 per cent of the tax liability may be imposed if the person has without a justifiable reason failed to give a tax declaration or other document in due time or given essentially incomplete information. The tax surcharge may amount at the most to twice the amount of the tax liability, if the person has failed without a justifiable reason to fulfil his or her duties fully or partially even after being expressly asked to provide information.

17. In for example the Finnish judicial reference book *Encyclopædia Iuridica Fennica* a tax surcharge is defined as an administrative sanction of a punitive nature imposed on the tax payer for conduct contrary to tax law.

18. Under Finnish practice, the imposition of a tax surcharge does not prevent the bringing of criminal charges for the same conduct.

B. Oral hearings

19. Section 38 (1) of the Administrative Judicial Procedure Act (*hallintolainkäyttölaki, förvaltningsprocesslagen*; Act no. 586/1996) provides that an oral hearing must be held if requested by a private party. An oral hearing may however be dispensed with if a party's request is ruled inadmissible or immediately dismissed or if an oral hearing would be clearly unnecessary due to the nature of the case or other circumstances.

20. The explanatory part of the Government Bill (no. 217/1995) for the enactment of the Administrative Judicial Procedure Act considers the right to an oral hearing as provided by Article 6 and the possibility in administrative matters to dispense with the hearing when it would be clearly unnecessary, as stated in section 38(1) of the said Act. There it is noted that an oral hearing contributes to a focussed and immediate procedure but since it does not always bring any added value, it must be ensured that the flexibility and cost effectiveness of the administrative procedure is not undermined. An oral hearing is to be held when it is necessary for the clarification of the issues and the hearing can be considered beneficial for the case as whole.

21. During the period 2000 to 2006 the Supreme Administrative Court did not hold any oral hearings in tax matters. As to the eight Administrative Courts, appellants requested an oral hearing in a total of 603 cases. The courts held an oral hearing in 129 cases. There is no information as to how many of these taxation cases concerned the imposition of a tax surcharge. According to the Government's written submission of 12 July 2006, the Administrative Courts had so far in 2006 held a total of 20 oral hearings in tax matters. As regards the Helsinki Administrative Court in particular, in 2005, it examined a total of 10,669 cases out of which 4,232 were tax matters. Out of the last mentioned group of cases 505 concerned VAT. During that year the Administrative Court held a total of 153 oral hearings out of which three concerned VAT.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

22. The applicant complains that the tax surcharge proceedings were unfair as the courts did not hold an oral hearing in his case. The Court has examined this complaint under Article 6 of the Convention, which reads, insofar as relevant, as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.”

A. The parties' submissions

1. The applicant

23. The applicant contested the Government's submissions as giving misleading erroneous interpretations of domestic and Convention law. According to the applicant, his case required, both under the domestic legislation and under Article 6 of the Convention, a mandatory oral hearing due to his need for legal protection and the fact that the credibility of witness statements played a significant role in the determination of the case. According to the applicant, the matter did not concern EUR 308.80 only but altogether a financial liability of EUR 7,374.92. The applicant maintained that the lack of an oral hearing *de facto* placed the burden of proof on him. He also emphasised the importance of the threat of the punishment and the impact on his business from having to pay unjustified taxes without legal basis.

24. In his oral submissions, the applicant pointed out that he had not “opted for” the liability to pay VAT. On the contrary, as the annual turnover exceeded the threshold laid down by the Value Added Tax Act, it was compulsory to file a VAT return.

2. The Government

25. The Government recalled the fundamental nature of the obligation on individuals and companies to pay tax. Tax matters formed part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. An extension of the ambit of Article 6 § 1 under its criminal heading to cover taxes could have far-reaching consequences for the State's possibilities to collect taxes.

26. The Government noted that, under the Finnish legal system, tax surcharges belonged to administrative law. They were not imposed under criminal law provisions but in accordance with various tax laws. Moreover, they were determined by the tax authorities and the administrative courts, and they were in all respects treated differently from court-imposed sanctions. The surcharge in issue in this case was targeted at a given group with a particular status, namely citizens under the obligation to pay VAT and registered as subject to VAT. It was not therefore imposed under a general rule. The main purpose of the surcharges was to protect the fiscal interests of the State and to exert pressure on taxpayers to comply with their legal obligations, to sanction breaches of those obligations and to prevent re-offending. However this aspect was not decisive. They emphasised that the penalty imposed did not reach the substantial level identified in *Bendenoun v. France* (judgment of 24 February 1994, Series A no. 284). The tax surcharges could not be converted into a prison sentence and the amount of the tax surcharge in the present case was low, ten per cent, which amounted to the equivalent of EUR 308.80, with an overall maximum possible of 20 per cent applicable.

27. Assuming Article 6 was applicable, the Government maintained that the obligation under Article 6 § 1 to hold a public hearing was not an absolute one. A hearing might not be necessary due to the exceptional circumstances of the case, for example when it raised no questions of fact or law which could not be adequately resolved on the basis of the case file and parties' written observations. Besides the publicity requirement there were other considerations, including the right to a trial within a reasonable time and the related need for an expeditious handling of the courts' case-load, which had to be taken into account in determining the necessity of public hearings in proceedings subsequent to the trial at first-instance level.

28. The Government maintained that in the present case the purpose of the applicant's request for an oral hearing was to challenge the reliability and accuracy of the report on the tax inspection by cross-examining the tax inspector and the expert. They noted that the Administrative Court took the measure of inviting written observations from the tax inspector and after that a statement from an expert chosen by the applicant. An oral hearing was manifestly unnecessary as the information provided by the applicant himself formed a sufficient factual basis for the consideration of the case. The issue at hand was rather technical, being based on the report of the tax inspector. Such a dispute could be better dealt with in writing than in oral argument. There was nothing to indicate that questions of fact or law would have emerged, which could not have been adequately resolved on the basis of the case file and the written observations of the applicant, the tax inspector and the expert. No additional information could have been gathered by hearing, as required by the applicant, the tax inspector or the expert personally. Furthermore, the applicant was given the possibility of putting forward any views in writing which in his opinion would be decisive for the outcome of the proceedings. He also had the possibility to comment on all the information provided by the tax authorities throughout the proceedings. Further, he was able to appeal to the County Administrative Court and Supreme Administrative Court both of which had full jurisdiction on questions of fact and law and could quash the decisions of the tax authorities. The Government concluded that there were circumstances which justified dispensing with a hearing in the applicant's case.

B. The Court's assessment

1. Applicability of Article 6

29. The present case concerns proceedings in which the applicant was found, following errors in his tax returns, liable to pay VAT and an additional ten per cent surcharge. The assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head (see *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII). The issue therefore arises in this case whether the proceedings were “criminal” within the autonomous meaning of Article 6 and thus attracted the guarantees of Article 6 under that head.

30. The Court's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria, sometimes referred to as the “*Engel* criteria” were most recently affirmed by the Grand Chamber in *Ezeh and Connors v. the United Kingdom* ([GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X):

“... [I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. ...

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. ..."

31. The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see *Ezeh and Connors*, cited above, § 86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 54; also *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, § 55). This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Ezeh and Connors*, § 86, citing, *inter alia*, *Bendenoun v. France*, § 47).

32. The Court has considered whether its case-law supports a different approach in fiscal or tax cases. It recalls that in the *Bendenoun* judgment, which concerned the imposition of tax penalties or surcharge for evasion of tax (VAT and corporation tax in respect of the applicant's company and his personal income tax liability), the Court did not refer expressly to *Engel* and listed four elements as being relevant to the applicability of Article 6 in that case: that the law setting out the penalties covered all citizens in their capacity as taxpayers, that the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter re-offending; that it was imposed under a general rule whose purpose is both deterrent and punitive; and that the surcharge was substantial (422,534 French francs (FRF) in respect of the applicant and FRF 570,398 in respect of his company, corresponding to EUR 64,415 and EUR 86,957 respectively). These factors may be regarded however in context as relevant in assessing the application of the second and third *Engel* criteria to the facts of the case, there being no indication that the Court was intending to deviate from previous case-law or to establish separate principles in the tax sphere. It must further be emphasised that the Court in *Bendenoun* did not consider any of the four elements as being in themselves decisive and took a cumulative approach in finding Article 6 applicable under its criminal head.

33. In *Janosevic v. Sweden* (no. 34619/97, ECHR 2002-VII), the Court made no reference to *Bendenoun* or its particular approach but proceeded squarely on the basis of the *Engel* criteria identified above. While reference was made to the severity of the actual and potential penalty (a surcharge amounting to 161,261 Swedish crowns (SEK), corresponding to EUR 17,284, was involved and there was no upper limit on the surcharges in this case), this was as a separate and additional ground for the criminal characterisation of the offence which had already been established on examination of the nature of the offence (*Janosevic*, §§ 68-69; see also *Västberga Taxi Aktiebolag and Vulic v. Sweden* (no. 36985/97, 23 July 2002 decided on a similar basis at the same time).

34. In the subsequent case of *Morel v. France* ((dec.), no. 54559/00, ECHR 2003-IX), however, Article 6 was found not to apply in respect of a ten per cent tax surcharge (FRF 4,450, corresponding to EUR 678), which was “not particularly high” and was therefore “a long way from the 'very substantial' level” needed for it to be classified as criminal. The decision, which applied the *Bendenoun* rather than the *Engel* criteria attaches paramount importance to the severity of the penalty to the detriment of the other *Bendenoun* criteria, in particular that concerning the nature of the offence (and the purpose of the penalty) and makes no reference to the recent *Janosevic* case. As such, it seems more in keeping with the Commission's approach (see *Bendenoun v. France*, no. 12547/86, Commission's report of 10 December 1992, Decisions and Reports (DR) in which the Commission based the applicability of Article 6 chiefly on the degree of severity of the penalty, unlike the Court in the same case, which weighed up all the aspects of the case in a strictly cumulative approach). *Morel* is an exception among the reported cases in that it relies on the lack of severity of the penalty as removing the case from the ambit of Article 6, although the other criteria (general rule, not compensatory in nature, deterrent and punitive purpose) had clearly been fulfilled.

35. The Grand Chamber agrees with the approach adopted in the *Janosevic* case, which gives a detailed analysis of the issues in a judgment on the merits after the benefit of hearing argument from the parties (cf. *Morel* which was a decision on inadmissibility). No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6.

36. Furthermore, the Court is not persuaded that the nature of tax surcharge proceedings is such that they fall, or should fall, outside the protection of Article 6. Arguments to that effect have also failed in the context of prison disciplinary and minor traffic offences (see, variously, *Ezeh and Connors* and *Öztürk*, cited above). While there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention. In this case the Court will therefore apply the *Engel* criteria as identified above.

37. Turning to the first criterion, it is apparent that the tax surcharges in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive.

38. The second criterion, the nature of the offence, is the more important. The Court observes that, as in the *Janosevic* and *Bendenoun* cases, it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. It is not

persuaded by the Government's argument that VAT applies to only a limited group with a special status: as in the previously-mentioned cases, the applicant was liable in his capacity as a taxpayer. The fact that he opted for VAT registration for business purposes does not detract from this position. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge.

39. The Court must therefore consider whether the tax surcharge proceedings complied with the requirements of Article 6, having due regard to the facts of the individual case, including any relevant features flowing from the taxation context.

2. Compliance with Article 6

40. An oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 79) and where an applicant has an entitlement to have his case “heard”, with the opportunity *inter alia* to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.

41. That said, the obligation to hold a hearing is not absolute (see *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, § 66). There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (see, for example, *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; *cf. Lundevall v. Sweden*, no. 38629/97, § 39, 12 November 2002 and *Salomonsson v. Sweden*, no. 38978/97, § 39, 12 November 2002, and see also *Göç v. Turkey* [GC], no. 36590/97, § 51, ECHR 2002-V, where the applicant should have been heard on elements of personal suffering relevant to levels of compensation).

42. The Court has further acknowledged that the national authorities may have regard to the demands of efficiency and economy and found, for example, that the systematic holding of hearings could be an obstacle to the particular diligence required in social security cases and ultimately prevent compliance with the reasonable time requirement of Article 6 § 1 (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 58 and the cases cited therein). Although the earlier cases emphasised that a hearing must be held before a court of first and only instance unless there were exceptional circumstances that justified dispensing with one (see, for instance, *Håkansson and Sturesson v. Sweden*, cited above, p. 20, § 64; *Fredin v. Sweden (no. 2)*, judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and *Allan Jacobsson v. Sweden (no. 2)* judgment of 19 February 1998, *Reports* 1998-I, p. 168, § 46), the Court has clarified that the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases (see *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005). The overarching principle of fairness embodied in Article 6 is, as always, the key consideration (see, *mutatis mutandis*, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II; *Sejdovic v. Italy* [GC], no. 56581/00, § 90, ECHR 2006-...).

43. While it may be noted that the above-mentioned cases in which an oral hearing was not considered necessary concerned proceedings falling under the civil head of Article 6 § 1 and that the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly “criminal charges” of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80), customs law (*Salabiaku v. France*, judgment of 7 October 1988, Series A no 141-A), competition law (*Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendenoun* and *Janosevic*, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body: *a contrario*, *Findlay v. the United Kingdom*, cited above).

44. It must also be said that the fact that proceedings are of considerable personal significance for the applicant, as in certain social insurance or benefit cases, is not decisive for the necessity of a hearing (see *Pirinen v. Finland* (dec.), no. 32447/02, 16 May 2006).

45. While the Court has found that Article 6 § 1 of the Convention extends to tax surcharge proceedings, that provision does not apply to a dispute over the tax itself (see *Ferrazzini v. Italy* [GC], cited above). It is, however, not uncommon for procedures to combine the varying elements and it may not be possible to separate those parts of the proceedings which determine a "criminal charge" from those parts which do not. The Court must accordingly consider the proceedings in issue to the extent to which they determined a "criminal charge" against the applicant, although that consideration will necessarily involve the "pure" tax assessment to a certain extent (see *Georgiou v. the United Kingdom* (dec.), no. 40042/98, 16 May 2000 and *Sträg Datatjänster AB v. Sweden* (dec.), no. 50664/99, 21 June 2005).

46. In the present case, the applicant's purpose in requesting a hearing was to challenge the reliability and accuracy of the report on the tax inspection by cross-examining the tax inspector and obtaining supporting testimony from his own expert since, in his view, the tax inspector had misinterpreted the requirements laid down by the relevant legislation and given an inaccurate account of his financial state. His reasons for requesting a hearing therefore concerned in large part the validity of the tax assessment, which as such fell outside the scope of Article 6, although there was the additional question of whether the applicant's bookkeeping had been so deficient so as to justify a surcharge. The Administrative Court, which took the measure of inviting written observations from the tax inspector and after that a statement from an expert chosen by the applicant, found in the circumstances that an oral hearing was manifestly unnecessary as the information provided by the applicant himself formed a sufficient factual basis for the consideration of the case.

47. The Court does not doubt that checking and ensuring that the taxpayer has given an accurate account of his or her affairs and that supporting documents have been properly produced may often be more efficiently dealt with in writing than in oral argument. Nor is it persuaded by the applicant that in this particular case any issues of credibility arose in the proceedings which required oral presentation of evidence or cross-examination of witnesses and it finds force in the Government's argument that any issues of fact and law could be adequately addressed in, and decided on the basis of, written submissions.

48. The Court further observes that the applicant was not denied the possibility of requesting an oral hearing, although it was for the courts to decide whether a hearing was necessary (see, *mutatis mutandis*, *Martinie v. France* [GC], no. 58675/00, § 44, 12 April 2006). The Administrative Court gave such consideration with reasons. The Court also notes the minor sum of money at stake. Since the applicant was given ample opportunity to put forward his case in writing and to comment on the submissions of the tax authority, the Court finds that the requirements of fairness were complied with and did not, in the particular circumstances of this case, necessitate an oral hearing.

49. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to four that Article 6 of the Convention is applicable in the present case;

2. Holds by fourteen votes to three that there has been no violation of Article 6 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 November

Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?

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I. Introduction

In light of the EC Commission's recent public consultation on the functioning of Regulation 1/20031, it appears to us an opportune moment to look again at the Commission's enforcement powers and potential need for reform in this regard. This paper considers the current accumulation of investigational, prosecutorial and adjudicative powers within the Commission in competition matters and the negative impact of that accumulation on the quality of decision-making and the problems it raises with respect to the right to a fair trial.

First, as so often stressed –and most recently by the OECD–, "*combining the function of investigation and decision in a single institution*" may have the effect to "*dampen internal critique*" within the institution and raise "*concerns about the absence of checks and balances*"2. Creating the proper decisional structure is indeed fundamental for the quality of decisions. Second, from a strictly legal point of view, the combination of all powers within one institution raises the question of the compatibility of competition law proceedings led by the European Commission ("*the Commission*") with the fundamental right to a fair trial as enshrined in Article 6 of the European Convention of Human Rights ("*ECHR*")3.

Traditionally, the view is taken that, it is sufficient for Commission decisions in antitrust cases to be subject to review by the Community courts and particularly by the Court of First Instance ("*the CFI*"), even if the Commission itself is not an "*independent and impartial tribunal*" under Article 6 ECHR.4 However, where fines of close to a billion € are imposed today on companies and where competition law is becoming more and more criminalised, it is questionable whether this view is still valid.

A thorough analysis of the case-law of the European Court of Human Rights ("*the ECtHR*") shows that fundamental procedural rights are broader and apply much more strictly when "*criminal sanctions*" are imposed, in contrast with cases in which civil remedies or administrative sanctions are provided. True, the EU is currently not a party to the ECHR. This does however not mean that –as sometimes stated in the past– the ECJ "*does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.*"5 First, the European Court of Justice ("*the ECJ*") has always indicated its willingness to follow the case-law of the ECtHR.6 Second, it follows from recent ECtHR's jurisprudence that the provision of the ECHR must also be respected in the EU7.

As will be shown hereafter, unless the Community competition procedure is changed, it might sooner or later lead to a formal condemnation of all the Member States collectively8 or of the EU itself9 by the ECtHR. This paper will thus show that, given the rapid "*criminalisation*" of competition law proceedings, sanctions should in principle be imposed at first instance by an independent and impartial tribunal fulfilling all the conditions of Article 6 ECHR (part I). Or at the very least, these sanctions should be subject to full jurisdictional review by an independent and impartial tribunal in order to comply with Article 6 ECHR and to cure the defects of the administrative procedure (part II). It is doubtful however whether such a full jurisdictional review, as it is understood by the ECtHR, is available at Community-level in antitrust cases.

II. Sanctions imposed by the Commission in competition proceedings are "*criminal charges*" within the meaning of Article 6 ECHR

A. The notion of "criminal charge" under Article 6 ECHR

According to Article 6 ECHR10, any "*determination*" of a civil right or obligation or of any criminal charge, has to be made by an "*independent and impartial tribunal*" fulfilling the requirements of Article 6(1) ECHR. In addition, criminal proceedings – by contrast with civil proceedings – also have to comply with additional guarantees spelled out in the second and third paragraphs of that provision. This distinction between civil and criminal proceedings has several implications in terms of procedural rights.11 In this respect, the ECtHR has always insisted on the specific nature of criminal proceedings as regards the rights of the defence12 and on ensuring that Article 6 ECHR is not interpreted restrictively so that the rights guaranteed by this provision are not compromised. 13
Considering the *"prominent place held in a democratic society by the right to a fair trial"*14, the ECtHR, "*compelled to look behind the appearances and investigate the realities of the procedure in question"*,15 has been prompted to give an autonomous meaning to the concept of "*criminal charge*" and *"to prefer a 'substantive' rather than a 'formal' conception of the 'charge' contemplated by Article 6 par. 1 (art. 6-1)."16* This is notably to avoid that the application of this provision could be circumvented by parties to the Convention, simply by their domestic classification of penalties.17

In the landmark *Özturk* case18, the ECtHR applied this reasoning to the situation in which road traffic offences had been classified as mere "*regulatory offences*" and not as "*criminal offences*" in Germany and where the German judge had therefore considered that the offender was not entitled to be offered a free interpreter during the so-called "*administrative procedure*". The ECtHR forcefully argued

that *"there is in fact nothing to suggest that the criminal offences referred to in the Convention necessarily imply a certain degree of seriousness"* and that it would be *"contrary to the object and purpose of Article 6 (...), which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the States were allowed to remove from the scope of this Article (...) a whole category of offences merely on the ground of regarding them as petty."* 19 In order to determine objectively whether proceedings involve the determination of a "*criminal charge*" in the sense of Article 6 ECHR, the ECtHR relies in particular on:

• the classification of the offence under domestic law;
• the nature of the offence; and
• the nature and severity of the penalty (These three criteria are generally referred to as the "*Engel criteria*").20

These criteria are not cumulative and do not all carry the same weight21. In particular, the classification under domestic law provides no more than a starting point but carries less weight than the other criteria which are more objective22. In later case-law, the ECtHR clarified and specified its second and third criteria used for the determination of a "*criminal charge*" as follows:

• whether the norm is only addressed to a specific group or is of a generally binding character23. (This criterion is mainly used to distinguish criminal sanctions from mere disciplinary sanctions, which are generally addressed only to a specific group or a specific profession)24;
• whether the sanctions imposed are not merely compensatory but truly punitive and meant to have a deterrent effect25; and
• whether the level of the sanction and the stigma attaching to the offence is important.26

Thus, wherever a sanction is imposed (whatever its qualification under domestic law) whose main objective is to "*deter*" from future violations of the norm it is meant to enforce, where the violation of that norm is generally perceived as inherently "*bad*" or contrary to the common values shared in a democratic society, and where the norm is generally addressed to an undefined group of persons, this sanction will inevitably be considered as a "*criminal charge*" under Article 6 ECHR. Where not all these factors lead towards the same conclusion, a balancing process will have to be carried out in order to assess the possible criminal nature of the sanction imposed. It appears from the case-law of the ECtHR that the deterrent function of the sanction and its severity will have a particular weight in this regard.27

B. Proceedings under EC competition law constitute "*criminal charges*" within the meaning of Article 6 ECHR28

1. Application of the Engel criteria to EC competition proceedings

(i) Domestic classification

Much uncertainty as to whether EC competition law proceedings could be considered as involving a *"criminal charge"* within the meaning of Article 6 ECHR has stemmed from the fact that the EC law's domestic classification of *sanctions* imposed by the Commission for breaches of Articles 81 and 82 EC is explicitly non-criminal. Thus, the text of Article 23(5) of Regulation 1/2003 (and its predecessor Article 15 of Regulation 17/62) provides that the decision by which the Commission imposes a fine on undertakings "*shall not be of a criminal nature*". However, it should be stressed that such classification is of little relevance in the present context for a number of reasons: Firstly, to the extent Article 23(5) of Regulation 1/2003 seeks to classify EC competition law proceedings for the purposes of Article 6 ECHR, it should be recalled that domestic classification is not the conclusive or the most important criterion in determining the criminal nature of proceedings under that provision. It is indeed merely a starting point, and the ECtHR has not in the past hesitated to go against this domestic classification29. This is in conformity with the aim *"to prefer a 'substantive' rather than a 'formal' conception of the 'charge' contemplated by Article 6 par. 1 (art. 6-1)."30* According to the case-law of the ECtHR, classifications under domestic law as to the criminal nature of the offence have only a "*relative value*".31 This is understandable, since the opposite conclusion would result in signatory states being able to unilaterally determine the scope of protection enjoyed by individuals under Article 6 ECHR. In this regard, when stating first in Article 15 of Regulation 17/62 and then in Article 23(5) of Regulation 1/2003 that fines "*shall not be of a criminal nature*", it is generally recognised that the main – or at least one key – reason was that Member States wanted to make it clear that in adopting Regulation 17/62 they were not recognising that the Community had any criminal competences32. It is possible also that at the time of adoption of Regulation 17/62, Member States genuinely believed that the sanctions proposed – and perhaps even the proceedings more generally – were not truly of a criminal law nature. After all, for many years the fines imposed for even the most egregious breaches of Article 81 EC were sanctioned with fines running at most to tens of thousands of EUR, as opposed to thousands of times those amounts today, and the rhetoric surrounding enforcement was very different33. When the provision was then taken over word for word in Regulation 1/2003 –and again no discussion at all appears in the initial proposal for Regulation 1/200334 in which the text already appeared– it is possible that there was a continued concern about a perceived transfer of competences in the criminal sphere. However, as noted above, this does not of course address the issue of substance in relation to Article 6 ECHR.

One crucial point to note, however, is that – unlike the situation under Regulation 17/62 – in retaining the provision in Regulation 1/2003, it is certain that at least some consideration was also given to Article 6 ECHR. This point was simply too important to be ignored given in particular the developments in the ECtHR case law over the previous decades, which clearly indicated that the fines in similar contexts

were criminal in nature (see below (ii)). However, what the intention of Article 23(5) was in relation to this point remains a mystery. To our knowledge, the only institution to leave an official public trace of its consideration of the criminal nature of sanctions under Regulation 1/2003 is the European Parliament (which, it is recalled had only a consultative role in the legislative process). In its position document, the European Parliament did not request the removal of Article 23(5) of the Regulation, but called for proper judicial review of Commission (and national competition authority) decisions in the field of competition law, noting that: "*The issue of the compatibility of the Community's competition procedure as a whole with Article 6 of the ECHR will be particularly important if, as seems probable, the fines which can be imposed by the Commission come to be regarded as criminal penalties for the purposes of Article 6.*"*35* In conclusion on this point, it is unclear what the intention behind Article 23(5) of Regulation 1/2003 was in relation to Article 6 ECHR. In any event, as indicated, domestic classification is not decisive for purposes of application of Article 6 ECHR.

Secondly, although fines imposed by the Commission are explicitly classified as non-criminal, this does not necessarily imply that proceedings relating to EC competition law infringements are inherently non-criminal in nature. This is an important point, since Article 6 ECHR requires the respect of certain fundamental rights in the determination of *"criminal charges"* and *"criminal offences"* and does not talk in terms of criminal sanctions (which constitute only one of the *Engel* criteria). In determining this, the nature of the sanctions that are imposed is only one element (one of the *Engel* criteria)36. Another important consideration is the stigma attaching to the offences. Thus, whilst maintaining that sanctions imposed by it are not criminal, the Commission has pursued an active policy of heavily stigmatizing violations of EC competition law, and indeed the current Competition Commissioner has explicitly equated cartel activity to theft37.

Thirdly and finally, Regulation 1/2003 explicitly foresees the formal criminalisation of such proceedings under national law. Thus, Article 5 of Regulation 1/2003 allows the imposition of criminal sanctions under national law for breaches of Articles 81 and 82 EC. Article 12(3) provides that *"[…] information exchanged [between national authorities] cannot be used by the receiving authority to impose custodial sentences".* Regulation 1/2003 therefore explicitly acknowledges the possibility that criminal sanctions could be imposed by Member States for violation of EC competition rules. In practice, this is in fact what has happened in a number of Member States that can impose custodial sentences, individual fines and other sanctions on natural persons for breaches of EC competition law38. As a result, as Article 6 ECHR is intended to protect against violations by public authorities of the fundamental right of access to justice, it is clearly appropriate to consider classification in the legal system in which the law is actually enforced by authorities, i.e. classification both under EC law and under national law. And it is arguably difficult to accept that a different classification would apply depending on which authority (EU or national) applies the rules. Otherwise Member States might indeed easily circumvent their obligations under the ECHR by delegating them to a centralised authority39.

In conclusion, we therefore do not agree that Article 23(5) of Regulation 1/2003 settles the issue of domestic classification for the purposes of Article 6 ECHR40.

(ii) Other Engel criteria

To assess the nature of the offence and nature and seriousness of the penalty, the ECtHR case law requires consideration of the general nature of the offence, the punitive and deterrent nature of the penalty and the stigma attaching to the offence. Applying these criteria to proceedings under Article 81 and 82 EC the following can be noted:
• firstly, Articles 81 and 82 EC are general rules applying to all undertakings;
• secondly, the central justification for EC competition law is protection of society against welfare loss caused by anticompetitive conduct41, or as stated by the Commission of Human Rights in the *Stenuit case*: "*the aim pursued by the impugned provisions of the Order of 30 June 1945 was to maintain free competition within the French market. The Order thus affected the general interests of society normally protected by criminal law (…)*;"*42*
• and finally, the fines imposed under Regulation 1/2003 have a clear punitive and deterrent character. This point is explicitly and repeatedly confirmed *inter alia* by the language used in the Commission's fining guidelines43.

In particular as to the seriousness of the penalty, it is hard to identify any other areas of the law where fines of the magnitude observed in the field of EC competition law are imposed44. In relative terms, the sanctions imposed by the Commission for breach of Articles 81 and 82 EC are in practice hundreds or even thousands of times higher than those in other cases where the ECtHR has classified proceedings as criminal in nature for the purpose of interpreting Article 6 ECHR45. But also in absolute terms, the level of fines for breach of EC competition law are generally economically very significant46, and indeed the imposition of fines for violation of EC competition law may (and in many cases does) result in the company that is fined going into liquidation47.

In this regard, it should be observed that in line with the punitive and deterrent character of the fines that are imposed, there is no strict relationship between these and the profits derived from or impact of the illegal activity (although the impact of distortions of competition is to some extent taken into account48). And the Community does not refrain from applying typical criminal law concepts
such as the notion recidivism, which is treated as an aggravating factor aimed at deterring repeat offending by materially increasing the level of fines imposed. This is an important feature of the Commission's approach to fining as the very presence of the concept in this area and the resulting escalation of penalties point to an intent not only to deter but also to morally condemn the impugned behaviour, to stigmatise it and, ultimately, to treat it as criminal49. Indeed, the word *"recidivism"* itself is by definition associated with compulsive

criminal behaviour. Thus, standard dictionary definitions of the term include *"the habit of relapsing into crime"*50, *"a tendency to relapse into a previous condition or mode of behavior; especially: relapse into criminal behavior"51*. The ECtHR has in the past explicitly stated that fining policies designed to deter re-offending are indicative of "*criminal charges*" within the meaning of Article 6 ECHR52. Other aspects such as the introduction *of leniency policies* at EC and Member State level appears relevant in this regard.53

Finally, in relation to the stigma attaching to violations of competition law, for the purposes of analysis this question can be looked at from the point of view of presentation (i.e. how such offences are presented to the public by relevant authorities), perception (i.e. the public reaction to such offences) and consequences (i.e. the consequences for businesses and individuals of violations of competition law with which they are associated). These three elements of presentation, perception and consequence are dynamic and interrelated. However, as a general observation, there has been a very marked tendency over the past decade in particular for violations of competition law to be presented increasingly as an extremely serious form of attack on society, carrying grave consequences, and one to which members of the public should not only be concerned about but also react to. Thus, a number of Member States have formally criminalised certain types of competition law violations54 and in certain cases provide for imprisonment55, or in any event apply significantly higher fines than in the past56. Other types of sanctions also exist, for example in the UK, where individuals involved in violations of EC or national competition law may be temporarily prevented from acting as company director57, i.e. a restriction on such individuals' freedom to undertake a certain profession.

Beyond these formal sanctions, there may also be other consequences for individuals involved in violations of EC competition law, in particular, reputational and career consequences. It is not, however, possible to quantify this type of effect since very little information on the fall out of EC competition law violations that affects individuals is reported in the press. Nonetheless, there is evidence that implication in such violations often result in individuals losing their positions within their company58. As regards the rhetoric used against persons that violate EC competition law, it is not the purpose of this article to exhaustively analyse the speeches of public officials charged with implementation. However, as a general observation, violations of EC competition law are presented by enforcers as very serious, as an attack on society and as "*comparable with theft*". A number of quotes are set out below to illustrate this point:

"I do believe that we need to begin changing general perception of the competition rules. […] It is up to us to show that when we break up cartels, it is to stop money being stolen from customers' pockets." Neelie Kroes, EC Commissioner for Competition*59*

"Cartels involve substantial theft and economic harm" John Fingleton, UK OFT Chief Executive*60*

"cartels are like theft, criminalisation makes the punishment fit what is indeed a crime" John Vickers, UK OFT Chairman

"Cartels are like cancers on the open market economy, which forms the very basis of our Community […]" Mario Monti, ex-Commissioner for Competition

"[l]et me be very clear: these cartels are the equivalent of theft by welldressed thieves, and they deserve unequivocal public condemnation." Joel Klein, US Assistant Attorney General61

In addition to presenting violations of EC competition law as very serious, the above quotes also point to a policy of altering public perception of such offences.62 The above observations demonstrate a clear EC policy to stigmatise violations of EC competition law through the way in which the offences are presented to the public and the consequences of their breach.

Actual public reaction to and perception of anticompetitive conduct constitutes another dimension of the stigma attaching to an offence. This is clearly a more difficult aspect to measure. For example, around the time of the overhaul of the national competition rules in the UK, the legislative developments were profiled by the UK government as tackling *"rip-off Britain"* and in some cases the media were prepared to confirm broadly that *"There is no doubt that British consumers have the impression they are regularly being ripped off by international cartels using cynical price-fixing measures to steal the last penny out of their wallets."*63

In conclusion on the above, it follows from consideration of the nature of EC competition law, the nature and severity of the sanctions resulting from and stigma attaching to its violation, that EC competition law proceedings should be treated as *"criminal charges"* within the meaning of Article 6 ECHR, as interpreted using the *Engel* criteria laid down by the ECtHR.

In the words of one Commission official who has published extensively on this subject *"it appears difficult to deny that the application of the criteria set out in the case law of the European Court of Human Rights leads to the conclusion that proceedings based on Regulation No 1/2003, leading to decisions in which the Commission finds violations of Articles 81 or 82 EC, orders their termination and imposes fines relate to "the determination of a criminal charge" within the meaning of Article 6 ECHR."64*

As we shall see in the following section, this analysis is furthermore confirmed by the ECtHR and the Human Rights Commission's own case-law, as well as the case-law of a number of national supreme courts in the Member States.

2. Case law of the ECtHR and European Human Rights Commission supporting the criminal charges classification

In the *Stenuit* case, concerning proceedings led by the French competition authorities, the Human Rights Commission classified these proceedings as criminal for the purposes of Article 6 ECHR, explicitly rejecting the French government's arguments to the contrary. The Human Rights Commission noted that *"the aim pursued by the impugned provisions of the Order of 30 June 1945 was to maintain free competition within the French market. The Order thus affected the general interests of society normally protected by criminal law (…). The penalties imposed by the Minister were measures directed against firms or corporate bodies which had committed acts constituting "infractions". The Commission further points out that the Minister could refer the case to the prosecuting authorities, with a view to their instituting criminal proceedings against the 'contrevenant'."*65

With regard to the nature and the severity of the penalty to which those responsible for infringements made themselves liable, the Human Rights Commission went on to observe that: *"[i]n the present case the penalty imposed by the Minister was a fine of 50.000 FRF [7.620 € approximately], a sum which, in itself is not negligible. But it is above all the fact that the maximum fine, i.e. the penalty to which those responsible for infringements made themselves liable, was 5% of the annual turnover for a firm and 5.000.000 FRF [762.000 € approximately] for other 'contrevenants' which shows quite clearly that the penalty in question was intended to be deterrent."66* The Human Rights Commission therefore concluded in this case that the Minister's decision to impose a fine constituted, for the purposes of Article 6 ECHR, determination of a "*criminal charge*" and that the fine in question had to be regarded as a criminal penalty. The case was finally not adjudicated by the ECtHR, as the applicant and the French government settled the case. Indeed, the infringements that had been found had largely been remedied after the creation of the French Competition Council (*Conseil de la Concurrence*).67 In another case, *Neste St. Petersburg v. Russia68* , the ECtHR considered that the antitrust proceedings led by the Russian authorities were not "*criminal*" in nature, but this was due to the fact that Russian competition law only *"empowers the antimonopoly bodies to impose administrative sanctions (…) for obstructing the authorities investigations and do not serve as punishment for substantive antimonopoly violations."* Furthermore, the ECtHR noted that *"section 6-1 of the Competition Law, under which the applicant companies were charged, does not provide for any specific sanctions as such"* and that the confiscation order to which the applicant companies were subjected *"is intended as pecuniary compensation for damage rather than as a punishment to deter re-offending."* (emphasis added). In a more recent case *Jussila v. Finland*,69 the ECtHR reviewed its previous caselaw and confirmed that: *"the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (…) competition law (*Société Stenuit v. France, *…) and penalties imposed by a court with jurisdiction in financial matters (…)."* It is thus clear from this review of ECtHR case-law, as well as of decisions of the Human Rights Commission, that competition proceedings, in the course of which the Commission takes a decision imposing fines on undertakings, are to be qualified as "*criminal*" under Article 6 ECHR.

3. Case law of national courts supporting the criminal charges classification

The position of the ECtHR referred to above has meanwhile been endorsed by a number of the highest courts in the Member States. Thus, in the *RioTintoZinc Case* for instance, the House of Lords found that EU competition fines were "*penalties*" and that therefore the principle of non-selfincrimination applied under the Civil Evidence Act70. The French Constitutional Court has also stressed the gravity of antitrust fines and therefore that all the principles attaching to the rights of defence apply71 and the French *Cour de Cassation* went so far as to rule that the participation of the *rapporteur* in the deliberation of the *Conseil de la concurrence*, to the extent he has undertaken investigations during the fact-finding process, was contrary to Article 6(1) ECHR.72

4. Case law of the ECJ on the criminal charges classification

Whilst there is thus wide support for the proposition that competition proceedings in which fines are imposed are to be qualified as "*criminal*" under Article 6 ECHR, the case-law of the ECJ to date remains unclear in this regard. In a number of early cases, the ECJ was clearly reluctant to accept the applicability of Article 6 ECHR to such proceedings73. The case-law showed however progressively an inclination to accept that this was the case. Thus, in the first series of cases brought before the newborn CFI, Judge Vesterdorf acting as Advocate General argued that: *" [i]n view of the fact – in my view confirmed to some extent by the judgment of the Court of Human Rights in the Öztürk case – that fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character, it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights. At all events, the framework formed by the existing body of rules and the judgements handed down hitherto it must therefore be sought to ensure that legal protection meets the standard otherwise regarded as reasonable in Europe."74*

This issue was not further discussed by the CFI in this case, but in further case-law the ECJ was inclined to follow Judge Vesterdorf's appraisal. In *Baustahlgewebe* for example, Advocate General Léger considered that: *"[i]t cannot be disputed – and the Commission does not dispute – that, in the light of the case-law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a 'criminal charge'."75*

At para. 21 of its judgment in that case, the ECJ accordingly concluded that: *"the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (…), and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law."76* In *Hüls*, the ECJ explicitly stated: *"[…] it is certainly true that the right to be heard by a tribunal and the right to a fair trial, as they result, in particular from Article 6(1) ECHR, are among the fundamental rights which , according to the Court's consistent case law, also confirmed by the preamble to the Single European Act and by article F(2) of the Treaty of the European Union (now, after modification, article 6(2) EU), are protected in the Community legal order and that, having*
*regard to the nature of the infractions in question as well as the nature and the degree of severity of the sanctions they give rise to, undertakings accused of violations of the competition rules that have been imposed fines must for this reason enjoy the guarantees that are provided for procedures of a penal character"*77.

However, recent cases have again been less receptive to the idea that antitrust fines were criminal charges. Thus in *Volkswagen*78, the ECJ rejected the argument that, in order to establish that an infringement was international in nature, the person having acted improperly should have been identified since under Article 15 (4) of Regulation 17, "*decisions imposing […] a fine are not of a criminal law nature*" and "*were the appellant's view to be upheld, this would infringe seriously on the effectiveness of Community competition law*". On the basis of this relatively unclear statement, the CFI in *Compagnie Maritime Belge79* confirmed that antitrust
fines were not of a criminal nature as deciding otherwise, this would "*infringe seriously on the effectiveness of Communitiy competition law*". It is underlined that the effectiveness of the law is not among the Engel criteria affecting criminal classification. Moreover, it is unclear what "effectiveness" should be read to mean in this context. If it is to be understood as meaning that criminalisation may (significantly) reduce the number of (successful) prosecutions, that is of course possible. However, the same might be said of many other undoubtedly criminal areas of the law. Were theft to be treated as non-criminal, for example, and the relevant procedural safeguards dispensed with, there would almost certainly be a sharp increase in the number of prosecutions (particularly if the police were granted the power to prosecute and judge the cases themselves). This would, however, be to the detriment of the quality and soundness of decisions, and in the medium to long term the credibility of the justice system. It is also noted that there are of course plenty of examples of legal systems that formally criminalise competition law and offer the corresponding safeguards, but without finding that the system collapses or grinds to a halt.

5. Arguments against the criminal charges classification

Having considered in detail above the reasons why EC competition law proceedings must be regarded as involving criminal charges within the meaning of Article 6 ECHR, it seems to us that none of the counter-arguments that are or could be invoked against this position are decisive. Article 23(5) of Regulation 1/2003 is most often quoted in this context but as indicated above, the contention that Article 23(5) of Regulation 1/2003 somehow settles the question of classification of EC competition law proceedings is clearly inaccurate80. The main other arguments against a classification of competition law proceedings as involving criminal charges are discussed below:

(i) Competition law is not part of the "*core*" criminal law
One objection to the conclusion that EC competition law proceedings involve a criminal charge under Article 6 ECHR is that they are not "*traditionally*" looked on as criminal, or do not constitute "*core*" criminal offences. However, a general appeal to traditional conceptions of what is criminal does not appear particularly rigorous and fails to take into account evolution of society. Fifty years ago the notion of environmental crime basically did not exist. One hundred years ago selling opium was in many countries not regarded as criminal. Two hundred years ago, slavery was in many countries not regarded as criminal. But three hundred years ago anticompetitive conduct was already regarded as criminal in England and similar examples can be cited bank to the Roman Empire, where at times certain market distorting behaviour carried the death penalty81, which arguably means the "*traditional*" epithet is in fact justified. Reflecting the dynamic nature of criminal law, the ECHR generally interpreted in a dynamic manner82, and the concept of criminal Article 6 ECHR specifically must take into account evolving perceptions (as discussed above, for example, the *Engel* criteria refer among others to *"stigma"*, not fifty years ago but today). Moreover, ECtHR case law explicitly recognises that Article 6 ECHR is not intended to be limited to crimes that have been around for a "*long time*". As the ECtHR observed in the *Jussila* case quoted above: *"the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example […] competition law (Société Stenuit v. France, …)"*. True, EC competition law violations are obviously not on a par with horrific crimes such as murder or rape. However, as has been seen above, they are frequently equated with the more traditional and familiar crime of theft83. It follows that appeals to tradition in the classification of offences under the criminal head of Article 6 ECHR is misplaced.

A more balanced variation of this argument is that, although competition law violations may fall under the criminal head of Article 6 ECHR, they are not "*core*" offences or serious enough to warrant the full gamut of protections offered under that provision. As a preliminary remark, Article 6 ECHR itself distinguishes only between civil and criminal heads, and lays down clear criteria for determining which of these applies. As discussed above, in the case of EC competition law, it is undoubtedly the criminal head that applies. Within the criminal head of Article 6 ECHR, the ECtHR's case law does in fact distinguish between *minor and disciplinary* offences and other

offences falling under the criminal head. This distinction is considered in detail below. However, it is worth noting here that, although there is clearly a sliding scale of seriousness of offences, the relative positioning of offences on that scale is – except in extreme cases – highly subjective. It is therefore logical and appropriate that the ECtHR does not seek to make legal distinctions between, for example's sake, a fully fledged "*force 10*" criminal offence and a mere "*force 8.5*" criminal offence, with a fixed list of procedural rights attaching to the former and a shorter list of procedural rights attaching to the latter. Such distinctions would, in our view, be arbitrary in the extreme.

(ii) No prison sentences are imposed by the Commission and moreover sanctions are imposed on companies not individuals84. Another argument made to support the theory that EC law is not "*real*" criminal law, is that sanctions are imposed on companies only and that no prison sentences are involved. However, there are again a number of flaws with this argument, and mainly the fact that fulfilment of the *Engel* criteria does not require the possible imposition of prison sentences. Under the *Engel* criteria the nature and severity of sanctions is considered. Whilst the imposition of prison sentences would be sufficient to classify related offences as criminal within the meaning of Article 6 ECHR, it is certainly not a necessary condition and offences can be considered as criminal where 'only' fines are imposed85. In any event, as discussed above, prison sentences can in fact result from violations of EC competition law, where these are imposed by Member States' courts. Finally, as is well known, the ECHR does not distinguish between natural and legal persons as regards the rights they enjoy under Article 6 ECHR. *86* Nothing in this argument therefore puts in doubt the criminal classification of EC competition law proceedings under Article 6 ECHR. Again, it could be argued that, whilst EC competition law clearly falls under the criminal head of Article 6 ECHR, within that criminal head there are offences of varying degrees of seriousness that merit different levels of procedural rights. However, beyond the basic distinction operated between minor and non-minor offences that is considered in greater detail below, such an argument is, in our opinion, no more valid in this context than in the context of an argument based on "*traditional/core*" and "*non-traditional/non-core*" offences (see above).

(iii) Procedural safeguards are inferior to those offered in criminal proceedings87
The argument that procedural safeguards in antitrust cases are inferior to those offered in criminal proceedings and therefore support the view that such proceedings are not criminal is logically flawed. It would be circular to refer to the very procedures, whose legality is under examination, to assist in determining the standards that they should respect. Thus, under the ECHR, the classification of an offence as criminal must result in certain procedural safeguards. The reverse, however, is not always true. In other words, the absence of those safeguards might well indicate that an offence is not criminal, but it could equally indicate that the state is simply not offering the safeguards that it should be. One variation on this argument is that in a *"true"* criminal context, suspects get a tougher time than they do in EC competition proceedings. Thus, for example, individuals may be cross-examined in court by hostile prosecutors, investigative powers of relevant authorities are more significant, there is trial by jury, the prospect of jail sentences etc88. These arguments suffer from similar logical failures to those discussed in the preceding paragraph. Thus, the way procedures are designed results from the process of classification and not *vice versa*. Moreover, it must be emphasised that being subjected to a Commission competition investigation is hardly a pleasant experience. Vast quantities of documents are demanded by the Commission, initial failure to cooperate with investigations (by, for example, invoking the right to silence or legal privilege) regularly results in threats of criminal sanctions at which point individuals will often submit. This practice was indeed recently condemned by the Court of First Instance in the *Akzo* case89 in the following terms:
"With regard to the first step, the applicants submit that the Commission forced them to reveal the contents of the documents in question although they had claimed that they were covered by [legal privilege]. Following disclosure of those documents, long discussions ensued between the applicants' in-house counsel and the Commission as to the procedure to be followed for examining those documents. The Commission informed the applicants that any further delay in the handing over and examination of the documents would amount to obstruction of the investigation and could constitute a criminal offence under section 65 of the UK Competition Act, which is punishable by a term of imprisonment and a fine. It was only under strong protest that the applicants handed the Set B documents to the Commission for examination. Furthermore, during the investigation the Commission inspectors read and described to each other the contents of the Set A and Set B documents for several minutes at a time. [...] It is also apparent from the report and the minutes mentioned above that the Commission insisted on taking a cursory look at those documents and that the applicants' representatives only agreed to this after the Commission and the OFT officials informed them that refusal to allow them to do so would be tantamount to obstructing the investigation, an action which would be punishable by administrative and criminal penalties. 95. In those circumstances, the Court considers that the Commission forced the applicants to accept the cursory look at the disputed documents, even though, as regards the two copies of the typewritten memorandum in Set A and the handwritten notes in Set B, the applicants' representatives claimed, and provided supporting justification, that such an examination would require the contents of those documents to be disclosed."

For individuals involved in the investigation, there may also be the possibility that they will be criminally pursued by Member State authorities.

(iv) Application of Article 6 ECHR "*would impinge seriously on the effectiveness of Community competition law*"
As indicated above, in *Volkswagen90*, the ECJ found that if decisions imposing a competition fine were to be regarded as of a criminal law nature, "*this would impinge seriously on the effectiveness of community competition law*". This argument, which has already been commented on above, is hardly more convincing than the previous one. The more serious the offence, the more necessary it is to comply with procedural safeguards. Arguments of administrative efficiency or convenience are hardly sufficient to warrant infringements of fundamental rights. These arguments cannot affect the finding of the ECtHR *inter alia* in *Jussila* that competition law procedures have to

respect the basic requirements of Article 6 ECHR. It is worrying however to see as a quite general and recent development fundamental rights to be purely set aside, temporarily suspended or simply diminished for the declared purpose of attaining objectives such as the "*good administration of justice*" or the "*effectiveness of the law*". Such attempts have already been fiercely criticized by supreme courts in Europe and in the US in the context of the so-called "*war on terror*".91 There is no reason therefore to see why this would constitute a more valid argument in the field of EU competition law.

6. Conclusion

On the basis of the above, we conclude that EC competition law proceedings leading to fines can only be considered as "*criminal*" within the meaning of Article 6 ECHR. In the next section we will now look at the main consequence of this finding for the conduct of these proceedings.

III. Criminal charges must generally be heard at first instance by an independent and impartial tribunal, EC competition law is no exception

1. Introduction

The right to a fair trial as embodied in Article 6 ECHR requires in the first place that any judgement concerning the determination of civil rights or of any criminal charge be given by an independent and impartial tribunal established by law. This right is often regarded as *"one of the most important guarantees of the whole Convention"*.92 As indicated above, this right is stricter in criminal – than in civil – cases. One consequence of this is that, whilst the ECtHR generally admits that the right to a fair trial is fully complied with in civil cases when effective access to a court is only exercised on appeal (meaning that the first determination of the right can be made by an administrative body and that the case is being heard on appeal by an impartial and independent tribunal having full jurisdiction), it will in principle not admit such two-tier jurisdictional review with regard to "*criminal cases*". This is due notably to the particular nature of criminal offences, on which the ECtHR has always been reluctant to compromise.93 As it is put in the case law of the ECtHR, "*[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (…) and where the applicant has an entitlement to have its case "heard", with the opportunity* inter alia *to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses."94* The ECtHR has only ever admitted exceptions to this principle of first instance decision by a tribunal in narrow circumstances, essentially where the criminal charges under consideration are either minor or disciplinary in nature. Notwithstanding, discussions on this point often involve a cursory and general extension of the exception to all areas of criminal law except the *"traditional"* areas of criminal law, in other words, the exception becomes the rule. A more careful reading of the case law does not, however, allow such conclusions to be drawn. The general principle, as set out in the above quote, is that criminal charges must be heard at first instance by an independent and impartial tribunal and any derogation from this is exceptional and must be justified. In light of their nature and the penalties involved, EC competition law proceedings cannot be considered as falling within such exceptions. The inevitable conclusion is that having such cases heard by the Commission at first instance is incompatible with Article 6 ECHR. These points are considered below.

In the following part of this paper (part C), we will then consider the alternative view, i.e. that the exception can extend to EC competition law, and the consequences this has for the type of judicial review that is then required. And finally we will address a few other issues that may be problematic in the EC system viz Article 6 ECHR (part D). A. The right to a first instance independent and impartial tribunal in criminal cases and the scope of exceptions

1. Introductory remarks

When considering arguments raised by parties alleging a violation of Article 6 ECHR by the Commission, the ECJ has summarily rejected those by considering that *"the Commission cannot be considered as a 'tribunal' within the meaning of Article 6 of the ECHR (…). The applicant's argument that the decision is unlawful simply because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions is therefore irrelevant."95* However, EC competition proceedings do not simply escape from Article 6 ECHR because a body that falls outside the notion of *"tribunal"* has been put in charge of them. In other words, the applicability of Article 6 ECHR: *"depends therefore on the nature of the procedure concerned, rather than on whether it is in practice a 'tribunal' or an administrative body that investigates the case in question. In the case of procedures involving the determination of civil rights or any criminal charge, any party should be 'entitled' to be heard by an independent and impartial tribunal. Therefore, the mere fact that the Commission is not a 'tribunal' within the meaning of Article 6(1) should not mean as such that Article 6(1) is not applicable to the proceedings concerned."96* How then can Article 6 ECHR be respected? In response to this, it is generally argued that: *"[a]lthough the Commission combines the investigative and prosecutorial with adjudicative functions, and thus cannot be qualified as an independent and impartial tribunal, this does not as such make the current system incompatible with Article 6 (1) ECHR. Indeed, the European Court of Human Rights has ruled that, for reasons of efficiency, the determination of civil rights and obligations or the prosecution and punishment of offences which are "criminal" within the wider meaning of Article 6 ECHR can be entrusted to administrative authorities, provided that the persons concerned are able to challenge any decision thus made before a judicial body that has full jurisdiction and that provides the full guarantees of Article 6(1) ECHR."97*

In other words, according to the above, the fact that the Commission does not constitute an independent and impartial tribunal does not

result in a violation of Article 6 ECHR, because its decisions are reviewed by the CFI and such a two-tiered procedural approach has been endorsed by the ECtHR. However, this does not reflect the case law of the ECtHR. Rather, the ECtHR states that *"in the criminal context, [...] generally there must be at first instance a tribunal which fully meets the requirements of Article 6"98* and refusal of such access at first instance is therefore the exception. The key question is accordingly whether EC competition law is capable of falling within this exception, such that subsequent judicial review of Commission decisions imposing sanctions for reaches of Articles 81 and 82 EC by the CFI is sufficient to comply with the requirements of Article 6 (1) ECHR. We therefore consider in detail below the case law of the ECtHR on this point and whether EC competition law can be considered as falling within this exception.

2. Requirement of an independent and impartial tribunal at first instance and its exceptions: case law of the ECtHR

In its famous judgment in *Le Compte v. Belgium*, the ECtHR held that *"whilst Article 6 par. 1 (…) embodies the "right to a court" (…), it nevertheless does not oblige the Contracting States to submit "contestations" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect (…)."99*

In a subsequent case concerning disciplinary proceedings against *Le Compte*, a Belgian doctor, the ECtHR further held that *"[i]n many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (…) is applicable, conferring powers in this manner does not in itself infringe the Convention (…). Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the (administrative) organs themselves comply with the requirements of Article 6 (1) or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide for the guarantees of Article 6 para. 1 (…)."100*

In the *Öztürk* case, the ECtHR extended this line of case-law to certain criminal proceedings. However, the ECtHR also made very clear that, *"[h]aving regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (...)."101*

Then, in *Bendenoun v. France*, a case concerning tax surcharges, the ECtHR held that *"[a]s regards the general aspects of the French system of tax surcharges where the taxpayer has not acted in good faith, the Court considers that, having regard to the large number of offences of the kind referred to in Article 1729 para. 1 of the General Tax Code (…), Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones. Such a system is not incompatible with Article 6 (…) of the Convention so long as the taxpayer can bring any decision affecting him before a court that affords the safeguards of that provision."102* It does however not follow from the *Bendenoun* judgment that the exception allowed for criminal cases in *Öztürk* applies not only to "*minor offences*" but to all criminal cases in general as soon as there would be a "*large number of offences*" to punish.103

In this regard it should be recalled that the ECtHR has always insisted on the peculiar nature of criminal proceedings with regard to the application of Article 6 ECHR,104 as well as on the restrictive interpretation to be given to the exceptions developed by case-law.105 The guarantees provided by Article 6 (3) ECHR apply to all criminal law matters, and not only to the hard core of criminal law such as imprisonment sanctions, as some authors have argued.106 It is clear from of the Court's case-law that, as a general rule, criminal law proceedings should be heard at first instance by a tribunal respecting all the requirements of that provision. This interpretation is furthermore comforted by the text of Article 6 ECHR, which provides that *"[i]n 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."107*

The *Bendenoun* judgment was furthermore distinguished from "*the hard core of criminal law*" in the recent Grand Chamber case of *Jussila v. Finland: "[t]ax surcharges differ from the hard core of criminal law; consequently, the criminalhead guarantees will not necessarily apply with their full stringency (...).*"108 Moreover, the ECtHR stated that "*the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in [the fiscal] sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention.*"109 The Court also firmly reaffirmed that "*[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (…) and where the applicant has an entitlement to have its case "heard", with the opportunity* inter alia *to give evidence in his own defence, hear the evidence against him and examine and crossexamine the witnesses."110* Also, in *Findlay v. United Kingdom*, concerning the trial of a military officer before a martial court, the ECtHR stated unequivocally that *"[s]ince the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6 para. 1 (…)."111*

Thus, it appears that a first instance tribunal is necessary in criminal cases in order to comply with Article 6 ECHR. This is a legal

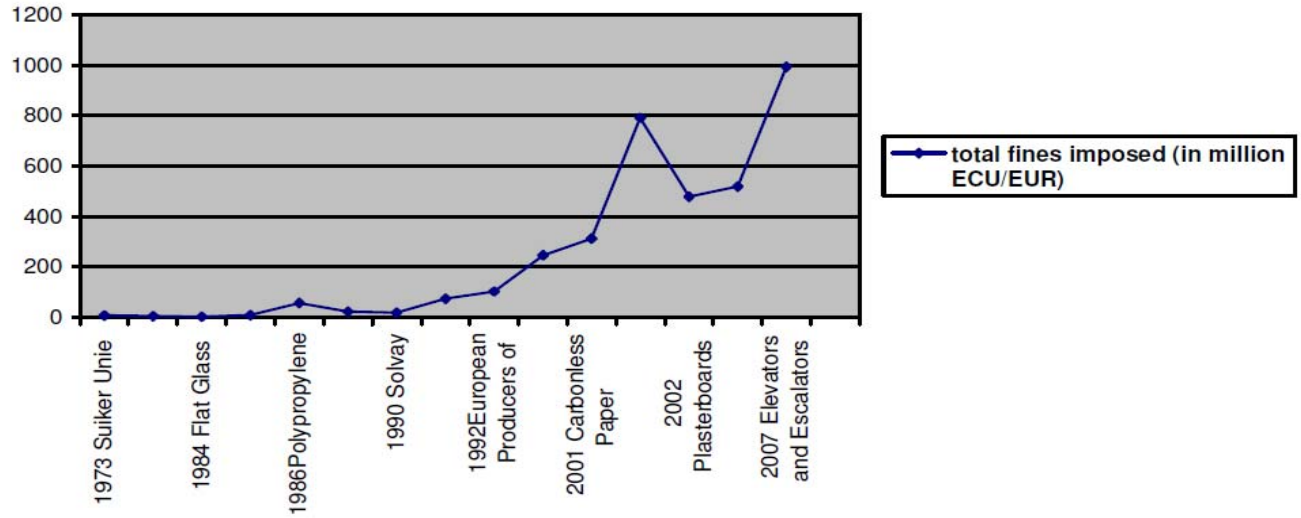
obligation from which it may only be derogated in exceptional circumstances in criminal proceedings, i.e. when "*minor offences*" such as traffic offences or tax surcharges) are at stake. This exception may be explained by the fact that in particular because in such minor cases, either the judge's review of the case will not be compromised or coloured by the pre-existence of an administration decision or the risk of such compromise is worth taking in light of certain factors (less serious nature of the offence, the great volume of cases, etc.)

In the case of minor offences indeed the procedural defects of the administrative stage are outweighed by the benefits gained from the efficiency of the whole system (e.g. the economy of procedural costs, the expediency of the procedure, the possibility for the administrative authority to concentrate its scarce resources on more serious cases, etc.) combined with the possibility to have these procedural defects redressed on appeal in any case. However, in normal criminal cases, the rights of the defence outweigh these marginal advantages. As will be shown below, the requirements of independence and impartiality are indeed not purely formalistic but lay at the heart of the principle of due process. For reasons of judicial efficiency or economy, only exceptionally may the requirement that the sanction is imposed by a tribunal be derogated from and only provided that there is a possibility for judicial review against the decision taken. Or as stated by three members of the Human Rights Commission "*where criminal justice, as is often the case, is administered at two levels – at first instance and on appeal – it is not sufficient that the requirement of impartiality is satisfied at the appeal stage. While various minor procedural deficiencies may well be remedied in appeal proceedings, the requirement of an impartial tribunal is of such a fundamental character that it should be satisfied already during the trial at first instance, this being in general an essential – and perhaps even the most important – part of the criminal proceedings against an accused person, in particular where – as would seem to have been the situation in the present case – the evidence in the case was not heard again by the court of appeal."112*

3. Competition law infringements leading to sanctions cannot be regarded anymore as "*minor offences*"

The distinction drawn by the ECtHR between "*minor offences*" and other violations forming part of the "*core of criminal law*" can be traced back to the *Öztürk* judgment in 1984.113 However, as shown above, the ECtHR has only applied this line of case-law so far to minor traffic offences and tax surcharges or still to disciplinary offences where criminal sanctions were small. In fact, as the ECtHR explained in *Jussila*, this distinction is linked to the progressive stretching out of the notion of "*criminal sanction*" under the ECHR following the application of the *Engel and others* criteria: it would simply have been very difficult to require Member States to comply with all the requirements of Article 6 in areas such as traffic offences and tax surcharges, where hundreds of thousands of minor violations take place every year.

The same cannot be said about Community antitrust proceedings, not only because they are less numerous, but also because a number of factors indeed indicate that competition law proceedings can no longer qualify under the "*minor offences*" exception allowed under ECtHR case-law. First, the amount of the fines imposed by the Commission for violations of Article 81 or 82 of the EC Treaty has risen dramatically over the last 15 years. For example, whilst fines imposed by the Commission in the late 1970s were of the order of several tens of thousands of EUR, the maximum fine imposed for a cartel infringement in 2007 of 992 million EUR in the *Elevators and Escalators* case.114 This increase seems even to have accelerated in the last two or three years.115



Second, violations of competition law have been criminalised in a growing number of Member States.116

Thirdly, as indicated, the stigma attached to violations of competition rules has increased dramatically, cartels being prohibited in stronger terms than ever. 117

The progressive evolution of the Commission's fining policy with regard to competition law infringements, considered together with the clarification of Article 6 ECHR by the ECtHR, make it obvious today that the current Community system in antitrust proceedings is not in line anymore with the fundamental right to a fair trial. Indeed, while the Commission is "*determining*" at first instance "*the existence of a criminal charge*" (in the sense of Article 6 ECHR), it is not complying with the substantive requirements imposed by this provision. It can therefore only be concluded that competition law infringements leading to sanctions cannot be regarded anymore as "*minor offences*", and that there is therefore a requirement of an independent and impartial tribunal already at first instance.

4. The conjunction of investigative, prosecutorial and adjudicative powers by the Commission and the problem of prosecutorial bias

The current institutional system before the Commission is not only problematic because it goes against the requirements of the ECtHR. It is also problematic because the accumulation of investigative, prosecutorial and adjudicative powers by the Commission during the whole proceedings in antitrust cases leads naturally to what is called "*prosecutorial bias*", i.e. the fact that a case handler will naturally tend to have a bias in favour of finding a violation once proceedings have been commenced. The case-handler's position is in this regard not different from the position of a defence lawyer who naturally develops a bias in favour of his client. Applied to the Commission in competition proceedings, this however means that the Commission will be naturally more inclined to find the existence of a breach of Articles 81 and 82 EC and to take a decision imposing sanctions than if this decision was taken by an independent and impartial tribunal which played no role whatsoever during the investigation of the case. In good "*Hegelian dialectics*", a sound system would however require "*thesis*", "*antithesis*" and "*synthesis*" by three different actors. A "*Salomon*" with an open mind should listen to both parties and then decide the case.118

The existence of a "*prosecutorial bias*" is generally explained by the following set of factors:119

• First, there is a natural tendency for persons investigating on a case to search for evidence which confirms rather than challenges one's beliefs, and to accept more readily the conclusion to a syllogism if it corresponds to one's belief than if it does not, irrespective of its actual logical validity (a so-called "*confirmation bias*"). Such a confirmation bias certainly exists in proceedings relating to the application of Articles 81 and 82 EC, because the Commission will normally only start an investigation if the officials of DG Competition hold the initial belief that an infringement is to be found.

• Secondly, there is what psychologists call *hindsight bias* or the desire to justify past efforts. As one author has put it *"it is understandable in human terms that Commission officials sometimes want to push through what they perceive to be 'their' case. And it explains why arguments put forward by the parties often appear to fall on deaf ears."*120 This may be simply explained by the fact that person will naturally refrain from coming to conclusions that put into question the validity of their past conclusions. An official of DG Competition for example will be reluctant, after having pushed a case through and issued a statement of objections, to consider later in its investigations that the case for the finding of an infringement was weaker than he had initially thought. This may be explained not only by internal psychological factors but also by the need to justify past decision to hierarchical superiors or to outside observers.

• Thirdly, there is the *desire to show a high level of enforcement activity*.

This aim has also been actively pursued by the Commission in competition matters, as exemplified by the statistics published on its website121 and by numerous speeches of Competition Commissioners insisting on the number of decisions imposing fines and on the high level of these fines.122 While this may be a legitimate means to ensure deterrence, there is obviously also *"a potential risk of abuse, in that dubious cases might be pursued or fines might be inflated in order to keep up the statistics."* 123

A prosecutorial bias does however not arise in a system in which the competition enforcement authorities prosecute before an independent court, as it is the case in a large number of countries in the world.124 Such a system does not only provide for better procedural safeguards against partiality and prosecutorial bias, but enjoys higher legitimacy for those undertakings on which sanctions are imposed, with the result that there is a higher degree of acceptance of the decision and that fewer appeals are being brought before superior courts.125

The current "*prosecutorial bias*" is only partly remedied by the recent introduction of "*peer review panels*" composed of experienced officials in order to scrutinise the case team's conclusions with a "*fresh pair of eyes*". Indeed, if the peer review normally takes place before the sending of a statement of objections, in all cases applying Article 82 EC, it only applies to cases applying Article 81 EC "*where appropriate*" and in principle not in cartel cases.126 Second, this system is by no means equivalent to having an independent administrative law judge taking a decision following a full trial in which both sides of the case are present. Third and in any event, the Commissioners are not "*walled-off*" from discussion of the matter with the staff investigating the case while the case is under adjudication.127 Fourth, it is also questionable whether such a duplication of tasks simply results in more lengthy and costly proceedings128, with the decision-taking phase of the administrative proceedings becoming *"a superfluous anticipation of the work which will be done anyway by the reviewing judge"*.129 Finally, the most insidious and intractable problem with this accumulation of powers by the administrative authority is that its impact on the outcome of a decision is impossible to measure. As the ECtHR stated in *Tsfayo*, *"[o]ne of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute*

*is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary facts and the inferences drawn from those facts. (...) Thus it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence."*130

The fact that prosecutorial bias has a definite but immeasurable impact on the outcome of decisions is probably a further reason why decisions in criminal cases should in our view always be taken at first instance by a tribunal respecting all the requirements of Article 6 ECHR. Unlike cases under the civil head of Article 6 (and exceptionally minor criminal offences), the risk that prosecutorial bias will not be corrected by subsequent judicial review is simply unacceptable in criminal cases. This is why the ECtHR excludes as a matter of principle that, except in exceptional cases, criminal sanctions are imposed at first instance by an administrative body.

5. The right to a hearing that is public

Oral hearings present companies accused of violating competition law with a last chance to defend themselves before the Commission rules on their case. Such hearings –which are also attended by officials from the EU Member-States– are always held behind close doors largely to shield the companies involved and guard against the release of sensitive business secrets. Even when parties waived their right to a confidential hearing to ensure a full and fair examination of the issues and urged the Commission to hold a public hearing this has been denied. Indeed, the Commission found that in such a case "*presentation from the various parties would play to the gallery rather than throw light on the issues at stake in the case*."131 Needless to say, this is a strange argument as public hearings before courts have on the contrary always been regarded as an essential guarantee of the fairness and openness of debate. According to the ECtHR, "*[a]n oral, and public hearing constitutes a fundamental principle enshrined in Article 6, §1*."132

6. The right to an oral hearing before the person deciding the case

A further difficulty with the current proceedings in EU competition cases is that the persons actually adjudicating the cases are not present at the hearing. According to the ECJ, *"[a]s the purpose of the procedure before the Commission is to apply Article [81] of the Treaty even where it may lead to the imposition of fines, it is an administrative procedure. Within the context of such a procedure there is nothing to prevent the Members of the Commission who are responsible for taking a decision imposing fines from being informed of the outcome of the hearing by such persons as the Commission has appointed to conduct it […]. Thus, the fact that the applicant was not heard personally by the members of the Commission at its hearing cannot amount to a defect in the contested decision."133* Again, one may wonder if such reasoning would still be valid today. The ECtHR has recently recalled that the right to *"[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (…) and where the applicant has an entitlement to have its case "heard", with the opportunity* inter alia *to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses."134* "*[A]lthough earlier cases emphasised that a hearing must be held before a court of first and only instance unless there were exceptional circumstances that justifies dispensing one (…), the Court has clarified that the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases (…). The overarching principle of fairness embodied in Article 6 is, as always, the key consideration (…).*"*135* The ECtHR insisted in this regard in particular on the fact that *"the requirements of a fair hearing are the most strict in the sphere of criminal law"136*. Dispensing with an oral hearing would not be acceptable in areas forming *"the hard core of criminal law"137*, and then probably only for minor and/or mere disciplinary offences.

As will be explained in more detail below, proceedings before the Commission in competition cases are led by a team of Commission officials investigating the case. Parties have the right to express their views orally during these proceedings before a Hearing Officer, who will subsequently report to the Competition Commissioner on the content of this hearing. Finally, the Commissioner in charge of competition brings the case before the full College of Commissioners, who –although it did not attend the hearing– takes a final decision. It should be recalled at this stage that the right to be heard means that no decision may be taken against a person unless that person was previously given an opportunity to state his or her position on the issue. A proper hearing is not only necessary to ensure greater acceptance of the decision, but allows opposing positions to be directly confronted and challenged, including the possibility for cross-examination and interactive exchanges. Obviously, this requires the presence at oral proceedings of the persons who are ultimately deciding the case.

In this regard, as stated by the OECD, *"[n]o other jurisdiction in the OECD assigns decision–making responsibility in competition enforcement to a body like the Commission*" as indeed "[*w]ith 25 members, the Commission is too large to effectively deliberate and decide fact-intensive matters*"138. In most EU Member States, hearings in competition law proceedings take place before the persons (whether it is an independent judge or an administrative authority) responsible for taking the final decision (see table below). On the contrary, in the EU, "*when the Commission decides a matter, it has typically not heard directly the case against the proposed decision*", and *"[n]o Commissioner, including even the competition Commissioner, will have attended the hearing*"139. Indeed, *"[a]ll depends on briefings from staff and there is no ex parte rule or other control on contacts between investigating staff and the Commissioners who decide the matter*."140 *proceedings*

Member State	Body responsible for taking a decision imposing sanctions for competition law infringements	Right to an oral hearing before the members of this body who are ultimately taking the decision
Austria	Cartel Court	Yes
Belgium	Competition Council	Yes
Bulgaria	Commission for the Protection of Competition	Yes
Cyprus	Commission for the Protection of Competition	Yes
Czech Republic	Office for the Protection of Competition	Yes (if necessary)
Denmark	Criminal Court	Yes
Estonia	Criminal Court	Yes
Finland	Market Court	Yes
France	Competition Council	Yes
Germany	Competition Authority	Yes
Greece	Competition Commission	Yes (but not always before all of them)
Hungary	Competition Council	Yes (but only in important cases)
Ireland	Court	Yes
Italy	Competition Authority	Yes
Latvia	Competition Council	Yes
Lithuania	Competition Council	Yes
Luxembourg	Competition Council	Yes
Malta	Court	Yes
The Netherlands	Director General of the Competition Authority	Yes
Poland	President of the Competition Office	No
Portugal	Competition Council	No
Romania	President of the Competition Council	Yes
Slovakia	Antimonopoly office	Yes
Slovenia	Competition Authority	Yes (but not always)
Spain	Competition Court	Yes (upon request)
Sweden	Court of First Instance	Yes (upon request)
United Kingdom	Office for Fair Trading	No
European Union	European Commission (College of Commissioners)	No

The same is true for the major jurisdictions outside the EU.

Member State	Body responsible for taking a decision imposing sanctions for competition law infringements	Right to an oral hearing before the members of this body who are ultimately taking the decision
Australia	Court	Yes
Canada	Court	Yes
Japan	Court	Yes
South Korea	Court	Yes
Norway	Criminal Court	Yes
United States	Federal District Court	Yes

Thus, even in countries where there is no strict separation between investigatory, prosecutorial and adjudicative powers at the administrative stage (as it is the case in the EU), parties are generally given the opportunity to present their views to those members of the administrative body who will ultimately be taking the decision imposing sanctions. The fact that no such guarantee exists under the Community system constitutes further evidence of the fact, not only that Article 6 ECHR is not complied with141, but also that the general requirements of fairness embodied in that provision are not being given enough attention. A. If criminal sanctions are not imposed at first instance by an independent and impartial tribunal, they should at the very least be subject to fuller judicial review as required under Article 6 ECHR

1. The requirement under Article 6 ECHR for full jurisdictional review

In *Le Compte142*, the ECtHR stated that *"the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6, paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6, paragraph 1."* As shown above, this possibility only extends to civil and disciplinary proceedings, but is not allowed in criminal law matters (except for minor offences).143 Such a system would thus only be acceptable with regard to antitrust cases if it were to be admitted that antitrust violations constitute "*minor offences*" such as traffic offences or tax surcharges in the light of Article 6 ECHR.144

In our view, and as indicated, criminal sanctions such as those imposed by the Commission for antitrust violations are not "*minor offences*" and can only be imposed at first instance by an independent and impartial tribunal. However, even if it were to be considered that antitrust violations benefit from the "*minor offences*" exception –*quod certe non*– the question is then whether the current standard of review exercised by the Community courts in antitrust cases does amount to a "*full judicial review*" as required under Article 6 ECHR. The main question is therefore what is meant by "*full judicial review*". Does it suffice to have a mere control of legality, as currently exercised by the CFI and the ECJ in antitrust matters, or is it necessary to have a complete *de novo* review, implying the possibility for the judge to remake entirely the whole decision?145 In this regard, it is clear that a different standard of review applies with regard to civil cases than in criminal cases.146 With respect to decisions concerning the "*determination of civil rights and obligations*", the ECtHR has stated that in specialised areas of an administrative nature, it is sufficient for the court of review to exercise a restricted jurisdiction and to leave the determination of primary facts to the administrative body, *"particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (…)". 147* In these cases "*it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body*".148 However, when the determination of the facts lies at the heart of the judicial proceedings and of the applicants' contestation, the ECtHR requires that the review Court must have the power to rehear the evidence or to substitute its own views to that of the administrative authority. Otherwise, there would be a risk that *"there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute"*.149

In cases concerning the "*determination of a criminal charge*" however, the ECtHR takes a stricter approach, requiring that the appeal jurisdiction does not only verify the correct application of the law by the administrative authority but is also able to engage in a complete reassessment of the facts and of the evidence produced before it ("*de novo review*"). In that regard, the ECtHR has also consistently stated that *"the right to a court and the right to a judicial determination of the dispute cover question of fact as much as questions of law."*150

Thus, in *Schmautzer*, a case concerning an Austrian citizen who was imposed a fine (with twenty-four hours' imprisonment in default of payment) for not wearing his safety belt while driving his car, the ECtHR considered that *"the powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention."151* The ECtHR went on to observe that *"when the compatibility of those powers with Article 6 para. 1 (…) is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, the decision of the body below."152* As the Administrative Court lacked that power in this case, the ECtHR considered that it could not be regarded as a "*tribunal*" within the meaning of the Convention and that there had been a violation of Article 6 ECHR. More clearly still in *Kyprianou*, concerning a contempt of Court before the Cypriot jurisdiction falling under the criminal heading of Article 6 ECHR, the ECtHR held the following:

"According to the Court's case-law, it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention (see the De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 19, § 33). However, in the present case, the Court observes that the Supreme Court agreed with the approach of the first instance court, i.e. that the latter could itself try a case of criminal contempt committed in its face, and rejected the applicant's complaints which are now before this Court. There was no retrial of the case by the Supreme Court. As a court of appeal, the Supreme Court did not have full competence to deal de novo with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an ab initio, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant. Indeed, although the Supreme Court had the power to quash the impugned decision on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so. The Court also notes that the appeal did not have a suspensive effect on the judgment of the Assize Court. In this connection, it observes that the applicant's conviction and sentence became effective under domestic criminal procedure on the same day as the delivery of the judgment by the Assize Court, i.e. on 14 February 2001. (…) In these circumstances, the Court is not convinced by the Government's argument that any defect in the proceedings of the Assize Court was cured on appeal by the Supreme Court." 153 It follows from the above that the requirements of the ECHR are extremely strict and require effectively a full *de novo* review of the case.

2. The standard of review applied by the ECJ and CFI

This strict approach has to be contrasted to that of the Community courts which take a fairly conservative approach as to their own competence. For instance, the Community courts generally take the view that "*(…) the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article [81(3)] of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisals or misuse of powers (…) It is not for the Court of First Instance to substitute its own assessment for that of the Commission.*"*154* The same reasoning is also applied in Article 82 cases, in which complex economic assessments are even more often at stake. In the recent *Wanadoo* judgment for example, the CFI held that, *"as the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion (…). The Court's review must therefore be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."155*

The same reasoning can be found in most judgments, such as most recently in the *Microsoft* case or in the *Deutsche Telekom case*.156 In this regard, it should also secondly be recalled that Articles 229 and 230 of the EC treaty only confer unlimited jurisdiction on the Community courts with regard to the determination of pecuniary sanctions.157 As one of its former members has stated, the CFI is, *"essentially, a review court. That is to say its function is not to rehear the case or to substitute its own opinion for that of the Commission, but to review the legality of what the Commission has decided."158*

3. Conclusion

In the light of ECtHR case-law, it is clear that judicial review by the CFI in antitrust cases should not be limited to questions of law and to the determination of the appropriate level of the fine, but should also extend to a full reassessment of the facts and to the expediency of the Commission's decision. The CFI cannot limit its analysis to *"manifest errors of appraisals or misuses of power"* but should in every case reassess fully the facts and the choice of the appropriate legal and economic tests applied to these facts. The "*unlimited jurisdiction*" that the Community Courts are entitled to exercise should not be limited to altering the amount of the fines imposed on companies but should also extend to the very determination of the infringement giving rise to these sanctions.159 Indeed, the progressive change of nature of antitrust proceedings and of the sanctions are imposed in such proceedings now require "*full judicial review*", as it is understood by the ECtHR, in these cases.

A. Other issues that are problematic in the EC system viz Article 6 ECHR In this regard, two other features of the current system of judicial review appear problematic in the light of ECtHR case-law. The first issue is the absence of suspensory effect for proceedings brought before the Community Courts.160 As shown for instance in the quotation from the *Kyprianou judgment* hereabove, a proper system of full jurisdictional review by an independent tribunal requires automatic suspensory effect. However, under the EU competition system, even if there is the theoretical possibility for companies to request a suspension of the application of the Commission's decision, such a request will almost invariably be rejected in practice, due to the extremely strict conditions that have been developed by the Community courts in their case-law.161 As a result, companies have no choice but to comply with a Commission decision imposing very important fines before having had the opportunity to a "*fair trial*" complying with the requirements of Article 6 ECHR. This is illustrated by the *Microsoft* case where Microsoft was forced to divulge under the threat of daily penalty fines valuable know-how before any court had ever heard its case162. This practice has also been condemned by the ECtHR in criminal cases.163 A second issue is the obligation which is put on national courts not to contradict a Commission decision when they are dealing with a case based on the same facts than those being dealt with by the Commission.164 Thus, companies could not only be subject to the fines of the Commission, but also possibly to injunctive relief or damage actions in several Member Sates with authoritative reference to the Commission's decision, before having been offered the chance of being heard in accordance with the requirements of a fair trial embodied in Article 6 ECHR.

Under the current case-law, national courts have no obligation to refer questions of validity of Community decisions to the ECJ if they find that there is no reason to consider such acts illegal, nor are they under any obligation to stay proceedings until a judgment is given by the Community courts.

IV. Conclusions – The way forward

There is a growing tendency towards building a more efficient economic justice and a high level of enforcement of antitrust rules by public authorities. This cannot be done however at the cost of disregard for fundamental rights. The intention of some Member States to formally "*decriminalise*" competition law is unacceptable at a time where the level of the fines and other remedies which are imposed on companies have never been as high. The case-law of the ECHR makes very clear that –except for "*minor offences*"
sanctions must be imposed at first instance by an independent and impartial tribunal fulfilling all the requirements of Article 6 ECHR. Subsequent judicial review is not sufficient in that regard.

The day has therefore come to start thinking about a profound reform of the current system, both to comply with the ECHR and to make it more efficient and legitimate. Ideally, this should be done by granting the decisional power to the CFI, or to a new competition court. In this regard, the view has sometimes been expressed that such a reform would require a modification in the treaties themselves, under

which it is allegedly the Commission which is responsible for developing competition policy and ensuring compliance with the competition rules, not the ECJ, whose role is only to ensure that "*in the interpretation and application of this Treaty the law is observed*".*165* In the *Italian Flat Glass* case, the Court thus considered that *"although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence. In the light of those factors, the Court considers that it is not for itself, in the circumstances of the present case, to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition."166*

However, in our opinion, this case-law cannot be read as preventing a change in the decisional Structure defined in Regulation n° 1/2003 but only as defining the scope of judicial review when the adjucative function is vested with the Commission. Thus, when the Commission has decision-making power –as it currently has in Regulation n° 1/2003, the Treaty does not allow full jurisdictional review (except for fines). This does however not mean that the Treaty prohibits a system whereunder antitrust decisions are taken by the Courts and not by the Commission if Regulation n° 1/2003 is modified accordingly. In this regard, EC Article 83 indeed gives to the Council the legislative power, on a proposal from the Commission and after consulting the European Parliament to adopt "*the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82*" and in particular "*to define the respective functions of the Commission and of the Court of Justice*" in applying the competition rules. This leaves thus every possibility open to leave the adjudicating function in antitrust cases to the Courts and in this regard, ideally the role of the Court could be taken over by an EU competition court created as a "*judicial panel*" attached to the CFI, according to Article 225a of the EC Treaty.167 It can be recalled here that in areas other than competition, the Court has been entrusted with the power to find infringements (see e.g. ECA p. 226) and there is no reason why the same should not be true in antitrust cases.166

Footnotes

1 See IP/08/12030.

2 See OECD country studies –European Commission– Peer Review of Competition Law and Policy – 2005, p. 62.

3 See notably D. WAELBROECK and D. FOSSELARD, "Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures", 15 *YEL* (1995), pp. 111-142; W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", 27(2) *World Competition* (2004), pp. 201-224; K. LENAERTS and J. VANHAMME, "Procedural Rights of Private Parties in the Community Administrative Process", 34 *CMLR* (1997), pp. 531-569; W. WILS, "La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme", *CDE* (1996), pp. 329- 354. D. WAELBROECK and C. SMITS, "*Le droit de la concurrence et les droits fondamentaux*", in "*Les droits de l'homme dans les politiques de l'Union européenne*", Larcier, 2006, p. 135 et seq.; D. WAELBROECK, "*Twelve feet all dangling down and six necks exceeding long. The EU network of competition authorities and the European Convention on Fundamental Rights*", in "*The EU Network of Competition Authorities*", Hart Publishing 2005, p. 465 et seq.

4 See e.g. judgment of the CFI of 11 July 2007 in case T-351/03, *Schneider Electric 3A v. Commission* at para 183.

5 Joined Opinion of Mr Advocate General Darmon delivered on 18 May 1989 in case 374/87, *Orkem v. Commission* and in case 27/88, *Solvay v. Commission*, [1989] ECR p. 3283.

6 A formal commitment to abide by fundamental rights as enshrined in the ECHR was even undertaken in Article 6(2) of the Treaty on European Union. The ECJ tends indeed increasingly to refer directly to judgments of the ECtHR in its own rulings. See for example the judgment of the CFI of 8 July 2008 in case T-99/04, *AC-Treuhand AG v. Commission*, not yet reported, at para. 52; judgment of the Court of 1 July 2008 in Joined cases C-341/06 P and C-342/06 P, *Chronopost SA and La Poste v. Union française de l'express (UFEX) and Others*, not yet reported, at para. 46. For a critical comment on this, see notably A.G. TOTH, "The European Union and Human Rights: the Way Forward", 34 *CMLR* (1997), pp. 491 *et seq.*

7 See the judgments of the ECtHR of 18 February 1999, *Matthews v. United Kingdom*, App. n° 24833/94, and of 30 June 2005, *Bosphorus v. Ireland*, App. n° 45036/98. The latter judgment indicates at para. 156 that any presumption of compliance with the provisions of the ECHR by the EU "*can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.*"

8 Such attempts have already been made in the past (see notably the *Senator Lines* case, App. n°56672/00) where the compatibility of the non-suspensory nature of Community proceedings with Article 6 ECHR was questioned. The application was finally declared as "*devoid of purpose*" by the ECtHR after the CFI decided to set aside the fine imposed by the Commission.

9 This would be possible in the perspective of accession to the ECHR by the European Union, which is explicitly made possible by the new Reform Treaty (see Article 6 of the future Treaty on the European Union, as approved by the Lisbon intergovernmental conference, which states that *"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."*). This Treaty should enter into force on 1 January 2009 provided that it is ratified by all the Member States.

10 Article 6 ECHR ("*Right to a fair trial*") reads as follows: "*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 an 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 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 of the court."
Article 47 of the charter of Fundamental Rights of the European Union similarly recognises that "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*".
11 For a discussion of this distinction in the field of competition law, where merger control proceedings are generally considered as falling under the civil heading of Article 6 ECHR, whereas antitrust cases (i.e. implementing Article 81 and Article 82 EC with the possible use of sanctions by the Commission) are considered as falling under the criminal heading of Article 6 ECHR, see notably D. WAELBROECK and D. FOSSELARD, cited above, W. WILS, cited above and A. ANDREANGELI, "Toward an EU Competition Court: "Article-6-Proofing" Antitrust Proceedings before the Commission ?", *World Competition* 30 (4), pp. 595-622.
12 See for example the Judgment of 9 March 2004, *Pitkänen v. Finland*, App. n° 30508/96, at para. 59.
13 See for example the Judgement of 26 October 1984, *De Cubber v. Belgium*, Series A 86, at para. 32.
14 Judgement of the ECtHR of 27 February 1980, *Deweer v. Belgium*, A 35, at para. 44.
15 *Ibidem*
16 *Ibidem*
17 Judgement of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*, A 22, at para. 81. In this case, the ECtHR stated that *"[t]he Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (...). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (...), in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (...) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (...) and even without reference to Articles 17 and 18 (...), to satisfy itself that the disciplinary does not improperly encroach upon the criminal."* See also for another example *Société Stenuit v. France*, Decision of the Commission of Human Rights of 27 February 1992, A/232-A.
18 Judgement of the ECtHR of 21 February 1984, *Öztürk v. Germany*, A 73, at paras. 47-49.
19 *Öztürk v. Germany*, cited above, at para. 53.
20 See in particular the judgments of the ECtHR in *Engel and others v. the Netherlands*, cited above, at para. 82; in *Öztürk v. Germany*, cited above, at para. 50; and of 23 November 2006, *Jussila v. Finland*, App. n° 73053/01, at para. 30.
21 See the Judgement of the ECtHR of 9 October 2003, *Ezeh and Connors v. United Kingdom*, App. n° 39665/98 and 40086/98, at para. 86.
22 *Öztürk v. Germany*, cited above, at para. 52.
23 See for example the Judgement of the ECtHR of 24 February 1994, *Bendenoun v. France*, A 284, at para. 46; and *Jussila v. Finland*, cited above, at para. 38.
24 Judgement of 22 May 1990, *Weber v. Switzerland*, A 177, at para. 33.
25 See the Judgement of the ECtHR of 7 July 1989, *Tre Traktörer AB v. Sweden*, A 159, at para. 46; and *Bendenoun v. France*, cited above, at para. 47: *"the tax surcharges are intended not as a pecuniary compensation for damage but essentially as a punishment to deter reoffending".*
26 In this regard, imprisonment is considered to be the criminal penalty *par excellence*. However, penalties other than deprivations of liberty have in the past also be considered severe enough to justify the applicability of Article 6. In the *Malige* case, for example (Judgment of 23 September 1998, Reports 1998-VII), concerning a measure of docking points from driving licenses after a conviction for a traffic offence, and where no possible detention as an alternative was involved, the Court found the measure to be of a severity to make it a criminal sanction (see P. VAN DIJK, F. VAN HOOF, A. VAN RIJN and L. ZWAAK, *Theory and Practice of the European Convention on Human Rights* (4th ed.), Intersentia, Antwerpen/Oxford, 2006, pp.548-554). In the *Weber* case (cited above), which concerned proceedings where the fine could amount to 500 Swiss francs and could be converted into a term of imprisonment in certain circumstances, the Court held that "*what was at stake was sufficiently important to warrant classifying the offence as a criminal one under the Convention*." In the *Schmautzer* case (Judgement of 23 October 1995, A 328-A), the Court held that driving without wearing a seat-belt, an administrative offence under Austrian law, was criminal in nature, due notably to the fact that the fine of 200 Austrian schillings had been accompanied by an order for committal to prison in case of non-payment.
27 See notably *Bendenoun v. France*, cited above, at para. 47; and *Jussila v. Finland*, cited above.
28 This section deals with the application of the Engel criteria to EC competition law. In other words, it deals with the criminal nature of EC competition law as appreciated in light of the ECHR. It is noted that this is obviously a different question from whether the Commission is a "tribunal" within the meaning of Article 6 ECHR. As consistently found by the ECJ, and as the Commission's itself agrees, it is not. See e.g. Judgment of the CFI of 15 March 2000 in joined cases T-25/95 and others, *Cimenteries CBR and others* [2000] ECR II-700, at paras. 712-724; and of 14 May 1998 in case T-348/94, *Enso Española v. Commission* [1998] ECR p. II-1875, at para. 56. See also Judgment of the Court of 29 October 1980 in joined cases 209 to 215 and 218/78, *van Landewijck e.a. v. Commission (Fedetab)* [1980] ECR p. 3125, at para. 81; and of 7 June 1983 in joined cases 100 to 103/80, *Musique Diffusion française e.a. v. Commission* [1983] ECR p. 1825, at para. 7.
29 See above, note 15. See also *Engel & Others*, *supra* note 17, at para 81; *Öztürk*, *supra* note 18, at para 49; *Ezeh & Connors*, *supra* note 21, at paras 83, 100; Judgment of the ECtHR of 16 December 1997, *Tejedor Garcia*, App. n° 142/1996/761/962, ECR 1997-VIII, at para 27.
30 *Ibidem*
31 See the case-law of the ECtHR cited above. See accordingly W. WILS, "*The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*", 27(2) *World Competition* (2004), p. 208; D. WAELBROECK and D. FOSSELARD, cited above, p. 120; and K. LENAERTS and J. VANHAMME, cited above, p. 557.
32 See e.g. M. WAELBROECK and A. FRIGNANI, Commentaire Mégret, vol. 4, concurrence, Ed. ULB, 1997, p. 419 and references. See also R. Legros, "*L'avenir du droit penal international*", Mélanges offerts à Henri Rolin, Paris, 1964, P. 194.
33 These evolutions are considered in detail below.
34 COM(2000)582, OJ [2000] C 385/284, 19 December 2000.

35 European Parliament position, 1st reading or single reading, OJ [2002] C 72/236, 21 March 2002. See Amendment 43 proposed by the Parliament. In proposing this amendment the Parliament urged: " *the institutions and the Member States to give careful consideration to amending Articles 229 and 230 of the EC Treaty with a view to giving the Court of First Instance the power to conduct judicial review of findings and orders made by the Commission in its competition decisions to PE 296.005 64/65 RR\296005EN.doc EN a standard sufficient to satisfy the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; likewise calls on the Commission to do whatever is necessary, in cooperation with the national authorities, to ensure that the application of Community competition law by national competition authorities is in all respects clearly in accordance with Article 6 of the European Convention*". The following justification was given by the Parliament for this: "*The issue of the compatibility of the Community's competition procedure as a whole with Article 6 of the ECHR will be particularly important if, as seems probable, the fines which can be imposed by the Commission come to be regarded as criminal penalties for the purposes of Article 6. But even if this does not come about, it is already clear that Commission competition decisions determine the 'civil rights and obligations' of companies in very important ways. Therefore companies are entitled under Article 6 to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' in Community competition cases. The European Commission could not be regarded as a 'tribunal', and its procedures are not in public. In addition, it is open to question whether it could be considered 'independent' for this purpose, because essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved. It follows that if Community competition procedures are to comply with the ECHR, they must do so because the Court of First Instance provides the hearing required by Article 6. Insofar as Community fines are concerned, the Court has 'full jurisdiction' and this is certainly all that Article 6 requires. However, all the other findings and orders made by the Commission in its competition decisions are subject only to the considerable but nonetheless limited degree of judicial review on the four grounds set out in Article 230 of the EC Treaty. The Court of First Instance undoubtedly goes a long way to inquire into and reconsider the Commission's findings of fact and economic assessments when it thinks it appropriate to do so. The Court does, however, recall that it defers to the Commission's economic assessments unless they are clearly incorrect or have been reached after procedural errors. It is therefore not completely certain that the Court can, consistently with the terms of Article 230, provide as full a re-hearing as might be thought necessary to fulfil the requirements of Article 6 of the Convention. No doubt the Court of First Instance will do everything it can to make sure that its review does not fall short of the standard required by Article 6. However, to resolve doubts, the possibility of amending Articles 229 and 230 should be considered. Similar issues arise in all of the Member States in which competition law fines, whether for breach of Community law or of national competition law, are imposed by administrative authorities and not by courts. The Commission therefore should do whatever is necessary, in cooperation with the national authorities to ensure that the application of Community competition law by national competition authorities, in accordance with the Commission's proposals for decentralisation, is in all respects clearly in accordance with Article 6 of the ECHR*."

36 It is, however, noted that whilst certain sanctions may be compatible with the classification of a charge as non-criminal, others – in particular imprisonment – will automatically imply that a charge is criminal (See i.a. *Engel and Others*, supra note 17 at para 82; *Campbell and Fell*, Judgment of 28 June 1984, Series A 80, at para 72.) In other words, in classifying a charge as criminal for the purposes of Article 6 ECHR, the imposition of a certain type of sanction may be sufficient but is not necessary.

37 See below at point under Section I.B. (iii).

38 For a comprehensive study of the situation in Member States, see *inter alia*, "*Concurrence et droit penal*", by various authors in *Concurrences* n° 1-2008, p. 1 et seq.

39 This is *mutatis mutandis* also the reason why, whilst the EU is not a signatory of the ECHR, it is generally recognised that it is also obliged to comply with the ECHR – because the powers it has have been delegated by the Member States and because the key guarantees of the ECHR could otherwise easily be circumvented.

40 See accordingly: A. ANDREANGELI, cited above, at p. 605; W. WILS, "The Combination…", cited above, pp. 208-209.

41 See notably A. Jones and B. Sufrin, *EC Competition Law*, 3rd edition, OUP, 2008, p. 44; R. Whish, *Competition Law*, Fifth edition, OUP, 2005, p. 17; See also the Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08), at para. 33:
"The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources".

42 See Decision of the Commission of Human Rights of 27 February 1992, *Société Stenuit v. France*, 1992, A/232-A.

43 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n° 1/2003, JO C 210, 1 September 2006. in these Guidelines, the Commission states for example that "*fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).*"; "*it is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.*"; "*In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, marketsharing and output-limitation agreements.*"; "*C. Specific increase for deterrence: The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates*."; "*Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing of a particular case from such methodology or from the limits specified in point 21.*" (emphasis added). See also Commissioner Neelie Kroes' declarations in the *Financial Times* of 29 November 2007 about the fines imposed by the Commission in the new flat glass cartel: "*the important thing is that the fine as a whole is sufficiently deterrent, so that none of these companies will be tempted to infringe the rules again.*"

44 It appears for example that fines imposed in the US for tax evasion, which is the most serious federal tax crime, can only reach a maximum amount of 250.000$, whereas the most serious corporate crime possible would be subject to sanctions raising until 290.000$. These sanctions are thus far less important than those which may be imposed for serious antitrust violations, and this tendency seems to be even more obvious in Europe, where the maximum penalties that can be imposed for antitrust violations are higher than in the US and Japan.

45 See for example the *Stenuit* case, cited above, where the fine imposed was 50.000 FRF. See also *Bendenoun v. France*, cited above, where the tax surcharges which were imposed were considered as "*very substantial*" by the ECtHR as they amounted to FRF 422,534 (approximately 64.000 €) in respect of Mr Bendenoun personally and FRF 570,398 (approximately 87.000 €) in respect of his company.

46 Fines imposed are frequently of the order of a thousand times, and occasionally ten thousand times, the average per capita GDP across the 27 Member States. According to the Commission's statistics the per capita GDP in 2007 was 24.800 EUR.

47 For instance, in the *District Heating Cartel case* the fines led to liquidation for numbers 2 and 3 on the market, the companies Løgstør Rør and Tarco.

48 Thus –according to the fining guidelines–, in determining the basic account of the fine to be imposed, the Commission will take the value of the undertaking's sales to which the infringement relates into account. The Commission will also take into account the need to increase the fine in order to exceed the amounts of gains improperly made.
49 *"(from latin recidivus "recurring", from re- "back" + cado "I fall"), is the act of a person repeating an undesirable behavior after they have either experienced negative consequences of that behavior, or have been treated or trained to extinguish that behavior. The term is most frequently used in conjunction with substance abuse and criminal behavior. For example, scientific literature may refer to the recidivism of sexual offenders, meaning the frequency with which they are detected or apprehended committing additional sexual crimes after being released from prison for similar crimes."* (Source: http://en.wikipedia.org/wiki/Recidivism).
50 Oxford English Dictionary.
51 Merriam-Webster's Collegiate Dictionary.
52 See *Neste St. Petersburg v. Russia*, below at note 68.
53 See G. Parleani, "*La sanction pénale des pratiques anticoncurentielles*", *Concurrences* n°1-2008, p. 3, at paras 5-6.
54 See L. Idot, "*Concurrence et droit pénal*", "*Le droit des Etats members de l'Union européenne*" in *Concurrences* n° 1-2008, p. 14 et seq.
55 See footnote 116 *infra*.
56 Even if several countries have introduced criminal sanctions against individuals engaging in anticompetitive conduct, it seems that no individual in Europe had received a custodial sentence for a competition law offence until 2006, when an Irish court sentenced an
individual to a period of six months' imprisonment, suspended for a period of 12 months, in connection with an Irish heating oil cartel that operated in the west of Ireland. The UK is expected to follow by imposing custodial sentences to the businessmen found guilty in the Marine Hose Cartel case after they had already been condemned by the US DoJ to prison sentences ranging from 20 months to two and a half year. It is worth noting however that the maximum penalty in the UK is five years' imprisonment compared with the maximum of 10 years' imprisonment in the US..
57 Section 204 of the Entreprise Act 2002 amends the Company Directors Disqualification Act 1986 and provides for disqualification orders against a company director if : *"(a) his conduct contributed to the breach of competition law mentioned in subsection (2); (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it; (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach"* (§6). It is immaterial whether the person knew that the conduct of the undertaking constituted the breach (§7). The maximum period of disqualification is 15 years (§9).
58 See, for example, the resignation of two executives of British Airways following the imposition by the European Commission of a 300 million GBP fine for price fixing http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2006/10/09/bcnba09.xml (same example: http://www.irishtimes.com/newspaper/breaking/2008/0807/breaking69.htm).
59 International Bar Association/European Commission Conference 'Anti-trust reform in Europe: a year in practice', Taking Competition Seriously – Anti-Trust Reform in Europe, Brussels, 10 March 2005.
60 John Fingleton, Marie-Barbe Girard and Simon Williams, "The fight against cartels: is a 'mixed' approach to enforcement the answer?", Title II, in 2006 Fordham Comp. L. Inst. 10 (B. Hawk ed. 2007).
61 The war against international cartels: lessons from the battlefront. Speech presented at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy New York, October 14, 1999.
62 Another significant strand of this policy in recent years, is the active encouragement of private enforcement of EC competition law, which has occurred both at EC and national level, *inter alia* so as to ensure higher deterrence. Notably, the Commission published in
April 2008 its White Paper on private enforcement (White Paper on damages actions for breach of the EC antitrust rules, 2 April 2008 Doc COM (2008) 165 final) which stresses that damage actions ought to produce "*beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules*".
63 http://news.bbc.co.uk/1/hi/uk_politics/661476.stm
64 W. WILS, cited above, p. 209. See also C. D. EHLERMANN, "*Developments in Community Competition Law Procedures*", EC Competition Policy Newsletter, Vol. 1, n° 1, p. 2.
65 HR Commission Report of 30 May 1991 in *Société Stenuit v. France*, cited above, at paras.62-64.
66 *Ibidem*.
67 Decision of the Human Rights Commission of 27 February 1992 in *Société Stenuit v. France*, cited above. See also the Human Rights Commission decision of 9 February 1990 in *M. & Co. v. Germany*, App. n° 13258/87, where the question arose whether, *"by giving effect to a judgment reached in proceedings that allegedly violated Article 6, the Federal Republic of Germany incurred responsibility under the Convention on account of the fact that these proceedings against a German company were possible only because the Federal Republic has transferred its powers in this sphere to the European Communities"*. The Human Rights Commission found in this case that *"for the purpose of the examination of this question it can be assumed that the anti-trust proceedings in question would fall under Article 6 (…) had they be conducted by German and not by European judicial authorities."* This reasoning seems to be guided only by the fact that the EC was not itself a party to the Convention reasoning which may not be applicable today anymore (see *infra*).
68 Judgment of 3 June 2004, App. n° 69042, 69050, 69054, 69055, 69056, and 69058/01
69 Judgment of the ECtHR of 23 November 2006, *Jussila v. Finland*, App. n° 73053/01, emphasis added.
70 [1978] (ML Rep. 100).
71 See e.g. decision of 22-23 January 1987, *JORF*, 25 January 1987, p. 924; see also J-C and JL. FOURGOUX, "*Le Conseil de la concurrence dans la vie économique et juridique de l'Europe*", GP, 26-27 September 1990, p-12,13).
72 See D. Waelbroeck and M. Griffiths "French *Cour de Cassaction: TGV Nord et Pont de Normandie*, Judgment of 5 October 1999" case-note in 37 CMLR (2000) pp. 1465-1476.
73 Advocate General Mayras, already found in his Opinion delivered on 29 October 1975 in case 26/75, *General Motors v. Commission* [1975] ECR p. 1367, that *"[a]lthough in the strict sense of the term the fines prescribed by regulation n° 17 are not in the nature of criminal-law sanctions, I do not consider it possible, in interpreting the term 'intentionally', to disregard the concepts which are commonly accepted in the penal legislation of the Member States."* This view was however not widely shared. Thus, even after the *Öztürk* judgment Advocate General Darmon considered that "*it does not seem (…) to be blindingly clear that the Öztürk judgment should be seen as being so far-reaching that the concept of 'charged with a criminal offence' within the meaning of the Convention should be taken to extend to undertakings which are the subject of administrative proceedings intended to determine whether or not they have committed an infringement of competition rules.*" (Opinion of Advocate General Darmon delivered on 18 May 1989 in Case 347/87 *Orkem v. Commission* [1989] ECR p. 3301, at para. 137). In the same case, the ECJ seemed to take at least a more careful approach in

its judgement by stating that "*[a]s far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.*"(Judgement of the Court of 18 October 1989 in Case 347/89, *Orkem v. Commission*, cited above, at para. 30 (emphasis added). Note that in the French version (which was the original language of the case), the Court only stated the following: *« En ce qui concerne l'article 6 de la Convention européenne, en admettant qu'il puisse être invoqué par une entreprise objet d'une enquête en matière de droit de la concurrence, il convient de constater qu'il ne résulte ni de son libellé ni de la jurisprudence de la Cour européenne des droits de l'homme que cette disposition reconnaisse un droit de na pas témoigner contre soi-même. »* (emphasis added)).

74 Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône Poulenc S.A. v. Commission* [1991] ECR II-867, at p. 885 (emphasis added)

75 Opinion of Advocate General Léger in Case C-185/95 P, *Baustahlgwebe v. Commission* [1998] ECR I-8422, at para. 31.

76 Judgment of the ECJ of 17 December 1998 in Case C-185/95 P, *Baustahlgewebe v. Commission* [1998] ECR I-8422, at para. 21.

77 Free translation by the authors from the original French text *"[…] il est certes vrai que le droit d'être entendu par un tribunal et le droit à un procès équitable, tels qu'ils resultant notamment de l'article 6, paragraphe 1, de la CEDH, font partie des droits fondamentaux qui, selon la jurisprudence constante de la Cour, par ailleurs réaffirmée par le préambule de l'Acte unique européenne et par l'article F, paragraphe 2, du traité sur l'Union européenne (devenu, après modification, article 6, paragraphe 2, UE), sont protégés dans l'ordre juridique communautaire et que, eu égard à la nature des infractions en cause ainsi qu'à la nature et au degré de sévérité des sanctions qui s'y rattachent, les entreprises accusées de violations des règles de concurrence qui se sont vu infliger des amendes pour ce motif doivent bénéficier des garanties qui sont prévues pour les procédures à caractère pénal."* Order of the Court of 16 Decembre 1999 in Case C-137/92 P-DEP, *Hüls v. Commission,* not published, referring to judgment of the Court of 8 July 1999 in Case C-199/92 P, *Hüls v. Commission* [1999] ECR I-4383, at para. 150. See also the Judgment of the CFI of 6 October 2005 in Joined cases T-22/02 and T-23/02, *Sumitomo Chemical v. Commission* [2005] ECR II-4065, at para. 105; the Judgment of the Court of 11 January 2000 in Joined Cases C-174/98 P and C-189/98 P, *van der Wal* [2000] ECR I-1 para. 17; and the recent Opinion of AG Kokott in case 280/06, *Autorità Garante della Concorrenza e del Mercato v. ETI an others*, not yet published, at para 71: *"The consequence of the sanctionative nature of measures imposed by competition authorities for punishing cartel offences – in particular*
fines – is that the area is at least akin to criminal law."

78 Judgment of the ECJ of 19 September 2003 in Case C-338/00 P, *Volkswagen*, [2003], ECR I-9189, at para 97.

79 Judgment of the CFI of 1st July 2008, in Case T-276/04, *Compagnie Maritime Belge*, not yet published, at para 66.

80 See *supra* Section I.B.1(i).

81 See Wilberforce, Campbell and Elles (1966) The Law of Restrictive Practices and Monopolies.

82 See the judgment of the ECtHR in *Jussila v. Finland*, cited above fn. 69.

83 See above at Section I.B.1(ii).

84 *"Individuals are not at risk. Nobody goes to prison or gets a criminal record. The Commission may fine only business entities."*
http://ec.europa.eu/comm/competition/speeches/text/sp1995_044_en.html

85 See above, note 31. See also e.g. Wils, "Is Criminalisation of EU competition law the Answer", at point 2.1. *"Whereas fines can be either criminal or civil or administrative, imprisonment appears to be essentially a criminal sanction. The possibility of a prison*
sanction does not seem top be a necessary condition for a prohibited act or for an enforcement procedure to be criminal, but it is certainly a sufficient condition."

86 See for example the judgment of the ECtHR of 7 July 1989, *Tre Traktörer AB*, Application no. 10873/84, at para. 35. For more on *locus standi* of legal persons under the Convention see P. VAN DIJK, F. VAN HOOF, A. VAN RIJN and L. ZWAAK, *Theory and Practice of the European Convention on Human Rights* (4th ed.), supra note 26, pp.52-55; See also Wils, "Is Criminalisation of EU competition law the Answer?", at point 2.1 *"Individual penalties are however neither a necessary not a sufficient condition for enforcement to be criminal."*

87 See e.g. W. Wils, "Is Criminalisation of EU Competition Law the Answer?", at point 2.6.

88 An example of this argument can be found in the following text by ex Commission official Julian Joshua (in Attitudes to Anti-trust Enforcement in the EU and US, Dodging the Traffic Warden, or Respecting the Law? The text is extensively quoted here because it is a good example of an attempt to validate a logically flawed argument through repetition (*argumentum via repititio)*: *"Just so we are under no illusion, let us remember how a real criminal enforcement system operates. In the United States the Justice Department always prosecutes suspected price fixers criminally. The primary investigative instrument is the Grand Jury. Targeted individuals are summoned for examination on oath by hostile prosecutors without benefit of judge or counsel. Vast quantities of documents are subpoenaed. Corporations cannot hide behind the Fifth Amendment, and individuals who invoke the constitutional privilege against self-incrimination may find themselves obliged to testify nevertheless under strictly limited court-ordered immunity. Failure to cooperate will mean prosecution for contempt of court, obstruction of justice or perjury. Remember too that the Justice Department now often calls on the FBI to assist: house searches, consensual telephone monitoring, sending turned conspirators "wired up" into cartel meetings - these are commonly employed to gather evidence. And of course a Sherman Act indictment can well be reinforced by prosecutors adding a racketeering or wire fraud count. Grand Juries, it should be said, almost always find a "true bill", i.e. they vote to indict. The criminal trial itself is usually before a Federal jury - that is, if the accused plead not guilty. Almost invariably where the evidence is convincing they will seek a plea bargain on the best terms they can get. The Justice Department on conviction will always press for a prison term as well as fines: under recent amendments it is a felony and the jail sentence can be up to three years. A jury verdict is final as to the facts. One can go to the Circuit Court of Appeals, but while most appeals are on evidentiary questions, they are concerned with narrow questions of admissibility or the adequacy of the judge's directions to the jury. As long as there was some evidence on which to convict, the Appeal Court does not go into the facts."*

89 Joined cases T-125/03 and T-253/03, *Akzo v. Commission,* ECR [2007], not yet reported, at points 63, 94 and 95.

90 Judgment of the ECJ of 18 September 2003, in case C-338/00 P, *Volkswagen*, [2003], ECR I-9189, point 97; see also Judgment of the CFI of 1st July 2008, in case T-276/04, *Compagnie Maritime Belge*, para.66.

91 See the US Supreme Court rulings in *Rasul v. Bush* 542 U.S. 466 (2004); *Boumediene v. Bush* 553 U.S. __ (2008); *Al Odah v. United States* 542 U.S. 466 (2004); in the EU see the CFI judgments in cases T-229/02, *PKK v. Council*, not yet published; T-256/07*, People's Mojahedin Organization of Iran v. Council*, not yet published; T-327/03, *Al Aqsa v. Council*, not yet published; T-47/03, *Sison v. Council*, not yet published; T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR p. II-4665; see also the Opinion of Advocate General Maduro in case 402/05 P, *Kadi v. Council and Commission*, not yet published.

92 See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, at p. 46.

93 See notably the *De Cubber*, *Bendenoun*, *Öztürk*, and *Jussila* judgments, all cited above.

94 *Jussila v. Finland*, cited above, at para. 40 (emphasis added). 92 See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, at p. 46.
93 See notably the *De Cubber*, *Bendenoun*, *Öztürk*, and *Jussila* judgments, all cited above.
94 *Jussila v. Finland*, cited above, at para. 40 (emphasis added).
95 See e.g. the judgments of the ECJ in joined cases 209-15 and 218/78, *Heinz van Landewyck v. Commission* (*Fedetab*), [1980] ECR 3125; or in joined cases 100-103/80, *Musique diffusion française v. Commission (Pioneer)*, [1983] ECR 1825.
96 D. WAELBROECK and D. FOSSELARD, cited above, p. 115.
97 W. WILS, cited above, p. 209 (emphasis added). See also K. LENAERTS and J. VANHAMME, cited above, at pp. 555-556.
98 *Jussila v. Finland*, cited above, at para. 40.
99 Judgment of the ECtHR of 23 June 1981 in the case *of Le Compte, Van Leuven and De Meyere v. Belgium*, A 54, at para. 51 (emphasis added). On the basis of this *le Compte* caselaw, the CFI found in *Schneider* (judgment of 11 July 2007, case T-351/03, at para. 183) that in merger cases, the fact that the decisional power was with the Commission and not a court was no breach of Article 6 ECHR. Merger cases are however not criminal law cases.
100 Judgment of the ECtHR of 10 February 1983 in the case of *Albert and Le Compte v. Belgium*, series A 58, at para. 29 (emphasis added).
101 *Öztürk v. Germany*, cited above, at para. 56 (emphasis added).
102 *Bendenoun v. France*, cited above, at para. 46 (emphasis added).
103 See for example W. WILS, "La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme", cited above, at pp. 337-338. In subsequent articles, the author recognises however, that *« [t]his alternative means [provided by the* Le Compte *case-law] of satisfying the requirements of Article 6(1) ECHR does not appear to be available in more traditional areas of criminal law or in areas considered criminal under domestic law (…). »* (W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, at p. 209, fn. 13). The author seems to consider however that only prison sanctions *"would require the transfer of the decisional power from the European Commission to the Community Courts."* (*idem*, at p. 224, footnote 57).
104 See e.g. Judgment of 9 March 2004, *Pitkänen v. Finland*, App. n° 30508/96, at para. 59.
105 See for example the Judgement of 26 October 1984, *De Cubber v. Belgium*, Series A 86, at para. 32.
106 See footnote 103 above.
107 Emphasis added. We insist on the language used *"in the determination…"* and not *"in the final determination…"*. No need to recall that according to Articles 31 and 32 of the Vienna Convention on the law of treaties, the first method of interpretation is to be based on the text and the wording of the treaty provision to be interpreted.
108 *Jussila v. Finland*, cited above, at para. 43. (emphasis added)
109 *Jussila v. Finland*, cited above, at para. 36.
110 *Jussila v. Finland*, cited above, at para. 40 (emphasis added).
111 Judgment of 25 February 1997, *Findlay v. United Kingdom*, reports 1997-I, at para. 79.
112 Dissenting Opinion of Mr H. Danelius, Mrs. G. H. Thune and Mr. L. Loucaides in the Report of the Human Rights Commission of 2 March 1995 in case *Thomann v. Switzerland*, App. n° 17602/91. It has to be observed that in this case the majority did not disagree with this finding of the minority but merely held that *in casu*, there was no lack of impartiality at the appeal stage. The mere fact that the accused had first been judged in his absence by the same judges that subsequently judged him on appeal did not reveal any lack of impartiality The Human Rights Commission recalled however (at para. 65) that impartiality was required already at first instance. A problem might occur for instance*"where a trial judge had previously held in the public prosecutor's department an office whose nature was such that he may have had to deal with the case (…), or exercised the functions of an investigating judge with extensive powers and particularly detailed knowledge of the files (…), or taken pre-trial decisions on the basis of legal provisions requiring a particularly confirmed suspicion (…)."*
113 Cited above.
114 Commission Decision of 21st February 2007, case COMP/E-1/38.823, no public version yet available.
115 The latest fine imposed by the Commission has raised the total amount of fines imposed by the Commission in antitrust cases to more than 3 billion EUR in 2007. The total fines of 486 million EUR which were imposed in the recent Flat Glass case were imposed for cartel activities lasting less than a year. This makes some lawyers suggest that, on the basis of the Commission's new Fining Guidelines, allowing for amounts of fines reaching the 30% turnover, fines beyond 1 billion EUR could become the new benchmark (in *Financial Times* of 29 November 2007, "*Flat Glass groups are fined 500 million EUR*").
116 In accordance with Article 5 of Regulation n° 1/2003, a total of 17 Member States have taken laws imposing criminal sanctions on companies and/or on individuals for breaches of competition law in their jurisdiction (UK, Germany, Denmark, France, Italy, Ireland, Austria, Greece, Spain, Estonia, Slovak Republic, Czech Republic, Finland, Norway, Cyprus, Malta and Slovenia) with sanctions ranging from criminal fines to imprisonment or disqualification of company directors. Not to speak about the possibility for national criminal sanctions in the hypothesis of a refusal to cooperate with the Commission when it is exercising its powers of investigation, including during a dawn raid for example (see notably, with regard to the UK, the Judgment of 17 September 2007 in joined cases T-125/03 and T-253/03, *Akzo and Akcros v. Commission*, not yet published, at para. 63).
117 See above Section I.B.1(ii).
118 Although the ECtHR has never had to decide on this question with regard to the EC, for obvious reasons of competence, it appears that this absence of formal separation at EC level between prosecutorial and adjudicative functions would very likely be problematic under Article 6 ECHR. Interestingly, at national level, the French *Cour de Cassation* has already decided in a judgment of 5 October 1999, *TGV Nord et Pont de Normandie*, that the participation of the *rapporteur* in the deliberations of the *Conseil de la Concurrence*, to the extent that he has undertaken investigations during the fact-finding process, was contrary to Article 6(1) ECHR. For a more detailed discussion on this judgment, see D. WAELBROECK and M. GRIFFITHS, "French *Cour de Cassation: T.G.V. Nord et Pont de Normandie*, Judgment of 5 October 1999", case note in 37 CMLR (2000), pp. 1465-1476.
119 We are indebted here to W. WILS and his article on "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, pp. 212-220.
120 F. MONTAG, "The Case for a Radical Reform of the Infringement Procedure under Regulation 17" [1996] 8 ECLR 428-437, at p. 430.
121 See the Commission's webpage: http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf.
122 See notably the Speech of Neelie Kroes of 26 June 2007 (Speech 07/425, available on the Commission's website), where Ms. Kroes stated that *"[s]o far this year we have adopted three cartel decisions with fines totalling more than 2 billion euros. And I expect to bring several more investigations*

to an end later this year."
123 W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, p. 217. In addition, fines have become an important resource for the Community (with a total budget of 126.5 billion € in 2007, fines totalling more than 2 billion € constitute between 1% and 2% of this total budget).
124 Such as Korea, Japan, Canada, Australia and Norway for example. In the 27 EU Member States, practice is much more contrasted, with 14 countries (namely Bulgaria, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia and Slovenia) still allowing for sanctions to be taken by the investigating authorities, subject to subsequent judicial review by an independent court, while in the 13 others (namely Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Greece, Ireland, Malta, Spain, Sweden and the United Kingdom) these sanctions – which are
often considered as having a criminal character – may only be imposed by an independent body or court (within the meaning of Article 6 ECHR), with the investigating authority playing the role of a prosecutor before it. This classification may be subject to some changes, depending on the definition of a court in every single case and to internal reforms.
125 In this regard, see F. MONTAG, cited above, at p. 429: *"Undertakings often feel that they are treated unfairly and that their procedural rights are violated in the course of infringement proceedings. (…) [B]ecause undertakings are uncomfortable with the way in which infringement proceedings are carried out and decisions are reached, Commission decisions imposing significant fines lack acceptance."*
126 See W. WILS, cited above, at p. 203.
127 On the contrary, under Commission proceedings, the College of Commissioners (who is taking the final decision on the case by simple majority) only receives a proposal from the Competition Commissioner, who has himself or herself been briefed by the DG Competition officials dealing with the case, including the Chief Competition Economist and the review panel if they have been involved in the case, as well as by the Hearing Officer and possibly other Commission officials. See W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, pp. 203 and 207.
128 Administrative cost being traditionally the main argument invoked to support the maintenance of the current system in comparison with a system based on prosecution before the Community Courts.
129 W. WILS, cited above, p. 222.
130 Judgment of the ECtHR of 14 November 2006, *Tsfayo v. United Kingdom*, App. n° 60860/00, at para. 33.
131 See e.g. Microsoft's requests reported in F.T. 14 March 2006.
132 Judgments of the ECtHR of 23 February 1994, *Fredin (n° 2)*, Series A283-A, para. 21; of 26 April 1995, *Fischer*, Series A312, para. 44; *Jussila v. Finland*, supra note 20, at para. 40 (emphasis added). See also the statement of Robert Badinter in *Le Monde* of 27.1.2004 concerning the project of direct settlement procedure in France: *"Le coeur de la procedure pénale, c'est l'audience. C'est le lieu où l'on décide de la valeur des preuves, de la culpabilité, enfin de la peine et de la réparation due à la victime. A l'audience, le procureur n'est pas une partie privilégiée. Le débat est public. Depuis la Révolution, cette publicité est une garantie pour le prévenu et pour le peuple que la justice n'est ni confisquée, ni manipulée.*
133 Judgment of the ECJ of 15 July 1970 in Case 45/69, *Boehringer Mannheim v. Commission* [1970] ECR p. 769, at para. 23.
134 *Jussila v. Finland*, cited above, at para. 40 (emphasis added). See also the judgments of the ECtHR of 23 February 1994, *Fredin (N° 2*), Series A 283 A at para. 21, and of 26 April 1995, *Fischer*, Series A 312, at para. 44.
135 *Jussila v. Finland*, cited above, at para. 42 (emphasis added).
136 *Idem*, at para. 43. Furthermore, in its partly dissenting opinion in the same case, Judge Loucaides, joined by Judges Zupancic and Spielmann, argued that *"[t]he requirement of a public hearing in judicial proceedings has been challenged during the drafting of certain international instruments, but even where this challenge has been successful, as in the case of the American Convention on Human Rights, the guarantee of a public hearing has been retained in respect of criminal proceedings. It appears from the Court's case-law that whenever the Court has found that a hearing could be dispensed with in respect of criminal proceedings at the appeal stage, it was always made clear that a hearing should have taken place at first instance (…)."*
137 *Ibidem.*
138 Report quoted above, at p. 63.
139 *Ibidem*, p. 64.
140 *Ibidem.*
141 See above.
142 Cited above, at fn.100. The CFI has referred to this judgment to justify the fact that merger decisions are taken by an administrative authority in Case T-351/03, *Schneider Electric SA v. Commission*, 11 July 2007, para. 183. However, merger decisions, contrary to decision imposing fines are clearly not of a "*criminal nature*".
143 See the developments above. See also the judgment of the ECtHR of 26 October 1984, *De Cubber v. Belgium*, cited above, at para. 32.
144 See notbaly the *Öztürk* judgment and the developments above.
145 For a more in-depth analysis of the notion of *"tribunal having full jurisdiction"*, see D. WAELBROECK and D. FOSSELARD, cited above, at pp. 127-133.
146 See also A. ADREANGELI, cited above at footnote 11.
147 Judgment of the ECtHR of 22 November 1995, *Bryan v. United Kingdom*, Series A 335-A, at para. 47. See also the judgments of 18 January 2001, *Chapman v. U. K.*, App. n° 27238/95 and *Jane Smith v. U.K.*, App. n° 25154/94.
148 Judgment (Grand Chamber) of 28 May 2002, *Kingsley v. U.K.*, App. n° 35605/97, at para. 58. See also the judgment of 31 May 2007, *Bistrovic v. Croatia*, App. n° 25774/05.
149 Judgment of 14 November 2006, *Tsfayo v. U.K.*, App. n° 60860/00, at para. 48.
150 *Le Compte, Van Leuven and De Meyere v. Belgium*, cited above, at para. 51.
151 Judgment of 23 October 1995, *Schmautzer v. Austria*, Series A328-A, at para. 36.
152 *Ibidem*. See also the judgment (Plenary Chamber) of 29 April 1988, *Belilos v. Switzerland*, Series A 132,at paras. 69-70.
153 Judgment of 27 January 2004, *Kyprianou v. Cyprus*, App. n° 73797/01, at paras. 43-46 (emphasis added). This judgment was subsequently upheld by the Grand Chamber of the ECtHR, who delivered its judgment in the same case on 15 December 2005. See also the judgment of 26 April 1995, *Fischer v. Austria*, Series A 312.
154 See for example case T-17/93, *Matra Hachette v. Commission*, [1994] ECR II-595-656, at para. 104. (emphasis added). See further case 42/84, *Remia*, [1985] ECR 2545, para. 34, joined cases 142/84 and 156/84, *BAT and Reynolds*, [1987] ECR 4487, at para; 62, case C-194/99 P, *Thyssen*

Stahl, [2003] ECR I-10821, at para. 78. See also the case-law cited above.
155 See the recent CFI Judgment in case T-340/03, *France Télécom v. Commission (Wanadoo)*, at para. 129.
156 Case T-201/04, *Microsoft v. Commission*, at para. 87: *"The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers."*
157 See the recent CFI Judgment in Case T-271/03, Deutsche Telekom v. Commission, at para. 185 which repeats the same statement. See K. Lenaerts, I. Maselis and D. Arts, Procedural Law of the European Union, Robert Bray (ed.), Thomson, Sweet and Maxwell, London, 2006, pp. 447-451.
158 Judge D. Barrington, cited in D. Waelbroeck and D. Fosselard, cited above, at p. 132.
159 See also D. Waelbroeck and D. Fosselard, cited above, at pp. 127-133.
160 Article 242 EC. See also K. Lenaerts, I. Maselis and D. Arts, cited above, at p. 419, and W. Wils, "The Combination (…)", cited above, at p. 202.
161 The grant of interim relief is subject to three cumulative conditions, namely (i) that there is a prima facie case for the adoption of the requested measures both in fact and in law, (ii) that their adoption is necessary to avoid serious and irreparable damage, and (iii) that the balance of interests favours such an order. The condition of "serious and irreparable damage" is generally interpreted extremely narrowly as meaning that any financial loss will only constitute such an "irreparable damage" if, for example, the very existence of the undertaking would be threatened. (See notably the Order of the President of the Court of 21 March 1997 in case T-41/97 R, *Antillean Rice Mills v. Council* [1997] ECR p. II-447, at para. 47)
162 See D. Waelbroeck "*Microsoft Round 12 – Is the Commission now trying to preempt the judges?*", Competition Law Insights 2007.
163 Judgment of 27 January 2004, *Kyprianou,* cited above, at para. 45. Again, such an absence of suspensory effect would be acceptable in administrative or civil case but not in criminal cases in the light of the Convention.
164 Judgment of the Court of 14 December 2000 in Case C-344/98, *Masterfoods* [2000] ECR p.I-11369, at paras. 49-60. See also Case T-65/98, *Van den Bergh Foods v. Commission* [2003] ECR p. II-4653, at para. 199. On the precise implications of this jurisprudence, see A. P. KOMNINOS, "Effect of Commission decisions on private antitrust litigation: setting the story straight", 44 *CMLR* (2007), pp. 1387-1428.
165 Article 220 EC. See A. ANDREANGELI, *cited above.*

The Substantial Law of the EU: The Four Freedoms Law (3rd Edition)

Catherine Barnard

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CHAPTER 11: FREEDOM TO PROVIDE AND RECEIVE SERVICES

A. INTRODUCTION

Articles 56 and 57 TFEU (ex Article 49 and 50 EC) lay down the principle of freedom to provide services on a temporary basis by a person established in one Member State to a recipient established in another. Article 57 defines services and applies the principle of equal treatment to the service provider.[1] Thus, the structure of Articles 49 and 57 does not differ very much from the Treaty provisions on workers and establishment. Yet for many years services were seen as the poor relation to the other freedoms because Article 57 suggested that the services provisions were subordinate to the other freedoms:[2]

> Services shall be considered to be 'services' within the meaning of the Treaties . . . insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.[3]

However, in reality, growth in the economy has essentially been driven by services,[4] which now account for 70 per cent of GDP and employment in the majority of the Member States and this has been reflected in the case law: an increasing number of cases were decided under Articles 56 and 57 in the 1990s.[5] Perhaps reflecting this change of perspective, the Court said in *Fidium Finanz*[6] that Article 57 did not establish any order of priority between the freedom to provide services and other freedoms; it merely related to the definition of the notion of services. It continued: 'The notion of "services" covers services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.'[7] The Court will therefore determine the centre of gravity of the particular case before deciding which Treaty provision applies.[8]

However, services pose intellectual and practical problems not experienced with the other freedoms. 'Services' cover a vast range of situations: service providers can move from one state to another to provide professional services (as lawyers, accountants, or architects) or various trades (the infamous Polish plumber); service receivers might move between states in search of healthcare, tourism, or education; and, of increasing importance, neither provider nor receiver move but the service itself does (e.g. over the web, such as internet gambling). Regulations in the states also vary: in some states it is the service itself which is regulated; in others it is the service provider which is regulated. With this variety of situations and methods of regulation it is difficult to have a 'one size fits all' model for addressing restrictions on freedom to provide services. This helps to explain why adopting a single 'Services' Directive has presented significant problems (considered below).

For the Court, the variety of services situations has also posed problems.[9] As Advocate General Jacobs pointed out in *Säger*,[10] where the provider of the service spends a substantial period of time in the host State (e.g., an architect supervising the execution of a large building project) there is a fine line between services and establishment. There is also a potential overlap with the free movement of goods, where the person providing the service transmits it in the form of a product (e.g. the provider of an educational service posts a series of books and CDs). In examining these difficulties, this chapter will follow the structure of those on workers and establishment: it will consider who is entitled to benefit from the services provisions and the rights they enjoy in respect of (1) initial access to the market; (2) the exercise of the freedom; and (3) The enjoyment of social advantages. The chapter concludes with a consideration of the Services Directive.

B. WHO CAN RELY ON ARTICLES 56 AND 57?

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[1] See also General Programme for the Abolition of Restrictions of Freedom to Provide Services ([1961] OJ Spec Ed Second series IX/3). For a full discussion on recent developments, see V. Hatzopoulos and T. Do, 'The Case Law of the ECJ concerning the Free Provision of Services: 2000–2005' (2006) 43 *CMLRev*. 923.

[2] E.g. Case C–55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, para. 22.

[3] Emphasis added.

[4] Commission, 'The State of the Internal Market for Services', COM(2002)441, 5. The Lisbon European Council said that a key part of the programme to make the EU the most competitive and dynamic knowledge-based economy in the world by 2010 was to make the internal market work for services (Press Release Lisbon (24 March 2000) No. 100/1/00).

[5] Sometimes alongside other Treaty provisions such as Art. 34 (e.g., Joined Cases C–34–36/95 *De Agostini* [1997] ECR I–3843) and sometimes instead of other Treaty provisions such as Art. 56 on capital (e.g., Case C–118/96 *Safir* v. *Skattemyndigheten i Dalarnas Län* [1998] ECR I–1897, para. 35).

[6] Case C–452/04 *Fidium Finanz AG* v. *Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I–9521, para. 32.

[7] Ibid.

[8] Para. 34.

[9] Case C–215/01 *Schnitzer* [2003] ECR I–4847, para. 30.

[10] Case C–76/90 *Säger* v. *Dennemeyer & Co. Ltd* [1991] ECR I–4221, paras 25–6, the comment by W. Roth (1993) 30 *CMLRev*. 145.

1. THE SCOPE OF ARTICLES 56 AND 57

1.1 The freedom to provide services

The first paragraph of Article 56 provides that:

> [R]estrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended.[11]

Article 56 therefore envisages the situation where the service provider established in State A holding the nationality of one of the Member States[12] (not necessarily that of State A) provides services in Member State B[13] and then returns to State A once the activity is completed.

Article 56 can be used to challenge rules laid down by both the host state (State B) and the home state (State A) which obstruct the provision of services. Most cases concern barriers raised by the host state (State B). For example, in *Van Binsbergen*[14] a Dutch national, Kortmann, living in Belgium, challenged a Dutch rule requiring legal representatives to be established in the Netherlands before they could represent a person in the Dutch courts. The Court found that in principle the Dutch rule breached Article 56. Similarly, in *Commission* v. *France (performing artists)*[15] the Court said that French law which presumed artists had 'salaried status', resulting in them being subject to the social security scheme for employed workers, constituted a restriction on freedom to provide services. The Court said that the French system was 'likely both to discourage the artists in question from providing their services in France and discourage French organisers of events from engaging such artists'.[16]

However, an increasing number of cases concern obstacles to the provision of services created by the home state, State A. For example, in *Ciola*[17] the Court said that an Austrian company which provided moorings for boats on Lake Constance to boat owners resident in other Member States could rely on Article 56 against the Austrian authorities when they limited the number of moorings available for boat owners resident abroad. In *Gourmet*[18] the Court went further and said that a national rule preventing undertakings established in State A from offering advertising space in their publications to *potential* advertisers established in other Member States could be challenged in State A as contrary to Article 56.[19]

Perhaps the most remarkable decision in this line of case law is *Carpenter*[20] where a Filipino national married to a British husband successfully challenged British immigration rules which were going to result in her deportation on the ground that this would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercised the freedom to provide services.[21] Mr Carpenter ran a business selling advertising space in medical and scientific journals. Although the business was established in the UK, where the publishers of the journals were based, much of his work was conducted with advertisers established in other Member States. The Court found that such services fell within Article 56, 'both in so far as the provider travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established'.[22] The Court said, '[t]hat freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse'.[23] Read together, *Ciola*, *Gourmet*, and *Carpenter* not only demonstrate that service providers can invoke Articles 56 and 57 against their home states but they also show that the Court has gone a long way towards eroding the principle that Union law does not apply to wholly internal situations in the field of services.

1.2 The freedom to travel to receive services

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[11] Art. 56(2) allows the EP and Council, by the ordinary legislative procedure, to extend the provisions of the services chapter to nationals of a third country who provide services and are established in the EU.

[12] Both conditions need to be satisfied: Case C–290/04 *FKP Scorpio* [2006] ECR I–9461, paras 67–8.

[13] Case C–452/04 *Fidium Finanz AG* v. *Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I–9521, para. 25 confirms that Article 49 cannot be relied on by a company established in a third country.

[14] Case 33/74 *J.H.M. van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

[15] Case C–255/04 *Commission* v. *France (performing artists)* [2006] ECR I–5251, para. 38. In Case C–154/89 *Commission* v. *France (tour guides)* [1991] ECR I–659 where the Court clarified that the activities of a tourist guide from the home state (State A) who takes tourists on a tour from State A to a host state (State B) may be subject to two distinct sets of legal rules: (1) if a tour company from State A is established in State B and employs its own guides established in State A, then it is the tour company that provides the service; (2) if a tour company from State A hires self-employed tourist guides who are established in State B, then it is *the guide* who provides the service. Art. 56 applied to both situations (para. 10)

[16] Para. 38.

[17] Case C–224/97 *Ciola* v. *Land Vorarlberg* [1999] ECR I–2517, paras. 11–12.

[18] Case C–405/98 *Konsumentombudsmannen (KO)* v. *Gourmet International Products (GIP)* [2001] ECR I–1795, para. 35.

[19] See also Case C–384/93 *Alpine Investments BV* v. *Minister van Financiën* [1995] ECR I–1141, para. 19: prior existence of an identifiable recipient was not a condition for the application of the provisions on the freedom to provide services.

[20] Case C–60/00 *Carpenter* v. *Secretary of State for the Home Department* [2002] ECR I–6279.

[21] Para. 39.

[22] Para. 29.

[23] Para. 39.

The text of Articles 56 and 57 is confined to giving rights for service providers only. However, if service providers can travel to the state of the recipient, then logic would suggest that the recipient should also be able to travel to the state of the provider. The Council took this view in (the now repealed) Directive 73/148 where Article 1(b) required the abolition of restrictions on the movement and residence of 'nationals wishing to go to another Member State as recipients of services'. Subsequently, the Court confirmed that the Treaty did apply to this situation. In *Luisi and Carbone*[24] two Italians were fined for taking more money out of Italy than the (then) currency regulations permitted in order to go to other Member States both as tourists and to receive medical treatment. The Court said that the freedom to receive services from a provider established in another Member State was the 'necessary corollary' of the freedom to provide services.[25] Therefore the Court said that tourists, individuals receiving medical treatment, and those travelling for the purpose of (private) education[26] or business should have the right of free movement without being obstructed by restrictions, even in relation to payment.[27] This decision paved the way for various attempts at medical tourism, with a view to gaining access to treatment not available in the home state[28] or, at least, gaining access more quickly than would otherwise be the case (see case studies 11.1 and 11.3).[29]

1.3 Neither provider nor recipient travels

The Court has also said that Articles 56 and 57 apply where neither the provider nor the recipient of the service travels but the service itself moves (e.g., by telephone, fax, email, the internet, or cable).[30] Two cases illustrate this, *Alpine Investments*[31] and *Bond*.[32] In *Alpine Investments* the Dutch Ministry of Finance prohibited a Dutch company from telephoning individuals in the Netherlands or in other Member States to offer them various financial services (cold calling) unless they had the prior written consent of the clients. The Court ruled that Article 56 covered services which the provider offered by telephone to potential recipients established in other Member States without moving from the Member State in which the service provider was established.[33]

Bond demonstrates just how complex the case law on services can be. Dutch law prohibited the distribution by cable of radio and television programmes transmitted from other Member States which contained advertising aimed at the Dutch public (see fig. 11.1). The Court noted that the transmission of programmes across frontiers involved two distinct, cross-frontier services:[34] (1) the service provided by the cable companies in the receiving state (the Netherlands) to the broadcasting companies in the transmitting state (e.g., Luxembourg) by retransmitting programmes to their subscribers; and (2) the service provided by the broadcasting companies in the transmitting state to advertisers in the receiving state (the Netherlands) in broadcasting adverts aimed at potential customers in the Netherlands. The Court also noted that both services were provided for remuneration.[35] First, the cable network operators were paid in the form of fees which they charged their subscribers for the service they provided to the broadcasters. The Court said that it was irrelevant that the broadcasters did not generally pay the cable network operators for relaying their programmes because Article 57 did not require the service to be paid for by those for whom it was performed. Secondly, the broadcasters were paid by the advertisers for the service of broadcasting the adverts.

2. PERFORMANCE OF A SERVICE FOR REMUNERATION

Having considered who can rely on the services provisions, the next question is what is a service? Article 57 provides that services shall be considered 'services' within the meaning of the Treaty where they are 'normally provided for remuneration' and provided on a temporary basis. Article 57 therefore has three elements (1) services; (2) remuneration; and (3) temporary. We shall look at these in turn.

2.1 What activities constitute 'services'?

Article 57(1) gives examples of what constitutes a service, including activities of craftsmen and the professions, and activities of an industrial and commercial character. The case law has significantly expanded on this rather anachronistic

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[24] Joined Cases 286/82 & 26/83 *Luisi and Carbone* v. *Ministero del Tesoro* [1984] ECR 377.
[25] Para. 10.
[26] See further below n. 100.
[27] Para. 16.
[28] Case C–159/90 *The Society for the Protection of Unborn Children Ireland Ltd (SPUC)* v. *Stephan Grogan and others* [1991] ECR I–4685 (abortion); Case C–157/99 *H.T.M Peerbooms* v. *Stichting CZ Groep Zorgverzekeringen* [2001] ECR I–5473.
[29] Case C–157/99 *B.S.M Geraets-Smits* v. *Stichting Ziekenfonds VGZ; H.T.M Peerbooms* v. *Stichting CZ Groep Zorgverzekeringen* [2001] ECR I–5473 (neuro-stimulation). See Box 2.
[30] See, e.g., Case 62/79 *SA Compagnie générale pour la diffusion de la télévision Coditel* v. *Ciné Vog Films* [1980] ECR 881; Joined Cases C–34–36/95 *De Agostini* [1997] ECR I–3843.
[31] Case C–384/93 *Alpine Investments* [1995] ECR I–1141. See also Case C–243/01 *Piergiorgio Gambelli* [2003] ECR I–13031, para. 54 (betting services provided over the internet).
[32] Case 352/85 *Bond van Adverteerders and others* v. *Netherlands* [1988] ECR 2085.
[33] Para. 42. See also the cases on cross-border advertising, e.g. Case C–405/98 *Gourmet International Products* [2001] ECR I–1795, para. 39.
[34] Paras. 14–15.
[35] Para. 16.

list. From *Luisi and Carbone* we have already seen how tourism,[36] medical,[37] financial,[38] business, and educational activities constitute services. We have also seen that the transmission of a television signal[39] and a signal by cable television constitutes a service.[40] In other cases the Court has said that the provision of people by an employment agency,[41] debt-collection work,[42] lotteries,[43] bank building loans,[44] insurance,[45] and sporting activities[46] are all services. Given the breadth of the subject matter included within the definition of services[47] and the scope of the Treaty provisions, it is hard to think of areas of activity excluded from its protection.[48]

2.2 Services are 'normally provided for remuneration'

(a) The need for an economic link

The requirement in Article 57(1) that services are 'normally provided for remuneration' was introduced to exclude gratuitous services from the scope of the Treaty. This point was emphasized in *Jundt*[49] which concerned a German lawyer, resident in Germany, who taught a 16 hour course at the University of Strasbourg for which he received a small honorarium (about 500 euros). The Court said that he was a service provider under Article 56, even thought the activity was carried out on a quasi-honorary basis. said it added that for the Treaty to apply, 'the activity must not be provided for nothing' although there is no need 'for the person providing the service to be seeking to make a profit'.[50]

The Court has used the requirement of 'remuneration' to exclude services without a direct economic link between the provider and the recipient from the scope of the Treaty. This can be seen in *SPUC* v. *Grogan*.[51] Handbooks prepared and distributed by various Irish students' unions included information about the availability of legal abortion in the UK and the identity and location of a number of abortion clinics in the UK. The Society for the Protection of the Unborn Child (SPUC), an anti-abortion group, argued that the distribution of such information contravened the Irish ban on abortion and so sought an injunction against Grogan, the President of the students' union, seeking to restrain the distribution of the handbooks. In his defence, Grogan argued that because he was providing information about the availability of a service the injunction constituted an obstacle to the freedom to provide services contrary to Article 56.

Setting the moral debate about abortion to one side,[52] the Court agreed that abortion performed in accordance with the law of a particular Member State did constitute a service within the meaning of Article 57.[53] However, it said that Union law did not apply to the provision of information about the identity and location of clinics in another Member State providing abortions[54] because the information was not distributed on behalf of an economic operator established in another Member State.[55] The Court concluded that the information constituted a 'manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics in another Member State'.[56] This conclusion enabled the Court to avoid deciding a case where *EU* fundamental *economic* rights (freedom to travel to receive a service) appeared to collide with a fundamental tenet of a *national* constitution (the right to

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36 See also Case C–198/89 *Commission* v. *Greece* [1991] ECR I–727 (guiding by a tourist guide is a service).

37 This applies to care provided both in and out of a hospital environment: Case C–157/99 *Geraets-Smits and Peerbooms* [2001] ECR I–5473, para. 53. See also Case C–159/90 *SPUC* v. *Grogan* [1991] ECR I–4685.

38 Case C–384/93 *Alpine Investments BV* [1995] ECR I–1141.

39 Case 155/73 *Sacchi* [1974] ECR 409, para. 6. However, the Court said that trade in material, sound recordings, films, apparatus, etc. used for the diffusion of television signals was subject to the rules relating to the free movement of goods.

40 Case 52/79 *Procureur du Roi* v. *Debauve* [1981] ECR 833, para. 8; or, as the Court put it in Case 352/85 *Bond* [1988] ECR 2085 and Joined Cases C–34–36/95 *De Agostini* [1997] ECR I–3843, the service of transmitting programmes and advertisements from broadcasters in one Member State to cable networks in another.

41 Case 279/80 *Criminal Proceedings against Alfred John Webb* [1981] ECR 3305.

42 Case C–3/95 *Reisebüro Broede* v. *Sandker* [1996] ECR I–6511, para. 24.

43 Case C–275/92 *Schindler* [1994] ECR I–1039.

44 Case C–484/93 *Svensson* v. *Ministre du Logement et d'Urbanisme* [1995] ECR I–3955 (legal persons); Case C–222/95 *Société Civile Immobilière Parodi* v. *Banque H. Albert de Bary et Cie* [1997] ECR I–3899.

45 Case C–118/96 *Safir* v. *Skattemyndigheten i Dalarnas Län* [1998] ECR I–1897, para. 22.

46 Joined Cases C–51/96 & C–191/97 *Deliège* [2000] ECR I–2549.

47 The Court has made clear that the special nature of certain services, e.g. social security, does not remove them from the scope of the fundamental principle of freedom of movement: Case 279/80 *Webb* [1981] ECR 3305, para. 10, Case C–158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I–1931 paras 20–1.

48 For further examples, see Art. 4(1) of the Services Directive and 34th Recital considered below.

49 Case C-281/06 *Jundt* v. *Finanzamt Offenburg* [2007] ECR I-12231.

50 Paras. 32-3.

51 Case C–159/90 [1991] ECR I–4685. See further, T. Hervey and J. McHale, *Health Law and the European Union* (CUP, Cambridge, 2004), 144–56.

52 Para. 20.

53 Para. 21. This classification of abortion as a service (or by the language used) offended many: see, e.g., the views of Pat Cooney MEP reported in *EP News*, 9–13 Mar. 1992, 4, and M. Kenny, 'The dilemma that won't go away', *The Sunday Telegraph*, 23 Feb. 1992, 13, who asked 'Is that all it is—[is abortion] like hairdressing or chiropody? Where is conscience? Where is feeling?'.

54 Para. 27.

55 Para. 26.

56 Ibid.

life of the unborn).[57] Eventually the European Court of Human Rights and the Member States in an IGC were left to resolve some of the issues arising from the case (see case study 11.1).

This judgment has been much criticized[58] because the Court's reasoning turned on the absence of an economic link between the information provider (Grogan) and the service provider (the abortion clinics). Had the abortion clinics paid the students' union—even a small sum—for providing the information the outcome would have been different. And even on the facts as they stood there was an indirect economic link in the relationship: although the clinics did not pay the students' union for distributing the information, the pregnant women who received the information would have paid the abortion clinics in England and Wales for the termination. According to (the admittedly more commercial case) *Bond*,[59] considered above, that might have been sufficient to bring the matter within the scope of Union law because the Court said that it was not relevant that 'some of those services are not paid for by those for whom they are performed'.[60]

With the benefit of hindsight, a better way of understanding the case might be to view it as a *Graf*-type situation,[61] where the effect on Union law of the Irish courts granting an injunction was too remote and so did not create a sufficiently substantial impediment to access to the market. The Court said as much, noting that the link between Grogan and the abortion clinics in other Member States was 'too tenuous for the prohibition on the distribution of information to be regarded as a restriction' falling within Article 56.[62]

The Advocate General in the case adopted a different approach from the Court, albeit one that led to the same outcome. He thought that the rule developed in the goods case, *GB-INNO*[63] (where consumers' freedom to shop in another Member State was compromised if they were deprived of access to advertising in their own state), should apply to services. He considered that the Irish ban on abortion constituted a non-discriminatory impediment to intra-Union trade in services, contrary to Article 56, but one that could be justified under Article 46 on the ground of public policy because it related to 'a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States'.[64] He also considered that the steps taken to pursue the objective of protecting the unborn life were proportionate and compatible with fundamental human rights.

Case study 11.1 Irish abortion, British IVF, and European Community law

The decision in *SPUC* v. *Grogan* focused international attention on the Irish ban on abortion found in Article 40, s. 3, sub-s. 3 of the Constitution. It provides: The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.[65]

This provision was introduced in 1983[66] to copperfasten the prohibition against abortion contained in the Offences Against the Person Act 1861 from any attempts by an activist judiciary to use the constitutional right to privacy[67] to legalize abortion in the manner of the US Supreme Court in *Roe* v. *Wade*.[68]

By contrast, in the UK abortion is legal and freely available (within the limits of the Abortion Act 1967). About 8,000 Irish women come to Britain for abortions each year,[69] often after receiving advice from welfare clinics in Ireland. These clinics were prevented from giving such information in *Attorney General (SPUC)* v. *Open Door Counselling and Dublin Well Woman Centre*[70] where, relying on Article 40.3.3, the Irish Supreme Court granted an injunction restraining welfare clinics from assisting pregnant women travelling abroad to obtain abortions. The clinics challenged this decision

[57] Ibid. See D.R. Phelan, 'The Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union' (1992) 55 *MLR* 670. The Court may have feared a supremacy challenge: see the veiled threats made by Walsh J in the Supreme Court in *Grogan*: 'any answer to the reference received from the European Court of Justice will have to be considered in the light of our own constitutional provisions', considered in S. O'Leary, 'The Court of Justice as a Reluctant Constitutional Adjudicator: an Examination of the Abortion Information Case' (1992) 17 *ELRev*. 138, 154–7.

[58] See, e.g., ibid., 146.

[59] Case 352/85 [1988] ECR 2085, para. 16. See also Joined Cases C–51/96 & 191/97 *Deliège* [2000] ECR I–2549, para. 56.

[60] Para. 16.

[61] Case C–190/98 *Graf* v. *Filzmozer Maschinenbau GmbH* [2000] ECR I–493. See further Ch. 11.

[62] Para. 24. See T. Hervey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *OJLS* 207 and S. Weatherill, 'The EU Charter of Fundamental Rights and the Internal Market', Francisco Lucas Pires Working Paper 2003/03.

[63] Case C–362/88 *GB-INNO-BM* v. *Conféderation du commerce luxembourgeois* [1990] ECR I–667, para. 8, considered further in Ch. 6.

[64] Para. 26.

[65] Ss. 58 and 59 of the Offences Against the Person Act 1861 make it a criminal offence unlawfully to procure or to assist in the procurement of abortion. For a more detailed analysis of the background, see O'Leary, above n. 51, 138–41.

[66] Eighth Amendment of the Constitution Act 1983. However, as the *Irish Times* noted the turn-out in the referendum on the amendment was 53.6%. Of those, 66.45% voted in favour of the amendment, 35.79% of eligible voters: A. Murdoch, 'The Irish myth of a blinkered society', *Independent on Sunday*, 8 Mar. 1992, 8.

[67] This concern was triggered by the Irish Supreme Court's decision in *McGee* v. *Attorney General* [1974] IR 284. For a full discussion see G. Hogan and G. Whyte, *Kelly's The Irish Constitution* (3rd edn., Dublin, Butterworths, 1994), 790–1.

[68] 410 US 113 (1973).

[69] A. Tate, 'Day trippers: the women forced to come to England for abortions', *The Mirror*, 20 July 2002, 16 and 18.

[70] [1988] IR 593.

before the European Court of Human Rights,[71] where the majority of the Court upheld their complaint and found a breach of Article 10 on freedom of expression.[72] While recognizing that the injunction pursued 'the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect',[73] the Court found the restriction to be over-broad and disproportionate.[74]

While *Open Door Counselling* forced the Irish government to confront the potential conflict between the application of its abortion laws and human rights, the earlier case of *Grogan* (discussed above) had obliged the Irish government to address the potential conflict between Article 56 EC and Article 40.3.3 of the Irish Constitution. As we have seen, the Court of Justice fudged the issue but indicated that Irish law was compatible with Article 56. To put the matter beyond doubt, the Member States agreed at Maastricht to add the 'Abortion' Protocol to the Treaty on European Union protecting Article 40.3.3 from challenge under EC law. The Protocol provides: Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland.[75]
This Protocol was included in the Treaty 'by stealth and without reference of the issue to the Dail [Irish lower house of Parliament]'.[76] While it was intended to satisfy the pro-life lobby,[77] the Protocol caused consternation among liberals who feared that it denied Irish women access to information[78] and removed the rights of EU citizens to travel to another Member State to receive services. Moreover, the Protocol did not actually succeed in its primary purpose of putting an end to challenges based on Union law, as the *X* case[79] showed. X was a 14-year-old girl who became pregnant after being raped by a friend's father. Her parents brought her to London for an abortion and hoped that tissue collected from the foetus would provide the necessary forensic evidence to convict the man. When the papers were sent to the Irish Attorney General[80] he successfully sought an injunction from the High Court in Dublin preventing the girl from travelling to London for the abortion.[81] This forced the family to return to Ireland,[82] with X threatening to kill herself. The Supreme Court reversed the High Court's decision and lifted the injunction,[83] thereby allowing the girl to return to London for the abortion. The majority ruled, not on EU law, but on the basis of the wording in Article 40.3.3, that abortion was permissible if there was a 'real and substantial risk to the life as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy'.[84]

In the light of the confusion generated by the *X* case, and given the risk that in the Irish referendum on the ratification of the Maastricht Treaty liberals would vote against the Treaty if the issue of the right to travel were not resolved,[85] the Irish government sought to have a 'ten-minute' IGC to amend its Maastricht Protocol.[86] Fearing that this would pave the way for other states to revisit aspects of the Treaty that they wished to change, the Heads of State refused the request but they did agree to the addition of a (non-binding) Declaration which provided:[87] That it was and is their intention that the Protocol shall not limit freedom to travel between Member State or, in accordance with conditions which may be laid down, in conformity with Union law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in Member States.[88]

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[71] *Open Door Counselling and Dublin Well Woman* v. *Ireland*, Series A, No. 246 (1993) 15 EHRR 244 (judgment of 29 Oct. 1992).
[72] Cf. Van Gerven AG's views in Case C–159/90 *SPUC* v. *Grogan* [1991] ECR I–4685.
[73] Para. 63.
[74] Para. 74.
[75] Protocol No. 17 annexed to the TEU and to the Treaties establishing the European Communities. For a summary of the debate about the meaning and scope of this Protocol (esp. the phrase 'in Ireland'), see J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law* (Dublin, Round Hall, Sweet & Maxwell, 1997), esp. 167–70. See also N.Nic Shuibhne, 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) 34 *ELRev.* 230, 247. See now Protocol No. 35 of the Lisbon Treaty which is drafted in broadly the same terms. In order to reassure the Irish people, with a view to persuading them to vote in favour of the Lisbon Treaty in September 2009, the June 2009 European Council (Presidency Conclusions of the 18/19 June meeting, adopted a Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon, which came into force on the same date as the TEU and TFEU making clear that 'Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Secy=urity and Justice affects in any way the cope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and Article 40.3.3…'. This Decision will form a Protocol to be attached to the next accession Treaty.
[76] F. Murphy, 'Maastricht: Implementation in Ireland' (1994) 19 *ELRev*. 94.
[77] C. O'Brien, 'A constitutional change could get Ireland out of a tight spot on abortion', *The Times*, 1 Apr. 1992, 14.
[78] *EP News*, 9–13 Mar. 1992, 4. See also the Debates of the European Parliament, No. 3–416/207–218, 12 Mar. 1992.
[79] *Attorney General* v. *X* [1992] 2 CMLR 277.
[80] Cf. E. Gorman and T. Walker, 'Law Chief regrets abortion trauma', *The Times*, 10 Apr. 1992.
[81] Judgment of the High Court of Costello J [1992] 2 CMLR 277, 281.
[82] J. Langton, 'Ireland's Anguish', *Sunday Telegraph*, 23 Feb. 1992, 13.
[83] [1992] 2 CMLR 277, 290.
[84] Para. 38.
[85] There was also concern that the pro-life groups would vote against the Treaty because, in their view, it paved the way for a more liberal abortion regime.
[86] T. Jackson and A. Murdoch, 'EC dashes Irish hopes of amending treaty', *Independent*, 6 Apr. 1992.
[87] Declaration of the High Contracting Parties to the TEU of 1 May 1992 ([1992] OJ C191/109).
[88] The Amendment continued: 'At the same time the High Contracting Parties solemnly declare that, in the event of a future constitutional amendment in Ireland which concerns the subject matter of Article 40.3.3 of the Constitution of Ireland and which does not conflict with the intention of the High

The Irish people then voted in favour of the Maastricht Treaty which was ratified by Ireland in the summer of 1992.

However, the Declaration did not help Mr Grogan because the Irish High Court refused to allow it to be taken into account when deciding his case on its return from Luxembourg.[89] Morris J explained that since the Maastricht Treaty had not come into force at the time of the litigation it could not be relied on.[90] The High Court therefore concluded that the Irish prohibition on third parties providing a woman with information about abortion clinics in the UK did not contravene Union law and made permanent the injunction sought by SPUC against Grogan.[91]

SPUC's success was short-lived. As part of the deal to appease the liberals to secure a 'yes' vote in the Maastricht referendum, the Irish government committed itself to holding three referenda. The first two concerned the right of Irish citizens to travel abroad and to have free access to information about abortion. These were supported by a two-to-one majority. The third referendum on tightening up the Supreme Court's decision in *X* was defeated by a two-to-one majority.[92] As a result of these referenda, Article 40.3.3 of the Constitution was amended to read, first:

This subsection shall not limit freedom to travel between the State and another State.[93]and, secondly, that:
This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State.[94]
Despite these amendments, five years later another case similar to *X* came to public attention, this time concerning a 13-year-old rape victim.[95] She was said to be suicidal, and eventually the High Court did allow her to travel to England for an abortion.[96] In March 2002 a further referendum was held on whether to reverse the Supreme Court's ruling in *X* in order to prevent abortion even if the mother threatened suicide or if there were legitimate threats to the life of the mother. The proposal was rejected by a narrow margin.[97]

Ireland has not been alone in struggling to reconcile aspects of its social policy with EC law. In the UK, Diane Blood became famous for her successful attempt to circumvent the restrictions laid down in the Human Fertilization Embryology Act 1990 by relying on Articles 56 and 57 EC. When the Bloods were trying to conceive a child Steven Blood contracted meningitis. While he was in a coma, Mrs Blood requested the doctors to take samples of his sperm. They did so but, since he was in a coma, they did not obtain his written consent, as required by the 1990 Act. This meant that Diane Blood could not receive IVF treatment in the UK. Stephen died soon after. Subsequently Diane Blood sought IVF treatment using her husband's sperm which she wanted to take to Belgium where the consent rule did not apply. However, the UK authority, the HFEA, refused to grant permission because the conditions laid down in the 1990 Act had not been met.

In the Court of Appeal, the Master of the Rolls recognized that the refusal of permission to export the sperm made impossible the provision of fertilization services in another Member State.[98] Nevertheless, he said that given the ethical and moral considerations raised by artificial insemination, the UK was justified[99] in taking measures to prevent abuse and undesirable practices from occurring.[100] However, he found on the facts that the HFEA had failed to take two important considerations into account: it had not given due consideration to the effect of Article 56, nor had it recognized that this case was unique (after this judgment there would be no further cases where sperm was preserved without consent).[101] The

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Contracting Parties hereinbefore expressed, they will, following the entry into force of the Treaty on European Union, be favourably disposed to amending the said Protocol so as to extend its application to such constitutional amendment if Ireland so request'.

89 *SPUC* v. *Grogan* [1993] 1 CMLR 197.

90 Paras 30–4.

91 Para. 14. This was despite the fact that the Irish government had made a Statement in Strasbourg that the right to information on abortion did exist in Irish law. See Murphy, above n. 70, 104.

92 Ibid., 104.

93 13th Amendment of the Constitution Act 1992. A Dutch women's group tried to push the right to travel to receive an abortion one stage further. In June 2001 Women on Waves sailed the *Aurora*, a 'floating reproductive health centre', into the international waters 12 miles off the Irish coast to offer abortions to Irish women (N. Byrne, 'Anti-abortionists charter boat to confront "Aurora" ', *Independent*, 15 Jun. 2001 and S. O'Neill, 'Bouncers protect abortion ship', *Daily Telegraph*, 16 Jun. 2001). They failed to acquire the necessary licence under Dutch law to carry out abortions and so could not provide terminations. In a similar vein, see also S. Boseley, 'Fertility ships to offer a way out to couples hit by tougher UK rules', *The Guardian*, 16 Sept. 2005, 9.

94 14th Amendment of the Constitution Act 1992.

95 M. Sheehan and J. Burns, 'Court stops girl's abortion trip' and 'For Pity's Sake', *Sunday Times*, 23 Nov. 1997.

96 J. Kierans, 'Outrage as teenage rape victim prepares to abort pregnancy; Irish girl prepares for abortion in Britain', *People*, 30 Nov. 1997.

97 618,485 people voted for (45%) and 629,041 (50.4%) voted against with a turnout of around 45%: R. Cowan, 'Irish reject tougher abortion law: Tight Result in referendum fails to clear up confusion', *Guardian*, 8 Mar. 2002, 2. The defeat of the amendment was attributed in part to Rosemary Scallan MEP (the singer Dana), a prominent anti-abortion campaigner, who campaigned against the amendment on the ground that it did not go far enough: D. McKittrick, 'Irish liberals head off change to abortion law', *Independent*, 8 Mar. 2002, 2.

98 *R*. v. *Human Fertilisation and Embryology Authority, ex p. Diane Blood* [1997] 2 CMLR 591, para. 52. See generally T. Hervey, 'Buy Baby: the European Union and the Legislation of Human Reproduction' (1998) 18 *OJLS* 207 and D. Morgan and R. Lee, 'In the Name of the Father? *Ex parte Blood*: Dealing with Novelty and Anomaly' (1997) 60 *MLR* 840.

99 Citing Cases C–384/93 *Alpine Investments* [1995] ECR I–1141 and C–275/92 *Schindler* [1994] ECR I–1039, considered further in Ch. 11 and below nn. 162–165.

100 Para. 54. Some of these issues were explored further in *U* v. *W* [1997] 2 CMLR 431.

101 Para. 61.

HFEA then reversed its decision and Diane Blood travelled to Belgium for the treatment. At the end of 1998 Diane Blood gave birth to a son, Liam,[102] and, after receiving further treatment, another son, Joel, in 2002.[103]

(b) Services and the Welfare State

Services provided as part of the welfare state have presented particular problems for Union law. Given that most are paid for out of the public purse but are free at the point of delivery, the absence of remuneration between the provider and the recipient suggests that they fall outside the scope of Articles 56 and 57. This is the case with state education. As the Court said in *Humbel*,[104] state education did not constitute a service because the State was not seeking to engage in gainful activity—it was merely fulfilling its duties towards its own population in the social, cultural, and educational fields, and was paid for by the public.[105] Because the same considerations do not apply to education in the private sector the Court said in *Wirth*[106] that private education could constitute a service when it was financed essentially out of private funds, in particular by students or their parents, and where the provider sought to make an economic profit.[107]

In *Geraets-Smits and Peerbooms*[108] some of the Member States relied on *Humbel* to argue that hospital services were also 'special'[109] and so did not constitute an economic activity within the meaning of Article 57 because patients received care in a hospital without having to pay for it themselves (a benefits in kind system), albeit that in an insurance-based system, such as that in the Netherlands, all or part of the cost of the treatment was paid for directly by the relevant sickness scheme. The Court disagreed. It said that, despite the special nature of hospital services, Union law still applied.[110] Then, relying on the *Bond* line of case law (see fig. 11.1), the Court said that the payments made by the sickness insurance funds under contractual arrangements between the funds and the hospitals were consideration for the hospital services, even if payable at a flat rate. For this reason they 'unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character'.[111] In *Müller-Fauré*[112] the Court went further, focusing on the fact that the treatment received abroad had been paid for by the patient. It did not refer to the relationship either between the patient and the sickness fund or the sickness fund and the health care provider.[113] This suggests, and *Watts*[114] confirms, that Article 56 applies equally to benefits-in-kind systems like the British one where healthcare is provided to patients directly, without the medium of sickness funds, and paid for by general taxation.[115] In reaching this conclusion the Court opened up a market[116]—healthcare—previously reserved almost exclusively to Member States.[117] This approach may spill over to other sectors, as states increasingly apply a market model to the provision of welfare services.[118]

2.3 The temporary nature of services

The key factor distinguishing services from establishment is duration: while a person who stays in the host state permanently is likely to be covered by the rules relating to establishment,[119] a person staying there on a 'temporary'[120] basis is likely only to be providing services. How can the two situations be distinguished? In *Gebhard*[121] the Court said that the temporary nature of the activities has to be determined 'in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity'. Thus, as the Court indicated in *Schnitzer*,[122] there is no magic formula for determining whether the rules on services or those on establishment apply: it has to be decided by the national court on a

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102 S. Oldfield, 'Liam is his Daddy to a T', *Daily Mail*, 31 Dec. 1998, 2.

103 'Overjoyed Diane Blood cradles her second son', *Daily Mail*, 19 July 2002, 1. The HFEA 1990 prohibited the father's name from being used on the children's birth certificates. Subsequently, the government admitted that this rule contravened the Human Rights Act 1998 and this has now been rectified by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.

104 Case 263/86 *Belgium* v. *Humbel* [1988] ECR 5365.

105 Paras 17–19.

106 Case C–109/92 *Wirth* v. *Landeshauptstadt Hannover* [1993] ECR I–6447.

107 Para. 17.

108 Case C–157/99 [2001] ECR I–5473 considered below at nn.X.

109 Para. 54. See also the AGs' Opinions in Cases C–368/98 *Vanbraekel* v. *ANMC* [2001] ECR I–5363 and C–157/99 *Geraets-Smits and Peerbooms* [2001] ECR I–5473.

110 Para. 54.

111 Para. 58.

112 Case C–385/99 *V.G. Müller-Fauré* v. *Onderlinge Waarborgmaatschappij oz Zorgverzekeringen UA* and *E.E.M. van Riet* v. *Onderlinge Waarborgmaatschappij oz Zorgverzekeringen UA* [2003] ECR I–4509.

113 Para. 39.

114 Case C–372/04 *Watts* v. *Bedford Primary Care Trust* [2006] ECR I–4325. See further C. Newdick, 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *CMLRev*. 1645.

115 E. Spaventa, 'Public Services and European Law: Looking for Boundaries' (2003) 6 *CYELS* 271.

116 V. Hatzopoulos, '*Killing* National Health and Insurance Systems but *Healing* Patients? The European Market for Healthcare Services after the Judgments of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 *CMLRev*. 683.

117 G. Davies, 'Welfare as a Service' [2002] *LIEI* 27.

118 Ibid., 38–9. See also A.P. van der Mei, *Cross-border Access to Public Benefits* (Oxford, Hart, 2002).

119 Case 2/74 *Jean Reyners* v. *Belgium State* [1974] ECR 631; Case 11/77 *Patrick* v. *Belgian State* [1977] ECR 1119.

120 Art. 50(2).

121 Case C–55/94 [1995] ECR I–4165, para. 27 considered in Ch. 10. See also Case 63/86 *Commission* v. *Italy* (*social housing*) [1988] ECR 29, and Case C–298/99 *Commission* v. *Italy* [2002] ECR I–3129, para. 56.

122 Case C–215/01 *Schnitzer* [2003] ECR I–4847, paras 30–2.

case-by-case basis. However, in *Trojani*[123] the Court made clear that an activity carried out on a permanent basis, or at least without a foreseeable limit to its duration, would not fall within the services provisions. On the other hand, service providers under Article 56 can equip themselves with some form of infrastructure in the host Member State (e.g., an office, chambers, or consulting rooms), provided it is necessary to perform the services.[124] However, a requirement by the state for a service provider to have premises would breach Article 56 since it negates the freedom to provide services.[125]

C. THE RIGHTS CONFERRED ON SERVICE PROVIDERS AND RECEIVERS

1. RIGHTS OF DEPARTURE, ENTRY, AND RESIDENCE

1.1 The rights of the provider and recipient

Article 56 EC, together with Directive 73/148,[126] originally regulated the rights of entry and residence for those who actually move to provide or receive a service. This directive was repealed but not altogether replaced by the Citizens' Rights Directive (CRD) 2004/38.[127] Natural persons who are service providers going to another Member State for less than three months will be covered by Article 6 CRD in the same way as any other migrant (see fig. 12.4) but legal persons and those providing services for a longer period are not expressly covered by the CRD. For most purposes, this is not significant because in the field of services the Court has always placed much reliance on the Treaty provisions – and not secondary legislation - to give rights to service providers. This can be seen in *Commission* v. *Belgium (private security firms)*[128] concerning a law requiring every staff member of a security firm to carry an identification card issued by the Belgian Minister for the Interior. The Court said that the formalities involved in obtaining such an identification card were likely to make the provision of services across frontiers more difficult and so breached Article 56.[129] The Court added that since the migrant service provider had to be in possession of an identity card or a passport, the requirement to obtain an additional identity document was disproportionate.

The same reliance on the Treaty can be seen in *Oulane.*[130] A French service recipient was arrested in a goods tunnel closed to the public in Rotterdam Central station, with a view to his deportation on the ground that he failed to present a valid identity card or passport. The Court, having cited the relevant provisions of Directive 73/148 on the rights of residence and resident permits and noted that the conditions laid down were left unchanged by Directive 2004/38,[131] concluded that a detention order issued by the Dutch authorities constituted 'an unjustified restriction on the freedom to provide services and is therefore contrary to Article [56]'.[132]

1.2 The Position of the Provider's Workforce

The right of entry to a Member State to provide a service applies not only to the individual or company but also to its workforce, irrespective of nationality. The Court made this clear in *Rush Portuguesa*[133] where a Portuguese company used its own third-country national (TCN) workforce[134] to carry out a contract building a railway line in France. Rush Portuguesa's use of a TCN workforce contravened French rules which provided that only the French Office d'Immigration could recruit non-Union workers. The Court ruled that Articles 56 and 57 'preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory *with all his staff* '.[135] The Court continued that Member States also could not make the movement of staff subject to restrictions such as a condition as to engagement *in situ* or an obligation to obtain a work permit because such conditions discriminated against guest service providers in relation to their competitors established in the host country who were able to use their own staff without restrictions.

The result of *Rush Portuguesa* is that Article 56 allows companies from State A (e.g., Portugal) to 'post' (ie send) their own workforce to provide a service in State B (e.g., France), even where the workforce includes third-country nationals (TCNs), provided that the TCN workers do not seek access to the labour market in the host state and that they return to their

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123 Case C–456/02 *Trojani* v. *CPAS* [2004] ECR I–7573, para. 28.
124 Para. 27.
125 Case C-134/05 *Commission* v. *Italy (extra-judicial debt recovery)* [2007] ECR I-6251, para. 43; Case C-404/05 *Commission* v. *Germany (inspection of organic production)* [2007] ECR I-10239, para. 34.
126 Dir. 73/148 ([1973] OJ L172/14) on the abolition of the restrictions on movement and residence within the Union for nationals of Member States with regard to establishment and the provision of services.
127 This directive is considered in detail in Ch. 12.
128 Case C–355/98 *Commission* v. *Belgium (private security firms)* [2000] ECR I–1221, paras 38–9.
129 See also Case C–189/03 *Commission* v. *Netherlands (private security firms)* [2004] ECR I–9289, para. 27.
130 Case C–215/03 *Oulanev* v. *Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I–1215, para. 38.
131 Para. 20.
132 Para. 44.
133 Case C–113/89 *Rush Portuguesa* v. *Office national d'immigration* [1990] ECR I–1417.
134 The workforce was actually Portuguese, but at the time the transitional arrangements for Portuguese accession to the EC were in place and Portuguese workers did not enjoy the rights of free movement. For our purposes the Portuguese workers constitute third-country nationals (see para. 4 of the judgment).
135 Para. 12, emphasis added. See also Case C–43/93 *Vander Elst* v. *Office des Migrations Internationales (work permits)* [1994] ECR I–3803.

country of origin or residence once the contract is finished.[136] This raised the spectre of what some term 'social dumping', where service providers take advantage of cheaper labour (and inferior labour standards) in their own state (Portugal) to win a contract in the host state (France).[137] However, the Court sought to address these concerns in *Rush Portuguesa* by ruling in paragraph 18 that:[138]

> [Union] law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does [Union] law prohibit Member States from enforcing those rules by appropriate means.

This suggests that the host state *can* apply all of its labour laws to the provider's workforce, thereby removing the competitive advantage enjoyed by the service provider, namely its cheaper labour.

The position in *Rush Portuguesa* was apparently reinforced by the enactment of Directive 96/71 on Posted Workers.[139] The directive no longer gives the host Member State the discretion as to whether to apply its labour standards to posted workers; instead it *requires* the host state to apply to posted workers a 'nucleus of mandatory rules'[140] in Article 3(1), in particular relating to wages (but only minimum wages), working time, and equal treatment, as laid down either by law or, in the case of the construction industry, collective agreements which satisfy certain conditions laid out in Article 3(8). At least initially, trade union lawyers, particularly from the wealthier Northern European states, welcomed the Directive as a way of protecting labour standards in those states from being undermined by posted workers from southern and Eastern states. However, employers involved in posting staff argued that because the directive had the effect of requiring the out-of-state service provider to adapt its terms and conditions of employment each time it posted workers to another Member State, the Directive interfered with, rather than promoted, the provision of services.[141]

It was against this backcloth that the *Laval*[142] dispute arose. The case concerned a Latvian company which won a contract to refurbish a school in Sweden using its own Latvian workers who earned about 40% less than comparable Swedish workers. The Swedish construction union wanted Laval to apply the Swedish collective agreement but Laval refused, in part because the collective agreement was unclear as to how much Laval would have to pay its workers and in part because it imposed various supplementary obligations on Laval such as paying a 'special building supplement' to an insurance company to finance group life insurance contracts. There followed a union picket at the school site, a blockade by construction workers, and sympathy industrial action by the electricians unions. Although this industrial action was permissible under Swedish law, Laval brought proceedings in the Swedish labour court, claiming that this action was contrary to *Union* law (in particular Article 56 EC on freedom to provide services) and the Posted Workers' Directive.

The Court insisted on a narrow reading of the Directive: the host state could insist on applying its labour law rules to posted workers but only in respect of those matters exhaustively[143] listed in Article 3(1) of the Directive, thus apparently reversing paragraph 18 of *Rush Portuguesa*. Because Article 3(1) did not cover matters such as the 'special building supplement' and the other insurance premiums, these could not be applied to the Latvian posted workers.[144] The Court also said that the requirement to pay Latvian workers Swedish rates of pay was not compatible with the Directive. This is because Sweden had failed to comply with the precise terms of Articles 3(1) and 3(8) of the Directive by neither enacting minimum wage legislation nor expressly taking advantage of the complex provisions in Article 3(8) which allowed minimum wage rates to be set by collective agreements.[145] More generally, because the trade unions' demands fell outside the scope of the Directive,[146] industrial action taken to enforce the terms of the Swedish collective agreement was incompatible with Article 56.[147]

Laval shows that the Posted Workers' Directive is primarily a measure to facilitate free movement of services and not a measure to realize social policy objectives, a point confirmed by its legal basis (Articles 47(2) and 55). This view is reinforced by the Court's observations that the Directive is 'first' intended to 'ensure a climate of fair competition between

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136 Case C–43/93 *Vander Elst* [1994] ECR I–3803, para. 21.

137 Germany was particularly exercised by this problem. See W. Streeck, 'Neo-voluntarism: A New Social Policy Regime' (1995) 1 *ELJ* 31, 42, and S. Simitis, 'Dismantling or Strengthening Labour Law: the Case of the European Court of Justice' (1996) 2 *ELJ* 156, 163.

138 Para. 18.

139 Dir. 96/71/EC ([1996] OJ L18/1). See P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' (1997) 34 *CMLRev*. 571 and C. Barnard, *EC Employment Law* (Oxford, OUP, 2006), 280–9.

140 13th Recital of the Directive.

141 See, e.g., P. Davies, 'The Posted Workers Directive and the EC Treaty' (2002) 31 *ILJ* 298, 300.

142 Case C–341/05, *Laval* [2007] ECR I-987.

143 Case C–341/05 *Laval* [2007] ECR I-987, para. 71. This is more clearly expressed in Case C-319/06 *Commission* v. *Luxembourg* [2008] ECR I-4323, para. 26. For a full discussion, see Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 *Industrial Law Journal* 122.

144 Para. 83.

145 *Laval*, para 67.

146 *Laval* suggests that failure to comply with the terms of the Directive means that a breach of Article 49 cannot be justified (paras. 108-111). By contrast, Case C–346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, para. 36 suggests non-compliance with the Directive amounts to a breach of Art. 49.

147 By implication, in these situations the Preambular paragraph in Directive 96/71, to the effect that 'this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions', becomes irrelevant.

national undertakings and undertakings which provide services transnationally',[148] and that the mandatory rules for minimum protection in Article 3(1) prevent a situation from arising where the out-of-state provider competes unfairly against the host state.[149] Only 'secondly' does the Court refer to the worker protection element of the Directive.[150] It could, therefore, be argued that the Court has reached a careful compromise in these cases: posted workers will enjoy the better terms and conditions of employment in the host state but only if the host state has complied with the letter of the Directive; if it has not, then any attempt to apply the host state rules will breach both the Directive and Article 56. According to this analysis, the Directive and Article 56 are mutually reinforcing: the restrictive interpretation of the Directive is derived from Article 56 and the substance of Article 56 is derived from the Directive.[151] In this way, the Court has sought to silence those critics who argued at the time when the Directive was adopted that the Directive was *ultra vires* Article 56 because it obstructed the freedom to provide services.

2. RIGHTS OF ACCESS TO THE MARKET IN SERVICES IN OTHER MEMBER STATES

Laval demonstrates just how closely linked the right of entry is with questions of access to the market more generally. This section examines in more detail the nature of the obstacles that prevent or impede access to the market in services.

2.1 Discriminatory measures

(a) Distinctly applicable measures

Article 57 provides that 'the person providing the service may . . . temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals'. It therefore prohibits discrimination on the ground of nationality against those wishing to provide/receive services. The problem with applying the principle of non-discrimination is the choice of comparator. The obvious candidate is a person providing equivalent services who is established in the host state. However, establishment connotes more permanence than the provision of services; and the service provider already has a place of establishment—in the home state. Recognizing this problem, the Court noted in *Säger*[152] that:

> a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.

This ruling helps to explain in part the Court's decision in *Laval*: host states cannot require service providers and their staff to comply with all of the host state's labour standards since they have already satisfied the standards in the home state. Applying both sets of rules imposes a double burden and this would deprive Article 56 of all practical effectiveness.[153]

> The Court spelt out the meaning of the principle of direct discrimination in *Gouda*:[154]
>
> …Article [56] of the Treaty entails, in the first place, the abolition of any discrimination against a person providing services on *the grounds of his nationality or the fact that he is established in a Member State other than the one in which the service is provided*.

Thus, Article 56 prohibits (direct) discrimination not only on the grounds of nationality as with the other Treaty provisions, but also on the grounds of the place of establishment (see fig. 11.2), a wider concept of discrimination than is found in the other freedoms. The Court continued that:[155]

> [N]ational rules which are not applicable to services without discrimination as regards their origin are compatible with [Union] law only in so far as they can be brought within an express exemption, such as that contained in Article 46 of the Treaty.

Thus, in respect of direct discrimination on the ground of nationality, the Court reaffirmed the orthodox position that direct discrimination breaches Article 56 and can be saved only by reference to one of the express derogations. While the Court has wavered on this point over the years (se fig. 11.4), it recently re-confirmed the orthodoxy in *Laval*[156] and *Commission* v. *Poland (Germany/Poland agreement).*[157]

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148 *Laval*, para 74.
149 *Ibid*, para 75.
150 *Ibid*, para 76.
151 See esp. *Rüffert*, para. 36.
152 Case C–76/90 [1991] ECR I–4221, para. 13. See also Case 33/74 *Van Binsbergen* [1974] ECR 1299, para. 11; Case 205/84 *Commission* v. *Germany (the insurance cases)* [1986] ECR 3755, para. 26, and Case C–484/93 *Svensson* [1995] ECR I–3955 (legal persons); Case C–118/96 *Safir* [1998] ECR I–1897, para. 30.
153 See also Case C-164/99 *Portugaia Construções* [2002] ECR I-787.
154 Case C–288/89 *Stichting Collectieve Antennevoorziening Gouda* v. *Commissariaat voor de Media* [1991] ECR I–4007, para. 10 (emphasis added).
155 Para. 11.
156 Case C–341/05, *Laval* [2007] ECR I-987, paras. 116-7. See also Case C-490/04 *Commission* v. *Germany (posted workers)* [2007] ECR I-6095, para. 86.
157 Case C-546/07 [2010] ECR I-000, para. 47 (although cf paras. 43 and 51.

FDC provides an example of direct discrimination.[158] Under Spanish law, film distributors would be granted a licence to dub foreign (mainly US) films on condition that they also distributed a Spanish film at the same time. The Court said that this rule breached Article 56 because it gave preferential treatment to the producers of Spanish films over producers established in other Member States, since only Spanish producers had a guarantee that their films would be distributed. The Spanish government then tried to justify the rule for reasons of cultural policy, but this was rejected by the Court on the ground that cultural policy was not one of the exhaustive list of derogations in Article 46.

Where discrimination is based on the fact that the service provider is established in another Member State, the Court said in *Gouda* that such discrimination could also be saved only by reference to the express derogations found in Article 46.[159] However, the case law is not consistent on this point. If the national rule is drafted in terms of requiring a service provider to be established and/or to have a residence[160] in the host state, the mirror image of a rule discriminating against those established in another Member State, then the Court may treat this version of the rule as being indirectly discriminatory on the ground of nationality. [161] Such discrimination also breaches Article 56[162] but can be justified by the broader public interest requirements.[163] However, given the serious consequences for the provision of services of a national rule requiring establishment, the Court will carefully scrutinize any justification offered. Therefore, in *Van Binsbergen*[164] the Court recognized that a Dutch rule requiring representatives before tribunals to be resident in the Netherlands could be justified on the ground of professional rules of conduct connected with the administration of justice (relating to organization, qualifications, professional ethics, supervision, and liability).[165] However, it found the residence requirement to be disproportionate because the administration of justice could be satisfactorily ensured by measures less restrictive to the freedom to provide services, such as choosing an address for service.[166]

(b) Indistinctly applicable measures

In *Gouda*[167] the Court also confirmed that unjustified indistinctly applicable measures were prohibited by Article 56. It said:

> 12. In the absence of harmonisation of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.
>
> 13. . . . [S]uch restrictions come within the scope of Article [56] if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.

In other words, those measures which impose an additional burden on foreign service providers (including dual burden measures) breach Article 56 unless they can be justified by overriding reasons relating to the public interest (see fig. 11.2).[168]

Commission v. *Germany (insurance cases)*[169] provides a good example of an indistinctly applicable rule. The Court found that German rules requiring insurance companies wishing to provide insurance in Germany to be both established and authorized in Germany breached Articles 56 and 57 because the rules increased costs for those providing services in

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158 Case C–17/92 *Federación de Distribuidores Cinematográficos* v. *Estado Español et Unión de Productores de Cine y Televisión* [1993] ECR I–2239, para. 15.

159 See also Case 352/85 *Bond* [1988] ECR 2085, para. 32; Case C–260/89 *ERT* v. *DEP* [1991] ECR I–2925, para. 24. For further discussion and a proposed reconciliation of the case law, see Tesauro AG's Opinion in Case C–118/96 *Safir* [1998] ECR I–1897, para. 31.

160 See Case 39/75 *Coenen* v. *The Sociaal-Economische Raad* [1975] ECR 1547.

161 Cf Case C-546/07 *Commission* v. *Germany (Germany/Poland Agreement)* [2010] ECR I-000, paras. 39-40.

162 See, e.g., Case C–294/97 *Eurowings Luftverkehrs AG* v. *Finanzamt Dortmund-Unna* [1999] ECR I–7447, para. 19. In more recent cases the Court describes such rules as having a 'dissuasive' effect on free movement of services amounting to 'a denial of that freedom': Case C-150/04 *Commission* v. *Denmark (insurance)* [2007] ECR I-1163, para. 40.

163 For an illustration of complete conceptual and legal confusion, see Case C–484/93 *Svensson* [1995] ECR I–3955, para. 15: discrimination based on the place of establishment can 'only be justified on the *general interest* grounds referred to in Article [46(1)] to which Article [55] refers' (emphasis added). The Court then considers general interest grounds relating to the coherence of the fiscal regime and not the derogations listed in Art. 46 (paras 16–18).

164 Case 33/74 [1974] ECR 1299.

165 Para. 12.

166 Para. 16.

167 Case C–288/89 [1991] ECR I–4007, para. 12.

168 Para. 13. See also Joined Cases 110 & 111/78 *Ministère public and 'Chambre syndicale des agents artistiques et impresarii de Belgique' ASBL* v. *Willy van Wesemael* [1979] ECR 35 and Case 279/80 *Webb* [1981] ECR 3305. Some suggest that such dual burden cases really concern non-discriminatory measures which hinder market access. See, e.g., Jacobs AG's views in Case C–76/90 *Säger* [1991] ECR I–4221, paras 20–1.

169 Case 205/84 *Commission* v. *Germany (the insurance cases)* [1986] ECR 3755.

Germany, especially when the insurer conducted business there only occasionally.[170] These requirements therefore constituted 'the very negation of the fundamental freedom to provide services'.[171] On the question of justification[172] the Court noted the sensitivity of the insurance sector,[173] given the number of policy-holders affected, the difficulty facing anyone taking out insurance to judge the financial viability of an insurance company, and the fact that insurance was based on future and often unpredictable events.[174] For these reasons the Court considered that the German restrictions on the freedom to provide services could be justified on the ground of consumer protection and that those interests were not adequately protected in the state of establishment. However, while it found that the authorization requirement was proportionate it said the residence requirement was not.

(c) Non-discriminatory measures

The cases considered so far have all involved some form of discrimination and this constituted a restriction on free movement of services. As with the early case law on establishment, there was a period when the Court said that a national measure which was genuinely non-discriminatory did not breach Article 56. For example, in *Debauve*[175] it said that a national ban on transmitting advertisements by cable television did not breach Articles 56 and 57 'if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the services, or the place where he is established'.[176]

However, as the Court's case law increasingly took market access into account,[177] it recognized that non-discriminatory measures did in principle breach Article 56 if they were liable to prevent impede access to the market. We saw this in *Alpine Investments*,[178] considered in Chapter 8, and we can also see it in *Schindler*.[179] The Schindlers were agents of SKL, a public body responsible for organizing lotteries on behalf of four *Länder* in Germany. They sent advertisements and application forms to the UK inviting people to participate in the German lottery, and were prosecuted for breaching the (then) national law banning lotteries. The Court said that the national legislation prohibiting the holding of large lotteries was a non-discriminatory obstacle to the freedom to provide services contrary to Article 56.[180] However, the Court said that, bearing in mind the moral, religious, and cultural aspects of gambling, the restriction could be justified on the ground of preventing the lottery from becoming 'a source of private profit', as well as avoiding 'the high risk of crime or fraud' and 'the incitement to spend which may have damaging individual and social consequences'.[181]

2.2 Measures 'liable to prohibit or otherwise impede' freedom to provide servicesCases such as *Alpine* and *Schindler* marked a steping stone towards the market access test.[182] In fact, reliance on the market access test had already been signalled by the Court in the early case of *Van Binsbergen*[183] and confirmed in its seminal decision of *Säger*[184] where it said that Article 56 requires:

> *not only* the elimination of all discrimination against a person providing services on the grounds of his nationality *but also* the abolition of any restriction even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[185]

Säger concerned a German law requiring those monitoring patents to have a licence. This licence was granted on condition that the individual held certain professional qualifications (e.g., as a lawyer or patent agent). Dennemayer, a British company, monitored patents on behalf of clients, particularly in Germany, and informed them when the fees for renewing the patents became due. The commission charged by Dennemayer was lower than that charged by German patent

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170 Para. 28.

171 Para. 19. See also Case C–279/02 *Commission* v. *Italy (temp agencies)* [2002] ECR I–1425, para. 18.

172 Para. 27. See further Commission Interpretative Communication, Freedom to Provide Services and the General Good in the Insurance Sector, C(1999)5046 and M. Tison, 'Unravelling the General Good Exception: The Case of Financial Services' in M. Andenas and W. Roth, *Services and Free Movement in EU Law* (Oxford, OUP, 2002).

173 Case 205/84 *Commission* v. *Germany (insurance cases)* [1986] ECR 3755 now superseded by Dir. 88/357/EEC ([1988] OJ L172/1) amending Dir. 73/239/EEC ([1973] OJ L228/3) on direct, non-life assurance: Case C–191/99 *Kvaerner* v. *Staatssecretaris van Financiën* [2001] ECR I–4447, para. 38.

174 Paras 30–1.

175 Case 52/79 *Debauve* [1981] ECR 833.

176 Para. 16. See also Case 15/78 *Société générale alsacienne de banque SA* v. *Koestler* [1978] ECR 1971, para. 6. For criticisms of this view see Van Gerven AG in Case C–159/90 *SPUC* v. *Grogan* [1991] ECR I–4685 (abortion), paras 19–22.

177 The foundations of such jurisprudence can be traced back to the early case law: see, e.g., Case 39/75 *Coenen* [1975] ECR 1547, para. 6. See, esp., Case C–76/90 *Säger* [1991] ECR I–4221, para. 12.

178 Case C–384/93 [1995] ECR I–1141. See also Case C–118/96 *Safir* [1998] ECR I–1897, para. 30.

179 Case C–275/92 [1994] ECR I–1039.

180 Paras 47–8. See also Case C–36/02 *Omega* [2004] ECR I–9609, para. 25.

181 Para. 60.

182 See, for a recent example, Joined Cases C–94/04 & C–202/04 *Cipolla* v. *Fazari* [2006] ECR I–000, para. 56 where *Mobistar* was cited as authority for the *Säger* formula.

183 Case 33/74 *Binsbergen* [1974] ECR 1299, paras 10 and 11.

184 Case C–76/90 [1991] ECR I–4221. Cf. Case 205/84 *Commission* v. *Germany (insurance cases)* [1986] ECR 3755, para. 25.

185 Para. 12, emphasis added.

agents who complained that Dennemeyer was breaching German law by trading without a licence; Dennemayer argued that the German law breached Article 56. The Court found that the German rule prevented undertakings established abroad from providing services to patent holders established in the national territory, and prevented patent holders from freely choosing the manner in which their patents were to be monitored.[186] The rule therefore breached Article 56 unless it could be justified (see fig. 11.3).[187]

The *Säger* formulation, often simplified to the question 'Does the national law constitute a restriction on the freedom to provide services?',[188] which the Court has applied in most subsequent services cases,[189] avoids the intellectual somersaults involved in deciding whether particular national rules are indistinctly applicable or non-discriminatory (direct discrimination is still usually treated separately as fig. 11.3 shows).

The influence of the change wrought by *Säger* can be seen in *Commission* v. *Italy*,[190] another case about patent agents. Italian law required patent agents established in another Member State to be entered on the Italian register of patent agents before providing a service there. Registration was conditional on having a residence or place of business in Italy. Instead of considering whether registration and residence requirements discriminated in some way, due to the additional expense and administrative and economic burdens for businesses established in another Member State,[191] the Court merely observed that the Italian rules constituted 'a *restriction* within the meaning of Article [56]'.[192] The focus then shifted to questions of justification and proportionality.

The Court has considered a wide variety of national rules to be restrictions on freedom to provide services. For example, it has said that authorisation requirements are restrictions. Therefore, in *Commission* v. *Netherlands* the Court said that Dutch law requiring private security firms, detective agencies, and their managers to be authorized breached Article 56.[193] Where the authorisation or licensing requirements are subject to a territorial limitation, the Court is particularly suspicious,[194] especially when used to prevent an 'excessive number of foreign undertakings from establishing themselves' in that area.[195] Translation requirements are also restrictions due to the additional expense and the administrative and financial burden for undertakings established in another Member State'.[196] An obligation to swear an oath of allegiance to the state where the service is provided is also an 'impediment to' the pursuit of an out of state operator's activities in the host state which 'impairs its access to the market',[197] as are conditions relating to maximum/minimum staffing levels,[198] and obligations to lodge guarantees with the relevant authorities.[199] Legislation setting compulsory minimum fees or at least permitting control by the relevant authorities of the fees charged have also been considered restrictions on freedom to provide services.[200]

In addition, the Court has classified a number of rules regulating gambling as 'restrictions'. For example, in *Anomar*[201] the Court said that Portuguese rules restricting the right to operate games of chance or gambling solely to casinos in permanent or temporary gaming areas breached Article 56, as did the Greek prohibition on the installation of computer games in venues other than casinos in *Commission* v. *Greece*.[202] In *Placanica*[203] the Court said that an Italian rule prohibiting—on pain of criminal penalties—the pursuit of activities in the betting or gaming sector without a licence or

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186 Para. 14.

187 See also Case C–255/04 *Commission* v. *France (performing artists)* [2006] ECR I–5251, para. 29.

188 See eg Case C-243/01 *Gambelli* [2003] ECR I-13031, para. 45.

189 See, e.g., Case C–43/93 *Vander Elst* [1994] ECR I–3803, para. 14; Case C–272/94 *Guiot* [1996] ECR I–1905, para. 10; Case C–3/95 *Sandker* [1996] ECR I–6511, para. 25; Case C–222/95 *Parodi* [1997] ECR I–3899, para. 18; Case C–58/98 *Corsten* [2000] ECR I–7919, para. 33; Case C–433/04 *Commission* v. *Belgium (tax fraud)* [2006] ECR I–000, paras 28–9; Case C–341/05 *Laval* [2007] ECR I-987.

190 Case C–131/01 *Commission* v. *Italy* [2003] ECR I–1659. See also Case C-465/05 *Commission* v. *Italy* (private security activities) [2007] ECR I-11091, para.85; Case C-389/05 *Commission* v. *France (Insemination of bovine semen)* [2008] ECR I-000, para.66.

191 Joined Cases C–49/98 *Finalarte* [2001] ECR I–7831, para. 70.

192 Para. 27, and para. 42 on the residence requirement. Emphasis added. See also Case C–165/98 *Mazzoleni* [2001] ECR I–2189, para. 24; Case C–215/01 *Schnitzer* [2003] ECR I–4847, para. 34; Case C–496/01 *Commission* v. *France (bio-medical analysis)* [2004] ECR I–2351, para. 64. The same applies to companies: Case C–452/04 *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I–000, para. 46.

193 Case C–189/03 *Commission* v. *Netherlands (private security firms)* [2004] ECR I–9289, para. 17; Case C–43/93 *Vander Elst* [1994] ECR I–3803, para. 15; see also Case C–451/99 *Cura Anlagen GmbH* v. *Auto Service Leasing GmbH (ASL)* [2002] ECR I–3193, para. 37; Case C–205/99 *Analir and others* v. *Administración General del Estado* [2001] ECR I–1271, para. 22; Case C–410/96 *Criminal Proceedings against André Ambry* [1998] ECR I–7875, para. 30; Case C–288/02 *Commission* v. *Greece* [2004] ECR I–10071, para. 30.

194 Case C-134/05 *Commission* v. *Italy (extra-judicial debt recovery)* [2007] ECR I-6251, para. 64; Case C-465/05 *Commission* v. *Italy* (private security activities) [2007] ECR I-11091, para.58.

195 Case C-465/05 *Commission* v. *Italy (private security activities)* [2007] ECR I-11091, para.78.

196 Case C-490/04 *Commission* v. *Germany (posted workers)* [2007] ECR I-6095, para. 69.

197 Case C-465/05 *Commission* v. *Italy (private security activities)* [2007] ECR I-11091, para.46.

198 Ibid, para. 105.

199 Ibid., para. 109.

200 Ibid., para. 127.

201 Case C–6/01 *Anomar* v. *Estado português* [2003] ECR I–8621, para. 66.

202 Case C–65/05 *Commission* v. *Greece* [2006] ECR I–000, para. 56.

203 Joined Cases C–338/04, C–359/04 and C–360/04 *Placanica* [2007] ECR I–1891, paras 42 and 44. See also Case C–433/04 *Commission* v. *Belgium (tax fraud)* [2006] ECR I–10653, para. 32.

police authorization constituted a restriction on the freedom to provide services as did a rule prohibiting Italian intermediaries from facilitating the provision of betting services on behalf of a British supplier.

Advertising restrictions also breach Article 56. So, in *Gourmet*[204] the Court said that a prohibition on advertising had a particular effect on the cross-border supply of advertising, given the international nature of the advertising market. It therefore constituted a restriction on the freedom to provide services. Similarly, in *Bacardi*[205] the Court found the French 'loi Evin' prohibiting direct and indirect television advertising of certain alcoholic drinks breached Article 56 because (1) the owners of the advertising hoardings had to refuse any advertising for alcoholic beverages if the sporting event was likely to be retransmitted in France; (2) the French rules impeded the provision of broadcasting services for television programmes because French broadcasters had to refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France might be visible; and (3) the organizers of sporting events taking place outside France could not sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events was likely to contain indirect television advertising for those alcoholic beverages. The Court said that such restrictions could, however, be justified on the grounds of public health and that the steps taken were proportionate.[206]

2.3 Justification and proportionality

(a) Grounds of justification

As we have seen, indistinctly applicable measures and measures which hinder trade between Member States can be justified, using the language in *Säger,*[207] by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, *in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established*.

In *Gouda*[208] the Court listed a number of examples of imperative reasons in the public interest,[209] including consumer protection and worker protection. We shall consider these public interest grounds in more detail in Chapter 13. For now it is sufficient to note two points. First, there are still some hints in the case law that, as with the early case law on mandatory requirements, justifications and derogations serve a different legal function: derogations apply where the Treaty is actually breached. By contrast where a justification is made out, and the measure is proportionate, there is no breach of Article 56. For example, in *Kattner Stahlbau*[210] the Court said that 'Articles [56] and [57] are to be interpreted to the effect that they do not preclude national legislation' such as a German requirement that all employers in a certain industry and a certain territory be affiliated to the employers' liability insurance association on grounds that it can be justified by the principle of solidarity (spreading the cost of insurance over the good risks and the bad).

Second, the Court has applied these public interest requirements with a considerable degree of flexibility. In some cases it is prepared to engage in a detailed scrutiny of the justifications advanced by the Member States and/or in the question of proportionality, as the broadcasting cases considered below indicate (see Case study 11.2). In other cases, particularly those touching upon sensitive socio-cultural issues, it has afforded Member States a considerable margin of appreciation.[211] *Schindler* is the prime example of this. There the Court accepted without question all the justifications advanced by the UK government about the social ills of gambling, despite the fact that the Court knew that the National Lotteries Act 1993 had gone through Parliament permitting the creation of the very type of lottery which the UK government had so forthrightly condemned in *Schindler*.[212]

However, the Court's extreme leniency in *Schindler* was not repeated in *Zenatti*.[213] The case concerned an Italian law prohibiting the taking of bets on sporting competitions except through specially appointed bodies which then used the funds to promote sporting activities, especially in deprived areas. The Court said that such a limitation on who could take bets was acceptable only if, from the outset, it reflected a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities constituted only an incidental beneficial consequence[214] and not the

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[204] Case C–405/98 *Gourmet International Products AB (GIP)* [2001] ECR I–1795, para. 39.

[205] C–429/02 *Bacardi* v. *Télévision Française 1 SA* [2004] ECR I–6613. See also Case C–262/02 *Commission* v. *France* [2004] ECR I–6569.

[206] Paras 37–41.

[207] Case C–76/90 [1991] ECR I–4221, para. 15, emphasis added.

[208] Para. 13. See generally J. Fernández Martin and S. O'Leary, 'Judicial Exceptions to the Free Provision of Services' (1995) 1 *ELJ* 308 and the updated version in Andenas and Roth (eds), above n. X.

[209] Also described as 'overriding reasons in the public interest', 'justified by the general good' (Case 279/80 *Webb* [1981] ECR 3305, paras 16–17) and 'mandatory grounds in the general interest' (Case C–224/97 *Ciola* [1999] ECR I–2517, para. 15).

[210] Case C-350/07 *Kattner Stahlbau GmbH* v. *Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-000.

[211] This is the description used by the Court in Case C–67/98 *Questore di Verona* v. *Diego Zenatti* [1999] ECR I–7289, paras 15 and 33.

[212] See, e.g., paras 31 and 51.

[213] Case C–67/98 [1999] ECR I–7289, para. 36. See also Joined Cases C–338/04 & C–360/04 *Placanica* [2007] ECR I–1891, paras 53–4. For a full discussion, see D.Doukas and J.Anderson, 'Commercial Gambling without Frontiers: When the ECJ Throws, the Dice are Loaded' (2008) *Yearbook of European Law* xxx.

[214] See also Case E-3/06 *Ladbrokes Ltd* v. *Government of Norway*, judgment of the EFTA Court 30 May 2007, para. 48; Case E-1/06 *EFTA Surveillance Authority* v. *Norway* judgment of 14 Mar. 2007, para. 39.

real justification for the restrictive policy. If the real aim of the limitation was to fund social activities, that motive could not in itself be regarded as an objective justification for restrictions on the freedom to provide services.

(b) Home state control

When considering whether the host state's action could be justified in the field of services, *Säger* added the additional criteria that the national court had to take into account the action already taken by the *home* state to protect that particular interest (see fig. 11.3). This is a reflection of the principle of home state control or country of origin. The importance of this principle can be seen in *Guiot*.[215] The Court said that a national law requiring an employer providing a service in the host Member State to pay employer's contributions to the social security fund of the host Member State, in addition to the contributions paid to the social security fund in the state in which the employer was established, placed an additional financial burden on the employer which was liable to restrict the freedom to provide services. It said that the national legislation could be justified by the public interest relating to the 'social protection of workers in the construction industry'.[216] Then, reflecting the country of origin principle, the Court said that if the workers enjoyed the same protection, or essentially similar protection, by virtue of employer's contributions already paid by the employer in the Member State of establishment,[217] which was a matter for the national court to decide,[218] then the justification was not made out. In other cases, the Court has said that failure to take into account supervision which has already been carried out in the home state fails the test of proportionality.[219]

The requirement that the host state take account of the measures put in place by the home state to protect the relevant interest is important because, in respect of services, the primary regulator is the home state and the host state can impose only supplementary controls. In this regard, the services case law follows that on goods where, in cases such as *Biologische Producten*,[220] the Court ruled that the host state could require the product to undergo a fresh examination but had to take into account the results of tests already carried out by the state of origin. By contrast, the rule does not apply to Articles 45 and 49 on the free movement of workers and establishment where the primary regulator is the host state and so the controls imposed by the home state are of little relevance. The country of origin principle lay at the heart of the debate about the Services Directive which is considered below.

(c) Proportionality

Finally, the Court requires that the steps taken to protect the public interest must be proportionate, i.e., appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.[221] Once again it is possible to see how the intensity of the Court's review varies according to the sensitivity of the subject matter. Where national rules do not raise politically difficult issues, the Court's scrutiny tends to be quite intrusive. For example, in *Säger* itself the Court found that the licensing requirements for those monitoring patents exceeded what was necessary to protect the public interest because the services were straightforward (alerting clients when fees were due), the service provider gave no advice to the clients (who were themselves experts in the field), and there was no risk to clients if those monitoring the patents failed in their task (the German patent office itself also sent out official reminders).

Similarly, in the *Tourist Guide cases*[222] the Court found that while the requirement that tourist guides possess a licence could in principle be justified by 'the general interest in consumer protection and in the conservation of the national historical and artistic heritage', such a requirement was disproportionate.[223] The Court noted that the rule had the effect of reducing the number of tourist guides, leading tour operators to use local guides, with the drawback that the tourists 'do not have a guide who is familiar with their language, their interests and their specific expectations'. The Court added that the profitable operation of such group tours depended on the commercial reputation of the operator, who faced competitive pressure from other tour companies. These factors compelled companies to be selective in employing tourist guides and to exercise some control over the quality of their services.

Where cases do involve more politically sensitive issues the Court can adopt a much lighter touch. For example, in *Schindler* the Court did not consider proportionality at all when upholding the national rule banning lotteries; in *Läärä*[224] it

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[215] Case C–272/94 *Guiot* [1996] ECR I–1905. See also Case C–496/01 *Commission* v. *France (bio-medical analysis)* [2004] ECR I–2351, para. 71

[216] Para. 16.

[217] Para. 17. See also Joined Cases C–369/96 & C–376 *Arblade* [1999] ECR I–8453, para. 80.

[218] On the facts the Court observed that the Belgian and Luxembourg contributions at issue in practice covered the same risks and had a similar, if not identical, purpose (para. 19).

[219] Case C-465/05 *Commission* v. *Italy (private security activities)* [2007] ECR I-11091, para. 63.

[220] Case 272/80 *Criminal Proceedings against Biologische Producten BV* [1981] ECR 3277, para. 14 considered further in Chap. 6.

[221] Joined Cases C–369 & 376/96 *Arblade* [1999] ECR I–8453, para. 35.

[222] Case C–180/89 *Commission* v. *Italy* [1991] ECR I–709.

[223] Para. 24. See also Case C–11/95 *Commission* v. *Belgium* [1996] ECR I–4115, para. 55.

[224] Case C–124/97 [1999] ECR I–6067. See also Case C–6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and others* v. *Estado português* [2003] ECR I–8621.

did examine proportionality but its approach was remarkably hands-off.[225] The case concerned a Finnish law granting exclusive rights to run the operation of slot machines to a public body, with the revenue raised going into the public purse. This rule had the effect of preventing a British company from operating its slot machines in Finland. The Court said that the Finnish legislation involved no discrimination on grounds of nationality and applied without distinction to operators who might be interested in that activity, whether they were established in Finland or in another Member State.[226] However, it said that while such legislation constituted an impediment to freedom to provide services because it directly or indirectly prevented operators in other Member States from making slot machines available to the public,[227] it could be justified on the grounds laid down in *Schindler*,[228] and the steps taken were proportionate.[229] The Court said that it was for the Member States to decide whether to prohibit the operation of such machines or only to restrict their use.

This judicial deference towards the Member States may partly be explained by the fact that, in these cases involving an activity which is legal in one state but illegal in another, the Court is wary of imposing the values of the majority of the states (where lotteries are lawful, albeit highly regulated) on the minority (where lotteries are unlawful).[230] In this respect, the Court's approach stands in stark contrast to the majoritarian approach detected by Poiares Maduro in respect of product requirements under Article 34.[231] Another explanation is that these cases concern the situation of a service which moves but the provider and recipient do not.[232] In these situations traditional frontier controls imposed on migrants to protect the interests of the state do not function, and for this reason the Court may be more willing to allow Member States greater scope to protect their own interests. Only if the value judgments of the Member State appear manifestly unfounded will the national rule breach EC law.[233] This might help to explain why, in *Gambelli*,[234] the Court indicated that an Italian law imposing criminal penalties, including imprisonment, on private individuals in Italy who collaborated over the web with a British bookmaker to collect bets, an activity normally reserved to the Italian state monopoly CONI, was disproportionate, although the Court said it was ultimately for the national court to decide bearing in mind that betting was encouraged in the context of games organized by licensed *national* bodies[235] and that the British supplier was already regulated in the UK.[236]

Shortly after its decision in *Gambelli*, the Court ruled in *Lindman*[237] that a Finnish law which taxed lottery wins when the lottery took place in another Member State but not when they occurred in Finland was not appropriate to achieve the objective of preventing wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest and ensuring legal certainty. The Court said that the file transmitted by the referring court disclosed 'no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals . . . in lotteries organised in other Member States'.[238]

These lottery cases demonstrate a further noteworthy feature: even though the national law was apparently directly discriminatory, the Court allowed the Member States to justify the discrimination by reference to the broad public interest requirements laid down in *Schindler*, not just the express derogations, as the orthodox jurisprudence might suggest (see fig. 11.3).[239] However, the Court's case law is not consistent on this point. In the more recent decision, *Commission* v. *Spain (lottery winnings)*[240] the Court was adamant that the discriminatory Spanish rule (lottery winnings from lotteries organized in Spain were tax exempt while those from lotteries in other Member States were not) could not be saved by overriding reasons in the public interest: 'the fact remains that those [overriding reasons] cannot be relied on to justify discriminatory restrictions'.[241] It continued that such a discriminatory restriction is compatible with Union law 'only if it is covered by an

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[225] See also Case C–36/02 *Omega* [2004] ECR I–9609 discussed in Ch. 13 and Joined Cases C–94/04 & C–202/04 *Cipolla* v. *Fazari* [2006] ECR I–2049 discussed in Ch. 10; Case C-250/06 *United Pan Europe Communications* v. *Belgium* [2007] ECR I-000. Cf. Case C–65/05 *Commission v Greece (computer games)* [2006] ECR I–000, paras 37–41 where the Court distinguished the *Schindler* line of case law and applied a strict proportionality test.

[226] Para. 28.

[227] Para. 29.

[228] Para. 33.

[229] Para. 42. See also Case C-42/07 *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Bwin International Limited v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-000 where the Court found the Portuguese ban on operators established in other Member States from offering gmabling over the internet was also proportionate to the objective of the fight against crime.

[230] See, e.g., Case C–275/92 *Schindler* [1994] ECR I–1039, para. 32.

[231] M.Poiares Maduro, *We the Court*: *The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998), 68, 72ff, citing cases such as Case 178/84 *Commission* v. *Germany* (*Beer Purity)* [1987] E.C.R 1227; Case 407/85 *3 Glocken* [1988] E.C.R 4233 considered in Chap. 6.

[232] See also Case C–384/93 *Alpine Investments* [1995] ECR I–1141.

[233] See G. Straetmans (2000) 37 *CMLRev*. 991, 1001.

[234] Case C–243/01 *Gambelli* [2003] ECR I–13031. See also Joined Cases C–338/04, C–359/04 and C–360/04 *Placanica* [2007] ECR I–1891, para. 58. Cf. Case E–1106 *EFTA Surveillance Authority* v. *Norway* [2007] EFTA Ct Rep. 000, para. 51.

[235] Para. 72.

[236] Para. 73.

[237] Case C–42/02 *Lindman* [2003] ECR I–13519.

[238] Para. 26.

[239] Cf. this merging of the public interest requirements with the express derogations can also be seen in the 40th recital in the Preamble of the Services Directive considered below nn. XX and the briefer definition in Art. 4(8).

[240] Case C-153/08 [2009] ECR I-000.

[241] Para. 36, citing *inter alia,* Case C–243/01 *Gambelli* [2003] ECR I–13031, para. 65and Joined Cases C–338/04, C–359/04 and C–360/04 *Placanica*

express derogating provision … namely public policy, public security or public health'.[242] Tantalisingly, the Court left open the question whether the objective of preventing money laundering and combating tax evasion could fall within the definition of public policy.[243]

Case study 11.2 Broadcasting, advertising, and the freedom to provide services

The application of the rules on justification and proportionality is clearly demonstrated by the case law on the compatibility with Article 56 of restrictive (primarily Dutch and Belgian) national laws regulating broadcasting, retransmission of programmes, and advertising. For example, in *Bond*[244] the Court found that a Dutch law, the *Kabelregeling*, banning advertising intended specially for the Dutch public, breached Article 56 (see fig. 11.1). Even if it could be justified on the ground of maintaining 'the non-commercial and thereby pluralistic nature' of the Dutch broadcasting system, the Court found that the ban was not proportionate because there were less restrictive ways of achieving the objective by, for example, prohibiting the advertising of certain products or on certain days and limiting the duration and frequency of advertisements.

The successor regulations to the *Kabelregeling*, the *Mediawet*, were also condemned by the Court in *Gouda*.[245] Under the *Mediawet* only those broadcasters having a non-commercial structure could advertise. The law also imposed the limits on advertising which the Court had indicated in *Bond* would be legitimate (concerning quantity, placement, and timing). The requirement relating to non-commercial structure was justified by the Dutch government on the ground of cultural policy. This argument was rejected by the Court because it thought that there was no connection between cultural policy and the structure of foreign broadcasting bodies. By contrast, the Court thought that the condition relating to advertising could in principle be justified on the grounds of consumer protection and cultural policy. However, it found on the facts that the rules did operate to limit competition in advertising and so breached Article 56.

The *Mediawet* also required national broadcasting bodies to use the technical resources of the Dutch public studio to make 75 per cent of their programmes. In *Commission* v. *Netherlands*[246] the Court found that because this rule prevented or limited national broadcasters from using the services of undertakings established in other Member States it breached Article 56. Once again the Dutch government relied on a justification based on cultural policy, and again the Court rejected it on the ground of proportionality: the measure was not suitable to achieve the objective.

The result of these cases was to favour the right of the broadcaster in the transmitting state to provide services. In this respect the case law on broadcasting fits within the general principle laid down in *Säger* of home state control: the home state primarily regulates the activities of the broadcaster transmitting from its territory. The host (receiving) state can impose controls on broadcasters from other Member States but such controls are supplementary. And, as *Bond*, *Gouda*, and *Commission* v. *Netherlands* demonstrate, in practice the Court is unwilling to accept any interference with the broadcaster's freedom to provide services by the host state. The Court's approach is reflected in Directive 89/552,[247] originally called the Television without Frontiers Directive and now, since 2007, the Audiovisual Media Services Directive. The original version of the Directive was intended to secure the freedom to provide television services.[248] The 2007 amendments distinguish between linear (TV transmissions) and non-linear services (eg webclips). While there are certain common rules – and this is reflected in changes to the language (for example, references to 'television broadcasts are replaced by 'audiovisual media services'[249] and 'broadcasters' have become 'media service providers') - non-linear services will be subject to greater self-regulation. We shall focus primarily on linear services.

The Directive is based on the 'transmitting state' principle[250] which means, according to *De Agostini*,[251] that the transmitting state has the primary responsibility for ensuring that broadcasters[252] (now 'media service providers' following

[2007] ECR I–1891, para. 49.

[242] Para. 37.

[243] Para. 39.

[244] Case 352/85 [1988] ECR 2085.

[245] Case C–288/89 [1991] ECR I–4007.

[246] Case C–353/89 [1991] ECR I–4069, para. 23.

[247] [1989] OJ L298/23. It was subsequently amended by Dir. 97/36 ([1997] OJ L202/60) in order to 'clarify certain definitions or obligations on Member States under this Directive' (3rd recital). The TWF Directive was overhauled by EP and Council Dir. 2007/65 [2007] OJ L332/27 and renamed the Audiovisual Media Services Directive. For a full discussion of the changes introduced by the AVMS Dir., see M.Burri-Nenova, 'The New Audiovisual Media Services Directive: Telvision *Without* Frontiers, Television without cultural diversity' (2007) 44 *CMLRev.* 1689. For a more general discussion on harmonization in the services sector, see W. Roth, 'The European Economic Community's Law on Services: Harmonisation' (1988) 25 *CMLRev*. 35.

[248] Case C–412/93 *Leclerc-Siplec* v. *TF1 Publicité SA and M6 Publicité SA* [1995] ECR I–179, para. 28.

[249] Defined in Art. 1(a) as '- a service as defined by Articles [56] and [57 TFEU] which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast … or an on-demand audiovisual media service … of this Article, and/or- audiovisual commercial communication'. A 'television broadcast' '(i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule. An 'on-demand audiovisual media service' '(i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provide.

[250] Art. 2(1) provides that 'Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its

the 2007 amendments) established in that state comply with national rules co-ordinated by the directive on the 'organisation and financing of broadcasts and the content of programmes'.[253]

The corollary of the transmitting state principle is that the receiving state must allow programmes received from the transmitting state to be shown in its territory without restriction.[254] Therefore, the principle of mutual recognition underlies Directive 89/552: a television programme legitimately broadcast in one Member State can be rebroadcast in another without restriction.[255] Even if the receiving Member State considers that the transmitting state is not exercising proper control, the receiving state cannot unilaterally adopt corrective or protective measures but must bring infringement proceedings under Article 259 TFEU (ex Article 227 EC) or request the Commission to take action under Article 258 TFEU (ex Article 226 EC).[256]

Article 2a(2) lists the circumstances in which the receiving state can derogate from the rule of home state control. It provides that if a television broadcast[257] comes from another Member State which 'manifestly, seriously and gravely' infringes Article 22 concerning programmes which might seriously impair the physical, mental, or moral development of minors[258] and/or Article 3b concerning audiovisual media services containing 'incitement to hatred on grounds of race, sex, religion or nationality' and the broadcaster has infringed Article 22 and/or Article 3b on at least two occasions in the previous twelve months then the Member State must notify the broadcaster and the Commission. If attempts at seeking an amicable settlement fail then the receiving state can provisionally suspend retransmission until the Commission determines whether the suspension is compatible with Union law. The UK has made more use of this provision than any other Member State.[259] In particular, it banned reception of the Red Hot Dutch channel, broadcast initially via satellite from the Netherlands and then from Denmark.[260] The UK also relied on it to suspend the transmission of Eurotica Rendez-Vous by a Danish satellite television company. The Commission upheld the UK's decision as being compatible with the directive.[261]

Having concentrated on cases concerning broadcasting we turn now to advertising[262] or 'audiovisual commercial communication'[263] as it is now called. Although the basic rules are the same (i.e., the transmitting state principle still applies), the advertising provisions of Directive 89/552 are more prescriptive than those on broadcasting. While the broadcasting provisions say little about content or quality (leaving that for the Member State where the broadcaster is established), the directive does lay down a number of more detailed rules concerning the content of television advertising,[264] prescribing the conditions under which advertisements can be broadcast, prohibiting the use of certain techniques, and limiting the amount of broadcast time which can be devoted to advertising.[265]

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jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that State'. See also Case C–11/95 *Commission* v. *Belgium* [1996] ECR I–4115, para. 42; Case C–14/96 *Criminal Proceedings against Paul Denuit* [1997] ECR I–2785, para. 32. In addition Art.3(6) makes the transmitting state responsible for ensuring that the media service provider complies with the provisions of the directive.

[251] Joined Cases C–34–36/95 [1997] ECR I–3843, para. 28.

[252] See Case C–89/04 *Mediakabel BV* v. *Commissariaat voor de media* [2005] ECR I–4891 on the meaning of television broadcasting services.

[253] Arts. 2(2)-2(5) lay down the rules to determine which media service providers are under the jurisdiction of a Member State. Prior to the 1997 amendments, the Court had to grapple with the issue of a Member State's jurisdiction *ratione personae* over a broadcaster: Case C–222/94 *Commission* v. *UK* [1996] ECR I–4025. The 1997 directive in part codifies this judgment. For more details, see L. Woods and J. Scholes, 'Broadcasting: the Creation of a European Culture or the Limits of the Internal Market?' (1997) 17 *YEL* 47.

[254] Art. 2a(1) provides that 'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audivisual media services from other Member States for reasons which fall within the fields co-ordinated by this Directive'.

[255] C. Jones, 'Television without Frontiers' (1999/2000) 19 *YEL* 299, 308.

[256] Case C–11/95 *Commission* v. *Belgium* [1996] ECR I–4115, paras 36–7, referring to Case C–5/94 *Hedley Lomas* [1996] ECR I–2553, para. 20, considered in Ch. 5.

[257] Member States can derogate from on-demand audiovisual media services on the grounds of public policy, public health, public security and the protection of consumers (Art. 2a(4)).

[258] See also Rec. 2006/952/EC on the protection of minors and human dignity and ont eh right of reply in relation to the competitiveness of the European audiovisual and on-line services industry [2006] OJ L378/72.

[259] Information in this section comes from Jones, above n. X, 318–19. See also EP and Council Rec. 2006/952 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry ([2006] OJ L378/72).

[260] *R.* v. *Secretary of State for National Heritage, ex p. Continental Television* [1993] 3 CMLR 387 and referred to the ECJ in Case 327/93 *Red Hot Television*. The reference was removed from the register on 29 Mar. 1996 because Red Hot Dutch went bankrupt.

[261] The Commission's decision was unsuccessfully challenged under Art. 230 in Case T–69/99 *Danish Satellite TV (DSTV)* v. *Commission* [2001] ECR II–4039. The Court found that DSTV did not have *locus standi* since it was not directly concerned by the Act and was therefore not entitled to seek its annulment.

[262] The indirect advertising rules at issue in C–429/02 *Bacardi* v. *Télévision Française 1 SA* [2004] ECR I–6613 did not fall under the TWF Directive so were considered solely by reference to Art. 56 TFEU.

[263] This is defiend in Art. 1(h) as "audiovisual commercial communication" means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement'. One of the more controversial features of the revised Directive is that it allows for 'product placement' in television programmes (but not news or documentaries of children's programmes ie 'any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration'. The details are set out in Art. 3g.

[264] E.g., Art. 3e(1)(c) requires that audiovisual commercial communications should not prejudice respect for human dignity, be discriminatory, encourage

The provisions concerning both advertising and broadcasting are minimum requirements[266] which, according to Article 3(1), means that *transmitting* states can 'require media service providers under their jurisdiction to comply with more detailed or stricter rules' in the areas covered by the Directive. This is, however, subject to the free movement clause[267] contained in Article 2a(1), which provides that Member States must not 'restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive'. Therefore in *Leclerc-Siplec*[268] a French government ban on advertising in the distribution sector was compatible with Article 3(1) of the directive,[269] since it was applied by the *transmitting* state to broadcasters under its jurisdiction and did not affect the freedom of broadcasters established in other Member States, which met the minimum requirements laid down by the directive, from providing services.[270] Although a ban seems inconsistent with the directive's express aim of facilitating the provision of services, France could legitimately impose such a rule because the directive lays down only minimum standards. Apart from the free movement clause, the only ceiling constraining Member States when enacting the stricter requirements is compatibility with the Treaty provisions, in particular Articles 34 and 56. On the facts, the Court found that the French rules did not breach Article 34 because they were classified as certain selling arrangements and so, following the decision in *Keck*,[271] fell outside Article 34.[272]

The relationship between Directive 89/552 and the Treaty provisions was explored further in *De Agostini*,[273] this time concerning the rights of the *receiving* state to limit the activities of an advertiser. De Agostini, a Swedish company belonging to an Italian group, advertised a children's magazine about dinosaurs on TV3 (broadcast to Scandinavia by satellite from the UK) and on TV4 (a Swedish television station). This magazine was printed in Italy in a number of languages and it formed part of a series. With each issue came one part of a model dinosaur: children buying the whole series would have collected all parts of the model. The consumer ombudsman argued that this campaign contravened the Swedish ban on advertising aimed at children. The case was joined with *TV Shop*. TV Shop, which specialized in teleshopping, broadcast 'infomercials' for Body de Lite skincare products and the detergent Astonish on TV3 and on a Swedish home-shopping channel. This time the consumer ombudsman sought to restrain misleading advertising for these products.

The logic of Directive 89/552 suggests that, with the exception of the derogations laid down in the directive, the receiving state (Sweden) could not limit the advertisements broadcast by an out-of-state service provider. The Court disagreed. It noted that the directive, while co-ordinating national provisions on television advertising and sponsorship, did so only partially.[274] It continued that while the directive provided that Member States were to ensure freedom of reception and were not to impede retransmission on grounds relating to television advertising and sponsorship (the areas which had been harmonized), 'it does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes'[275] (the area which had not been harmonized). Therefore, the receiving state could apply its general rules on misleading advertising to television advertisements broadcast from other Member States in order to ensure the overriding interest of consumer protection.[276] They could do this provided that those national rules did not involve secondary control of television broadcasts (i.e. control additional to that which the broadcasting Member State had to carry out)[277] and did not prevent retransmission of television broadcasts coming from other Member States.[278] In response to arguments from the Commission and De Agostini that this ruling would undermine the transmitting state principle, the Court pointed to Directive 84/450 on misleading advertising[279]

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behaviour prejudicial to health and safety or the environment; while Art. 3(e)(1)(d) prohibits the advertising of cigarettes and other tobacco products. Art. 3(e)(1)(e) concerns advertisements directed at minors and Art. 3(e)(1)(g) provides that audiovisual commercial communications must not cause moral or physical detriment to minors by, for example, exploiting children's inexperience or credulity or pester power.

[265] E.g., Art. Art. 3(e)(1)(a) and (b) requires that TV advertising and teleshopping be readily recognizable and should not use subliminal techniques (see Case C-195/06 *KommAustria* v. *ORF* [2007] ECR I-8817 on the meaning of teleshoppingin the context of prize games). Art. 18 concerns the quantity of advertising permitted, and Art. 18a gives details of when advertising and teleshopping spots can be used.

[266] Minimum standards directives are considered further in Ch. 19.

[267] Free movement clauses are considered further in Ch. 19.

[268] Case C–412/93 [1995] ECR I–179.

[269] Para. 44.

[270] Para. 41.

[271] Joined Cases C–267 & 268/91 [1993] ECR I–6097, para. 16.

[272] See also Case C–6/98 *ARD* v. *PRO Sieben Media* [1999] ECR I–7599, paras 45–8 and Joined Cases C–320, 328, 329, 337, 338, & 339/94 *RTI* v. *Ministero delle Poste e Telecomunicazioni* [1996] ECR I–6471.

[273] Joined Cases C–34–36/95 [1997] ECR I–3843.

[274] Para. 32.

[275] Para. 33.

[276] Para. 28.

[277] Paras 34 and 35.

[278] Para. 38.

[279] [1984] OJ L250/17.

(now Directive 2006/114[280]) which would be 'robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser'.[281]

The Court then considered whether the Swedish rules breached Article 34. As we saw in Chapter 6, the Court adopted a more sophisticated analysis to its own *Keck* jurisprudence than it had done in *Leclerc-Siplec*. While recognizing that a prohibition on television advertising aimed at children constituted a certain selling arrangement,[282] it found that an outright ban might have a greater impact on products from other Member States (see fig. 6.2).[283] The ban therefore breached Article 34 and needed to be justified under either a *Cassis* mandatory requirement or an Article 36 derogation.[284] The Court reached a similar conclusion in respect of Article 56 but by a different route. There was no mention of certain selling arrangements. Instead, by applying *Bond* and *Gouda*, it found that the national rules prohibiting advertising constituted a restriction on the freedom to provide services, but that a receiving state (Sweden) could take measures against an advertiser in relation to television advertising, provided that those provisions were necessary for meeting overriding requirements of general public importance or one of the Article 52 TFEU (ex Article 46 EC) derogations, and that the steps taken were proportionate. The Court then returned to the directive and its application to the ban on advertising aimed at children. It said that, given the provisions specifically devoted to the protection of minors, Sweden could no longer apply rules specifically designed to control the *content* of advertising with regard to minors. In this field, at least, harmonization is total and the principle of transmitting state control reasserted.[285]

Leaving aside the ruling on the compatibility with the directive of a ban on advertising aimed at children, *De Agostini* produces a paradoxical result: the application of two harmonization directives and two fundamental Treaty provisions gives the green light to the Member States to *hinder* free movement in advertising.[286] Any such restrictions on advertising may infringe the freedom of expression under Article 10(1) ECHR but, as the Court pointed out in *RTL Television*[287] (a case on the interpretation of the (then) TWF Directive), the restrictions could be justified under Article 10(2). The restrictions pursue a legitimate aim involving the protection of consumers as television viewers (citing *Gouda)*, as well as their interest in having access to quality programmes, and the steps taken were proportionate. It seems that the case law before and after the directive is less different than would at first appear. This is perhaps not so surprising: as the Court made clear in *UTECA*,[288] the Directive does not completely harmonise the rules relating to the areas which it covers. Nevertheless, the Member States still have to satisfy the fundamental freedoms. The case concerned a Spanish rule requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State. While the Court considered that the 5% earmarking was not a restriction, the 60% rule was but could be justified on the grounds of defending and promoting Spanish multilingualism[289] and the rule was proportionate.

2.4 Abuse

Although the Court has done much to encourage the provision of services, it is wary of the services rules being abused by individuals who deliberately establish themselves in State A in order to provide services to customers in State B, thereby avoiding State B's more restrictive rules. It therefore said in *Commission* v. *Germany (insurance cases)*[290] that a host state (State B) was allowed to take measures to prevent a person from directing its activity entirely or principally towards its territory, but doing so by services rather than establishment, simply to avoid the professional rules of conduct which would be applicable to him had he been established in State B. The Court said that such a situation would be subject to judicial control under the provisions on establishment rather than on services.

As we saw in Case study 11.2 above, the Netherlands, with its restrictive broadcasting laws, has been particularly affected by attempts to avoid its rules, with Dutch companies setting up commercial stations in Luxembourg and, relying on the services provisions, using the Luxembourg station to broadcast programmes back to the Netherlands. The Dutch government passed a law prohibiting broadcasting organizations established in the Netherlands from investing in a broadcasting company established in another Member State which provided services directed towards the Netherlands. In

280 [2006] OJ L376/21.
281 Para. 37. However cf. Case C–99/01 *Gottfried Linhart* v. *Hans Biffl* [2002] ECR I–9375, para. 24.
282 Para. 39.
283 Para. 42. See the more assertive statement to that effect in Case C–405/98 *Konsumentombudsmannen* v. *Gourmet International Products (GIP)* [2001] ECR I–1795, para. 21.
284 Paras 45–6.
285 A. Criscuolo, 'The "TV Without Frontiers" Directive and the Legal Regulation of Publicity in the European Community' (1998) 23 *ELRev*. 357, 362.
286 Ibid., 363.
287 Case C–245/01 *RTL Television GmbH* v. *Niedersächsische Landesmedienanstalt für proviaten Rundfunk* [2003] ECR I–12489, paras 68–74.
288 Case C-222/07 *UTECA* v. *Administracíon General del Estado* [2009] ECR I-000, para. 19.
289 Paras. 26 and 27. For a similarly benign approach to Member State rules, see Case C-250/06 *United Pan-Europe Communications Belgium SA* v. *Etat belge* [2007] ECR I-11135.
290 Case 205/94 [1986] ECR 3755, para. 22, reaffirming Case 33/74 *Van Binsbergen* [1974] ECR 1299, para. 13.

Veronica[291] the Court said that such a rule did not breach Article 56 where it had the specific effect of ensuring that those organizations could not improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of those programmes.[292] It reached a similar conclusion in *TV10*[293] where it said that a Member State could regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State' s territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law, in this case those designed to ensure the pluralist and non-commercial content of programmes. However, the *TV10* approach may have differed from that in *Veronica* because it seemed to have classified the principle of abuse as a ground for justifying restrictions on the freedom to provide services, and not any longer as a ground for precluding its application.[294]

However, in *VT4*[295] the Court appeared to backtrack. VT4, a broadcaster established in the UK, made programmes aimed at the Flemish public and transmitted the signals from the UK to Belgium. The Belgian authorities thought VT4 had been established in the UK merely to circumvent the application of Flemish law. The Court said that just because all the broadcasts and advertisements were aimed at the Flemish public did not mean that VT4 could not be regarded as being established in the UK. Without referring to either *Veronica* or *TV10* it continued that '[t]he Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established'.[296] Therefore the pendulum seems to have swung back towards the Court's original stance supporting the provision of services, a change which coincided with the adoption of the TWF/AVMS Directive which laid down criteria for determining in which state a broadcaster was established.[297] As *Centros*[298] subsequently confirmed, there is nothing abusive about simply taking advantage of the Treaty provisions on free movement.[299]

3. THE EXERCISE OF SERVICE ACTIVITY

3.1 Social Advantages

Having looked at rules which prevent or impede initial *access* to the services market in another Member State we turn now to consider rules which impede the actual performance of, or the receipt of, a service in the host state. In the absence of a provision equivalent to Article 7(1) and (2) of Regulation 1612/68 on workers, the Court has read Article 56 so as to require equal treatment in respect of the terms and conditions on which the service is provided or received and equal treatment in respect of social and tax advantages. We begin by considering social advantages. In *Cowan*[300] a British tourist attacked and robbed outside a *métro* station in Paris. He was refused criminal injuries compensation because he was neither a French national nor was he resident in France. The Court said that when Union law guarantees a person the right to go to another Member State, the corollary of the right is that the individual be protected from harm on the same basis as nationals and persons residing there. Consequently, the principle of non-discrimination applied to recipients of services, even where the compensation was financed by the treasury.[301]

For similar reasons, in *Commission* v. *Spain (museums)*[302] the Court condemned a Spanish law providing for free admission to state museums for Spanish nationals and foreigners resident in Spain but not to tourists. The Commission pointed out that since visiting museums encourages tourists, as recipients of services, to go to another Member State, there was a close link between freedom of movement and museum admission. The Court found that the Spanish rules breached both Articles 12 and 56.[303]

3.2 Tax Advantages

(a) The Provision of Services

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[291] Case C–148/91 *Vereniging Veronica Omroep Organisatie* v. *Commissariaat voor de Media* [1993] ECR I–487.
[292] Para. 13.
[293] Case C–23/93 *TV10 SA* v. *Commissariaat voor de Media* [1994] ECR I–4795 and the note by P. Wattel (1995) 32 *CMLRev*. 1257.
[294] D.Doukas, 'Free Movement of Broadcasting Services and Abuse of Law' in R. de la Feria and S. Vogenauer, *Prohibition on Abuse of Law* (Oxford, hart Publishing, forthcoming).
[295] Case C–56/96 *VT4 Ltd* v. *Vlaamse Gemeenschap* [1997] ECR I–3143.
[296] Para. 22.
[297] See Art. 2 of Dir. 89/552.
[298] Case C–212/97 *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECR I–1459 considered in Ch. 13.
[299] For a full discussion, see A. Kjellgren, 'On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Abuses of Community Law' in Andenas and Roth (eds), above n. 156.
[300] Case 186/87 *Cowan* v. *Le Trésor Public* [1989] ECR 195. See also Case 63/86 *Commission* v. *Italy (social housing)* [1988] ECR 29, para. 19 and Case C–484/93 *Svensson* [1995] ECR I–3955.
[301] Para. 17. In a similar vein, see Case C-164/07 *Wood* v. *Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* [2008] ECR I-4143. Cf. Case C–109/92 *Wirth* [1993] ECR I–6447 considered above, n. X.
[302] Case C–45/93 [1994] ECR I–911; Case C–388/01 *Commission* v. *Italy* [2003] ECR I–721, para. 12.
[303] See also Case C–20/92 *Hubbard* v. *Hamburger* [1993] ECR I–3777, para. 14.

Initially, the Court applied the equal treatment model to taxation. This can be seen in *De Coster*[304] where a Belgian tax on satellite dishes encouraged subscribers to receive their programmes by cable instead (no tax was levied on cable). Because Belgian distributors had unlimited access to cable distribution,[305] the Court found that this rule had a particular impact on broadcasters established in other Member States which could be received only by satellite.[306] The tax therefore breached Article 56 and could not be justified.[307]

However, as we have seen elsewhere, the Court subsequently moved away from the discrimination model and applied the restrictions approach. For example, in *Sea-Land Service*[308] the Dutch authorities levied a tariff to cover the cost of navigation services charged on sea-going vessels but not on inland waterway vessels. Sea-Land argued that the tariff was indirectly discriminatory because the majority of those operating inland waterway vessels were Dutch. The Court found that while there was no discrimination because the two means of transport were not comparable, the tariff imposed on sea-going vessels was liable to 'impede or render less attractive' the provision of those services and so breached Article 56.[309] However, it ruled that the tariff could be justified on the ground of public security provided there was a correlation between the amount of the tariff and the cost of the service from which the sea-going vessels benefit.

The facts of this case highlight the problem of applying the restrictions model to taxation. What is the impediment to out of state actors? The actual payment of the tax. While noone likes paying tax, if all sea-going vessels have to pay it, there is no particular impediment for the out of state vessel. The Court appears to have seen the force of this argument in *Viacom II*[310] [311]and *Mobistar*[312] which suggest a return to a non-discrimination approach, at least in the field of tax (see fig. 11.2). In *Mobistar* the Court found that a municipal tax on transmission pylons, masts, and antennae for GSM, which applied 'without distinction to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States', did not breach Article 56.[313] In *Viacom II*[314] the Court found that a municipal tax on outdoor advertising, applied on a non-discriminatory basis and fixed at a level considered 'modest in relation to the value of the services provided' did not breach Article 56 since 'the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned'.[315]

(b) Receipt of Services

Most of the cases considered so far concern national rules which are intended to discourage service *providers* of other Member States from exercising their rights in the host state. Yet, there is also a group of cases concerning national rules, often concerning tax, intended to discourage potential national service *recipients* from receiving that service in another state. When considering the validity of these rules the Court often uses the language of discrimination. For example, in *Bent Vestergaard*[316] Danish tax law distinguished between professional training courses held at tourist resorts in other Member States and those taking place in Denmark. While Danish law presumed that courses held abroad were an excuse for a holiday, with the result that the costs were not tax-deductable, it did not apply the same presumption to courses held in Denmark. The Court found that such a rule involved an unjustifiable difference in treatment based on the place where the service was provided and therefore breached Article 56.[317] Similarly, in *Laboratoires Fournier*[318] the Court said that French law restricting the benefit of a tax credit only to research carried out in France, differentiated according to the place where the services were provided, contrary to Article 56. In other cases the Court says that national rules making the provision of services between Member States more difficult than the provision of services within just one Member State[319] also breach Article 56.[320]

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304 Case C–17/00 *François De Coster* v. *Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I–9445.

305 Para. 31.

306 Para. 35.

307 See also Case C-169/08 *Presidente del Consiglio dei Ministri* v. *Regione Sardegna* [2009] ECR I-000.

308 Joined Cases C–430 & 431/99 *Inspecteur van de Belastingdienst Douane, district Rotterdam* v. *Sea-Land Service Inc. and Nedlloyd Lijnen BV* [2002] ECR I–5235, para. 32.

309 Para. 32. See also Case C-345/04 *Centro Equestre da Lezíria Grande* v. *Bundesamt für Finanzen* [2007] ECR I-1425, para. 29.

310 Case C–134/03 [2005] ECR I–1167. See also Case C-222/07 *UTECA* v. *Administracíon General del Estado* [2009] ECR I-000, para. 22 considered below.

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312 Joined cases C–544/03 & C–545/03 *Mobistar* v. *Commue de Fléron* [2005] ECR I–7723. Cf. Case C–17/00 *De Coster* v. *Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I–9445.

313 Para. 35.

314 Case C–134/03 [2005] ECR I–1167.

315 Paras 37–8.

316 Case C–55/98 *Skatteministeriet* v. *Bent Vestergaard* [1999] ECR I–7641.

317 Para. 22.

318 Case C–39/04 *Laboratoires Fournier SA* v. *Direction des verifications nationales et internationales* [2005] ECR I–2057, para. 15. See also Case C-150/04 *Commission* v. *Denmark (insurance)* [2007] ECR I-1163, para. 42 where the Court used the language of dissuasion.

319 Case C–158/96 *Kohll* [1998] ECR I–1931, para. 33. See also Case C–381/93 *Commission* v. *France (maritime services)* [1994] ECR I–5154, para. 17; Case C–136/00 *Rolf Dieter Danner* [2002] ECR I–8147, para. 29; Case C–118/96 *Safir* [1998] ECR I–1897, para. 23; Case C–17/00 *François De Coster* v. *Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I–9445, para. 30; Case C–422/01 *Försäkringsaktiebolaget Skandia*

While the language used by the Court in all these cases carries overtones of direct discrimination the Court in fact seems to regard such rules as impeding, deterring[321] or constituting a restriction on[322] the exercise of the freedom to receive services[323] which can then be justified not only by the express derogations laid down in the Treaty but also by the broader public interest requirements. This can be seen in *Skandia*[324] concerning Swedish rules which treated an occupational pension insurance policy taken out by a Swedish company with an out-of state insurer less favourably than if the policy had been taken out with a Swedish company. The Court said that in view of the disadvantage to the employer in financial terms in the postponement of the right to deduction until the time the pension benefits were paid to the employee, the Swedish rules were 'liable both to dissuade Swedish employers from taking out occupational pension insurance with institutions established in other Member States and 'to dissuade those institutions from offering their services on the Swedish market'.[325] The rules breached Article 56 and could not be justified.

The approach which looks to see whether the national rule under challenge has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State is the mainstay of the healthcare tourism cases which we now consider.[326]

3.3 The healthcare cases

(a) Introduction

One of the sectors in which the application of these basic principles on receipt of services has produced such a dramatic effect is healthcare. Healthcare has traditionally been provided on a territorial basis. Patients contribute to a national system either through taxation or by paying premiums into an insurance scheme. In return, healthcare is available from a locally based provider. The only express provision made by Union law for treatment in other Member States is contained in the Social Security Regulation 1408/71.[327] Article 22(1) requires the home state (State A) to meet bills incurred by State A patients while in the host state (State B) in two situations: first, where they need emergency medical treatment using what was the form E111 and now the European Health Insurance Card;[328] and, secondly, where they have been expressly authorized to receive non-emergency treatment in State B using the E112 form.[329] In respect of the second situation, Article 22(2) explains that authorization cannot be refused where the treatment is among the benefits provided for in State A[330] and where the patient cannot be given the treatment within the time normally necessary for obtaining the treatment in State A,[331] taking into account the patient's current state of health and the probable course of the disease. If the costs of the treatment in State B are higher than those in State A, then the relevant body in State A must meet those additional costs where authorization is granted.[332] However, Article 22(2) puts the funder of the healthcare, and not the patient, in charge of the decision whether to authorize treatment abroad and, in the past, such authorizations have been relatively rare.[333]

(publ), Ola Ramstedt v. *Riksskatteverket* [2003] ECR I–6817, para. 26;

320 However, where the rules do not have the effect of making the provision of services more difficult between states than those offered purely within one Member State there is no breach of Article 49: Case C–8/02 *Leichtle* v. *Bundesanstalt für Arbeit* [2004] ECR I–2641, para. 37; Case C-281/06 *Jundt* v. *Finanzamt Offenburg* [2007] ECR I-12231, para. 52.

321 Cases C-76/05 and C-318/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6847, para. 66.

322 Case C-281/06 *Jundt* v. *Finanzamt Offenburg* [2007] ECR I-12231, para. 55.

323 See Case C–118/96 *Safir* [1998] ECR I–1897, paras 25 and 30; Case C–290/04 *Scorpio* [2006] ECR I–9461, para. 33. See also the discussion of Case C–109/04 *Kranemann* [2005] ECR I–2421 in Ch. 8.

324 C-422/01 *Försäkringsaktiebolaget Skandia (publ)* v. *Riksskatteverket* [2003] ECR I-6817.

325 Para. 28.

326 See g Case C–158/96 *Kohll* [1998] ECR I–1931, para. 35; Case C–157/99 *Geraets-Smits and Peerbooms* [2001] ECR I–5473, para. 69.

327 Consolidated version [1997] OJ L28/1.

328 Art. 22(1)(a). See also Communication from the Commission concerning the introduction of a European health insurance card (COM(2003)73 final), and its adoption by Commission Dec. 189/03 [2003] OJ L276/1. There is also special provision for pensioners and members of their families when they require treatment abroad in Art. 31 of Reg. 1408/71 (Case C–326/00 *Idryma Koinonikon Asfaliseon (IKA)* v. *Vasilios Ioannidis* [2003] ECR I–1703). However, Reg. 1408/71 itself has now been amended to bring the entitlements of the rights of other patients more closely into line with the rights of these pensioner patients (see Reg. 631/2004/EC [2004] OJ L 100/1). So all patients are now entitled, during a stay in another Member State for a reason other than the receipt of the treatment, to treatment 'which become[s] necessary on medical grounds during a stay in the territory of another Member State/the Member State other than the State of residence, taking into account the nature of the benefits and the expected length of the stay'.

329 Art. 22(1)(c). Where authorization has been granted, concerns about the planning and organization of hospital care cannot be invoked by the competent state: Case C–145/03 *Heirs of Annette Keller* v. *INSS* [2005] ECR I–2529, para. 62. Reg. 1408/71 is due to be replaced by Reg. 883/2004/EC ([2004] OJ L166/1). Specifically, the new Art. 20, replacing Art. 22 of Reg. 1408/71, imposes a duty on the home state to grant authorization where the medical treatment cannot be given in the home Member State 'within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness'. The British Department of Health website (www.dh.gov.uk/PolicyandGuidance/healthadvicefortravellers) provides full details.

330 This limitation was upheld in Case C–157/99 *Geraets-Smits and Peerbooms* [2001] ECR I–5473, para. 45.

331 This requirement was interpreted in Case C–372/04 *Watts* v. *Bedford Primary Care Trust* [2006] ECR I–4325 to mean whether the hospital treatment required by the patient's medical condition could be provided in the home state within 'an acceptable time which ensures its usefulness and efficiency'.

332 Art. 36 of Reg. 1408/71.

333 For a full discussion, see T. Hervey, 'The current legal framework on the right to seek health care abroad in the European Union' (2006–7) 9 *CYELS* forthcoming. She emphasizes that individual authorized treatment differs from block purchasing agreements, for which the High Level Group on Health

How do Articles 56 and 57 fit into this framework? Their relevance first became apparent in *Luisi and Carbone*[334] and *SPUC* v. *Grogan*[335] which showed that EU nationals could in principle travel to another Member State to receive medical treatment because medical services constituted 'services' within the meaning of Article 57. But who pays for the treatment? If patients cannot get the treatment they want within a reasonable time at home, can they be treated in another Member State and then, under Articles 56 and 57, expect their own Member State to foot the bill? If so, Union law would pose a considerable threat to careful planning for comprehensive healthcare provision at national level. The easiest way of avoiding such problems would have been for the Court to say that Union law did not apply to national healthcare provision since it did not constitute an economic activity. However, as we have already seen, the Court rejected this approach[336] and said that Articles 56 and 57 did apply to healthcare. Instead, it has used the public interest requirements to reconcile the individual's right to travel in order to receive treatment in another Member State with the home state's duty to provide adequate healthcare to the population as a whole.

(b) Kohll and Dekker: opening up the market

This process of reconciliation began with *Kohll*,[337] which concerned the Luxembourg healthcare system according to which medical services were offered on a reimbursement basis. The insurance rules permitted treatment to be received in other Member States but required prior authorization from the sickness fund which was meeting the cost. No requirement for prior authorization was imposed in respect of treatment received domestically. When Kohll's daughter was refused permission to receive orthodontic treatment in Germany he argued that the Luxembourg rules breached Article 56. In principle the Court agreed, arguing that because the rules had the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State,[338] they breached Article 56 unless they could be justified.

The Luxembourg authorities put forward two justifications for the authorization requirement: first, that it constituted the only effective and least restrictive means of controlling expenditure on health and balancing the budget of the social security system. While the Court accepted this argument in principle,[339] it rejected it on the facts. Because Kohll sought reimbursement for the treatment in Germany at the same rate that applied in Luxembourg and according to the tariff laid down by the insurance scheme, there was no significant effect on the financing of healthcare or the social security scheme.[340]

Secondly, Luxembourg argued that the rule could be justified on public health grounds in order to ensure both the quality of the medical treatment and a balanced medical and hospital service open to all. Once again, the Court accepted the argument in principle, but rejected it on the facts. It said that since the conditions for taking up and pursuing the professions of doctor and dentist had been the subject of several co-ordinating and harmonizing directives, Luxembourg could not raise such public health concerns.[341] It also said that Luxembourg had failed to produce any evidence showing that the rules were indispensable for the maintenance of an essential treatment facility or medical service in Luxembourg. Since the rules could not be justified the authorization requirement breached Articles 56 and 57, despite the fact that Article 22(2) of Regulation 1408/71 expressly envisaged prior authorization.[342]

Kohll therefore suggested that Articles 56 and 57 were able to reshape the contours of Article 22. The importance of what the Treaty provisions could achieve was again seen in *Vanbraekel*.[343] In that case prior authorization was wrongfully withheld from a patient insured in Belgium who had received treatment in France. The question raised was at what level the reimbursement should be made—according to the higher tariffs payable if the treatment had been provided in Belgium or the lower tariffs payable if the treatment was received abroad. Article 56 was used to fill the gap. The Court noted that if a patient had a lower level of cover when receiving hospital treatment in another Member State (France) than when undergoing the same treatment in the state where he was insured (Belgium), this could 'deter, or even prevent, that person from applying to providers of medical services established in other Member States and constitutes, both for insured persons and service providers, a barrier to freedom to provide services'.[344] The Court also rejected the justifications put forward by the Belgian government. It said that reimbursement of the higher amount which

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Services and Medical Care has drafted the 2005 EU Guidelines for Purchase of Treatment Abroad.

334 Joined Cases 286/82 & 26/83 [1984] ECR 377, above n. 21.

335 Case C–159/90 [1991] ECR I–4685 above nn. 45–58.

336 Case C–157/99 [2001] ECR I–5473, paras 52–9.

337 Case C–158/96 [1998] ECR I–1931. Cf. Case C–120/95 *Decker* v. *Caisse de maladie des employés privés* [1998] ECR I–1831 (on goods) in which no prior authorization was sought.

338 Para. 33.

339 Para. 41.

340 Paras 40 and 42.

341 Paras 47–9.

342 In Case C–56/01 *Patricia Inizan* v. *Caisse primaire d'assurance maladie des Hauts-de-Seine* [2003] ECR I–12403, para. 26 the Court nevertheless still found Art. 22(2) to be valid.

343 Case C–368/98 [2001] ECR I–5363.

344 Para. 45.

would have been payable had the treatment been carried out in Belgium neither jeopardized a balanced medical and hospital service open to all nor had a significant effect on the functioning of the social security scheme.[345] Article 56 therefore required reimbursement at the higher rate.

Kohll and the related case *Decker*, on goods, created 'lively' reactions in the healthcare world[346] because they suggested that in respect of non-hospital (extramural) care a prior authorization requirement could not be justified, with the result that patients (as opposed to the healthcare service or sickness funds) could demand treatment in other Member States and be reimbursed for the costs of that treatment. As Van der Mei put it, reimbursement of the costs of cross-border healthcare no longer seemed a rarely granted privilege but a judicially enforceable right.[347] However, *Decker* and *Kohll* left open two questions: first, whether the same rules applied to hospital (intramural) healthcare and, secondly, whether the principles laid down in those cases applied to a system based on benefits in kind rather than on reimbursement. These questions were considered by *Geraets-Smits and Peerbooms*[348] and *Müller-Fauré and van Riet*.[349]

(c) Intramural care

Both cases concerned the Dutch healthcare system, which is funded through a sickness insurance scheme. Unlike the Luxembourg scheme which provides a right for the insured to be reimbursed for medical bills paid to providers, the Dutch scheme provides benefits in kind. This means that the sickness funds enter into agreements with (local) healthcare providers (usually hospitals in the Netherlands)[350] and the insured patient must go to one of the contracted providers for treatment. Unlike the Luxembourg system, the patient does not pay and then get reimbursed. Instead, the contracted providers are paid directly by the sickness funds.[351]

While the basic rule was that patients receive treatment from contracted providers, the Dutch sickness funds did authorize treatment from non-contracted providers (both at home and abroad) on two conditions: first, that the treatment was 'normal in the professional circles concerned' and, secondly, that the treatment by the non-contractual provider was necessary for the patient, having first assessed the treatment available in the Netherlands, and whether it could be obtained without undue delay. The compatibility of these conditions with Union law was at issue in the two Dutch cases: *Geraets-Smits and Peerbooms* largely concerned the question of the availability of the treatment, *Müller-Fauré and van Riet* undue delay.[352]

Mrs Geraets-Smits, a Dutch national suffering from Parkinson's disease, sought reimbursement for the costs of her medical treatment in Germany which she claimed was better than that provided in the Netherlands. Mr Peerbooms, a Dutch national in a persistent vegetative state, was transferred to Austria for neurostimulation treatment. He could not have obtained this treatment in the Netherlands where the technique was used only experimentally. In both cases reimbursement was refused on the ground that satisfactory and adequate treatment was available in the Netherlands.

The Court found that the prior authorization rules laid down by the insurance schemes for treatment by non-contracted providers 'deter, or even prevent, insured persons from applying to providers of medical services established in another Member State and constitute, both for insured persons and service providers, a barrier to freedom to provide services'.[353] In principle the rules therefore breached Article 56.

The Court then considered the justifications for the authorization requirement. It noted that the Dutch system was planned to ensure sufficient and permanent access to a balanced range of high-quality hospital treatment (i.e., by establishing and equipping an appropriate number of hospitals evenly distributed throughout the country)[354] while at the same time trying to control costs and prevent wastage of financial, technical, and human resources.[355] Allowing patients to go to any non-contracted hospital would jeopardize this careful planning at a stroke.[356] For these reasons the Court found that a system of prior authorization for intramural care was in principle 'both necessary and reasonable' on public health grounds in order to guarantee a 'rationalised, stable, balanced and accessible supply of hospital services'[357] provided that

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345 Paras 51–2.

346 W. Palm, J. Nickless, H. Lewalle, and A. Coheur, *Implications of Recent Jurisprudence on the Co-ordination of Health Care Protection Systems* (Brussels, Association Internationale de la Mutualité, 2000).

347 A.P. van der Mei, 'Cross-Border Access to Health Care within the European Union: Some Reflections on *Geraets-Smits and Peerbooms* and *Vanbraekel*' (2002) 9 *MJ* 189.

348 Case C–157/99 [2001] ECR I–5473.

349 Case C–385/99 *V.G. Müller-Fauré* v. *Onderlinge Waarborgmaatschappij oz Zorgverzekeringen UA and E.E.M. van Riet* v. *Onderlinge Waarborgmaatschappij oz Zorgverzekeringen UA* [2003] ECR I–4509.

350 Para. 66.

351 See C–385/99 *Müller-Fauré* [2003] ECR I–4509, para. 105.

352 E. Spaventa, 'Public Services and European Law: Looking for Boundaries' (2003) 6 *CYELS* 271.

353 Para. 69. Cf. Case C-444/05 *Stamatelaki* v. *OAEE* [2007] ECR I-000 (total ban on treatment abroad breached Art. 49).

354 Para. 76.

355 Paras 78–9. All this at a time when the healthcare sector has to satisfy increasing needs with limited funding.

356 Case C–385/99 *Müller-Fauré* [2003] ECR I–4509, para. 82.

357 Paras 80–1.

the conditions under which the authorization was granted—both substantively and procedurally—could themselves be justified.[358]

Looking first at the *procedural* conditions,[359] the Court said that these could be justified provided the procedural system was easily accessible for patients; that the decision whether to grant authorization was based on objective, non-discriminatory, and pre-determined criteria; that the request was dealt with objectively and impartially and within a reasonable time; and that refusals to grant authorization were capable of being challenged in judicial or quasi-judicial proceedings.[360]

The Court then turned to the *substantive* conditions for attaining authorization, beginning with the requirement that the treatment had to be 'normal in the professional circles concerned'. It found this to be justified provided it took account of what was sufficiently tried and tested[361] by *international* science (as opposed to simply national science which would tend to favour national treatment).[362] The Court thought that the second condition, necessity, could also be justified on grounds both of public health and of ensuring the financial stability of the sickness insurance system,[363] provided that the condition was construed as meaning that authorization to receive treatment in another Member State could be refused only if the same or equally effective treatment could be obtained without undue delay from a contracted provider in the home state.[364] The Court recognized that if contracted providers were not given priority, this would put at risk the very principle of having contractual arrangements with hospitals and so 'undermine all the planning and rationalisation carried out in this vital sector'.[365] Thus, while rejecting the territorial nature of healthcare services, the Court did recognize the value of a 'closed' system based on a number of contracted providers.[366]

However, when considering whether the treatment could be granted without undue delay from a contracted provider, the Court said that the national authorities had to consider all the circumstances of each specific case, taking into account both the patient's medical history and condition and the degree of pain or the nature of the patient's disability which might make it impossible or extremely difficult for the patient to carry out a professional activity.[367] This subjective approach, based on the individual patient's state of health, means that a state cannot refuse permission for treatment abroad simply because it would mean that the patient would jump the waiting list queue. Therefore, in *Van Riet* the Dutch sickness fund could not refuse to pay for Mrs van Riet's treatment (an arthroscopy) in Belgium where it was available much sooner than in the Netherlands simply because appropriate treatment was available in the Netherlands without undue delay. In deciding whether to authorize treatment the fund had to take into account Mrs van Riet's medical condition and medical history (she had been suffering pain for eight years).

(d) Extramural care

The cases we have considered so far (*Geraets-Smits and Peerbooms* and *Van Riet*) concerned hospital services. We turn now to non-hospital services which were considered in *Müller-Fauré*. While on holiday in Germany Müller-Fauré underwent major dental treatment. When the Dutch sickness fund refused to reimburse her because she had not received prior authorization for the treatment, she argued that this requirement breached Article 56. The Court agreed, but this time found no justification for the authorization rule. It said that no evidence had been produced to show that if patients were allowed to travel to another Member State for non-hospital treatment without authorization, this would seriously undermine the financial balance of the Dutch scheme.[368] As the Court noted, care is generally provided near the patient's residence, in a cultural environment familiar to the patient, and allows a relationship of trust to build up with the treating doctor.[369] For these reasons the Court anticipated that the numbers taking advantage of the possibility of (non-hospital) treatment in other Member States would be small due to the barriers of language, geography, the cost of staying abroad, and the lack of information about the care provided there.[370]

However, the Court did add an important caveat to its ruling, which it had already mentioned in *Kohll*[371] and *Decker*:[372] patients from State A travelling to State B for extramural treatment but without prior authorization could

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358 As elaborated by Case C–385/99 *Müller-Fauré* [2003] ECR I–4509, para. 66.

359 On the importance of the procedural requirements, see Case C–205/99 *Analir* [2001] ECR I–1271, paras 37–8.

360 Para. 90.

361 I.e., the authorities must take into consideration all the relevant available information, e.g., existing scientific literature and studies, the authorized opinions of specialists, and whether the proposed treatment is covered by the sickness insurance system of the Member State in which the treatment is provided (para. 98).

362 Para. 97.

363 Para. 105–6.

364 Para. 104.

365 Para. 106. The Court added that if the contracted provider could not provide the treatment, the sickness fund could not give priority to a non-contracted national provider (para. 107).

366 Van der Mei, above n. 112, 201.

367 C–385/99 *Müller-Fauré* [2003] ECR I–4509, para. 90.

368 Para. 93.

369 Para. 96.

370 Para. 95.

371 Para. 42.

claim reimbursement of the treatment cost, but only within the limits of the cover provided by the sickness insurance scheme in State A[373] (rather than for all expenses incurred, which would be the case under Article 22 of Regulation 1408/71). The Court also said that State A could impose other conditions on reimbursement in so far as they were neither discriminatory nor an obstacle to free movement (e.g., requiring that a GP should refer a patient to a specialist consultant).[374]

This case law tells us that medical services fall within the scope of Articles 56 and 57. Prior authorization requirements in principle breach Article 56 but are likely to be justified for intramural care (where there seems to be a presumption of legality) but not for extramural care (where there seems to be a presumption of illegality)[375] or (possibly) for systems based on reimbursement (following *Kohll*).[376] This largely institutional distinction between intra– and extramural care will create a number of difficulties. Does it turn on the physical location of the treatment (GP's surgery or hospital out-patient department) or the type of treatment (minor or major surgery)?[377] Cross-border access to *hospital* care, therefore, remains governed by Regulation 1408/71, but insured persons may be entitled to get authorization in a greater number of cases than the few falling within the ambit of Article 22(2) of Regulation 1408/71.[378] For example, following *Van Riet* account should be taken not only of the patient's current state of health (as required by Article 22(2)) but also the past medical record. And, in respect of waiting lists, account should not just be taken of 'the time normally necessary' for the treatment in State A but consideration must also be given to 'all circumstances of each specific case', which may include the circumstances of the patient[379] as well as a more objective reading of what constitutes a 'normal' waiting time.[380] It therefore seems that Article 56 EC and Article 22 of Regulation 1408/71 run in parallel.[381]

(e) Application of these principles to the British NHS

The parallelism between Article 56 and Article 22 of Regulation 1408/71 is supported by *Watts*,[382] a case concerning the British National Health Service (NHS), where care is basically free at the point of delivery but paid for out of taxation. Watts suffered from severe arthritis of the hips but was told in October 2002 that, since her case was 'routine', there would be a one-year wait for surgery. She therefore applied to the Bedford Primary Care Trust (PCT) for authorization to undergo surgery abroad under the E112 scheme but this was refused, on the ground that treatment could be provided to the patient 'within the Government's NHS Plan targets' and therefore 'without undue delay'. She therefore sought judicial review of the PCT's decision. Subsequently, her health deteriorated and she was re-examined in January 2003 when she was listed for surgery within three or four months. Although Bedford PCT repeated its refusal to issue an E112, in March 2003 Mrs Watts nevertheless underwent a hip replacement operation in France for which she paid £3,900. She continued with her judicial review application, claiming in addition reimbursement of the medical fees incurred in France, but her application was dismissed on the ground that she had not had to face undue delay after the re-examination of her case in January 2003. The Court of Appeal referred the matter to the ECJ.

In *Watts* the ECJ was less concerned with the Article 56 aspect of the case than with the application of Regulation 1408/71. It said that, in order to be entitled to refuse authorization on the ground of waiting time, the competent institution (essentially the PCT) had to establish that 'the waiting time, arising from objectives relating to the planning and management of the supply of hospital care . . . does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorization is sought'.[383] It adopted a similar approach under Article 56.[384] Furthermore, it added, the setting of waiting times should be done 'flexibly and dynamically', so that the period initially notified to the person concerned could be reconsidered in the light of any deterioration in the patient's state of health occurring after the first request for authorization. For good measure it added that Article 56 required the UK to reimburse Mrs Watts' travel and accommodation costs where it would have reimbursed those costs had the travel occurred in the UK.

Watts shows that the Court's case law in the Dutch and Luxembourg cases applies to public systems such as the British NHS even though there is no mechanism for reimbursement in a non-insurance based system such as the UK's. It also shows that the UK practice of the blanket use of waiting lists as a way of managing limited NHS

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372 Para. 40.
373 Paras 98 and 106.
374 Para. 106.
375 Van der Mei, above n. 114, 200.
376 P. Cabral, 'The Internal Market and the Right to Choose Cross Border Medical Care' (2004) 29 *ELRev*. 673, 686.
377 E. Steyger, 'National Health Systems Under Fire (but not too heavily)' (2002) 29 *LIEI* 97, 106.
378 Van der Mei, above, n. 114, 200 and 206.
379 See G. Davies, 'Medical Treatment Abroad' (2003) 153 *NLJ* 938, 939.
380 See also Case C–385/99 *Müller-Fauré* [2003] ECR I–4509, para. 92.
381 See Ruiz-Jarabo Colomer AG's Opinion in Case C–56/01 *Inizan* [2003] ECR I–12403.
382 Case C–372/04 *Watts* v. *Bedford Primary Care Trust* [2006] ECR I–4325.
383 Para. 68.
384 Paras 119–20.

resources cannot be justified if account is not taken of the individual circumstances of the applicant. *Watts* also means that the NHS regulations will have to set out the criteria for the granting or refusal of prior authorization necessary for reimbursement of the cost of hospital treatment provided in another Member State, in order to circumscribe the exercise of the national competent authorities' discretionary power and permit effective judicial review of decisions refusing to grant authorization. However, for Mrs Watts herself the decision might not help: she still might not recover her £3,900 since there was no undue delay after the re-examination of her case in January 2003.

While cases like *Geraets-Smits and Peerbooms* may not have revolutionized the cross-border provision of intramural care, they have certainly raised awareness, at least in the UK, of the possibility of using foreign hospitals to cut waiting lists. When *Geraets-Smits and Peerbooms* was decided, there were about a million people waiting for surgery on the NHS and more than 200,000 had been waiting at least six months.[385] The Labour government had committed itself to reducing that number to zero. Less than six months after *Geraets-Smits and Peerbooms*, the first group of British patients who had been waiting for surgery for over a year travelled by Eurostar to France for hip and knee replacements and cataract operations.[386] Although the Department of Health based its decision on *Geraets-Smits and Peerbooms* and *Vanbraeckel*,[387] *Geraets-Smits* in fact concerned treatment which was not available in the Netherlands and did not concern undue delay. All these developments have, however, forced the Commission to explore the implications of the Court's decisions on patient mobility and healthcare in the EU[388] to work out ways, for example, of reaching a 'common understanding on patients' rights, entitlements and duties', and working out ways of sharing spare capacity and transnational care.

D. THE SERVICES DIRECTIVE

1. INTRODUCTION

So far we have concentrated on the application of the Treaty provisions on services. We turn now to consider the adoption of the controversial Services Directive 2006/123[389] by the Council and European Parliament at the end of 2006. The aim of the Directive was to open up the market in services, which accounts for over two thirds of Europe's GDP. There were two main drafts of the Directive: the 'Bolkestein' draft of 2004[390] and the McCreevy draft of 2006 which reflected the significant changes introduced by the European Parliament. The original 'Bolkestein' provided a legal framework that would (1) eliminate the obstacles to the freedom of establishment for service providers; (2) remove the obstacles to temporary service provision between the Member States; and (3) lay down detailed rules on mutual assistance between Member States as well as requiring Member States to establish a Point of Single Contact (PSC). The provisions on establishment (which were discussed in Chapter 10) and mutual assistance remained largely intact throughout the process of negotiation. However, the rules on temporary service provision, based as they were on the country of origin principle, proved particularly controversial and were subject to significant revision.

2. SCOPE

We turn now to examine the content of the Directive, a vexed but important question because if the national rule falls within the scope of the Directive, the rules in the Directive will apply. If the rules fall outside the scope of the Directive, the provisions of the Treaty and the case law discussed above will apply.[391] This leads to the unfortunate result that a Directive intended to provide some clarity for SMEs has actually introduced an increasingly complex and fragmented regime.

2.1 The Meaning of Services

According to Article 2(1), the Directive applies to 'services supplied by providers established in a Member State'. Services are defined in accordance with the GATS definition:[392] '"Service" means any self-employed economic activity, normally

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385 R. Mendick, 'Thousands to get NHS ops abroad', *Independent on Sunday*, 28 Jul. 2002.

386 N. Hawkes and C. Bremner, 'English patients take French cure', *The Times*, 19 Jan. 2002, which also notes the patients were promised 'explanations in English, British newspapers, "and a decent cup of tea" '; J. Mulkerrins, 'Britain's best new hospital (it's in France)', *Sunday Times*, 20 Jan. 2002. See also J. Hope, 'More patients could go abroad on the NHS', *Daily Mail*, 14 Aug. 2002.

387 www.doh.gov.uk/international/eu.htm, 3.

388 Commission Communication, 'Follow-up to the high level reflection process on patient mobility and healthcare developments in the European Union' (COM(2004)301 final). See also Commission Communication, 'Modernising social protection for the development of high-quality, accessible and sustainable health are and long term care: support for the national strategies using the "open method of coordination" ' (COM(2004)304 final) and the Commission's consultation paper regarding 'Community action on health services', 26 Sept. 2006.

389 [2006] OJ L376/36. The following draws on the more extensive discussion in C.Barnard, 'Unravelling the Services Directive' (2008) 45 *CMLRev.* 323.

390 COM(2004) 2 final/3.

391 See also Article 3(3) of the Directive which provides that 'Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.' It therefore seems that in respect of those sectors which are excluded from the scope of the Directive, the full gamut of the Court's case law on Articles 49 and 49 will continue to apply, including the wide range of public interest requirements developed by the Court.

392 Although the Directive itself does not cover external aspects nor does it concern negotiations within international organisations on trade in services,

provided for remuneration, as referred to in Article [57] of the Treaty'.[393] The list of services found in Article 57 has been updated by the Directive to include:

- business services such as management consultancy, certification and testing; facilities management, including office maintenance; advertising; recruitment services; and the services of commercial agents;
- services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; distributive trades; the organisation of trade fairs; car rental; and travel agencies;
- consumer services such as those in the field of tourism, including tour guides; leisure services, sports centres and amusement parks; and, to the extent that they are not excluded from the scope of application of the Directive, household support services, such as help for the elderly.[394]

The striking feature about this list is that the services identified are relatively uncontroversial and are often provided by small operators.

2.2 Requirements, Restrictions and Barriers

Assuming the activity is a service within the meaning of the Directive then the Directive can be used to challenge 'requirements which affect access to or the exercise of a service activity'.[395] The word 'requirement' is broadly construed by Article 4(7) of the Directive:

> any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy;[396]

While the broad definition of 'requirement' is intended to give the Services Directive the widest possible reach, for the over-zealous, it will catch rules never intended to be covered by Union law. As we saw in chapter 5, the breadth of the *Dassonville* formula[397] eventually led to the Court's ruling in *Keck*[398] (certain non-discriminatory selling arrangements did not breach Article 34). In the field of persons, the use of the restrictions/obstacles jurisprudence has generated similar anxieties[399] and the Court has experimented with different formulae to try to identify the outer limits of the Treaty provisions in these areas, including specifying that rules, such as those in *Graf*,[400] whose effect on free movement is too remote or insubstantial do not breach the Treaty. Some have suggested that it is necessary to carve a *Keck*-style certain selling arrangements (CSAs) exception out of Article 56. However, in *Omega*[401] Advocate General Stix-Hackl counselled against any such development, arguing that the transposition of the distinction made in *Keck* to freedom to provide services is unpersuasive because, 'where there are sufficient international implications, a rule on arrangements for the provision of any service—irrespective of location—must constitute a restriction of relevance to [Union] law simply because of the incorporeal nature of services, without any distinction at all being permissible in this respect between rules relating to arrangements for the provision of services and rules that relate directly to the services themselves.' [402]

The 'requirement' formula used in the Services Directive also generated concerns in the European Parliament:

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in particular in the framework of GATS (16th Recital).

393 Art. 4(1).

394 33rd Recital. The Commission's Handbook also provides a non-exhaustive list: the activities of most of the regulated professions (such as legal and fiscal advisers, architects, engineers, accountants, surveyors), craftsmen, business-related services (such as office maintenance, management consultancy, the organisation of events, recovery of debts, advertising and recruitment services), distributive trades (including retail and wholesale of goods and services), services in the field of tourism (such as services of travel agencies), leisure services (such as services provided by sports centres and amusement parks), construction services, services in the area of installation and maintenance of equipment, information services (such as web portals, news agency activities, publishing, computer programming activities), accommodation and food services (such as hotels, restaurants, catering services), services in the area of training and education, rental (including car rental) and leasing services, real estate services, certification and testing services, and household support services (such as cleaning services, private nannies or gardening services).

395 9th Recital.

396 However, rules laid down in collective agreements negotiated by the social partners 'shall not as such be seen as requirements within the meaning of this Directive'.

397 Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

398 Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paras. 16 and 17.

399 See eg AG Geelhoed in Case C-374/04 *ACT Group Litigation* [2006] ECR I-000, AG Tizzano in Case C-442/02 *Caixa-Bank* [2004] ECR I-8961.

400 Case C–190/98 *Graf* v. *Filzmozer Maschinenbau GmbH* [2000] ECR I–493.

401 Case C–36/02 *Omega* [2004] ECR I–9609, para. 36. See also Case C-356/08 *Commission* v. *Austria* [2009] ECR I-000 where the Court avoided the Austrian government's arguments that the requirement to open a bank account with a bank in the region concerned a method of use to which *Keck* applied (although see now Case C-110/05 *Commission* v. *Italy (trailers)* [2009] ECR I-000 discussed in Chap. 6.

402 Case C–287/03 *Commission* v. *Belgium (loyalty bonus)* [2005] ECR I–3761 lends support to the Advocate General's view that the concept of CSA should not be applied to services. Belgian law prevented vendors from making a 'linked offer', through its customer loyalty programme, of products and services dissimilar to those principally sold. While the Court dismissed the Article 226 application on the grounds that the Commission had failed to establish a breach of Article 49, at no stage did the Court suggest that Article 49 would not apply because the national rule affected selling arrangements.

could British service providers argue that the requirement to drive on the right in all Continental European countries restrict their ability to provide services there? The 9th Recital was included in the Preamble to try to put a stop to such arguments. The Recital distinguishes between two situations. The first sentence provides that where requirements affect the access to, or the exercise of,[403] a service activity, the Directive will apply. This also suggests that the Directive supports a market access, rather than a discrimination reading of the Directive.

> However, the second sentence of the 9th Recital says that the Directive does not apply:
> to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.

Thus, certain non-discriminatory 'rules of the game',[404] using the language of *Deliège,* are presumptively lawful. This view is reinforced by the unusual phrase 'in the same way as by individuals acting in their private capacity'. So, if the rules apply to all individuals, irrespective of their nationality or the status in which they are acting, they are lawful. However, if the service provider can show that the rules do 'specifically regulate or specifically affect the service activity' then they may be unlawful and need to be justified. Therefore, because the Belgian requirement of driving on the right is non-discriminatory and applies to all Belgians including those acting in their private capacity, it is presumptively compatible with the Directive.

However, as the Court itself has discovered with *Keck*, trying to define a rule that weeds out the unmeritorious claims while leaving the door open to genuine claims is not easy, and the second sentence of the 9th Recital suffers from similar shortcomings as the 'certain selling arrangement' formula in *Keck.*[405] The reference in the Recital to planning is instructive. Most people would agree that green belt legislation or listed building legislation should, in principle, fall outside the scope of Union law. The second sentence of the 9th Recital is intended to achieve this. On the other hand, planning restrictions can interfere with an individual's freedom of establishment or freedom to provide services, especially when the planning rules are more akin to an authorisation requirement (eg the requirement to get planning permission prior to building a new office).[406] The Commission's handbook seeks to address this difficulty by saying that the mere fact that rules are labelled in a specific way, for example as town planning rules, or that requirements are formulated in a general way, i.e. are not specifically addressed to service providers, is not sufficient to determine that they are outside of the scope of the Services Directive.[407]

2.3 Exclusions, Limitations and Derogations

(a) Exclusions and limitations

We have already seen that the Directive does not cover non-economic activity, matters which are not considered as services (such as goods) and non-discriminatory rules of the game. There are also more specific exclusions, limitations and derogations. The principal exclusions can be found in Articles 2(2) and 2(3). These provisions list those service sectors to which the Directive 'does not apply'. The list is long and broad,[408] including services of general interest,[409] financial services,[410] electronic communication services and networks,[411] temporary work agencies,[412] and private security services.[413] Most importantly, from the perspective of those following the case law of the Court of Justice, healthcare services,[414] audiovisual services[415] and gambling activities,[416] including lotteries, gambling in casinos and betting transactions,[417] are excluded from the scope of the Directive. In addition, Article 2(3) adds that 'This Directive shall not

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[403] Case 197/84 *Steinhauser* v. *City of Biarritz* [1985] ECR 1819 had already established that Article 49 covered both access to and exercise of the freedom of establishment.
[404] BERR refers to these as 'rules of universal application': Consultation Paper 2007, 93.
[405] S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *CMLRev.* 885.
[406] See the 47th and 59th recital.
[407] OPEC, 2007 also available at http://ec.europa.eu/internal_market/services/services-dir/index_en.htm, 17.
[408] Cf the Commission's original proposal which listed only three excluded services (financial services, electronic communications and transport).
[409] Art. 2(2)(a).
[410] Art. 2(2)(b).
[411] Art. 2(2)(c). However, these services are only excluded with respect to matters covered by the five directives included in the so-called "telecoms package". As regards matters which are not covered by these five Directives, such as "points of single contact" or electronic procedures, the Services Directive will still apply.
[412] Art. 2(2)(e).
[413] Art. 2(2)(k).
[414] Art. 2(2)(f). See the European Parliament's report on the impact and consequences of the exclusion of health services from the Directive on services in the internal market (2006/2275(INI)), A6-0173/2007.
[415] Art. 2(2)(g). See also the 24th Recital of the Preamble with the additional reference to state aids. The Handbook (p.14) says that other services linked to audiovisual services or to radio broadcasting, such as advertising services or the sale of popcorn at cinemas, is not covered.
[416] Art. 2(2)(h). See also 25th Recital of the Preamble.
[417] According to the Handbook (p.14) this includes numeric games such as lotteries, scratch cards, gambling services offered in casinos or licensed premises, betting services, bingo services and gambling services operated by and for the benefit of charities or non-profit-making organisations. By

apply to the field of taxation'.

Articles 1(2)-(7) of the Directive spell out a further group of 'limitations'. Of perhaps most interest are Articles 1(6) and (7). Introduced to appease the trade union movement which had expressed grave concern over the implications of the Services Directive, concerns embodied in the figure of the Polish plumber seen as threatening Northern European jobs, Article 1(6) makes clear that the Directive *does not affect* labour law and social security legislation of the Member States.[418] This observation was particularly important in the light of the disputes in *Viking*[419] and *Laval*[420] then progressing through the courts. These cases highlighted the fact that, absent any exclusion for labour law, national labour laws risked being challenged under the Services Directive and that the posted workers provisions in the original (2004) draft services directive were inadequate to address these concerns. Moreover, the Posted Workers Directive had nothing to say about the right to take collective action - at issue in both *Viking* and *Laval* - to protect the workers' interests. An attempt to address this point can be found in Article 1(7) of the Directive which adds that:

> This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by [Union] law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect [Union] law.[421]

Originally modelled on the fundamental rights clause in so-called Monti Regulation 2679/98,[422] Article 1(7) indicates that a right to take industrial action is only a legitimate exception to the freedom to provide services insofar as this is consistent with Union law.[423] Therefore industrial action which the Court deems inconsistent with Union law - such as the situation identified in *Viking* where strike action was taken even though no jobs were 'jeopardised or under serious threat'[424] - will be covered by the Services Directive (and Article 56[425]).[426]

(b) Other derogations

There are other derogations which apply to specific parts of the Directive, most importantly Article 17, entitled 'additional derogations', and Article 18, 'case-by-case derogations', both of which derogate from Chapter IV on the free movement of services. We shall consider these later. In addition, some of the requirements in Chapter III on establishment are subject to the full range of public interest requirements developed by the Court of Justice ('broad justifications'), while some of the requirements in Chapter IV are subject to the express derogations provided in the Treaty plus environmental protection ('narrow justifications). These are considered further below.

3. FREEDOM TO PROVIDE SERVICES

Following its radical overhaul by the McCreevy draft, Chapter IV on free movement of services, especially section 1, contains some of the most opaque provisions of the Directive. This problem is exacerbated by the awkward mismatch between the original draft (country of origin principle + derogations) and the final version (no country of origin principle + derogations), and between the Directive and the case law under the Treaty. We start by considering the most controversial provision of the Directive, Article 16.

3.1 Article 16(1): Freedom to Provide Services v. the Country of Origin Principle

The first and second paragraphs of Article 16(1) contain the general statements that:

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

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contrast, games of skill, gaming machines that do not give prizes or that give prizes only in the form of free games and promotional games whose exclusive purpose is to encourage the sale of goods or services are not covered by the exclusion and thus benefit from the Services Directive. Furthermore, other services provided in casinos, for example the sale of food and drinks, are also not covered by the exclusion and have to be covered by implementing measures.

418 Emphasis added. In the absence of a Union definition of labour law, the Directive tries to provide some guidance. The protection of discrimination law is mentioned only in the Preamble: 11th Recital. Further details as to what constitutes terms and conditions of employment can be found in the 3th and, more specifically, the 14th Recital. The 14th Recital explicitly identifies 'the right to strike and to take industrial action in accordance with national law and practices which respect [Union] law'.

419 Case C-438/05 *International Transport Workers' Federation* v. *Viking Line ABP* [2007] ECR I-000.

420 Case C-341/05 *Laval* [2007] ECR I-987.

421 See also the 15th Recital which expressly refers to the Charter and the accompanying explanations.

422 OJ [1998] L337/8 considered in Chap. 6.

423 See also the similar drafting in Art. 28 of the Charter of Fundamental Rights 2000.

424 Para. 84.

425 See *Viking*, para. 44 the right to strike may be 'subject to certain restrictions. As is reaffirmed by Article 28 of the Charter … those rights are to be protected in accordance with Union law and national law.'

426 T, Novitz, 'EU labour Rights as Human Rights' (2006-7) 9 CYELS 357, 374.

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

The third paragraph of Article 16(1) adds that 'Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements' which do not satisfy the principle of non-discrimination, a narrow range of justifications and proportionality.

The three parts of Article 16(1), based essentially on the Treaty language of freedom to provide services, replaced the controversial country of origin principle (CoOP) found in the original Article 16(1) of the Bolkestein draft. The original provision said:

> Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.

It continued that Article 16(1) covered national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising contracts and the provider's liability. The original Article 16(2) then made clear that the Member State of origin was to be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State. Article 16 was then subject to express derogations.

For the Commission, the use of the country of origin principle in the 2004 version of the Services Directive was a logical extension of, for example, the Television Without Frontiers (TWF) Directive 89/552, now Audiovisual Media Services (AVMS) Directive (considered above in Case Study 11.2)[427] and the E-commerce Directive 2000/31[428] both of which had the country of origin principle at their core.[429] However, the Services Directive was considerably more ambitious than its sectoral forebears, since its horizontal approach meant that it covered all the sectors in its scope[430] not just specific sectors. Further, while the TWF/AVMS Directive 89/322 contained a mix of deregulation (country of origin principle) and re-regulation through minimum harmonisation (eg rules on protection of minors, prohibition of racism), the Bolkestein proposal concerned deregulation (country of origin principle) and only very limited re-regulation. Given the broad and unidentified nature of services covered, more extensive re-regulation was not possible.[431]

For this reason, among others, a large number of states lined up against the CoOP principle and the original Article 16 was doomed to fail in its pure CoOP form. The European Parliament's intervention secured the removal of the CoOP wording and replaced it with something apparently more anodyne now found in the current Article 16(1). But how great, in fact, is the difference between the CoOP and the freedom to provide services? Under the country of origin principle, the principal regulator would have been the home state, reinforced by the presumption that the host state could not impose any additional requirements unless there were very good reasons (listed in the derogations in the original Articles 17-19) for this. On one view, the present Article 16 comes very close to a country of origin principle: while the original version of Article 16 defined the law which could be applied (the home state law), the current version defines the law that cannot be applied (the host state law).[432] Another reading is that the current approach appears to reverse the country of origin principle: [433] it accepts that the host state can impose its own restrictions on the service provider, where there are good reasons for so doing, account being taken of the protection already provided in the home state.[434] This reading broadly reflects the case law of the Court where the CoOP is not as firmly embedded in respect of services as it is in goods. As we have seen,[435] the CoOP does exist, but not in terms of establishing the breach (as is the case for goods), but in terms of justifying the breach where the Court requires the host state to take into account requirements already imposed by the home state.[436]

In practice, the difference between the original and current version of Article 16 may well be one of emphasis rather than substance: the country of origin principle raises a strong presumption of illegality of the host state measure; the current approach raises a weaker presumption of illegality. This may well mean that service providers will continue having to investigate the rules (justified under Article 16(1), third sentence and Article 16(3)) in each state in which they provide services although their task will be made easier by the Point of Single Contact to provide recipients, in their state of

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427 OJ [1989] L298/23.

428 OJ [2000] L178/1

429 For a discussion on the three generations of the CoOP in the legislative practice of the EC: Hatzopoulos, 'Legal Aspects in Establishing the Internal Market for Services' College of Europe Research Paper in Law 6/2007, 27-29.

430 See eg COM(2004)2, 8.

431 See De Witte, above n.17.

432 This reading is supported by looking at the three sentences of Article 16(1) together.

433 However, despite the change of wording in Article 16(1), elements of the country of origin principle remain elsewhere in the Directive, provisions which came almost unamended from the Bolkestein draft. See eg Article 29 requires the authorities in the state of *establishment* to provide information to the host state about the legitimacy of the services provider. If the host state has reason to think that the service provider does not comply with the laws of the home state, the state of *establishment* must carry out checks, inspections or investigations.

434 This reading is supported by looking at Article 16(1), third sentence.

435 See above n.X.

436 See e.g. Case C–76/90 *Säger* [1991] ECR I–4221, para. 15 'the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, *in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established*.' (emphasis added).

residence, clear, easily accessible information, including by electronic means, about requirements applicable to service activities.[437]

3.2 Article 16(2): Particularly Suspect Requirements

In its original version, Article 16 contained a list of *prohibited* requirements which could not be saved by any general justifications but to which the express derogations (see below) in Articles 17-19 applied. This approach was changed in the final version of the Directive. Article 16(2) identifies seven requirements (including an obligation on the provider to have an establishment in the territory of the host state;[438] or to obtain an authorisation from the host state's competent authorities, including an entry in a register;[439] a ban on the provider setting up a certain form or type of infrastructure, including an office or chambers[440]) which can be saved not only by the express derogations in Article 17 and the case-by-case derogations in Article 18,[441] but also by a narrow list of public interest requirements provided for by the Directive. Moreover, this narrow list of public interest requirements can be used to justify not only the seven requirements listed in Article 16(2) but also, according to Article 16(1), 3rd paragraph, 'any [other] requirements' which affect access to or exercise of a service activity in another Member State', such as rule requiring the use of a particular language in the host state, which also need to be justified by the narrow justifications. In practice, it is likely that states will find the seven requirements hard to justify. Therefore, we might term these requirements 'particularly suspect'.

3.3 (Narrow) Justifications

These particularly suspect requirements, along with 'any [other] requirements', can be saved by the narrow justifications listed in Article 16(1), third paragraph and largely repeated in Article 16(3).[442] According to Article 16(1), third paragraph, Member States shall not, 'make access to or exercise of a service activity in their territory subject to compliance with any requirements' which do not respect the principles of: (a) non-discrimination; (b) necessity and (c) proportionality.

Article 16(1) explains 'non-discrimination', in the following terms: 'the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established'. This is fairly standard fare, although no reference is made to discrimination on the grounds of establishment which is a well-established prohibited ground of discrimination in the Court's case law on services.[443]

The language of 'necessity' is misleading.[444] It does not in fact refer to the first limb of a proportionality test but rather to justifications: 'the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment'. In fact, even the language of justifications is misleading because the list contained in heading (b) is actually an expanded list of express derogations found in the EU Treaty; environment has been added.[445] No reference is made to the judicially developed overriding reasons relating to the public interest (ORRPI) used in Chapter III on establishment. It must therefore be assumed that the drafters of the Directive deliberately decided not to apply the full gamut of 'overriding reasons in the public interest' to the seven requirements listed in Article 16(2) of the Directive and 'any [other] requirements'.[446] In this way the Directive reflects the long-established idea that the host state has more right to intervene in respect of establishment (hence the broad justifications) than it does in respect of services, where the principal regulator is the home state (hence the narrow justifications).

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[437] Art. 21.

[438] Case 33/74 *J.H.M. van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case C-393/05 *Commission* v *Austria* [2007] ECR I-000.

[439] Case C-390/99 *Canal Satélite* [2003] ECR I-000

[440] Case C–55/94 *Gebhard* [1995] ECR I–4165.

[441] This leads to the result that the physical safety of consumers can be protected under Article 18 but the economic interests of consumers cannot be protected under Article 16(1) or 16(3).

[442] The McCreevy draft did not dare address this overlap: the version of Article 16 that had got through the European Parliament was treated as almost sacred: J.Flower, 'Negotiating the Services Directive' (2006-7) 9 CYELS 217, 229.

[443] Case 33/74 *J.H.M. van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

[444] See also Art. 15(3)(b). See above n.X.

[445] The Handbook explains (p.52) 'Member States have the possibility to ensure that service providers comply with their own national, regional or local rules which protect the environment. Taking into account specific characteristics of the place where the service is provided, Member States may prevent a service from impacting negatively on the environment at that particular place. Relevant rules might concern protection against noise pollution (maximum noise levels for the use of certain machines), rules on the use of hazardous substances with a view to preventing damage to the environment, rules on disposal of waste produced in the course of a service activity, etc. In all these cases it has to be carefully examined whether application of the host Member State's requirements is necessary and proportionate. For example, a provider may already be subject to environmental auditing in his Member State of establishment with regard to the environmental soundness of his operation and working methods and requirements in the host Member State must not duplicate that.

[446] See also Handbook, 50 and BERR Consultation Paper 2007, 68 'No other justifications will be sufficient'.

Heading (c), proportionality, is more straightforward. Here the Directive adopts the traditional two pronged approach - the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective). Integral to the proportionality review in the case law is a requirement on the host state to take account of the levels of protection provided to that interest in the home state.[447] This is not referred to in Article 16(1) but is implicit in the provisions on mutual assistance in Chapter VI.

3.4 Derogations

In the original version of the Directive, the country of origin principle was flanked by general derogations, transitional derogations and case-by-case derogations. This basic structure has remained largely intact in the final version of the Directive, despite the removal of the country of origin principle, but it is now supplemented by the justifications considered above. The derogations are now divided into two: the 'additional derogations' found in Article 17 and the case-by-case derogations found in Article 18.

The 'additional derogations' in Article 17 concern matters such as services of general economic interest in the utility sector[448] and judicial recovery of debts[449] as well as matters covered by specific Union measures, including the Posted Workers Directive 96/71,[450] the Lawyers' Directive 77/249,[451] Title II of the Professional Qualifications Directive 2005/36,[452] and the Citizens' Rights Directive 2004/38.[453]

The 'case-by-case' derogations found in Article 18 apply 'in exceptional circumstances only'.[454] Article 18(1) permits Member States to 'take measures relating to the safety of services' in respect of a particular provider established in another Member State. Article 18(2) adds two further caveats. First, a derogation can be made only after the mutual assistance procedure laid down in Article 35 has been complied with. The second caveat is that before the host state can take measures relating to the safety of a particular service, it must ensure firstly, that there has been no harmonisation in the field; secondly, that the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the home state; thirdly, the home state has not taken any measures or has taken measures which are insufficient as compared with those referred to in Article 35(2); and fourthly, the measures are proportionate.[455]

Given this elaborate procedure, it is hard to imagine a Member State ever making use of Article 18 when they can invoke the (narrow) justifications in Article 16(1) without having to go through any of this complex and time-consuming procedure first. Where the Articles 17 and 18 derogations apply, the rules will still be subject to the application of Article 56 TFEU and the broad justifications developed in the case law.

3.5 The Reporting Provisions

Buried in Article 45(5), and not in the Chapter on Services, are the reporting provisions: the Member States must, by 28 December 2009, present a report to the Commission on the national requirements whose application can be justified, giving reasons.[456] By implication, all Member States will first have had to screen their national legislation. After the 2009 deadline, Member States must inform the Commission of any changes in their requirements or any new requirements, together with the reasons for them (presumably based on Articles 16(1) and (3), although this is not stated). The Commission must inform the other Member States but the Member States remain free to adopt the provisions in question. The Commission is then to provide annual 'analyses and orientations on the application of these provisions in the context of this Directive.'

These screening provisions were introduced in the 2006 draft of the Directive, possibly to offset some of the consequences of removing the CoOP. At first blush these provisions appear to mirror the procedure for evaluating suspect requirements under Article 15 on establishment. There are, however, some significant differences. In particular, the services provisions are not subject to the full mutual evaluation procedure (despite the fact that the Commission says that the two procedures are in fact similar[457]), nor are they subject to the same quasi-standstill provision found in Article 15(6) of the Directive, nor are they subject to the equivalent of the procedure in the Technical Standards Directive 98/34.

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447 Case C–76/90 *Säger* [1991] ECR I–4221, para. 15 cited above at n.X.
448 The Directive gives a non-exhaustive list of examples which is narrowed down by the 70th recital in the Preamble. See also the 84th to 90th Recitals.
449 See also 85th Recital.
450 This is probably unnecessary given the exclusion in Article 3(1)(a). See also the 86th and 87th Recitals.
451 OJ [1977] L78/17.
452 OJ [2005] L 255/22. The Services Dir. will continue to apply to matters not linked to professional qualifications such as commercial communications, multi-disciplinary partnerships, tariffs etc: Handbook, 56.
453 OJ [2004] L158/77
454 See also 91st Recital.
455 Finally, Article 18(3) makes clear that the case-by-case derogations under Article 18 do not affect other Union instruments in which the freedom to provide services is guaranteed and where case-by-case derogations are provided, notably the E-commerce Directive.
456 This is possibly a narrower reporting obligation that that under eg Art 9(2).
457 Handbook, 79.

4. Rights of Recipients of Services

4.1 The Rights

Recipients of services also enjoy rights under the Directive. Article 19 says that *home* states cannot impose requirements on recipients which restrict their use of a service supplied by a provider established in the host state. It then offers two examples of such restrictions:

- an obligation on the recipient to obtain authorisation from, or to make a declaration to, the competent authorities of the home state.[458] However, non-discriminatory authorisation schemes are permitted.[459]
- discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.[460]

The striking feature of these examples is that they are firmly rooted in the discrimination model while the case law under Article 56 has moved beyond that.[461]

Article 20 is directed at the *host* state. Article 20(1) contains the general prohibition against discrimination (not restrictions/obstacles): 'Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence'. This sentiment is amplified in Article 20(2) which says that 'Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient'. However, the obligations in Article 20(2) go beyond the state; all providers are under an obligation not to discriminate. This is a far-reaching provision which shows how the regulation of the provision of services can penetrate deep into the private sphere.

Article 20(2) contains the intriguing caveat that the principle of non-discrimination does not preclude 'the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.' By way of example, the British Department for Industry (BIS) says that providers can impose different prices for postage and packaging depending on the location of the client.[462] It is not clear whether this means that all discrimination, direct or indirect, can be objectively justified, contrary to well established case law, or whether it means that in order to establish discrimination, the two situations have to be comparable and if there are objective differences between the situation of the service recipient and the migrant then no prima facie case of discrimination can be established.

Finally, Article 21 is intended to encourage potential recipients of a service to use services provided in other Member States by imposing requirements on the *home* state to provide information about consumer protection, the availability of dispute settlement in the providing state and contact details of consumer bodies which can provide practical assistance.[463]

5. Quality of Services

It might be thought that a Chapter on the quality of services would be the core of any Directive on services and that it would contain detailed rules on how quality might be achieved. This is not, in fact, the case with the Services Directive, not least because this would not be feasible in a horizontal Directive spanning over 80 sectors. Instead, much of Chapter V is actually devoted to the requirement of providing clear, timely[464] information with a view to creating transparency on the transnational services market and building confidence.[465] For example, Article 22(1) lists 'indispensable' information which must be provided by the provider,[466] including information about the provider (eg name, legal status, form, contact details) and about the service (eg the price of the service, and insurance guarantees).[467]

Further, albeit voluntary, confidence building measures can be found in Article 23. Article 23(1) provides that Member States 'may' ensure[468] that providers established in their territory, whose services present a direct and particular

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458 This complements the prohibition on the service provider from having to obtain authorisation from the host state under Art. 16(2)(b).

459 92nd Recital.

460 See Case C–55/98 *Skatteministeriet* v. *Bent Vestergaard* [1999] ECR I–7641 considered above.

461 See eg Case C–158/96 *Kohll* [1998] ECR I–1931, para. 33. See also Case C–381/93 *Commission* v. *France (maritime services)* [1994] ECR I–5154, para. 17; Case C–136/00 *Rolf Dieter Danner* [2002] ECR I–8147, para. 29; Case C–118/96 *Safir* [1998] ECR I–1897, para. 23.

462 BERR Consultation Paper 2007, 61. At p.62 BERR offers some further examples of objective criteria: different market conditions such as higher or lower demand influenced by seasonality, different holiday periods in Member States and pricing by different competitors; extra risks linked to rules differing from those of the Member State of establishment; and lack of required intellectual property rights in a particular territory.

463 Art. 21(2).

464 The information must be provided before the conclusion of the contract and, where there is no written contract before the service is carried out (Art. 22(4)).

465 See the equivalent provisions in Art. 5 of the E-commerce Dir. 2000/31 discussed by Lopez-Tarruella, 'A European Community Regulatory Framework for Electronic Commerce' (2001) 38 *CMLRev*. 1337,

466 Art. 22(2) explains how this can be done. See also the 96th Recital.

467 See also the overlap in Art.27(1).

468 In the 2004 version of the Directive, the obligation was mandatory. Note the more mandatory language in the 98th and 99th Recitals but the important caveat in the 99th Recital: 'there should be no obligation for insurance companies to provide insurance cover'.

risk to the health and safety of the recipient/third party/financial security of the recipient,[469] subscribe to professional liability insurance appropriate to the nature and the extent of the risk, or provide a guarantee or similar.[470]

> Only in Article 26 does the Chapter turn to the real question of quality of services and this is on a non-mandatory basis: 'Member States shall, in cooperation with the Commission, take accompanying measures to encourage providers to take action on a *voluntary basis* in order to ensure the quality of service provision'[471] in particular through certification or assessment of their activities by independent or accredited bodies; and drawing up their own quality charter or participation in quality charters or labels (eg the star classification system for hotels[472]) by professional bodies at Union level. This is the softest of the provisions in Chapter V.

6. The Role of the State

One of the distinctive features of the Directive concerns the onerous obligations it places on the states. These are found primarily in Chapter II concerning administrative simplification (which require states to get their own houses in order) and Chapter VI on Administrative Cooperation (which require states to cooperate with each other).

6.1 Administrative Simplification

In respect of administrative simplification, Article 5(1) requires Member States to 'examine the procedures and formalities' applicable to the access to, and exercise of, a service activity (eg submission of documents and filing a declaration or registration to the relevant authorities) and simplify them where they are not sufficiently simple.[473] These few words, especially when read in conjunction with the specific screening obligations resulting from Chapters III and IV,[474] impose a dramatic and onerous requirement not only on the Member States but also on the professional bodies, organisations and associations[475] to verify that all national laws and other professional rules are compatible with the Directive. If carried out thoroughly, and in the spirit of cooperation required by Article 4(3) TEU (ex Article 10 EC), the Directive requires states and professional bodies to trawl through the many thousands of pages of their rule books to check whether the rules fall within the scope of the Directive[476] and, if they do, which rules may constitute barriers to the provision of services or the establishment of service providers.[477] States must then either remove these barriers or justify them where appropriate and/or simplify the procedures, and then report back to the Commission on what they have done.[478] This legislative spring clean fits well with the Better Regulation agenda advocated by the Barroso Commission.[479]

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[469] These terms are all defined in Article 23(5).

[470] This provision does not affect professional insurance or guarantee arrangements provided for in other Union instruments Art. 23(4)). The Commission has powers to flesh out the details of this provision, again under the comitology procedures: Art. 23(4). The regulatory procedure is to be used to establish a list of services which present a direct and particular risk to the health or safety of the recipient or a third person; the regulatory procedure with scrutiny is to be used for establishing common criteria for defining, for the purposes of the insurance or guarantees referred to in the Article, what is appropriate for the nature and extent of the risk.

[471] Emphasis added.

[472] According to Art. 26(3) information on the significance of certain labels and the criteria for applying labels and other quality marks relating to services must be easily accessed by providers and recipients. See also 102nd Recital with the additional powers to the Commission to issue a mandate for the drawing up of specific European standards under Dir. 98/34 (OJ [1998] L204/37).

[473] This reflects the Union's own expressed intention to simplify its legislation: the Institutional Agreement on Better Law Making (OJ [2003] C321/1), para. 35.

[474] We have already examined the specific screening duties on the Member States:

- to review their authorisation schemes under Article 9(1);
- identify and remove the prohibited requirements under Article 14;
- evaluate the requirements under Articles 15 and 16 and abolish those which do not satisfy the requirements of non-discrimination, justification and proportionality or modify them to bring them into line with the Directive;
- screen national requirements restricting service recipients under Article 19;
- screen national legislation under Article 24 to remove any bans on commercial communications by regulated professions and justify any restriction as to content and conditions of advertising or adapt them where necessary. They must also ensure that relevant rules of professional bodies and organisations are adapted where necessary;
- remove restrictions on multidisciplinary activities except in certain circumstances, justify those that remain and assess whether those that remain could be replaced by less restrictive means (Article 25).

[475] Art. 4(7) and Handbook, 77.

[476] The UK, an enthusiastic supporter of the Directive, has erred on the side of generosity when determining scope.

[477] Sees also the 45th Recital: Member States should be able, in particular, to take into account [the] necessity [for the procedures and formalities] , [their] number, possible duplication, costs, clarity an accessibility as well as the delay and practical difficulties to which they could give rise for the provider concerned'

[478] Arts. 39(1) and (5) considered above.

[479] See eg Commission Communication, 'Strategic Review of Better Regulation in the European Union': COM(2006)689; 'A Single Market Review': COM(2007)60, 6. More generally, see http://ec.europa.eu/governance/better_regulation/simplification_en.htm considered further in Ch. 16.

Of more practical importance to service providers[480] is the obligation on the Member States to establish a - real or virtual - point of single[481] contact (PSC)[482] through which it is possible to *complete*[483] all procedures and formalities (eg authorisations, declarations, notifications, the allocation of a company registration number[484]), whether imposed by central, regional or local level.[485] These PSCs must, according to Article 7, provide providers and recipients of services with certain key information[486] - such as the procedures and formalities to be completed, the contact details of the competent authorities (considered further below), the means of, and conditions for, assessing public registers and databases, the means of redress available in the event of a dispute - in a variety of Union languages.[487]

Chapter II does not 'draw any distinction between domestic and foreign providers'. [488] Therefore, its provisions apply in the same way to service providers established in another Member State, and to service providers established (or wishing to establish) in the territory of their own Member State.[489] The thinking behind this is pragmatic. In the same way that domestic providers will benefit from any programme of legislative/administrative simplification which will also assist out of state providers, so should domestic providers also benefit from administrative support through use of single points of contact.

7.2 Administrative Cooperation

Chapter VI on administrative cooperation returns to a theme familiar from free movement of goods: mutual assistance 'in order to ensure the supervision of providers and the services they provide'.[490] This is the corollary of the mutual recognition provisions found in the Directive. Article 5(3) is one of the relatively few examples of mutual recognition provisions. It requires host states to accept documents from other Member States which serve equivalent purposes.[491] Mutual recognition thus has the potential to avoid a proliferation of rules applicable to service providers[492] but it only works if there is confidence between states and a willingness on the part of the host state to engage pro-actively with the home state and to cooperate. Mutual assistance is therefore intended to foster trust in the legal framework and supervision[493] in other Member States.

To persuade states to cooperate, the Directive designates which state is responsible in particular situations.[494] This is supported by a 'clear, legally binding obligation for Member States to cooperate effectively'.[495] In this way the Services Directive builds on the (untested[496]) Regulation 2006/2004 on the cooperation between consumer protection authorities.[497]. In practical terms, Member States have to designate one or more liaison points[498] as well as facilitating both operational cooperation and the provision of information by providers established in the home state to the competent authorities in other Member States.[499]

The success of the Directive will, of course, depend on Member States' enthusiasm to comply with their screening obligations. The initial signs were not that encouraging. There was no fanfare on 28 December 2009, the date for the

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480 This is all the more important following the abolition of the CoOP.

481 Single from the perspective of the user (see COM(2004) 21). The state may choose to set up different PSCs for the various sectors and that these PSCs have a coordinating, but not a decision-making, role. In this situation, Member States are responsible for ensuring the communication between the bodies.

482 Or a 'single institutional interlocutor' as the Handbook puts it (p.23). Further detail about single points of contact can be found in the 48th and 49th Recitals. The 48th Recital considers the devolution question in some detail; the 49th Recital indicates that the PSCs can charge a proportionate amount for their services. See also Council Dec. 2009/767/EC ([2009] OJ L274/36).

483 Cf Art. 57 of Recognition of Professional Qualifications Directive 2005/36 (OJ [2005] L255.22) where the contact point merely provides information and assistance about having professional qualifications recognised. The PSC will allow individuals to have their qualifications actually recognised.

484 Handbook, 26.

485 This is largely repeated in Art. 8(1).

486 Further detail about the information to be provided can be found in the50th and 51st Recitals.

487 Art. 7(5).

488 Handbook, 20-21.

489 Ibid.

490 Art. 28(1). See also 108th Recital.

491 It also provides that they may not require that certain evidence be provided in its original form or as a certified copy with a certified translation save in cases provided in other Union instruments or where there is an overriding reason relating to the public interest, including public order (probably a mistranslation or public policy) or public security.

492 105th Recital. See also COM(2004)2, 4 which sees harmonisation of requirements, measures for promoting the quality of services and encouraging codes of conduct as aspects of trust building.

493 'Supervision' covers 'activities such as monitoring and fact finding, problem solving, enforcement and imposition of sanctions and subsequent follow-up activities': 106th Recital

494 Arts. 29-35 considered above n.X.

495 Ibid. See Weatherill's criticism of the use of legal instruments to achieve cooperation (above n.X, 16).

496 Weatherill, above n.X, 15.

497 OJ [2004] L364/1, referred to in 104th Recital. For discussion, see Micklitz, 'Transborder Law Enforcement – Does it Exist?' in Micklitz and Weatherill, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques*, (Oxford, Hart Publishing, 2007).

498 Art. 28(2).

499 Arts. 28(3)-(7).

implementation of the Directive, because, according to press reports, only 11 Member States have completed the steps necessary to put the directive onto their national statute books, still fewer have completed all the necessary operational steps in time, although business associations do report that many Member States have made substantial changes to national rules and procedures implementing the Directive.[500]

E. CONCLUSIONS

The case law discussed in this chapter helps to demonstrate the problems posed by the sheer variety, nature, and duration of services. Another facet of the problem concerns the broad matrix of interests at stake: the interests of the state of establishment and those of the state where the service is provided, both of which may (or may not) want to encourage the export and import of the service;[501] the interests of the potential providers and recipients of the service, especially when the recipient travels to receive a service (e.g., tourist and healthcare services), and the interests of those who might lose out when chasing scarce resources (e.g., those still on waiting lists).[502] Given such a spectrum of interests, national regulation of services tends to be more detailed and complex because, unlike goods, it is not just the service itself but also the service provider, its staff, and equipment which are being regulated. This has posed a tremendous challenge to the Court in balancing the Union interest in opening up the services market with the need to preserve the often legitimate interests of the state. Because one size does not fit all the standard model of non-discrimination on the grounds of nationality—possibly suitable in the early days of the Union when the provision of services was less complex—does not readily resolve issues raised by the different barriers to the provision and receipt of services. Increasingly the Court falls back on the *Säger* hindrance/obstacle model, finds most national measures to breach Article 56, and then focuses on the question of justification. As the healthcare cases demonstrate, the Court's analysis of justification can be extremely detailed, but in cases where this proves to be too politically difficult it accepts the justification raised by the Member State without question.

Both the Television Without Frontiers and healthcare case studies presented in this chapter demonstrate a further complexity: the interrelationship between Article 56 on services and Article 34 on goods. Although the evolution of the case law in these two fields has been very different—with the services case law increasingly using the *Säger* hindrance/obstacle model to address ever more complex barriers to the free movement of services, while the goods case law is still dominated by the discrimination model re-emphasized by *Keck*[503]—the problems the Court has had to address under each Treaty provision are becoming increasingly closely connected. For this reason it comes as no surprise that the discrimination model is beginning to creak in the field of goods and there are signs of spillover from the persons case law to that of goods. For example, in *Gourmet*[504] the judgment resonated with a mix of both the discrimination model and the *Säger/Gebhard* formula when the Court noted that 'a prohibition of all advertising directed at consumers . . . is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar',[505] while in other cases the language of obstacles/barriers/restrictions begins to creep in alongside more traditional notions of measures having equivalent effect.[506] Eventually the Court will have to decide what the Treaty provisions on free movement are intended to achieve. Are they merely about eliminating discrimination, in which case barriers to movement will continue to exist so long as they are not discriminatory, or, more radically, are they about removing any obstacle to free movement which (substantially) hinders both access to the market and the exercise of the freedom. While the latter approach does more damage to national regulatory autonomy, some of this can be preserved through judicious and flexible use of the public interest requirements.

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[500] 'Services Law needs robust application', *European Voice,* 7 Jan. 2010.

[501] See generally W. Roth, 'The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?' in M. Andenas and W. Roth (eds), *Services and Free Movement in EU Law* (Oxford, OUP, 2002).

[502] Concerns fuelled by media reporting. See, e.g., the report by J. Wheldon in the *Daily Express*, 16 Aug. 2003, 1: 'One hospital is being conned into spending £750,000 a year treating "health tourists" who head for Britain claiming to be on holiday or business but have the sole aim of getting free NHS care'.

[503] Joined Cases C–267 & 268/91 [1993] ECR I–6097, para. 16.

[504] Case C–405/98 [2001] ECR I–1795.

[505] Para. 21.

[506] See, e.g., Case C–416/00 *Tommaso Morellato* v. *Comune di Padova* [2003] ECR I–9343, at para. 31 where both *Keck* and *Alpine Investments* are cited, and para. 41 where the Court talks of 'obstacle' to free trade; Case C–455/01 *Commission* v. *Italy (marine equipment)* [2003] ECR I–12023, para. 24 which talks of the 'restriction' on intra-Union trade resulting from a declaration of approval; Case C–294/01 *Granarolo SpA* v. *Comune di Bologna* [2003] ECR I–13429, para. 51.

The Substantial Law of the EU: The Four Freedoms Law (3rd Edition)

Catherine Barnard

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CHAPTER 8: INTRODUCTION TO THE FREE MOVEMENT OF PERSONS [Brief Extract]

p.234 – "Therefore Article 45 has horizontal direct effect, at least where the fundamental principle of non-discrimination is breached,[507] but it is not clear whether this ruling will also apply to Articles 21(1) on citizenship, 49 on establishment and 56 on services. In Viking,[508] Advocate General Poiares Maduro argued that these provisions should have horizontal direct effect when the private action was capable of effectively restricting others from exercising their right to freedom of movement.[509] However, the Court did not go that far. It said that Article 49 could be 'relied on by a private undertaking against a trade union or an association of trade unions.'[510] It added that in exercising their autonomous power to negotiate pay and conditions of employment with workers, trade unions participate in the drawing up of agreements seeking to regulate paid work *collectively*'.[511] This tends to suggest the Court is equating the role of trade unions with that of professional regulatory bodies[512] and is not yet advocating full horizontal direct effect."

[507] Para. 36. See also Case C-94/07 *Raccanelli v Max-Planck Gesellschaft (MPG)* [2008] ECR I-5939, para. 46, where the Court held that 'the prohibition of discrimination based on nationality laid down by Article 45 applies equally to private-law associations such as MPG'.

[508] Case C-438/05 *Viking* [2007] ECR I-10779, para. 43.

[509] In Case C-58/08 *Vodaphone v Secretary of State for Business, Enterprise and Regulatory Reform*, Opinion of 1 Oct. 2009, paras. 21-4, he argued that the Court should apply its case law on the horizontal application of the free movement rules to its analysis of the internal market legal basis Art. 114 TFEU (ex Art. 95 EC).

[510] Case C-438/05 [2007] ECR I-10779, para. 61. See also Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767 in respect of Art. 56. These rulings create problems for trade unions which have now been placed in the same position as states, with the same responsibilities, albeit that unlike states, trade unions have one principal objective, protecting the interests of their members. Further, while trade unions are subject to the same obligations as states, it is difficult for them ever to be able to invoke any of the defences in Art. 52 TFEU (ex Art. 46 EC), such as public policy, which were drafted with states in mind.

[511] Para. 65 emphasis added. See A. Dashwood, '*Viking* and *Laval*: Issues of horizontal direct effect' (2007-8) 10 *CYELS* 525. For a more detailed discussion on the other ways in which the horizontal application of these Articles might be extended, see D. Wyatt, 'Horizontal effect of fundamental freedoms and the right to equality after *Viking* and *Mangold*, and the implications for Community competence' (2008) 4 *Croatian Yearbook of European Law and Policy* 1.

[512] This lack of clarity is exacerbated by the fact that the Court somewhat surprisingly cited the decision in Case C-265/95 *Commission v France (strawberries)* [1997] ECR I-6959, a case on omissions by the state, not acts. This case is considered further in Ch. 4.

VIKING AND *LAVAL:* ISSUES OF HORIZONTAL DIRECT EFFECT

Alan Dashwood

Cambridge Yearbook of European Legal Studies (Vol 10, 2007-2008) at pp.525-540

A. Introduction

It is more than 40 years since the Court of Justice first articulated in *Van Gend en Loos*[513] the principle that has come to be known as the direct effect of Community law, and which means, in broad terms, that rules derived from the EC Treaty, so long as they are capable of being applied using ordinary judicial techniques, form part of the law available to courts and tribunals in the Member States for resolving disputes before them. As the Court famously stated: "the Community constitutes a new legal order of international law...the subjects of which comprise not only the Member States but also their nationals...Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".[514]

Much academic ink has flowed in expounding the principle as it has been developed in later case law – including from the pen of the present writer, whose first article on direct effect was published in 1978,[515] and the most recent one in this Yearbook's 2006/2007 edition.[516] The issues that remain controversial even now have mainly to do with so-called "horizontal direct effect", the possibility for an individual to enforce a right arising under a Community provision against another individual on whom a correlative duty has been imposed.[517] Two issues of horizontal direct effect, that were debated in the *Viking* and *Laval* proceedings, are the subject of this paper.

First, there is the issue (rightly described by Catherine Barnard as "vexed")[518] of the horizontal direct effect of the EC Treaty provisions on freedom of movement. Do those provisions, drafted in a way that suggests they are designed to control the exercise of public power by Member State authorities, also require private parties to refrain from conduct liable to impede, directly or indirectly, the movement of goods, persons, services or capital within the internal market? The *Viking* and *Laval* cases concerned horizontal disputes between trade unions, which are evidently not part of the state apparatus, and companies operating in the private sector, respectively a ferry business and a construction business. In *Viking* the boycott of the *Rosella* organised by the International Transport Workers' Federation (ITF) and the strike action threatened by the Finnish Seamans' Union (FSU), with the aim of preventing the ferry operators from moving part of their business to Estonia, were alleged to constitute an impediment to the enjoyment by the latter of their right of establishment under Article 43 EC and their freedom to provide services under Article 49 EC. Similarly, in *Laval* it was alleged that the Latvian company's rights under Article 49 had been infringed by the collective action taken by trade unions in Sweden, which effectively prevented it from fulfilling a construction contract in that country. As will be seen, fresh light has been shed by these cases on the direct effect of the free movement provisions, though we are still some way from achieving full illumination.

Secondly, there is the issue (more than merely "vexed") of the horizontal direct effect of directives. The unhappy story of the efforts by the Court of Justice to reconcile the objectives of preserving the specific identity of directives as a form of indirect legislation distinct from regulations, and ensuring their effective and uniform application, has been recounted by the author elsewhere.[519] An interesting footnote has been added to that story by the analysis in Advocate Genereral Mengozzi's opinion in the *Laval* case of the issue raised by the defendants as to the alleged invocation by Laval of certain provisions contained in Directive 96/71 (the Posted Workers Directive).[520]

B. Case law on the horizontal direct effect of the free movement provisions

In the leading cases where the horizontal direct effect of the Treaty provisions on the free movement of persons has been in issue, the Court of Justice has taken as its starting point the observation that those provisions do not apply only to the

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513 Case 26/62, *Van Gend en Loos* v *Nederlandse Administratie der Belastungen* [1963] ECR 1, p. 12.

514 *Ibid.*

515 Dashwood, "The Principle of Direct Effect in European Community Law" (1978) *Journal of Common Market Studies* 229.

516 Dashwood, "From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?", 9 CYELS (2006-2007), 81.

517 Distinguished from "vertical direct effect", which enables a Community rule to be invoked by an individual against the authorities of a Member State, as was the case in *Van Gend en Loos.*

518 Above, p.

519 In the article referred to in n. 4, above.

520 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L18/1.

actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.[521] The Court has then gone on to state its main reason for taking this view:

> "The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3 (c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law".[522]

On some occasions, a second reason has been given: that, since working conditions in the various Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting the prohibitions in Articles 39, 43 and 49 to acts of a public authority would risk creating inequality in their application.[523] If the legality of a rule depended on its public or private provenance, restrictions on freedom of movement that were banned by the Treaty in one Member State might have to be tolerated in another.

This is far from being a general justification of the application of the free movement provisions in horizontal situations. The Court's reasoning is adapted to a special category of private parties, namely bodies not themselves governed by public law that collectively regulate different forms of economic activity. These will be referred to, for convenience, as "non-governmental regulatory bodies". All but one of the horizontal direct effect cases prior to *Viking* and *Laval* have been concerned with the impact of rules adopted by such bodies, notably the associations governing various sports at the national or international level.

The Court of Justice has repeatedly emphasised that "the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty".[524] Thus, sporting activity must have the character of gainful employment or a remunerated service, to come within the range of the free movement provisions. Rules governing participation in an event, which are imposed by a national association for non-economic reasons of purely sporting interest, related to the specific nature or context of the event, will escape those provisions. A familiar example, first cited in the Court's *Dona* judgment, is the exclusion of foreigners from membership of teams representing the country concerned in matches against teams from other countries.[525] A further example was provided by the *Deliege* case. Ms Deliege, a succesful exponent of judo, complained of the fact that the governing bodies of the sport in Belgium had failed to select her for various international competitions, in which athletes took part, not as members of national teams, but as individuals. The Court held that, while selection rules such as those in question would inevitably have the effect of limiting the number of participants in a tournament, such limitation was "inherent in the conduct of an international high-level sporting event".[526] The rules could not, therefore, in themselves constitute a restriction on the freedom to provide services prohibited by Article 49 EC.

In the earlier cases, the infringements of Articles 39 and 49 EC that were found by the Court involved direct discrimination on grounds of nationality. *Walrave* was about a provision in the rules of the Union Cycliste Internationale governing world championship events, which required pacemakers to be of the same nationality as the cyclists they were teamed with. The dispute in *Dona* v *Montero* related to rules of the Italian Football Federation applicable at the time, under which only players affiliated to the Association were allowed to take part in matches in a professional or semi-professional capacity, such affiliation being confined to Italian nationals. The same was true of one of the rules at issue in the famous *Bosman* case, namely the so-called "3+2 rule", which was introduced by the Union of European Football Associations (UEFA) in response to the Court's *Dona* judgment; this set a minimum number of foreign players that football clubs must be allowed to include in their first division teams, leaving it open to national associations to ban any more extensive

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[521] Case 36/74 *Walrave and Koch* [1974] ECR 1405, para. 17; Case 13/76 *Donà* [1976] ECR 1333, para. 17; Case C-415/93, *Bosman* [1995] ECRI-4921; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para. 47; Case C-309/99 *Wouters* [2002] ECR I-1577, para. 120.
[522] *Walrave*, para.18. See also *Bosman*, para. 83; *Deliege*, para. 47; *Wouters*, 120.
[523] *Walrave*, para. 19; *Bosman*, para. 84.
[524] *Walrave*, para. 4; *Dona*, para. 12; *Bosman*, para. 73; *Deliege*, para. 41.
[525] As Catherine Barnard has observed, the view that matches between national teams are not commercial is, to say the least, contentious – especially where football is concerned. See Barnard, *The Substantive Law of the EU – The Four Freedoms* (2nd ed.) (OUP, 2007) (hereinafter "Barnard, *Substantive Law*"), at p. The Court's point is, presumably, that the principle of selection is dictated purely by considerations of national pride in sporting prowess.
[526] *Deliege*, para. 64.

participation.[527]

Later cases have shown that rights of free movement may be infringed by rules that are not directly, or even indirectly, discriminatory, if they have the effect of restricting access to the employment market, to self-employment or to the market for services. Another of the disputed elements in *Bosman* was the "transfer system" operated by football associations, under which a transfer, training or development fee was normally payable by a club recruiting a professional player, to the club that had formerly employed him. The rules in question applied to players, irrespective of their nationality, when moving to a new club within the same Member State, no less than when moving between Member States. Though wholly non-discriminatory, they were found capable of impeding players' rights of free movement as workers under Article 39 EC.[528]

Wouters was about a regulation adopted by a professional association, the Netherlands Bar Council. This prohibited the formation of multi-disciplinary partnerships between members of the Bar and accountants. While being wholly non-discriminatory, the regulation evidently constituted a restriction on one or both of the right of establishment and freedom to provide services; though the Court refrained from making a definite ruling to this effect, considering that, at all events, the imposition of such a restriction was amply justified.

In all of these cases, the analogy with restrictions on the free movement of persons resulting from measures taken by national authorities is compelling. Action by a non-governmental regulatory body had the effect of restricting access to a section of the employment market or of the market for a certain category of services, or of preventing the establishment of a certain kind of business.

The single previous case on horizontal direct effect that does not fit this pattern is *Angonese.*[529] The dispute concerned one of the conditions set by a private sector bank, for entering a competition for a post it was advertising: applicants must be in possession of a particular certificate of bilingualism that was obtainable only in the north Italian province of Bolzano, where the bank was located. Although a resident of Bolzano, Mr Angonese did not possess the requisite certificate and his application for the post was accordingly rejected; however, it was found as a fact that he was perfectly bi-lingual, having studied languages in Vienna. The imposition of a condition that persons other than residents of Bolzano, the majority of whom were Italian nationals, would find difficult, if not impossible, to fulfil was held by the Court to constitute discrimination on grounds of nationality, and it therefore fell within the prohibition in Article 39 EC.

The *Angonese* judgment reproduces in full the reasoning that was developed in the *Walrave* and *Bosman* judgments to justify horizontal direct effect. This is distinctly odd, since the discrimination found by the Court could not be said to be the consequence of "rules...aimed at regulating in a collective manner gainful employment"; nor could the bank involved in the dispute be described as an "association" or "organisation". For the case to be considered on all fours with the other authorities, it would have been necessary, say, for a rule to have been established by the Bolzano Chamber of Commerce requiring all its members to treat the disputed certificate as the only acceptable proof of bilingualism.

An additional element in the Court's reasoning was based on two passages in the *Defrenne* judgment: from paragraph 31, "the fact that certain provisions of the of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down; and from paragraph 39, "since [Article 141] is mandatory in nature, the prohibition against discrimination between men and women applies not only to the action of pubic authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals". From those passages, the Court in *Angonese* drew the following inferences:

> "Such considerations must, *a fortiori*, be applicable to [Article 39 EC], which lays down a fundamental freedom and which constitutes a special application of the general prohibition of discrimination in [Article 12 EC]…In that respect, like [Article 141 EC],it is designed to ensure that there is no discrimination on the labour market.

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[527] *Viz.* at least three foreign players, and two other foreigners who had been playing in the country concerned for a period of at least five years. See the much fuller account of *Bosman* and of the other authorities considered here in Barnard, *Substantive Law*, ch. 11.

[528] See also Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-268; Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991.

[529] Case C-281/98, *Roman Angonese* v *Cassa di Risparmiodi Bolzano SpA* [2000] ECR I-4139.

> Consequently the prohibition of discrimination on grounds of nationality laid down in [Article39 EC] must be regarded s applying to private persons as well".[530]

The Court's *a fortiori* point is unconvincing. The equal pay principle in Article 141 EC calls for a change of behaviour on the part of employers. Both the cause and the cure of the "mischief" addressed by the Article – sex discrimination in pay – lie entirely within their hands. Nor does Article 141 allow any exceptions to the prohibition it imposes. In contrast, Article 39 EC, like the other provisions on the free movement of persons, is essentially concerned with the removal of obstacles resulting from the exercise of public powers. The various rights listed in Article 39 (3) are ones no individual employer could ever be in a position to impede. Similarly, it is hard to see how the conduct of an individual employer could be brought within any of the justifications in the proviso to paragraph (3) ("limitations justified on grounds of public policy public security or public health").[531] Making a case for the horizontal direct effect of Article 39 is, therefore, a lot harder than for Article 141, and it cannot be said that in *Angonese* the Court of Justice came near to doing so.

The judgment does, however, have the virtue of clearly delimiting the scope of the finding on horizontal direct effect. It was specifically the prohibition of discrimination on grounds of nationality in Article 39 that the Court said "must be regarded as applying also to private parties". *Angonese* is not an authority for the application of the free movement provisions in horizontal situations in general, but only where direct discrimination practised by a private sector employer impedes access to the labour market.

C. Horizontal direct effect of Article 43 and 49 EC in Viking and Laval

In *Viking* the second of the questions referred to the Court of Justice asked whether Article 43 EC had horizontal direct effect so as to confer rights on a private undertaking that could be relied upon against a trade union or an association of trade unions in respect of collective action taken by them.[532] In *Laval*, although not explicitly raised by the referring court, the issue of the horizontal direct effect of Article 49 EC had to be addressed by the Court of Justice and by Advocate General Mengozzi as a step in their analysis of the question whether the collective action that effectively prevented the Latvian construction company from providing services in Sweden amounted to an infringement of Article 49 EC.

Those were novel issues, which could be approached in one of two ways. One possible approach was to attempt to formulate a general theory of the horizontal direct effect of the free movement provisions in the Treaty, and to apply this to the case in point. The other possibility was to reason by analogy from the established line of authorities that have been discussed. The former approach was adopted by Advocate General Poiares Maduro in *Viking*, and the latter by the Court of Justice in both cases, and by Advocate General Mengozzi in *Laval.*

1. The opinion of Advocate General Poiares Maduro in Viking

The opinion of the learned Advocate General starts from the premise that the rules on free movement and the rules on competition fulfil a similar function: "[e]ssentially they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market".[533] The primary role in providing such protection against conduct by private undertakings falls to the competition rules, and against conduct by Member State authorities, to the free movement rules. However, it does not follow that the latter are incapable of having horizontal effect. That they should do so "would follow logically from the Treaty where it would be necessary in order to enable market participants throughout the Community to have equal opportunities to gain access to any part of the common market".[534] While acknowledging that there are conflicting views on the matter,[535] the Advocate General is of the opinion that it is "more realistic" to regard the free movement rules as capable of limiting not only the powers of Member States but also the autonomy of individuals.[536]

Mr Maduro finds support for his opinion in two cases where the free movement of goods was in question:

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[530] *Angonese*, paras. 35 and 36.

[531] In para. 86 of its *Bosman* judgment, the Court said: "There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature *of the rules in question*"(emphasis added). It seems clear that, in referring to "individuals", the Court had non-governmental regulatory bodies in mind.

[532] *Viking* judgment, para. 27.

[533] *Viking* opinion, para. 33.

[534] *Ibid.*, para. 35.

[535] *Ibid*, para. 37. See the literature cited in footnotes 33 and 34 of the opinion; also Quinn and MacGowan, "Could Article 30 Impose Obligations on Individuals?", (1987)12 ELRev. 163.

[536] *Ibid.*, para. 38.

Commission v *France*, which arose out of the violent protests by French farmers, blocking imports of fruit and vegetable from other Member States;[537] and the *Schmidberger* case where an environmental protest, tolerated by the Austrian authorities, led to the temporary closure of a motorway.[538] As Catherine Barnard points out,[539] this was a surprising choice of authorities. It is simply not true that "[b]oth cases rely fundamentally on the reasoning that private action can jeopardise the objectives of the provisions on freedom of movement".[540] In reality, the claim in each of the cases was based on *public inaction* – the alleged failure of national authorities to use the powers available to them in order to prevent freedom of movement from being interrupted. The Advocate General contends that there is no difference in substance between the "indirect horizontal direct effect" that may be given to a right, by way of an action against public authorities that have failed to prevent it from being interfered with, and allowing the right to be directly invoked against the individuals responsible for the interference, but this seems implausible. Can it seriously be suggested that a private action, alleging the infringement of obligations pursuant to Article 28 EC, would ever succeed against individual protesters, however violent or persistent? Even as regards the *organisers* of the collective action in these two instances, the analogy with the position of the sporting and professional bodies that feature in the classic authorities on horizontal direct effect would seem too remote.[541]

At all events, such elaborate argumentation is unnecessary. Nobody can deny, at this time of day, that there are certain horizontal situations in which the free movement provisions apply directly; the problem is to identify those situations and to explain why the provisions apply there and not in other cases. Advocate General Maduro makes the point that in many circumstances private actors are simply incapable of obstructing the functioning of the common market. For instance, where an individual shopkeeper refuses to deal in goods from other Member States, suppliers in those countries would be able to find alternative commercial outlets, and the trader concerned would run the risk of losing customers; thus the market can be left to "take care of" such minor discriminatory behaviour. In general, however, Mr Maduro acknowledges that no simple answer is available. He observes that the Court of Justice has "proceeded carefully" by recognising the direct horizontal application of the rules on freedom of movement in specific cases, and illustrates this cautious approach with a brief survey of the familiar authorities. The lesson drawn from those authorities is that "the provisions on freedom of movement apply to private action that, by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent".[542]

The Advocate General goes on to consider the delicate balance which, in his opinion, needs to be struck between the subjection of certain private actors to the Treaty provisions on freedom of movement, and the need to respect the private autonomy of those actors, as protected under domestic law.[543] With that in view, it may not be appropriate to hold individuals to the same strict standards as national authorities. Moreover, Member States may enjoy a margin of discretion in the steps that should be taken to prevent obstacles to free movement resulting from the conduct of private actors. The Treaty provisions do not always provide a specific solution for each case but merely set certain boundaries within which a conflict between two private parties may be resolved.

Finally, in one short paragraph, without any attempt to develop analogies with the existing case law, the actions of the FSU and the ITF are found to have been capable of restricting the exercise of the right of establishment of an undertaking like Viking.

In the respectful submission of the writer, the approach adopted by the learned Advocate General, in addressing the issue of horizontal direct effect by way of an argument from first principles, cannot be judged a success. The test evidently favoured by Mr Maduro for identifying private conduct to which the rules on free movement apply, seems deficient in two ways. In the first place, it is dependent on the vague notion of conduct having a "general effect" on the holders of rights of free movement, so as to restrict the exercise of their rights, through an obstacle that cannot "reasonably" be circumvented. Secondly, the test has to be applied with caution, paying due regard to the autonomy of the private actor concerned. It is hard to imagine that such a test would facilitate the task of parties or of national courts in the future, when faced with claims as to the direct effect of the free movement provisions in horizontal situations that are novel.

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[537] Case C-265/95, *Commission* v *France* [1997] ECR I-6959. Referred to below as "*Rioting Farmers".*
[538] Case112/00, *Schmidberger* [2003] ECR I-5659.
[539] Above, p.
[540] *Viking* opinion, para. 38.
[541] The elements that distinguish the situation of trade unions are considered below.
[542] *Viking* opinion, para. 48.
[543] *Ibid*., paras. 49 to 54.

2. The opinion of Advocate General Mengozzi in Laval

In his opinion in *Laval,* Advocate General Mengozzi dealt lucidly and shortly with the issue of the horizontal direct effect of Article 49 EC.

His analysis begins by citing the established case law, initiated by the judgment in *Walrave*, on the horizontal direct effect of the free movement provisions;[544] and he quotes the reasons that have repeatedly been put forward by the Court of Justice to explain the position it has taken on this matter.[545] Mr Mengozzi acknowledges that the *Laval* case differs from those involving non-governmental rule-making bodies, since it is not about the legality of regulations drawn up by such a body, but about the right of trade unions to resort to collective action against a foreign service- provider, in order to compel it to sign a Swedish collective agreement. Nevertheless, by a model of analogical reasoning, he is able to show that the situation in *Laval* fits snugly within the established line of authority.

Recalling the language of the *Walrave* judgment,[546] the Advocate General notes that, "for the purpose of determining the terms and conditions of employment in the Member States, the Court considers that the principle of non-discrimination implemented by Article 49 EC applies to private persons as regards the drawing-up of (collective) agreements and the conclusion or *the adoption of other acts*".[547] The added emphasis is, presumably, to make the point that the kind of regulatory effects that are liable to trigger the prohibition in Article 49 can be produced by means other than consensual instruments. Then comes the key passage in this part of the opinion:

> "…the Swedish model of collective employment relations grants considerable autonomy to both sides of industry, guided by the principle that such parties are responsible for and regulate their own conduct. Trade unions enjoy in particular wide powers enabling them to extend the scope of collective agreements adopted in Sweden to employers not affiliated to an employers' organisation that is a signatory thereto in that Member State, including the power to take collective action if necessary. Those powers and the exercise of them thus have a collective effect on the Swedish employment market. Recourse to collective action ultimately represents a manifestation of the exercise by trade unions of their legal autonomy with the aim of regulating the provision of services, within the meaning of the case law referred to above".

A clear analogy with the previous case law is thus convincingly established, by demonstrating that, given the way in which industrial relations are organised in Sweden, recourse to collective action by trade unions formed an integral part of the process of regulating the provision of services in that country.

3. The judgments in Viking and Laval

In both judgments the question whether the rules of free movement can be invoked in respect of collective action by trade unions is answered by the Court of Justice through a fairly straightforward application of established case law. The treatment of the point in *Laval* is almost cursory – a single paragraph citing paragraphs 17 and 18 of the *Walrave* judgment and the corresponding passages of *Bosman* and *Wouters*. The more substantive reasoning, considered below, is found in the parts of the *Viking* judgment responding to the first and second questions referred by the Court of Appeal.[548]

The link with the cases on non-governmental regulatory bodies is found by the Court in two elements of the situation in *Viking*. First, the organisation of collective action by trade unions takes place under cover of the legal autonomy that unions enjoy, as private entities accorded special rights *inter alia* by national law.[549] Secondly, collective action of the kind in question "which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking".[550] The Court also cites *Defrenne* as authority for the proposition that "the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively". Essentially, therefore, the Court's reasoning is similar to that of

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[544] *Laval* opinion, para. 156.
[545] *Ibid.* and para. 157. See nn. 9 and 10, above.
[546] *Walrave*, para. 19.
[547] *Laval* opinion, para.159. Original emphasis.
[548] The first question asked whether trade union action of the kind in question fell, in principle, outside the scope of Article 43 EC. The second question explicitly raised the horizontal direct effect issue.
[549] *Viking* judgment, para. 35.
[550] *Viking* judgment, para. 36. See also para. 60.

Advocate General Mengozzi in *Laval.* The action taken by the trade unions against Viking Line could be seen as integral to a process of collective regulation of an economic activity.

Rather less convincingly, the Court refers to *Rioting Farmers* and *Schmidberger* as cases "from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State".[551] As noted above, those cases were argued on the footing that the restrictions in question were indeed "caused by the State", because of the failure by the national authorities concerned to intervene.

The Court explicitly rejects the argument, put forward by the trade union side, that the case law on horizontal direct effect initiated by the *Walrave* judgment applies "only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers"; while it also underlines the closeness of the analogy between such bodies and trade unions, in view of their legally protected role in the collective regulation of paid employment.[552]

D. Horizontal direct effect of Directive 96/71 ("the Posted Workers Directive")

This is not the place to re-visit the tortuous history of the "no horizontal direct effect rule" for directives. The Court of Justice has strained every sinew to escape the practical consequences of its principled stance that, for the provisions of a directive to be capable of being directly applied in disputes between private parties, would be contrary to the nature of this category of instruments, as defined by Article 249, third paragraph EC. Curious readers that can summon up the necessary stamina are directed to the article published on this subject by the author in last year's edition of the *Yearbook*.[553]

For present purposes, suffice it to say that, on an orthodox view of the law as confirmed by the Court of Justice in *Pfeiffer*,[554] in a dispute between private parties before a Member State court it would not be open to one of the parties to invoke a provision contained in the Posted Workers Directive, in order to prevent the case from being decided on the basis of a rule of national law incompatible with that provision. The national court would, however, be under a "duty of consistent interpretation", requiring every effort to be made in order to arrive at an interpretation of the applicable national rule reflecting the result prescribed by the Directive.[555]

The judgment in *Laval* has nothing whatever to say about the direct effect, horizontal or otherwise, of Directive 96/71. However, it appears from the opinion of Advocate General Mengozzi that the defendants and some of their supporters believed that Laval's case depended, in part, on the direct application of the Directive, and were able to convince the Advocate General of this.[556] The issue was raised in relation to the choice made by Sweden not to take advantage of the arrangements provided for by Article 3 (8) of the Directive, which could have been used to extend, by an act of public authority, the provisions of collective agreements, including the agreement the trade unions had been seeking to force upon Laval, to foreign service providers who post workers temporarily to that country. It seems to have been contended by the defendants that, in seeking to draw legal consequences from that choice of the Swedish authorities, Laval was setting up the Directive to prevent the application of the Swedish rules which left the protection of posted workers to be assured by collective trade union action.

While re-stating the orthodox position that a directive may not impose obligations on an individual, and cannot therefore be invoked as such against an individual,[557] Mr Mengozzi found two reasons to justify his going on to examine whether Sweden had implemented the Posted Workers Directive correctly: first, that "the problems associated with the direct horizontal effect of Directive 96/71 would arise only if the Court were persuaded to find that the Kingdom of Sweden incorrectly transposed Article 3 of that directive";[558] and secondly, that there would anyway be a duty to interpret the applicable national legislation, as far as possible, in conformity with it.[559] In the event, the Advocate General did not return to the horizontal direct effect issue, since he was satisfied that Article 3 of the Directive had been correctly implemented in Sweden.

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[551] *Viking* judgment, para. 62.
[552] *Ibid*., para. 64.
[553] See n. 4, above.
[554] Joined cases C-397 to 403/01, *Pfeiffer and others* v *Deutsche Rotes Kreuz* [2004] ECR I-8835.
[555] *Ibid.*, paras. 109 to 119.
[556] The matter is considered in paras.134 to 143 of the opinion.
[557] *Laval* opinion, para.135.
[558] *Ibid.*, para. 138.
[559] *Ibid.*, para. 140.

In the view of the author, the Court of Justice was right to ignore the issue of the horizontal direct effect of Directive 96/71, because it did not arise on the facts of *Laval*. It is respectfully suggested that Advocate General Mengozzi was misled in this matter by the defendants' failure to comprehend the true function of Article 3 of Directive 96/71. This is to ensure that posted workers enjoy the rights that are laid down in one of the "officially recognised" ways provided for by the Article (including by collective agreements "declared universally applicable" within the meaning of paragraph (8)) for the benefit of workers in the host Member State. There would, for instance, have been an issue of the horizontal direct effect of Directive 96/71, if legislation existed in Sweden establishing minimum rates of pay for the employees of local construction companies, but not for workers posted by foreign companies, and a member of Laval's own workforce had brought proceedings before a Swedish court seeking to compel compliance by the employer with the requirements of Article 3. The Laval employee would have been asking the court to disapply the national legislation in so far as it failed to provide for posted workers to receive the minimum rates of pay prescribed for Swedish workers, and to apply Article 3 (1) (c) of the Directive directly; and the case law suggests this claim would have received a dusty answer. An entirely different question is whether a particular form of protection is provided by the host Member State for its own workers, by one of the "officially recognised" methods; if not, then there is no obligation to provide such protection for posted workers, and failure by the host State to do so cannot be characterised as incorrect implementation of Directive 96/71. That was the situation in *Laval* as regards the conditions of employment (essentially, pay and related matters) that were the subject, not of legislation, but of collective agreements. The Swedish authorities' choice not to make use of the arrangements in Article 3 (8) of the Directive, which would have given "official" status to the collective agreement for the building trade, meant simply that the extension of the agreement to foreign service providers employing posted workers would not take place pursuant to the obligation imposed by Article 3 (1). For the agreement nevertheless to be applied to posted workers would be perfectly compatible with Directive 96/71 but would lack the "cover" the Directive provides against the possible infringement of Article 49 EC.

The case Laval had to make was, therefore, not that relevant aspects of Swedish law and practice in the employment field must be disapplied, and direct effect given to relevant provisions of Directive 96/71. It was rather that the matter in dispute fell outside the scope of application of the Directive, leaving the collective action that had been taken by the defendants vulnerable to attack as an interference, contrary to Article 49, with Laval's freedom to provide services. And so, at the end of the day, it was found to have been.

E. Conclusions

It may be helpful to summarise briefly the main conclusions that can be drawn from the foregoing discussion:

(1) On the issue of the horizontal direct effect of Articles 43 and 49 EC, the judgments in *Viking* and *Laval*, and the opinion of Advocate General Mengozzi in the latter case, are in line with the case law that descends from *Walrave.* Trade unions enjoy a legally (sometimes constitutionally) protected status, which may allow them effectively to regulate working conditions in a Member State by way of collective agreements, underpinned by the threat or use of collective action. Such action may be found to restrict access to the market of a Member State for businesses seeking to become established or to provide services there. The ability of trade unions to obstruct freedoms guaranteed by the EC Treaty is, therefore, broadly analogous to that of the non-governmental regulatory bodies whose activity was the subject of cases like *Walrave* and *Bosman*.

(2) The analogical reasoning employed by the Court of Justice and by Advocate General Mengozzi provides a more reliable guide to the application of the rules on freedom of movement in horizontal situations that are novel, than the arguments from first principles that were developed in *Viking* by Advocate General Poiares Maduro.

(3) *Angonese* remains a solitary example of the direct application of Article 39 EC to the conduct of an individual undertaking, in circumstances lacking any element of *de facto* regulatory activity. It had no application in *Viking* and *Laval* and remains an authority for the narrow proposition that Article 43 prohibits direct discrimination by a private sector employer that impedes access to the labour market.

(4) No issue of the direct effect of the Posted Workers Directive arose in *Laval.* The no horizontal direct effect rule for directives means that provisions contained in a directive may not be invoked in legal proceedings between private parties before a national court, to prevent the case from being decided on the basis of an otherwise applicable rule of national law because it is incompatible with that provision. However, there can be no possible objection to putting forward an argument that requires the court to interpret a directive, with a view to establishing whether the circumstances of the dispute fall outside its scope.

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SUPPLEMENTARY BACKGROUND READING

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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-lnnenstadt* [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-lnnenstadt* [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-lnnenstadt,* [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* Co/son 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
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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.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 5: Principles of direct applicability and direct effects

5.1 Introduction

It has already been seen that EC law, if not EU law, is supreme to national law and that domestic courts are under an obligation to give full effect to EC law (see Chapter 4). With this in mind, the question then arises to what extent individuals can rely on EC law before the national courts, particularly where a Member State has failed to implement a particular measure, or where the implementation is in some way defective and does not provide the full extent of the rights an individual should enjoy by virtue of the relevant EC measure. To deal with this question, and very much in accordance with the principle of supremacy, the European Court of Justice (ECJ) has developed three interrelated doctrines: direct effect, indirect effect, and state liability. Taken together, these seek to ensure that individuals are given the greatest possible level of protection before their national courts. This chapter considers the scope of the doctrines of direct and indirect effect, as well as identifying difficulties in the jurisprudence. One particular area in which problems arise is that of ensuring the enforceability of directives. This chapter will look at this issue and the various approaches that the ECJ has developed with regard to it. Chapter 9 will examine the jurisprudence in the field of state liability.

5.2 Doctrine of direct effects

5.2.1 Direct applicability

As was noted in Chapter 4, the European Community Treaties were incorporated into UK law by the European Communities Act 1972. With the passing of this Act all Community law became, in the language of international law, directly applicable, that is, applicable as part of the British internal legal system. Henceforth, 'Any rights or obligations created by the Treaty are to be given legal effect in England without more ado' (per Lord Denning MR in *HP Bulmer Ltd v JBollinger SA* [1974] Ch 401). As directly applicable law, EC law thus became capable of forming the basis of rights and obligations enforceable by individuals before their national courts.

Provisions of international law which are found to be capable of application by national courts *at the suit of individuals* are also termed 'directly applicable'. This ambiguity (the same ambiguity is found in the alternative expression 'self-executing') has given rise to much uncertainty in the context of EC law. For this reason it was suggested by Winter that the term 'directly effective' be used to convey this secondary meaning. Although this term has generally found favour amongst British academic writers, the ECJ as well as the British courts tend to use the two concepts of direct applicability and direct effects interchangeably. However, for purposes of clarity it is proposed to use the term 'directly effective' or 'capable of direct effects' in this secondary meaning, to denote those provisions of EC law which give rise to rights or obligations which individuals may enforce before their national courts.

Not all provisions of directly applicable international law are capable of direct effects. Some provisions are regarded as binding on, and enforceable by states alone; others are too vague to form the basis of rights or obligations for individuals; others are too incomplete and require further measures of implementation before they can be fully effective in law. Whether a particular provision is directly effective is a matter of construction, depending on its language and purpose as well as the terms on which the treaty has been incorporated into domestic law. Although most states apply similar criteria of clarity and completeness, specific rules and attitudes inevitably differ, and since the application of the criteria often conceals an underlying policy decision, the results are by no means uniform from state to state.

5.2.2 Relevance of direct effect in EC law

The question of the direct effects of Community law is of paramount concern to EC lawyers. If a provision of EC law is directly effective, domestic courts must not only apply it but, following the principle of primacy of EC

law (discussed in Chapter 4), must do so in priority over any conflicting provisions of national law. Since the scope of the EC Treaty is wide, the more generous the approach to the question of direct effects, the greater the potential for conflict.

Which provisions of EC law will then be capable of direct effect? The EC Treaty merely provides in Article 249 (ex 189; post Lisbon, Article 288 TFEU) that regulations (but only regulations) are 'directly applicable'. Since, as has been suggested, direct applicability is a necessary precondition for direct effects, this would seem to imply that only regulations are capable of direct effects.

This has not proved to be the case. In a series of landmark decisions, the ECJ, principally in its jurisdiction under Article 234 EC (ex 177; post Lisbon, Article 267 TFEU) to give preliminary rulings on matters of interpretation of EC law on reference from national courts, has extended the principle of direct effects to treaty articles, directives, decisions, and even to provisions of international agreements to which the EC is a party.

5.2.3 Treaty articles

s.2.3. 1 *The Starting Point: Van Gend en Loos*

The question of the direct effect of a treaty article was first raised in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (case 26/62). The Dutch administrative tribunal, in a reference under Article 234, asked the ECJ 'Whether Article 12 of the EEC Treaty [now 25 EC] has an internal effect... in other words, whether the nationals of Member States may, on the basis of the Article in question, enforce rights which the judge should protect?'

Article 25 (ex 12) EG (Article 30 TFEU) prohibits states from 'introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect'.

It was argued on behalf of the defendant customs authorities that the obligation in Article 25 was addressed to states and was intended to govern rights and obligations between states. Such obligations were not normally enforceable at the suit of individuals. Moreover the treaty had expressly provided enforcement procedures under what are now Articles 226-7 EC (ex 169-70; post Lisbon, Articles 258-9 TFEU) (see Chapter 11) at the suit of the Commission or Member States, respectively. Advocate-General Roemer suggested that Article 25 was too complex to be enforced by national courts; if such courts were to enforce Article 25 directly there would be no uniformity of application.

Despite these persuasive arguments the ECJ held that Article 25 was directly effective. The Court stated that 'this Treaty is more than an agreement creating only mutual obligations between the contracting parties. . . Community law . . . not only imposes obligations on individuals but also confers on them legal rights'. These rights would arise:

not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly denned manner, by the Treaty on individuals as well as on Member States and the Community institutions.

... The text of Article 12 [now 25] sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. This duty is imposed without any power in the States to subordinate its application to a positive act of internal law. The prohibition is perfectly suited by its nature to produce direct effects in the legal relations between the Member States and their citizens.

And further:

The vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169-70 [now 226-7] to the diligence of the Commission and the Member States.

Apart from its desire to enable individuals to invoke the protection of EC law the Court clearly saw the principle of direct effects as a valuable means of ensuring that EC law was enforced uniformly in all Member States, even when states had not themselves complied with their obligations.

s.2.3.2 *Subsequent developments*

It was originally thought that, as the Court suggested in *Van Gend,* only prohibitions such as (the then) Article

25 ('standstill' provisions) would qualify for direct effects; this was found in *Alfons Liitticke GmbHvHauotzollamt Saarlouk* in relation to the obligation that 'Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules'.

The ECJ found that the then Article 95(1) was directly effective; what was Article 95(3), which was subject to compliance within a specified time limit, would, the Court implied, become directly effective once that time limit had expired.

The Court has subsequently found a large number of treaty provisions to be directly effective. All the basic principles relating to free movement of goods and persons, competition law, and discrimination on the grounds of sex and nationality may now be invoked by individuals before their national courts.

5.2.3.3 *Criteria for direct effect*

In deciding whether a particular provision is directly effective certain criteria are applied: the provision must be sufficiently clear and precise; it must be unconditional, and leave no room for the exercise of discretion in implementation by Member States or Community institutions. The criteria are, however, applied generously, with the result that many provisions which are not particularly clear or precise, especially with regard to their scope and application, have been found to produce direct effects. Even where they are conditional and subject to further implementation they have been held to be directly effective once the date for implementation is past. The Court reasons that while there may be discretion as to the means of implementation, there is no discretion as to ends.

5.2.3.4 *Vertical and horizontal effect of treaty provisions*

In *Van Gend* the principle of direct effects operated to confer rights on Van Gend exercisable against the Dutch customs authorities. Thus the obligation fell on an organ of the state, to whom Article 25 was addressed. (This is known as a 'vertical' direct effect, reflecting the relationship between individual and state.) But treaty obligations, even when addressed to states, may fall on individuals too. May they be invoked by individuals against individuals? (This is known as a 'horizontal effect', reflecting the relationship between individual and individual.)

Van Gend implies so, and this was confirmed in *Defrenne* v *Sabena (No 2)* (case 43/75). Ms Defrenne was an air hostess employed by Sabena, a Belgian airline company. She brought an action against Sabena based on what was then Article 119 of the EEC Treaty (now 141 EC; post Lisbon Article 157 TFEU). It provided that 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'.

Ms Defrenne claimed, inter alia, that in paying their male stewards more than their air hostesses, when they performed identical tasks, Sabena was in breach of the then Article 119. The gist of the questions referred to the ECJ was whether, and in what context, that provision was directly effective. Sabena argued that the treaty articles so far found directly effective, such as Article 25, concerned the relationship between the State and its subjects, whereas former Article 119 was primarily concerned with relationships between individuals. It was thus not suited to produce direct effects. The Court, following Advocate-General Trabucci, disagreed, holding that 'the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.

This same principle was applied in *Walrave v Association Union Cycliste Internationale* (case 36/74) to Article 12 (ex 6, originally 7) EC which provides that '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 claimants, Walrave and Koch, sought to invoke Article 12 (post Lisbon, Article 18 TFEU) in order to challenge the rules of the defendant association which they claimed were discriminatory.

The ECJ held that the prohibition of any discrimination on grounds of nationality 'does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective

manner gainful employment and the provision of services'.

To limit the prohibition in question to acts of a public authority would risk creating inequality in their application. Even now, the precise scope of the horizontal nature of the provisions relating to free movement of individuals (Articles 39, 43, and 49; post Lisbon Articles 45, 49 and 56 TFEU respectively) is not clear. Whilst the judgment in *Walrave* can be read as a form of effectiveness, which could then extend the scope of the provisions to all non-state actors, it can equally be read as relating to collective agreements, or to situations where there is a violation of the principle of non-discrimination. Subsequent cases have not cleared up this ambiguity (see Chapter 21). It is generally accepted that the provisions on the free movement of goods (Articles 28-9 EC; post Lisbon Articles 34-5 TFEU) do not have horizontal direct effect, although the ECJ's jurisprudence has operated to compensate for this limitation (see Chapter 20). Nonetheless, many treaty provisions have now been successfully invoked vertically and horizontally. The fact of their being addressed to, and imposing obligations on, states has been no bar to their horizontal effect.

5.2.4 Regulations

A regulation is described in Article 249 EC as of 'general application ... binding in its entirety and directly applicable in all Member States'. It is clearly intended to take immediate effect without the need for further implementation.

Regulations are thus by their very nature apt to produce direct effects. However, even for regulations direct effects are not automatic. There may be cases where a provision in a regulation is conditional, or insufficiently precise, or requires further implementation before it can take full legal effect. But since a regulation is of 'general application', where the criteria for direct effects are satisfied, it may be invoked vertically or horizontally.

In *Antonio Munoz Cia SA v Frumar Ltd* (case C-253/00), the ECJ confirmed that regulations by their very nature operate to confer rights on individuals which must be protected by the national courts. In this case, Regulation 2200/96 ([1996] OJ L 297/1) laid down the standards by which grapes are classified. Munoz brought civil proceedings against Frumar who had sold grapes under particular labels which did not comply with the corresponding standard. The relevant provision in the regulation did not confer rights specifically on Munoz, but applied to all operators in the market. A failure by one operator to comply with the provision could have adverse effects, since the purpose of the regulation was to keep products of unsatisfactory quality off the market, and to ensure the full effectiveness of the regulation, it must be possible for a trader to bring civil proceedings against a competitor to enforce the regulation. This decision is noteworthy for several reasons. As with the early case law on the treaty articles, it reasons from the need to ensure the effectiveness of Community law. It also confirms that, as directly applicable measures, regulations can apply horizontally between private parties as well as vertically against public bodies. In terms of enforcement, it also seems to suggest that it is not necessary that rights be conferred expressly on the claimant before that individual may rely on the sufficiently clear and unconditional provisions of a regulation. Insofar as the ECJ's jurisprudence requires individuals seeking to rely on a directive to have received rights under that directive (see 5.2.5.3 below), there seems to be the beginning of a divergence between the jurisprudence on regulations and that on directives.

5.2.5 Directives

5.2.5.1 *The problem of the direct effect of directives*

A directive is (Article 249 EC) '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'.

Because directives are not described as 'directly applicable' it was originally thought that they could not produce direct effects. Moreover the obligation in a directive is addressed to states, and gives the state some discretion as to the form and method of implementation; its effect thus appeared to be conditional on the implementation by the state.

5.2.5.2 *The principle of direct effect of directives*

This was not the conclusion reached by the ECJ, which found, in *Grad v Finanzamt Traunstein* (case 9/70) that a directive could be directly effective. The claimant in *Grad* was a haulage company seeking to challenge a tax levied by the German authorities that the claimant claimed was in breach of an EC directive and decision. The

directive required states to amend their VAT systems to comply with a common EC system and to apply this new VAT system to, inter alia, freight transport from the date of the directive's entry into force. The German government argued that only regulations were directly applicable. Directives and decisions took effect internally only via national implementing measures. As evidence they pointed out that only regulations were required to be published in the *Official Journal.* The ECJ disagreed. The fact that only regulations were described as directly applicable did not mean that other binding acts were incapable of such effects:

It would be incompatible with the binding effect attributed to Decisions by Article 189 [now 249] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a Decision. . . the effectiveness of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.

Although expressed in terms of a decision, it was implied in the judgment that the same principle applied in the case of directives. The direct effect of directives was established beyond doubt in a claim based on a free-standing directive in *Van Duyn v Home Office* (case 4 1/74). Here the claimant sought to invoke Article 3 of Directive 64/221 to challenge the Home Office's refusal to allow her to enter to take up work with the Church of Scientology. Under EC law Member States are allowed to deny EC nationals rights of entry and residence only on the grounds of public policy, public security and public health (see Chapter 25). Article 3 of Directive 64/22 1 provided that measures taken on the grounds of public policy must be based exclusively on the personal conduct of the person concerned. Despite the lack of clarity as to the scope of the concept of 'personal conduct' the ECJ held that Mrs Van Duyn was entitled to invoke the directive directly before her national court. It suggested that even if the provision in question was not clear the matter could be referred to the ECJ for interpretation under Article 234 EC.

So both directives and decisions may be directly effective. Whether they will in fact be so will depend on whether they satisfy the criteria for direct effects—they must be sufficiently clear and precise, unconditional, leaving no room for discretion in implementation. These conditions were satisfied in *Grad.* Although the directive was not unconditional in that it required action to be taken by the state, and gave a time limit for implementation, once the time limit expired the obligation became absolute. At this stage there was no discretion left. *Van Duyn* demonstrates that it is not necessary for a provision to be particularly precise for it to be deemed 'sufficiently' clear. Significantly, the ECJ held in *Riksskatterverket v Soghra Gharehveran* (case C-441/99) that a provision in a directive could be directly effective where it contained a discretionary element if the Member State had already exercised that discretion. The reason for this was that it could then no longer be argued that the Member State still had to take measures to implement the provision.

The reasoning in *Grad* was followed in *Van Duyn* and has been repeated on many occasions to justify the direct effect of directives once the time limit for implemen tation has expired. A more recent formulation of the test for direct effects, and one that is generally used, is that the provision in question should be 'sufficiently clear and precise and unconditional'.

A directive cannot, however, be directly effective before the time limit for implementation has expired. It was tried unsuccessfully in the case of *Pubblico Ministero v Ratti* (case 148/78). Mr Ratti, a solvent manufacturer, sought to invoke two EC har-monisation directives on the labelling of dangerous preparations to defend a criminal charge based on his own labelling practices. These practices, he claimed, were not illegal according to the directive. The ECJ held that since the time limit for the implementation of one of the directives had not expired it was not directly effective. He could, however, rely on the other directive for which the implementation date had passed.

Even when a state has implemented a directive it may still be directly effective. The ECJ held this to be the case in *Verbond van Nederlandse Ondernemingen (VNO) v Inspecteur der Invoerrechten en Accijnzen* (case 51/76), thereby allowing the Federation of Dutch Manufacturers to invoke the Second VAT Directive despite implementation of the provision by the Dutch authorities. The grounds for the decision were that the useful effect of the directive would be weakened if individuals could not invoke it before national courts. By allowing individuals to invoke the directive the Union can ensure that national authorities have kept within the limits of their discretion. Indeed, it seems possible to rely on even a properly implemented directive if it is not properly applied in practice *(Marks and Spencer* (case G-62/00)).

Arguably, the principle in *VNO* could apply to enable an individual to invoke a 'parent' directive even before the

expiry of the time limit, where domestic measures have been introduced for the purpose of complying with the directive (see *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86)). This view gains some support from the case of *Inter-Environment WallonieASBL vRegion Wallonie* (case C-129/96). Here the ECJ held that even within the implementation period Member States are not entitled to take any measures which could seriously compromise the result required by the directive. This applies irrespective of whether the domestic measure which conflicts with a directive was adopted to implement that directive (case C-14/02 *ATRAL).* In *Mangold* (case C-l 44/04, see further below), the ECJ strengthened this view. According to its ruling, the obligation on a national court to set aside domestic law in conflict with a directive before its period for implementation has expired appears to be even stronger where the directive in question merely aims to provide a framework for ensuring compliance with a general principle of Community law, such as non-discrimination on the grounds of age (see Chapter 6). Note also the approach in regards to the obligation for consistent interpretation (see, eg, *Adeneler v ELOG* (case C-2 12/04) below).

5.2.5.3 ***Must rights be conferred by the directive?***

The ECJ's test for direct effects (the provision must be sufficiently clear, precise, and unconditional) has never expressly included a requirement that the directive should be intended to give rise to rights for the individual seeking to invoke its provisions. However, the justification for giving direct effect to EC law has always been the need to ensure effective protection for individuals' Community rights. Furthermore, the ECJ has, in a number of recent cases, suggested that an individual's right to invoke a directive may be confined to situations in which he can show a particular interest in that directive. In *Becker v Finanzamt MunsterInnenstadt* (case 8/81), in confirming and clarifying the principle of direct effect as applied to directives, the Court held that 'provisions of Directives can be invoked by individuals *insofar as they define rights which individuals are able to assert against the state'* (emphasis added).

Drawing on this statement in *Verholen* (cases C-87 to C-89/90), the Court suggested that only a person with a direct interest in the application of the directive could invoke its provisions: this was held in *Verholen* to include a third party who was directly affected by the directive. In *Verholen,* the husband of a woman suffering sex discrimination as regards the granting of a social security benefit, contrary to Directive 79/7, was able to bring a claim based on the directive in respect of disadvantage to himself consequential on the discriminatory treatment of his wife.

In most recent cases in which an individual seeks to invoke a directive directly, the existence of a direct interest is clear. The question of his or her standing has not therefore been in issue. Normally the rights he or she seeks to invoke, be it for example a right to equal treatment or to employment protection, are contained in the directive. Its provisions are clearly, if not explicitly, designed to benefit persons such as the individual. There are circumstances, however, where this is not so.

5.2.5.4 ***Member States' initial response***

Initially national courts were reluctant to concede that directives could be directly effective. The Conseil d'Etat, the supreme French administrative court, in *Minister of the Interior v Cohn-Bendit* ([1980] 1 CMLR 543), refused to follow *Van Duyn vHome Office* and allow the claimant to invoke Directive 64/221. The English Court of Appeal in *O'Brien v Sim-Chem Ltd* ([1980] ICR 429) found the Equal Pay Directive (75/117) not to be directly effective on the grounds that it had purportedly been implemented in the Equal Pay Act 1970 (as amended 1975). *VNO* was apparently not cited before the court. The German Federal Tax Court, the Bundesfinanzhof, in *Re VAT Directives* ([1982] 1 CMLR 527) took the same view on the direct effects of the Sixth VAT Directive, despite the fact that the time limit for implementation had expired and existing German law appeared to run counter to the directive. The courts' reasoning in all these cases ran on similar lines. Article 249 expressly distinguishes regulations and directives; only regulations are described as 'directly applicable'; directives are intended to take effect within the national order via national implementing measures.

On a strict interpretation of Article 249 EC this is no doubt correct. On the other hand the reasoning advanced by the ECJ is compelling. The obligation in a directive is 'binding "on Member States" as to the result to be achieved'; the useful effects of directives would be weakened if states were free to ignore their obligations and enforcement of EC law were left to direct action by the Commission or Member States under Articles 226 or 227. Moreover states are obliged under Article 10 (post Lisbon, Article 4 of the Treaty on European Union (TEU)) to 'take all appropriate measures... to ensure fulfilment of the obligations arising out of this Treaty or

resulting from action taken by the institutions of the Community'. If they have failed in these obligations why should they not be answerable to individual litigants?

5.2.5.5 ***Vertical and horizontal direct effects: A necessary distinction***

The reasoning of the ECJ is persuasive where an individual seeks to invoke a directive against the state on which the obligation to achieve the desired results has been imposed. In cases such as *VNO, Van Duyn,* and *Ratti,* the claimant sought to invoke a directive against a public body, an arm of the state. This is known as *vertical* direct effect, reflecting the relationship between the individual and the state. Yet as with treaty articles, there are a number of directives, impinging on labour, company or consumer law for example, which a claimant may wish to invoke against a private person. Is the Court's reasoning in favour of direct effects adequate as a basis for the enforcement of directives against individuals? This is known as *horizontal* direct effect, reflecting the relationship between individuals.

The arguments for and against horizontal effects are finely balanced. Against horizontal effects is the fact of uncertainty. Prior to the entry into force of the TEU, directives were not required to be published. More compelling, the obligation in a directive is addressed to the state. In *Becker v Finanzamt MunsterInnenstadt* (case 8/8 1) the Court, following dicta in *Pubblico Ministero v Ratti* (case 148/78), had justified the direct application of the Sixth VAT Directive against the German tax authorities on the grounds that the obligation to implement the directive had been placed on the state. It followed that:

a Member State which has not adopted, within the specified time limit, the implementing measure$ prescribed in the Directive, cannot raise the objection, as against individuals, that it has not fulfilled the obligations arising from the Directive. This reasoning is clearly inapplicable in the case of an action against a private person. In favour of horizontal effects is the fact that directives have always in fact been published; that treaty provisions addressed to, and imposing obligations on,Member States have been held to be horizontally effective; that it would be anomalous, and offend against the principles of equality, if an individual's rights to invoke a directive were to depend on the status, public or private, of the party against whom he wished to invoke it; and that the useful effect of Community law would be weakened if individuals were not free to invoke the protection of Community law against *all* parties.

Although a number of references were made in which the issue of the horizontal effects of directives was raised, the ECJ for many years avoided the question, either by declaring that the claimant's action lay outside the scope of the directive, as in *Burton v British Railways Board* (case 19/8 1) (Equal Treatment Directive 76/207) or by falling back on a directly effective treaty provision, as in *Worringham v Lloyds Bank Ltd* (case 69/80) in which the then Article 119 (now 141) was applied instead of Directive 75/117, the Equal Pay Directive.

The nettle was finally grasped in *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* (case 152/84). Here Mrs Marshall was seeking to challenge the health authority's compulsory retirement age of 65 for men and 60 for women as discriminatory, in breach of the Equal Treatment Directive 7 6/207. The difference in age was permissible under the Sex Discrimination Act 1975, which expressly excludes 'provisions relating to death or retirement' from its ambit. The Court of Appeal referred two questions to the ECJ:

(a) Was a different retirement age for men and women in breach of Directive 7 6/207?

(b) If so, was Directive 76/207 to be relied on by Mrs Marshall in the circumstances of the case?

The relevant circumstances were that the area health authority, though a 'public' body, was acting in its capacity as employer.

The question of vertical and horizontal effects was fully argued. The Court, following a strong submission from Advocate-General Slynn, held that the compulsory different retirement age was in breach of Directive 7 6/207 and could be invoked against a public body such as the health authority. Moreover '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'.

On the other hand, following the reasoning of *Becker,* since a directive is, according to Article 249, binding only on '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.

If this distinction was arbitrary and unfair:

Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.

So, with *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* the issue of the horizontal effect of directives was, it seemed, finally laid to rest (albeit in an *obiter* statement, since the health authority was arguably a public body at the time). By denying their horizontal effect on the basis of Article 249 the Court strengthened the case for their vertical effect. The decision undoubtedly served to gain acceptance for the principle of vertical direct effects by national courts (see, eg, *R v London Boroughs Transport Committee, ex parte Freight Transport Association Ltd* [1990] 3 CMLR 495). But problems remain, both with respect to vertical and horizontal direct effects.

5.2.5.6 ***Vertical direct effects: Reliance against public body***

First, the concept of a 'public' body, or an 'agency of the State', against whom a directive may be invoked, is unclear. In *Fratelli Costanzo SPA v Comune di Milano* (case 103/88), in a claim against the Comune di Milano based on the Comune's alleged breach of Public Procurement Directive 71/305, the Court held that since the reason for which an individual may rely on the provisions of a directive in proceedings before the national courts is that the obligation is binding on all the authorities of the Member States, where the conditions for direct effect were met, 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply these provisions'. The area health authority in *Marshall* was deemed a 'public' body, as was the Royal Ulster Constabulary in *Johnston v RUC* (case 222/84). But what of the status of publicly owned or publicly run enterprises such as the former British Rail or British Coal? Or semi-public bodies? Are universities 'public' bodies and what is the position of privatised utility companies, or banks, which are in the main owned by the taxpayer?

These issues arose for consideration in *Foster v British Gas pic* (case C-l 88/89). In a claim against the British Gas Corporation in respect of different retirement ages for men and women, based on Equal Treatment Directive 7 6/207, the English Court of Appeal had held that British Gas, a statutory corporation carrying out statutory duties under the Gas Act 1972 at the relevant time, was not a public body against which the directive could be enforced. On appeal the House of Lords sought clarification on this issue from the ECJ. That court refused to accept British Gas's argument that there was a distinction between a nationalised undertaking and a state agency and ruled (at para 18) that a directive might be relied on against organisations or bodies which were 'subject to the authority or control of the State or had special powers beyond those which result from the normal relations between individuals'.

Applying this principle to the specific facts of *Foster v British Gas pic* it ruled (at para 20) that a directive might be invoked 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 arid has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

On this interpretation a nationalised undertaking such as the then British Gas would be a 'public' body against which a directive might be enforced, as the House of Lords subsequently decided in *Foster* v *British Gaspic* ([1991] 2 AC 306).

It may be noted that the principle expressed in para 18 is wider than that of para 20, the criteria of 'control' and 'powers' being expressed as alternative, not cumulative; as such it is wide enough to embrace any nationalised undertaking, and even bodies such as universities with a more tenuous public element, but which are subject to *some* state authority or control. However, in *Rolls-Royce pic v Doughty* ([1992] ICR 538), the English Court of Appeal, applying the 'formal ruling' of para 20 of *Foster,* found that Rolls-Royce, a nationalised undertaking at the relevant time, although 'under the control of the State', had not been 'made responsible pursuant to a measure adopted by the State for providing a public service'. The public services which it provided, for example, in the defence of the realm, were provided to the *state* and not to the *public* for the purposes of benefit to the state: nor did the company possess or exercise any special powers of the type enjoyed by

British Gas. Mustill LJ suggested that the test provided in para 18 was 'not an authoritative exposition of the way in which cases like *Foster* should be approached': it simply represented a 'summary of the (Court's) jurisprudence to date'.

There is little evidence to support such a conclusion. The Court has never distinguished between its 'formal' rulings (ie, on the specific issue raised) and its more general statements of principle. Indeed such general statements often provide a basis for future rulings in different factual situations. A restrictive approach to the Court's rulings, as taken in *Rolls-Royce pic v Doughty,* is inconsistent with the purpose of the ECJ, namely to ensure the effective implementation of Community law and the protection of individuals' rights under that law by giving the concept of a public body the widest possible scope. This was acknowledged by the Court of Appeal in *National Union of Teachers v Governing Body ofSt Mary's Church ofEngland (Aided) Junior School* ([1997] 3 CMLR 630) when it suggested that the concept of an emanation of the state should be a 'broad one'. The definition provided in para 20 of *Foster* should not be regarded as a statutory definition: it was, in the words of para 20, simply *'included among* those bodies against which the provisions of a Directive can be applied'.

The English courts' approach to whether a particular body is an 'emanation of the state' for the purpose of enforcement of EC directives is unpredictable. It is not altogether surprising that they fail to take a generous view when the result would be to impose liability on bodies which are in no way responsible for the non-implementation of directives, a factor which was undoubtedly influential in *Rolls-Royce pic v Doughty.* But even if national courts were to adopt a generous approach, no matter how generously the concept of a 'public' body is defined, as long as the public/private distinction exists there can be no uniformity in the application of directives as between one state and another. Neither will it remove the anomaly as between individuals. Where a state has failed to fulfil its obligations in regard to directives, whether by non-implementation or inadequate implementation, an individual would, it appeared, following *Marshall,* be powerless to invoke a directive in the context of a 'private' claim.

s.2.5.7 *Horizontal direct effects*

In 1993, in the case of *Dori v Recreb Sri* (case C-9 1/92), the Court was invited to change its mind on the issue of horizontal direct effects in a claim based on EC Directive 85/577 on Door-step Selling, which had not at the time been implemented by the Italian authorities, against a private party. Advocate-General Lenz urged the Court to reconsider its position in *Marshall* and extend the principle of direct effects to allow for the enforcement of directives against *all* parties, public and private, in the interest of the uniform and effective application of Community law. This departure from its previous case law was, he suggested, justified in the light of the completion of the internal market and the entry into force of the Treaty on European Union, in order to meet the legitimate expectations of citizens of the Union seeking to rely on Community law. In the interests of legal certainty such a ruling should however not be retrospective in its effect (on the effect of Article 234 rulings—see Chapter 10).

The Court, no doubt mindful of national courts' past resistance to the principle of direct effects, and the reasons for that resistance, declined to follow the Advocate-General's advice and affirmed its position in *Marshall:* Article 249 distinguished between regulations and directives; the case law establishing vertical direct effects was based on the need to prevent states from taking advantage of their own wrong; to extend this case law and allow directives to be enforced against individuals 'would be to recognise a power to enact obligations for individuals with immediate effect, whereas (the Community) has competence to do so only where it is empowered to adopt Regulations'. This decision was confirmed in subsequent cases, such as *El Corte Ingles SA vRivero* (case C-192/94) *Arcaro* (case C-l68/95), and more recently in *Carp v Ecorad* (case C-80/06).

However, in denying horizontal effects to directives in *Dori,* the Court was at pains to point out that alternative remedies might be available based on principles introduced by the Court prior to *Dori,* namely the principle of indirect effects and the principle of State liability introduced in *Francovich v Italy* (cases C-6 and 9/90— see Chapter 9). *Francovich* was also suggested as providing an alternative remedy in *El Corte Ingles SA v Rivero. Pfeiffer* (joined cases C-397/01 to 403/0 1) confirmed that directives could not have horizontal direct effect, but it emphasised, in the strongest possible terms, that a court was obliged to interpret domestic law in so far as possible in accordance with a directive (see 5.3, below). In the circumstances of that case, the practical outcome would have been akin to admitting horizontal direct effect, albeit by following the 'indirect effect' route. It must be borne in mind that one of the principal justifications for rejecting 'horizontal direct effect' has been that directives cannot, of themselves, impose obligations on individuals. In two-party situations, this

reasoning is straightforward. It is less so in a three-party situation where an individual is seeking to enforce a right under a directive against the Member State where this would have an impact on a third party. This issue arose in *Wells v SoSfor Transport, Local Government and the Regions* (case C-201/02), where Mrs Wells challenged the government's failure to carry out an environmental impact assessment (as required under Directive 85/337/EEC, [1985] OJ LI 7 5/40) when authorising the recommencement of quarrying works. The UK government argued that to accept that the relevant provisions of the directive had direct effect would result in 'inverse direct effect' in that UK government would be obliged to deprive another individual (the quarry owners) of their rights. The ECJ dismissed this, holding that permitting an individual to hold the Member State to its obligations was not linked to the performance of any obligation which would fall on the third party (at para 58), although there would be consequences for the third party as a result. It would be for the national courts to consider whether to require compliance with the directive in the particular case, or whether to compensate the individual for any harm suffered. A similar approach can be seen m *Arcor* (case C- 152-4/07). The case concerned a decision by the German telecommunications authority, approving a connection charge for calls from Deutsche Telekom's national network to a connection partner to cover the costs of maintaining the local telecommunications infrastructure. Third-party telecommunications operators sought to challenge that decision and it was this challenge that formed the basis of the reference. The ECJ held that the decision was incompatible with the directives regulating the area. The ECJ then referred to its decision in *Wells,* although the referring court had not raised the question in these terms, and re-emphasised that 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from relying on the provisions of a directive against the Member State concerned' (para 36). In coming to its conclusion in *Wells,* the ECJ relied, in part, on case law developed in the context of Directive 83/1 89/EEC on the enforceability of technical standards which have not been notified in accordance with the requirements of that directive. It had been suggested that these cases create something akin to 'incidental' horizontal effect, and it is therefore necessary to examine these in more detail.

5.2.5.8 *'Incidental' horizontal effect*

There have been cases in which individuals have sought to exploit the principle of direct effects not for the purposes of claiming Community rights denied them under national law, but simply in order to establish the illegality of a national law and thereby prevent its application to them. This may occur in a two-party situation, in which an individual is seeking to invoke a directive, whether as a sword or a shield, against the state. It presents particular problems in a three-cornered situation, in which a successful challenge based on an EC directive by an individual to a domestic law or practice, although directed at action by the state, may adversely affect third parties. In this case the effect of the directive would be felt horizontally. To give the directive direct effects in these cases would seem to go against the Court's stance on horizontal direct effects in the line of cases beginning with *Dori v Recreb Sri,* and the reasoning in these cases. Two cases, with contrasting outcomes, *CIA Security International SA v Signalson SA* (case C-194/94) and *Lemmens* (case C-226/97), illustrate the difficulty. Both cases involve Directive 83/189 (Directive 83/189 has been replaced and extended, by Directive 98/34 ([1998] OJ L204/37, amended by Directive 98/44, OJ L217/18), see 16.3.6). The directive, which is designed to facilitate the operation of the single market, lays down procedures for the provision of information by Member States to the Commission in the field of technical standards and regulations. Article 8 prescribes detailed procedures requiring Member States to notify, and obtain clearance from, the Commission for any proposed regulatory measures in the areas covered by the directive. In *CIA Security International SA v Signalson SA,* the defendants, CIA Security, sought to rely on Article 8 of Directive 83/189 as a defence to an action, brought by Signalson, a competitor, for unfair trading practices in the marketing of security systems. The defendants claimed that the Belgian regulations governing security, which the defendants had allegedly breached, had not been notified as required by the directive: they were therefore inapplicable. Contrary to its finding in the earlier case of *Enichem Base v Comune di Cinsello Balsamo* (case C-380/87), involving very similar facts and the same directive, the ECJ accepted this argument, distinguishing *Enichem* on the slenderest of grounds. Thus the effects of the directive fell horizontally on the claimant, whose actions, based on national law, failed.

Article 8 of Directive 83/189 was again invoked as a defence in *Lemmens* (case C-226/97). Lemmens was charged in Belgium with driving above the alcohol limit. Evidence as to his alcohol level at the relevant time had been provided by a breath analysis machine. Invoking *CIA Security International SA v Signalson SA,* he argued that the Belgian regulations with which breath analysis machines in Belgium were required to conform had not been notified to the Commission, as required by Article 8 of Directive 83/189. He argued that the consequent

inapplicability Of the Belgian regulations regarding breath analysis machines impinged on the evidence obtained by using those machines; it could not be used in a case against him. The ECJ refused to accept this argument. It looked to the purpose of the directive, which was designed to protect the interest of free movement of goods. The Court concluded:

Although breach of an obligation (contained in the Directive) rendered (domestic) regulations inapplicable inasmuch as they hindered the marketing of a product which did not conform with its provisions, it did not have the effect of rendering unlawful any use of the product which conformed with the unnotified regulations. Thus the breach (of Article 8) did not make it impossible for evidence obtained by means of such regulations, authorized in accordance with the regulations, to be relied on against an individual.

This distinction, between a breach affecting the marketing of a product, as in *CIA Security International SA v Signalson SA,* and one affecting its use, as in *Lemmens,* is fine, and hardly satisfactory. The decision in *CIA Security International SA* v *Signalson SA* had been criticised because the burden imposed by the breach (by the state) of Article 8, the non-application of the state's unfair practice laws, would have fallen on an individual, in this case the claimant. This was seen as a horizontal application in all but name. In two other cases decided, like *CIA Security International SA v Signalson SA,* in 1996, *Ruiz Bemaldez* (case C-129/94) and *Panagis Parfitis* (case C-441/93), individuals were permitted to invoke directives to challenge national law, despite their adverse impact on third parties.

Lemmens, on the other hand, did not involve a third-party situation. The invocation by the defendant of Article 8 of Directive 83/189 did, however, smack of abuse. The refinement introduced in *Lemmens* may thus be seen as an attempt by the ECJ to impose some limits on the principle of direct effects as affected by *CIA Security* and as applied to directives.

The *CIA Security* principle was, however, confirmed and extended to a contractual relationship between two companies in *Unilever Italia SpA v Central Food SpA* (case C443/98). Italy planned to introduce legislation on the geographical origins of various kinds of olive oil and notified this in accordance with Article 8 of the directive after the Commission requested that this be done. The Commission subsequently decided to adopt a Community-wide measure and invoked the 'standstill' procedure in Article 9 of the directive, which requires a Member State to delay adoption of a technical regulation for- 12 months if the Commission intends to legislate in the relevant field. Italy nevertheless adopted its measure before the 12-month period had expired. The dispute leading to the Article 234 reference arose when Unilever supplied Central Foods with olive oil which had not been labelled in accordance with Italian law. Unilever argued that Italian legislation should not be applied because it had been adopted in breach of Article 9 of the directive. Advocate-General Jacobs argued that the C/A principle could not affect contractual relations between individuals, primarily because to hold otherwise would infringe the principle of legal certainty. The Court disagreed and held that the national court should refuse to apply the Italian legislation. It noted that there was no reason to treat the dispute relating to unfair competition in *CIA Security* differently from the contractual dispute in *Unilever.* The Court acknowledged the established position that directives cannot have horizontal direct effect, but went on to say that this did not apply in relation to Articles 8-9 of Directive 83/189. The Court did not feel that the case law on horizontal direct effect and the case law under Directive 83/189 were in conflict, because the latter directive does not seek to create rights or obligations for individuals.

The initial reaction to *CIA Security* was that the Court appeared to accept that directives could have horizontal direct effect. But after *Unilever,* it is clear that this has not been its intention. However, this area remains one of some uncertainty. The position now seems to be that private parties to a contract for the sale or supply of goods need to investigate whether any relevant technical regulations have been notified in accordance with the directive. There may then be a question of whether the limitation introduced by *Lemmens* comes into play. The end result appears to be the imposition on private parties of rights and obligations of which they could not have been aware—this was the main reason *against* the acceptance of horizontal direct effect in the case of directives. Although the Court in *Unilever* was at pains to restrict this line of cases to Directive 83/189 (and its replacement, Directive 98/34), this is not convincing. Nevertheless, the ECJ has maintained its approach under this Directive (see, eg, *Lidl Italia Sri v Comune di Stradella* (case C-303/04)), and it would appear to be best to regard the case law under Directive 9 8/34 (and its predecessor) as being confined to the context of that and similar directives (see also, eg, *R v Medicines Control Agency exparte Smith & Nephew Ltd* (case C-201/94) in the context of the authorisation of medicinal products under Directive 65/65/EEC (superseded by 1993 measures),

permitting the holder of a marketing authorisation to rely on Article 5 of that directive in challenging the grant of an authorisation to a competitor). It should also be noted that the ECJ has not adopted this approach in analogous situations involving decisions *(Carp v Ecorad* (case C-80/06)). Such a view should, of course, not be understood as reducing the significance of these cases in the context of an important field of EC law, and *Wells* (case C-20 1/02) and *Arcor* (case C-1 52-4/07) have taken this approach into the field of direct effect generally.

5.2.5.9 ***No direct effect to impose criminal liability***

One important limitation to the direct effect principle was confirmed in *Berlusconi and others* (joined cases C-387/02, C-39 1/02, and C-403/02). Here, Italian company legislation had been amended after proceedings against Mr Berlusconi and others had been commenced to make the submission of incorrect accounting information a summary offence, rather than an indictable offence. The Italian criminal code provides that a more lenient penalty introduced after proceedings have been commenced but prior to judgment should be imposed, and in the instant cases, proceedings would therefore have to be terminated as the limitation period for summary offences had expired. The ECJ was asked (in Article 234 proceedings) if Article 6 of the First Company Law Directive (68/15 1/EEC) could be relied upon directly against the defendants. Having observed that the directive required an appropriate penalty and that it was for the national court to consider whether the revised provisions of Italian law were appropriate, the Court confirmed that it is not permissible to rely on the direct effect of a directive to determine the criminal liability of an individual (paras 73-8). In so holding, the ECJ followed the principles developed in the context of indirect effect (5.3.2, below) and reflects general principles of law (see Chapter 6).

s.2.5.10 ***Direct effect of directives: Conclusions***

The jurisprudence of the ECJ in this area has matured sufficiently to permit the conclusion that, as a general rule, directives cannot take direct effect in the context of a two-party situation where both parties are individuals. Directives can only be relied upon against a Member State (in a broad sense) by an individual (on limitations on the obligations an individual can enforce, note *Verholen* (case C-87/90)). A directive cannot impose an obligation on an individual of itself; it needs to be implemented to have this consequence. Nevertheless, it is apparent that the clear-cut distinction between vertical and horizontal direct effect in two-party situations becomes blurred when transposed into a tripartite context. The enforcement by an individual of an obligation on the Member State may affect the rights of other individuals, which, according to *Wells* (case C-201/02), is a consequence of applying direct effect, but does not appear to change its vertical nature. The rather specific context of notification and authorisation directives, which may also have an effect on relationships not involving Member States, adds to the uncertainty. But whilst the case law may seem settled, the debate as to whether directives *should* have horizontal direct effect is one that is unlikely to go away soon.

5.2.6 Decisions

A decision is 'binding in its entirety upon those to whom it is addressed' (Article 249 EC). Decisions may be addressed to Member States, singly or collectively, or to individuals. Although, like directives, they are not described as 'directly applicable', they may, as was established in *Grad v Finanzamt Traustein* (case 9/70), be directly effective provided the criteria for direct effects are satisfied. The direct application of decisions does not pose the same theoretical problems as directives, since they will only be invoked against the addressee of the decision. If the obligation has been addressed to him and is 'binding in its entirety', there seems no reason why it should not be invoked against him, providing, of course, that it satisfies the test of being sufficiently clear precise and unconditional. In the recent case of *Fosele v Sud-Ouest-Sarl* (case C- 18/08), which concerned a decision which permitted the state to exempt certain vehicles from motor tax, the ECJ held that due to the element of choice left to the Member State, the individual could not rely on the decision to obtain such an exemption. An individual may seek to rely on a decision addressed to a Member State against that Member State (eg, recently, *Fosele v Sud-Ouest-Sarl* (case C- 18/08)). In *Ecorad* (case C80/60), Ecorad sought to rely on the contents of a decision, adopted according to the terms of a directive, addressed to a Member State in the context of a contractual dispute with Carp. Carp claimed it was not bound by the decision. The ECJ reviewed the cases on the horizontal application of directives and concluded that:

the considerations underpinning the case-law referred to in the preceding paragraph with regard to directives apply *mutatis mutandis* to the question whether Decision 1999/93 may be relied upon as against an individual. [Para 21.]

5.2.7 Recommendations and opinions

Since recommendations and opinions have no binding force it would appear that they cannot be invoked by individuals, directly or indirectly, before national courts. However, in *Grimaldi v Fonds des Maladies Professionnelles* (case C-322/88), in the context of a claim by a migrant worker for benefit in respect of occupational diseases, in which he sought to invoke a Commission recommendation concerning the conditions for granting such benefit, the ECJ held that national courts were:

bound to take Community recommendations into consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures.

Such a view is open to question. It may be argued that recommendations, as non-binding measures, can at the most only be taken into account in order to resolve ambiguities in domestic law.

5.2.8 International agreements to which the EC is a party

There are three types of international agreements capable of being invoked in the context of EC law arising from the Community's powers under Articles 281, 300, 133, and 310 (ex 210, 228, 113 and 238 EC, post Lisbon, Articles 243, 260, 294, and 272 TFEU respectively—see Chapter 3). First, agreements concluded by the Community institutions falling within the treaty-making jurisdiction of the EC; secondly, 'hybrid' agreements, such as the WTO agreements, in which the subject matter lies partly within the jurisdiction of Member States and partly within that of the EC; and thirdly, agreements concluded prior to the EC Treaty, such as GATT, which the EC has assumed as being within its jurisdiction, by way of succession. There is no indication in the EC Treaty that such agreements may be directly effective.

The ECJ's case law on the direct effect of these agreements has not been wholly consistent. It purports to apply similar principles to those which it applies in matters of 'internal' law. A provision of an association agreement will be directly effective when 'having regard to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. Applying these principles in some cases, such as *International Fruit Co NV v Produktschap voor Groenten en Fruit (No 3)* (cases 21 and 22/72), the Court, in response to an enquiry as to the direct effects of Article XI of GATT, held, following an examination of the agreement as a whole, that the Article was not directly effective.

In others, such as *Bresciani* (case 87/75) and *Kupferberg* (case 104/81), Article 2(1) of the Yaounde Convention and Article 21 of the EC-Portugal trade agreement were examined respectively on their individual merits and found to be directly effective. The reasons for these differences are at not at first sight obvious, particularly since the provisions in all three cases were almost identical in wording to EC Treaty articles already found directly effective. The suggested reason (see Hartley (1983) 8 EL Rev 383) for this inconsistency is the conflict between the ECJ's desire to provide an effective means of enforcement of international agreements against Member States and the lack of a solid legal basis on which to do so. The Court justifies divergences in interpretation by reference to the scope and purpose of the agreement in question, which are clearly different from, and less ambitious than, those of the EC Treaty *(Opinion 1/91* (on the draft EEA Treaty)). As a result, the criteria for direct effects tend to be applied more strictly in the context of international agreements entered into by the EC.

Since the *International Fruit Co* cases the Court has maintained consistently that GATT rules cannot be relied upon to challenge the lawfulness of a Community act except in the special case where the Community provisions have been adopted to implement obligations entered into within the framework of GATT. Because GATT rules are not unconditional, and are characterised by 'great flexibility', direct effects cannot be inferred from the 'spirit, general scheme and wording of the Treaty'. This principle was held in *Germany v Council* (case C280/93) to apply not only to claims by individuals but also to actions brought by Member States. As a result the opportunity to challenge Community law for infringement of GATT rules is seriously curtailed. Despite strong arguments in favour of the direct applicability of WTO provisions from Advocate-General Tesauro in *THermes International v FH Marketing Choice BV* (case C-53/96), the Court has not been willing to change its mind. It appears that there is near-unanimous political opposition to the direct application of WTO. (See recently *Merck Genericos-Produtos Farmaciuticos Lda v Merck & Co Inc, and Merck Sharp & Dohme Lda* (case C-43 1/05)).

However, where the agreement or legislation issued under the agreement confers clear rights on

individuals the ECJ has not hesitated to find direct effects (eg, *Sevince* (case C192/89); *Bahia Kziber* (case C- 18/90)).

Thus, paradoxically, an individual in a dualist state such as the UK will be in a stronger position than he would normally be vis-a-vis international law, which is not as a rule incorporated into domestic law.

5.2.9 Exclusions from the principle of direct effects

In extending the jurisdiction of the ECJ to matters within the third—justice and home affairs (JHA)—pillar of the TEU to encompass decisions and framework decisions in the field of political and judicial cooperation in criminal matters taken under Title VI TEU, the Treaty of Amsterdam (ToA) expressly denied direct effects to these provisions (Article 34(2) TEU). Similarly, although areas within the third pillar of the TEU, relating to visas, asylum, immigration, and judicial cooperation in civil matters, were incorporated into the EC Treaty (new Title IV), the ToA excluded the ECJ's jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) 'relating to the maintenance of law and order and the safeguarding of internal security' (Article 68(2) EC); thus access to the ECJ via a claim before their national court was denied to individuals in areas in which they may be significantly and adversely affected. It should be noted that if the Treaty of Lisbon comes into force, Article 34 TEU would be deleted, all the provisions relating to judicial cooperation in criminal matters and to police cooperation being relocated to the TFEU (the EC Treaty after Lisbon corrfes into effect) as part of the area of freedom security and justice provisions. With the unitary structure, it will no longer be possible to distinguish between the policy areas in the current manner and thus these areas would seem to have the potential to become directly effective, though it should be noted that the CFSP provisions will remain in the TEU and therefore structurally separate. Arguably, distinctions may continue to be made here.

Although not an express exclusion from the principle of direct effects, a situation in which an individual was not be able to rely on Community law arose in the case of *Rechberger and Greindle v Austria* (case C-140/97). The case, a claim based on *Francovich,* concerned Austria's alleged breaches of Directive 90/134 on package travel both before Austria's accession, under the EEA Agreement, and, following accession, under the EC Treaty. The ECJ held that where the obligation to implement the directive arose under the EEA Agreement, it had no jurisdiction to rule on whether a Member State was liable under that agreement prior to its accession to the European Union (see also *Ulla-Brith Andersson v Swedish State* (case C321/97)).

5.3 Principle of indirect effects

Although the ECJ has not shown willing to allow horizontal direct effect of directives, it has developed an alternative tool by which individuals may rely on directives against another individual. This tool is known as the principle of 'indirect effect', which is an interpretative tool to be applied by domestic courts interpreting national legislation which conflicts with a directive in the same area. It is sometimes also called the principle of consistent interpretation.

The principle of indirect effects was introduced in a pair of cases decided shortly before *Marshall,* namely: *von Colson v Land Nordrhein-Westfalen* (case 14/83) and *Harz v Deutsche Tradax GmbH* (case 79/83). Both cases were based on Article 6 of Equal Treatment Directive 76/207. Article 6 provides that:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment... to pursue their claims by judicial process after possible recourse to other competent authorities.

The claimants had applied for jobs with their respective defendants. Both had been rejected. It was found by the German court that the rejection had been based on their sex, but it was justifiable. Under German law they were entitled to compensation only in the form of travelling expenses. This they claimed did not meet the requirements of Article 6. Ms von Colson was claiming against the prison service; Ms Harz against Deutsche Tradax GmbH, a private company. So the vertical/ horizontal, public/private anomaly was openly raised and argued in Article 234 proceedings before the ECJ.

The Court's solution was ingenious. Instead of focusing on the vertical or horizontal effects of the directive it turned to Article 10 of the EC Treaty. Article 10 requires states to 'take all appropriate measures' to ensure fulfilment of their Community obligations,

This obligation, the Court said, applies to *all* the authorities of Member States, including the courts. It thus falls on the courts of the Member States to interpret national law in such a way as to ensure that the objectives of the directive are achieved. It was for the German courts to interpret German law in such a way as to ensure an effective remedy as required by Article 6 of the directive. The result of this approach is that although Community law is not applied directly—it is not 'directly effective'—it may still be applied indirectly as domestic law by means of interpretation.

The success of the *von Colson* principle of indirect effect depended on the extent to which national courts perceived themselves as having a discretion, under their own constitutional rules, to interpret domestic law to comply with Community law. Although the courts in the UK showed some reluctance initially to apply this principle, relying on a strict interpretation of s 2(1) of European Communities Act 1972 as applying only to directly effective Community law (see the House of Lords in *Duke v GEC Reliance Ltd* ([1988] AC 618)), the position soon changed *(Litster v Forth Dry Dock & Engineering Co Ltd* ([1990] 1 AC 546). Occasional 'hiccups' still occurred, however, and may still do so today. In *Finnegan v Clowney Youth Training Programme Ltd* ([1990] 2 AC 407) the House of Lords had refused to interpret Article 8(4) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) in line with *Marshall,* even though the order had been made after the ECj 's decision in *Marshall.* This was because that provision was enacted in terms identical to the parallel provision considered in *Duke v GEC Reliance Ltd,* and 'must have been intended to' have the same meaning as in that Act. In the light of *Marleasing* (case 106/89, see below), such a decision would be unsustainable now, and today, the UK courts are taking their obligation seriously (see, eg, *Braymist Ltd* v *Wise Finance Co Ltd* [2002] Ch 273; *Director-General ofFair Trading* v *First National Bank* [2002] 1 AC 481).

5.3.1 The scope of the doctrine: *Marleasing*

The ECJ considered the scope of the 'indirect effect' doctrine in some depth in *Marleasing SA v La Comercial Internacional de Alimentation SA* (case C-106/89). In this case, which was referred to the ECJ by the Court of First Instance, Oviedo, the claimant company was seeking a declaration that the contracts setting up the defendant companies were void on the grounds of 'lack of cause', the contracts being a sham transaction carried out in order to defraud their creditors. This was a valid basis for nullity under Spanish law. The defendants argued that this question was now governed by EC Directive 68/151. The purpose of Directive 68/151 was to protect the members of a company and third parties from, inter alia, the adverse effects of the doctrine of nullity. Article 11 of the directive provides an exhaustive list of situations in which nullity may be invoked. It does not include 'lack of cause'. The directive should have been in force in Spain from the date of accession in 1986, but it had not been implemented. The Spanish judge sought a ruling from the ECJ on whether, in these circumstances, Article 11 of the directive was directly effective.

The ECJ reiterated the view it expressed in, *Marshall* that a directive cannot of itself 'impose obligations on private parties'. It reaffirmed its position in *von Colson* that national courts must *as far as possible* interpret national law in the light ot the wording and purpose of the directive in order to achieve the result pursued by the directive (para 8). And it' added that this obligation applied *whether the national provisions in question were adopted before or after the directive.* It concluded by ruling specifically, and without qualification, that national courts were 'required' to interpret domestic law in such a way as to ensure that the objectives of the directive were achieved (para 13).

Given that in *Marleasing* no legislation had been passed, either before or after the issuing of the directive, to comply with the directive, and given the ECJ's suggestion that the Spanish court must nonetheless strive to interpret domestic law to comply with the directive, it seems that, according to the ECJ, it is not necessary to the application of the *von Colson* principle that the relevant national measure should have been introduced for the purpose of complying with the directive, nor even that a national measure should have been specifically introduced at all.

5.3.2 The limits of *Marleasing*

The strict line taken in *Marleasing was* modified in *Wagner MiretvFondo de Garantira Salaria* (case C-334/92), in a claim against a private party based on Directive 80/987. This directive is an employee protection measure designed, inter alia, to guarantee employees arrears of pay in the event of their employer's insolvency. Citing its ruling in *Marleasing* the Court suggested that, in interpreting national law to conform with the objectives of a

directive, national courts must *presume* that the state intended to comply with Community law. They must strive 'as far as possible' to interpret domestic law to achieve the result pursued by the directive. But if the provisions of domestic law cannot be interpreted in such a way (as was found to be the case in *Wagner Miret)* the state may be obliged to make good the claimant's loss on the principles of state liability laid down in *Francovich v Italy* (cases 6 and 9/90).

Wagner Miret thus represents a tacit acknowledgment on the part of the Court that national courts will not always feel able to 'construe' domestic law to comply with an EC directive, particularly when the provisions of domestic law are clearly at odds with an EC directive, and there is no evidence that the national legislature intended national law to comply with its provisions, or with a ruling on its provisions by the ECJ. This limitation proved useful for courts which were unwilling to follow *Marleasing.* Thus, in *R v British Coal Corporation, ex parte Vardy* ([1993] ICR 720), a case decided after, but without reference to, *Marleasing,* the English High Court adverted to the House of Lords judgment in *Litster* but found that it was 'not possible' to interpret a particular provision of the Trade Union and Labour Relations Act 1992 to produce the same meaning as was required by the relevant EC directive (see also *Re Hartlebury Printers Ltd* [1993] 1 All ER 470 at 478b, ChD).

Thus the indirect application of EC directives by national courts cannot be guaranteed. Some reluctance on the part of national courts to comply with the *von Colson* principle, particularly as applied in *Marleasing,* is hardly surprising. It may be argued that in extending the principle of indirect effect in this way the ECJ is attempting to give horizontal effect to directives by the back door, and impose obligations, addressed to Member States, on private parties, contrary to their understanding of domestic law. Where such is the case, as the House of Lords remarked in *Duke v GEC Reliance Ltd* (see also *Finnegan v Clowney Youth Training Programme Ltd),* this could be 'most unfair'. Indeed, the dividing line between giving 'horizontal direct effect' to a directive and merely relying on the interpretative obligation under the doctrine of 'indirect effect' can be a very fine and technical one in the circumstances of a particular case, as evidenced by *Mangold* (case C-144/04). This case involved an interpretation of the notion of 'working time' in the context of the Working Time Directive (93/104/EC [1993] OJ L307/1 8). German case law had developed a distinction between duty time, on-call time and stand-by time, with only the first being regarded as 'working time'. Emergency workers employed by the German Red Cross had challenged a provision in their collective labour agreement which, they argued, extended their working time beyond the prescribed 48-hour limit. The Court suggested that this agreement may be in breach of the directive, but that the claimants could not rely on the directive itself as against their employer. Having restated the basic principle that national law must be interpreted in accordance with the treaty, in particular where this has been enacted to implement a directive, the Court went on to say that this obligation was not restricted to the provisions themselves, but extended to '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' (para 115).

A national court must do 'whatever lies within its jurisdiction' to ensure compliance with EC law. The ECJ did not go so far as to state expressly that existing case law might have to be reviewed to ensure such compliance, but the force of its reasoning appears to point in that direction. On the facts of the case, the outcome would be very close to allowing the individuals to invoke the direct effect of the directive against their employer.

The ECJ in *Adeneler* (case C-2 12/04) referred to another limitation on indirect effect, legal certainty and non-retroactivity. This line of reasoning finds its basis in the case of *Kolpinghuis Nijmegen* (case 80/8 6). Here, in the context of criminal proceedings against Kolpinghuis for breach of EC Directive 80/777 on water purity, which at the relevant time had not been implemented by the Dutch authorities, the Court held that national courts' obligation to interpret domestic law to comply with EC law was 'limited by the general principles of law which form part of Community law [see Chapter 6] and in particular the principles of legal certainty and non-retroactivity'.

Although expressed in the context of criminal liability, to which these principles were 'especially applicable', it was not suggested that the limitation should be confined to such situations. Where an interpretation of domestic law would run counter to the legitimate expectations of individuals *afortiori* where the state is seeking to invoke a directive against an individual to determine or aggravate his criminal liability, as was the case in *Arcaro* (case C-l68/95, see further below), the doctrine will not apply. Where domestic legislation has been introduced to comply with a Community directive, it is legitimate to expect that domestic law will be interpreted in conformity with Community law, provided that it is capable of such an interpretation (cf *Mangold,* case C-144/04, above). Where legislation has not been introduced with a view to compliance domestic law may still be interpreted in the

light of the aims of the directive as long as the domes'tic provision is reasonably capable of the meaning contended for. But in either case an interpretation which conflicts with the clear words and intentions of domestic law is unlikely to be acceptable to national courts. This has repeatedly been acknowledged by the Court *(Wagner Miret* (case C-334/92) and *Arcaro* (case C-1 68/95)).

Mangold could, however, be seen as a more unsympathetic approach to the limits of interpretation. A^-similarly unsympathetic approach to the difficulties of the national court can be seen in *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbdnde* (case C-404/06), where it was argued that, as the national court had ruled that there was only one possible interpretation and it was prohibited under national law from making a ruling *contra legem,* the reference should be declared inadmissible as the referring court would not be able to take account of any differing interpretation from the ECJ. The ECJ rejected the argument, on the basis of the separation of functions between the ECJ and the national court (see Chapter 10). It continued:

The uncertainty as to whether the national court—following an answer given by the Court of Justice to a question referred for a preliminary ruling relating to interpretation of a directive—may, in compliance with the principles laid down by the Court... interpret national law in the light of that answer cannot affect the Court's obligation to rule on that question. [Para 22.]

In effect, the ECJ held here that the problems of dealing with the doctrine of indirect effect are for the national court. It should not be thought that *Quelle* signals an end to the *contra legem* principle. It was a ruling of one of the chambers. The Grand Chamber shortly before *Quelle* in *Impact v Minister for Agriculture and Food and others* (case C-268/06) reaffirmed the principle, holding that the national court's duty under indirect effect is 'limited by general principles of law, particularly those of legal certainty and non-retroactivity' and therefore indirect effect 'cannot serve as the basis for an interpretation of national law *contra legem'* (para 100). *Quelle* and *Mangold* seem then to be exceptions, but the uncertainty they introduced is not helpful.

Arcaro (case C-1 68/9 5) could also be seen as introducing further limitations on the scope of indirect effect. There, the ECJ held that the:

obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law *reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed* or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions.

The Court has subsequently affirmed that the obligation to interpret domestic law in accordance with EC law cannot result in criminal liability independent of a national law adopted to implement an EC measure, particularly in light of the principle of non-retroactivity of criminal penalties in Article 7 of the European Convention on Human Rights (case C-60/02 *Criminal Proceedings againstX ('Rolex')).* This reasoning has also been applied in the context of direct effect (see *Berlusconi and others* (joined cases C-387/02, C-39 1/02 and C-403/02)).

The phrase 'imposition on an individual of an obligation' in *Arcaro* could be interpreted to mean that indirect effect could never require national law to be interpreted so as to impose obligations on individuals not apparent on the face of the relevant national provisions. It is submitted, however, that the ECJ's view in *Arcaro* is limited to the context of criminal proceedings, and that the application of the doctrine of indirect effect can result in the imposition of civil liability not found in domestic law (see also Advocate-General Jacobs in *Centrosteel Sri v Adipol GmbH* (case C-456/98), paras 31-5).

This seems to be the result of *Oceano Grupo Editorial vRocio Murciano Quintero* (case C240/9 8). Here, Oceano had brought a claim in a Barcelona court for payment under a contract of sale for encyclopaedias. The contract contained a term which gave jurisdiction to the Barcelona court rather than a court located near the consumer's home. That court had doubts regarding the fairness of the jurisdiction clause. The Unfair Contract Terms Directive (93/13/EEC) requires that public bodies be able to take steps to prevent the continued use of unfair terms. It also contains a list of unfair terms, including a jurisdiction clause, but this only became effective in Spanish law *after* Oceano's claim arose. Spanish law did contain a general prohibition on unfair terms which could have encompassed the jurisdiction clause, but the scope of the relevant Spanish law was unclear. The question arose whether the Barcelona court should interpret Spanish legislation in accordance with the Unfair

Contract Terms Directive. The ECJ reaffirmed the established position that a 'national court is obliged, when it applies national law provisions predating or postdating [a directive], to interpret those provisions, so far as possible, in the light of the wording of the directive' (para 32).

The Court went on to say that in light of the emphasis on public enforcement in the Unfair Contract Terms Directive, the national court may be required to decline of its own motion the jurisdiction conferred on it by an unfair term. As a consequence, Oceano would be deprived of a right which it might otherwise have enjoyed under existing Spanish law. This latter consideration should not prevent the national court from interpreting domestic law in light of the directive. In terms of the scope of the doctrine of indirect effect, it would be nonsensical to distinguish between cases which involve the imposition of obligations and those which concern restrictions on rights. Often, in a relationship between individuals, one individual's right is an obligation placed on another individual. The reasoning in *Arcaro* is best confined to the narrow context of criminal penalties.

Some questions have arisen as to when the obligation to use a consistent interpretation arises and in particular should it be the date the directive is enacted, or the date by which it must be implemented. This question came before the ECJ in *Adeneler.* The ECJ distinguished a positive and a negative duty for the courts of Member States. The positive aspect is the obligation to interpret all national law in line with the directive; that arises from the date by which the directive must be transposed. The negative aspect is based on the ECJ's reasoning in *Inter-Environnement Wallonie* (see 5.2.5.2 above). According to this line of reasoning, the national courts must, once the directive is in force (but before it is due to be transposed), refrain from interpreting national law in a way liable seriously to compromise the attainment of the result prescribed by the directive.

It may therefore be stated that the doctrine of indirect effect continues to be significant. However, there will be circumstances when it wilfhot be possible to apply it. In such a situation, as the Court suggested in *Wagner Miret,* it will be necessary to pursue the alternative remedy of a claim in damages against the state under the principles laid down in *Francovich v Italy* (cases C-6 and 9/90—see Chapter 9).

It may be significant that in *El Corte Ingles SA v Rivero* (case C-l92/94) the Court, in following the *Dori* ruling that a directive could not be invoked directly against private parties, did not suggest a remedy based on indirect effect, as it had in *Dori,* but focused only on-the possibility of a claim against the state under *Francovich.*

5.3.3 Indirect effect in other contexts

The discussion has, so far, concentrated on the application of this principle in the context of directives. However, *mMariaPupino* (case C-l05/03), the ECJ held that the obligation to interpret national law in accordance with European rules can extend to framework decisions adopted under Article 34(2) TEU, and that a national court is required to interpret domestic law, in so far as possible, in accordance with the wording and purpose of a corresponding framework decision. The decision is controversial, because it extends the notion of indirect effect into the domain of criminal law, an area in respect of which the Community has no competence to act and seems also to circumvent the limitation on the direct effect of JHA provisions noted at 5.2.9.

5.4 Conclusions

The principle of direct effects, together with its twin principle of supremacy of EC law, discussed in Chapter 4, has played a crucial part in securing the application and integration of Community law within national legal systems. By giving individuals and national courts a role in the enforcement of Community law it has ensured that EC law is applied, and Community rights enforced, even though Member States have failed, deliberately or inadvertently, to bring national law and practice into line with Community law. Thus, as the Court suggested in *Van Gend* (case 26/62), the principle of direct effects has provided a means of control over Member States additional to that entrusted to the Commission under Article 226 and Member States under Article 227 (see further Chapter 11). But there is no doubt that the ECJ has extended the concept of direct effects well beyond its apparent scope as envisaged by the EC Treaty. Furthermore, although the criteria applied by the ECJ for assessing the question of direct effects appear straightforward, in reality they have in the past been applied loosely, and any provision which is justiciable has, until recently, been found to be directly effective, no matter what difficulties may be faced by national courts in its application, or what impact it may have on the parties, public or private, against whom it is enforced. Thus the principle of direct effects created problems for national

courts, particularly in its application to directives.

In recent years there have been signs that the ECJ, having, with a few exceptions, won acceptance from Member States of the principle of direct effects, or at least—in the case of directives—of vertical effects, had become aware of the problems faced by national courts and was prepared to apply the principles of direct and indirect effect with greater caution. Its more cautious approach to the question of standing, demonstrated in *Lemmens* (case C-226/97), has been noted above. In *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (case C-236/92), the Court found that Article 4 of Directive 7 5/442 on the Disposal of Waste, which required states to 'take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment', was not unconditional or sufficiently precise to be relied on by individuals before their national courts. It 'merely indicated a programme to be followed and provided a framework for action' by the Member States. The Court suggested that in order to be directly effective the obligation imposed by the directive must be 'set out in unequivocal terms'. In *R v Secretary of State for Social Security, exparte Sutton* (case C-66/95) the Court refused to admit a claim for the award of interest on arrears of social security benefit on the basis of Article 6 of EC Directive 79/7 on Equal Treatment for Men and Women in Social Security, although in *Marshall (No 2)* (case C-27 1/91) it had upheld a claim for compensation for discriminatory treatment based on an identically worded Article 6 of Equal Treatment Directive 7 6/207. The Court's attempts to distinguish between the two claims ('amounts payable by way of social security are not compensatory') were unconvincing. In *El Corte Ingles SA v Rivero* (case C-192/94) it found the then Article 1 29a (now 153) of the EC Treaty requiring the Community to take action to achieve a high level of consumer protection insufficiently clear and precise and unconditional to be relied on as between individuals. This may be contrasted with its earlier approach to the former Article 128 EC, which required the Community institutions to lay down general principles for the implementation of a vocational training policy, which was found, albeit together with the non-discrimination principle of (the then) Article 7 EEC, to be directly effective (see *Gravier v City of Liege* (case 293/83)). Thus, a directive may be denied direct effects on any of the following the grounds:

(a) the right or interest claimed in the directive is not sufficiently clear, precise and unconditional

(b) the individual seeking to invoke the directive did not have a direct interest in the provisions invoked *(Verholen,* cases C-87-9/90)

(c) the obligation allegedly breached was not intended for the benefit of the individual seeking to invoke its provisions *(Lemmens).*

In the area of indirect effects, in *Dori v Recreb Sri* (case C-9 1/92), the ECJ, following its lead in *Marshall* (case 152/84), declared unequivocally that directives could not be invoked horizontally. This view was endorsed in *El Corte Ingles SA v Rivero, Arcaro* (case C- 168/95) and, most recently, in *Pfeiffer* (joined cases C-397/01 to C-403/01). In *Wagner Miret* (case C3 34/92) the ECJ acknowledged that national courts might not feel able to give indirect effect to Community directives by means of 'interpretation' of domestic law. This was also approved in *Arcaro.* In almost all of these cases, decided after *Francovich,* the Court pointed out the possibility of an alternative remedy based on *Francovich,* discussed in Chapter 9.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 6: General Principles of Law

6.1 Introduction

6.1.1 The relevance of general principles

After the concept of direct effects and the principle of supremacy of EC law the third major contribution of the European Court of Justice (ECJ) has been the introduction of general principles of law into the corpus of EU law. Although primarily relevant to the question of remedies and enforcement of EC law, a discussion of the role of general principles of law is appropriate at this stage in view of their fundamental importance in the jurisprudence of the ECJ.

General principles of law are relevant in the context of EU law in a number of ways. First, they may be invoked as an aid to interpretation: EU law, including domestic law implementing EC law obligations, must be interpreted in such a way as not to conflict with general principles of law. Secondly, general principles of law may be invoked by both states and individuals to challenge Community action, either to annul or invalidate acts of the institutions (under Articles 230, 234, 236, and 241 (ex 173, 177,179, and 184) EC post Lisbon 263, 267, 270 and 277 TFEU), or to challenge inaction on the part of these institutions (under Articles 232 or 236 (ex 175 and 179) EC post Lisbon 265 and 270 TFEU). Thirdly, as a logical consequence of its second role, but less generally acknowledged, general principles may also be invoked as a means of challenging action by a Member State, whether in the form of a legal or an administrative act, where the action is performed in the context of a right or obligation arising from Community law (see *Klensch* (cases 201 and 202/85); *Wachaufv Germany* (case 5/88); *Lageder v Amministrazione delle Finanze dello Stato* (case C31/91); but cf*R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C2/93)). The degree to which general principles of law affect actions by Member States will be discussed in more detail later in this chapter. General principles of law may be invoked to support a claim for damages against the Community, under Article 288(2) (ex 2 15(2) post Lisbon Article 340 TFEU) (see Chapter 14).

These reasons are all practical reasons, based in the arena of legal action. There are other reasons, too, which relate to how the Union is seen; what sort of values it has. The jurisprudence in this area expands the rights of individuals beyond the economic rights found in the original treaty. In parallel with the concept of citizenship, the protection of such rights suggests the Union itself has greater links with the individuals and is, itself, obtaining greater legitimacy.

This area has become a steadily evolving aspect of Union law. This chapter examines the general historical development of the Court's jurisprudence to explain how general principles have been received into Union law. It will be seen that general principles, in particular fundamental rights, are invoked with increasing frequency before the European courts. Some of these general principles are examined in more detail. However, this chapter does not provide a full survey of the substantive rights which are now recognised in Union law. Such a discussion is beyond the scope of this book and readers should refer to the specialist texts which are now available.

6.1.2 Fundamental principles

General principles of law are not to be confused with the fundamental principles of Community law, as expressed in the EC Treaty, for example, the principles of free movement of goods and persons, of non-discrimination on the grounds of sex (Article 141 (ex 119, as amended) EC) or nationality (Article 12 (ex 6) EC), although there may be some overlap or commonality between the two. General principles of law constitute the 'unwritten' law of the Union and they have been developed—or discovered—over time by the ECJ.

6.2 Rationale for the introduction of general principles of law

The original legal basis for the incorporation of general principles into Union law was slim, resting precariously on three articles. Article 230 gives the ECJ power to review the legality of Community acts on the basis of, inter alia, 'infringement of this Treaty', or 'any rule of law relating to its application'. Article 288(2), which

governs Community liability in tort, provides that liability is to be determined 'in accordance with the general principles common to the laws of the Member States'. And Article 220, governing the role of the ECJ, provides that the Court 'shall ensure that in the interpretation and application of this Treaty the law is observed'.

In the absence of any indication as to the scope or content of these general principles, it has been left to the ECJ to put flesh on the bones provided by the treaty. This function the Court has amply fulfilled, to the extent that general principles now form an important element of EU law.

One of the reasons for what has been described as the Court's 'naked law-making' in this area is best illustrated by the case of *Internationale Handelsgesellschaft mbH* (case 11/70). There the German courts were faced with a conflict between an EC regulation requiring the forfeiture of deposits by exporters if export was not completed within an agreed time, and a number of principles of the German constitution, in particular, the principle of proportionality. It is in the nature of constitutional law that it embodies a state's most sacred and fundamental principles. Although these principles were of particular importance, for obvious reasons in post-war Germany, other Member States also had written constitutions embodying similar principles and rights. Clearly it would not have done for EC law to conflict with such principles. Indeed, as the German constitutional court made clear ([1974] 2 CMLR 540), were such a conflict to exist, national constitutional law would take precedence over EC law. This would have jeopardised not only the principle of primacy of EC law but also the uniformity of application so necessary to the success of the new legal order. So while the ECJ asserted the principle of primacy of EC law in *Internationale Handelsgesellschaft,* it was quick to point out that respect for fundamental rights was in any case part of EC law.

Another reason now given to justify the need for general principles is that the Community's powers—and now those of the Union—have expanded to such a degree that some check on the exercise of the institutions' powers is needed. Furthermore, the expansion of Union competence means that the institutions' powers are now more likely to operate in policy areas in which human rights have an influence. Although those who wish to see sovereignty retained by the nation state may originally have been pleased to see the limitation of the institutions' powers, the development of human-rights jurisprudence in this context can be seen as a double-edged sword, giving the ECJ increased power to impugn both acts of the Union institutions and implementing measures taken by Member States on grounds of infringement of general principles.

6.3 Development of general principles

6.3.1 Fundamental human rights

The Court's first tentative recognition of fundamental human rights was prior to *Internationale Handelsgesellschaft,* in the case of *Stauder v City ofUlm* (case 29/69). Here the applicant was claiming entitlement to cheap butter provided under a Community scheme to persons in receipt of welfare benefits. He was required under German law to divulge his name and address on the coupon which he had to present to obtain the butter. He challenged this law as representing a violation of his fundamental human rights (namely, equality of treatment). The ECJ, on reference from the German court on the validity of the relevant Community decision, held that, on a proper interpretation, the Community measure did not require the recipient's name to appear on the coupon. This interpretation, the Court held, contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of law and protected by the Court.

The ECJ went further in *Internationale Handelsgesellschaft.* There it asserted that respect for fundamental rights forms an integral part of the general principles of law protected by the Court—such rights are inspired by the constitutional traditions common to the Member States. One point to note here is that the ECJ was not comparing EC law with *national* law but with the principles of *international* law which are embodied in varying degrees in the national constitutions of Member States. A failure to make the distinction between general principles of international law (even if embodied in national laws) which the Community legal order respects and national law proper could erode the doctrine of supremacy of Community law vis-a-vis national laws.

The *International Handelsgesellschaft* judgment can be taken as implying that only rights arising from traditions common to Member States can constitute part of EC law (a 'minimalist' approach). It may be argued that if the problem of conflict between Community law and national law is to be avoided in *all* Member States it is necessary for *any* human right upheld in the constitution of *any* Member State to be protected under EU law (a maximalist approach). In *Hoechst* v *Commission* (cases 46/87 and 227/88), in the context of a claim based on

the fundamental right to the inviolability of the home, the Court, following a comprehensive review by Advocate-General Mischo of the laws of all the Member States on this question, distinguished between this right as applied to the 'private dwelling of physical persons', which was common to all Member States (and which would by implication be protected as part of Community law), and the protection offered to commercial premises against intervention by public authorities, which was subject to 'significant differences' in different Member States. In the latter case the only common protection, provided under various forms, was protection against arbitrary or disproportionate intervention on the part of public authorities. Similarly, but dealing with administrative law, in *Australian Mining & Smelting Europe Ltd v Commission* (case 155/79), in considering the principle of professional privilege, the Court found that the scope of protection for confidentiality for written communications between lawyers and their clients varied from state to state; only privilege as between independent (as opposed to in-house) lawyers and their clients was generally accepted, and would be upheld as a general principle of Community law.

These cases suggest that where certain rights are protected to differing degrees and in different ways in Member States, the Court will look for some *common* underlying principle to uphold as part of Union law. Even if a particular right protected in a Member State is not universally protected, where there is an apparent conflict between that right and EU law, the Court will strive to interpret Union law so as to ensure that the substance of that right is not infringed. An exception to this approach can be seen in *Society for the Protection of the Unborn Child v Grogan* (case 159/90). This case concerned the officers of a students' union who provided information in Ireland about the availability of legal abortion in the UK. SPUC brought an action alleging that this was contrary to the Irish constitution. The officers' defence was based on the freedom to provide services within the Community and on the freedom of expression contained in the ECHR which also forms part of Community law as a general principle (see further below). The ECJ evaded this issue. Since the students' union did not have an economic link with the clinics whose services they advertised, the provision of information about the clinics was not an economic activity within the treaty. As the issues fell outside the scope of EC law, the officers could not rely on either the provisions on freedom to provide services in the treaty or on general principles of law. (See further Chapter 21.)

6.3.2 Role of international human-rights treaties

Following *Internationale Handelsgesellschaft* the scope for human-rights protection was further extended in the case of *Nold KG v Commission* (case 4/73). In this case J Nold KG, a coal wholesaler, was seeking to challenge a decision taken under the ECSC as being in breach of the company's fundamental right to the free pursuit of business activity. While the Court did not find for the company on the merits of the case, it asserted its commitment to fundamental rights in the strongest terms. As well as stating that fundamental rights form an integral part of the general principles of law, the observance of which it ensures, it went on to say: In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.

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.

The reasons for this inclusion of principles of certain international treaties as part of EU law are clearly the same as those upholding fundamental constitutional rights; it is the one certain way to guarantee the avoidance of conflict.

In this context, the most important international treaty concerned with the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), to which all Member States are now signatories. The Court has on a number of occasions confirmed its adherence to the rights protected therein, an approach to which the other institutions gave their support 0oint Declaration, [1977] OJ C 103/1). In *R v Kirk* (case 63/83), in the context of criminal proceedings against Kirk, the captain of a Danish fishing vessel, for fishing in British waters (a matter subsequently covered by EC regulations), the principle of non-retroactivity of penal measures, enshrined in Article 7 of the ECHR, was invoked by the Court and applied in Captain Kirk's favour. The EC regulation, which would have legitimised the British rules under which Captain Kirk was charged, could not be applied to penalise him retrospectively. (See also *Johnston v Chief Constable of the Royal Ulster Constabulary* (case 222/84) (ECHR, Article 6, right to

judicial process); *Hoechst* (cases 46/87, 227/88) contrast substantive ruling in *Roquette Freres* (case C-94/00); *National Panasonic v Commission* (case 136/79) (ECHR Article 8, right to respect for private and family life, home and correspondence—not infringed).) The impact of Article 8 ECHR can be seen clearly in the case law on free movement of people (see Chapter 25).

Thus, it seems that any provision in the ECHR may be invoked, provided it is done in the context of a matter of EU law. In *Kaur* v *Lord Advocate* ([1980] 3 CMLR 79), an attempt was made to invoke the Convention (Article 8 'respect for family life') by an Indian immigrant seeking to challenge a deportation order made under the Immigration Act 1971. She failed on the grounds that the Convention had not been incorporated into British law. Its alleged incorporation via the European Communities Act 1972 did not enable a party to invoke the Convention before a Scottish court in a matter wholly unrelated to EU law (see also *SPUC v Grogan* (case 159/90) and *Kremzow v Austria* (case C-299/95)). In *Mannesmannrohren-Werke AG* v *Commission* (Case T-l 12/98), the Court of First Instance (CFI) emphasised that although the ECHR has special significance in defining the scope of fundamental rights recognised by the Community, because it reflects the constitutional traditions common to the Member States, the Court has no jurisdiction to apply the ECHR itself. The CFI therefore rejected arguments based directly on Article 6 ECHR in relation to an application to annul a Commission decision, but allowed the application on other grounds (see 6.6.7). The CFI's view with regard to invoking ECHR articles may be technically correct, but it sits somewhat uneasily with other judgments both by the CFI and the ECJ in which the courts appeared more willing to refer directly to ECHR provisions, and even to the jurisprudence of the European Court of Human Rights itself (see, eg, *Roquette Freres* (case C-94/00); *Orfanopoulos* (case C-482/0 1), citing *Boultifv Switzerland* concerning right to family life; *Connolly v Commission* (case C-274/99P): civil servants' freedom of expression under Article 10 ECHR).

Other international treaties concerned with human rights referred to by the Court as constituting a possible source of general principles are the European Social Charter (1971) and Convention 111 of the International Labour Organisation (1958) *(Defrenne v Sabena (No 3)* (case 149/77)). In *Ministere Public v Levy* (case C-158/91) the Court suggested that a Member State might even be obliged to apply a national law which conflicted with a ruling of its own on the interpretation of EC Directive 7 6/207 where this was necessary to ensure compliance with an international convention (in this case ILO Convention 89,1948) concluded prior to that state's entry into the EC. The list has grown over the years, with the ECJ adding recently, for example, Convention on the Protection and Promotion of the Diversity of Cultural Expressions *(UTECA v Administracion General del Estado* (case C-222/07)) and the UN Convention on the Rights of the Child *(Dynamic Medien* (case C-244/06)).

6.3.3 Relationship between different legal systems protecting human rights

6.3.3.1 *Relationship with national constitutions*

We saw at the beginning of this chapter that one of the central reasons for the introduction of fundamental rights into EU law was the resistance of some of the constitutional courts to giving effect to Community rules which conflicted with national constitutional principles. The ECJ's tactics to incorporate these principles and stave off rebellion were undoubtedly successful as exemplified by the *Wilnsche* case ([1987] 3 CMLR 225), in which the German constitutional court resiled from its position in *InternationaleHandelsgesellschaft* ([1974] 2 CMLR 540) (see Chapter 4). This does not, however, mean that the ECJ can rest on its laurels in this regard. The Italian constitutional court in Fragd *(SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) reaffirmed its right to test Community rules against national constitutional rules and stated that Community rules that, in its view, were incompatible with the Italian constitution would not be applied. Similarly, the German constitutional courts have reasserted the right to challenge Community legislation that is inconsistent with the German constitution (see, eg, *Brunner v European Union Treaty* [1994] 1 CMLR 57; *M GmbH v Bundesregierung* (case 2 BvQ3/89) [1990] 1 CMLR 570 (an earlier tobacco-advertising case) and the bananas cases—*Germany v Council (Re Banana Regime)* (case C-280/93), *Germany v Council (Bananas II)* (case C-l22/95) and T Porr *GmbH v Hauptzollamt Hamburg-Jonas* (cases C-364 and 365/95)—discussed further in Chapter 4). Although the supremacy of Community law vis-a-vis national law might not be threatened by the possibility of its review in accordance with provisions of national constitutions embodying general principles of international law, its uniformity and the supremacy of the ECJ might well be eroded if national courts seek themselves to interpret these broad and flexible principles, rather than referring for a ruling on these matters from the ECJ. Equally, a failure on the part of national courts to recognise fundamental principles, in conjunction with a failure to refer, may have a similar effect.

6.3.3.2 *Accession to the ECHR*

Deferring to the ECJ does, however, concentrate a significant degree of power in that court, against whose rulings there is no appeal. One suggested safeguard for fundamental rights would be for the Community to accede to the ECHR. Questions of human rights and, in particular, interpretation of the ECHR, could then be taken to the European Court of Human Rights, a court which specialises in these issues. This would minimise the risk of the ECJ misinterpreting the ECHR and avoid the possibility of two conflicting lines of case law developing (eg, *Orkem* (case 3 74/87) and *FunkevFrance* (case SA 256A)). The ECJ, however, has ruled that accession to the ECHR would not be within the present powers of the Community: treaty amendment would be required before the Community could take this step *(Opinion 2/94 on the Accession by the Community to the European Convention on Human Rights).*

This was one of the issues discussed by the Convention on the Future of Europe preparing for the 2004 IGC. The treaty establishing a Constitution would not only have incorporated the EU Charter of Fundamental Rights (a separate document, not to be confused with the ECHR) into the Constitution (see further below), but would also have included an article in Part I which provided that the Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. A further declaration provided for cooperation between the ECHR and the ECJ. As we know, the Constitution has been abandoned and replaced by the Lisbon Treaty. Although Lisbon does not incorporate the charter, it continues the intention to accede to the ECHR (Article 6(2) TEU), but the status of the Lisbon Treaty is, like the Constitution before it, in doubt (see Chapter 1). Even if it were in force, the details of timing and other practicalities of accession remain to be worked out. The Treaty on European Union (TEU) (as amended by Lisbon) also specifies that accession would not affect the Union's competence as defined in the treaties. Yet, this remains a significant step forward. It also follows the line established by recent treaty amendments, which have seen a progressive raising of the profile of human-rights protection within the Community and, indeed, the Union.

6.3.3.3 *Enforcing respect for the ECHR within the EU structure*

The TEU had included in the Union general provisions a reference to the ECHR to the effect that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . and as they result from the constitutional tradition common to the Member States, as general principles of Community law. [Article 6(2) (ex F(2) TEU).]

The Constitution provided, to a similar effect, that:

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. [Article 1-9(3).]

This wording has been reproduced by the Lisbon Treaty at Article 6(3) TEU.

Additionally, Article 6(1) (ex F(l)) TEU stated that the Union was founded on respect for 'liberty, democracy and respect for human rights'. However, by Article L TEU, as it then was (now amended and renumbered as Article 46 TEU), the ECJ's jurisdiction as regards the general Union provisions was excluded. The Treaty of Amsterdam (ToA) amended Article 46 TEU to give the ECJ express competence in respect of Article 6(2) TEU with regard to action of the institutions 'insofar as the ECJ has jurisdiction either under the treaties establishing the Communities or under the TEU'. This would seem to be little more than a confirmation of the existing position, at least as far as the EC Treaty is concerned, though it might have some significance in respect of the ECJ's (limited) jurisdiction regarding justice and home affairs (JHA). Article 46 TEU will be repealed should the Lisbon Treaty come in to force.

The ToA inserted Article 7 into the TEU. This provided that where there has been a persistent and serious breach of a principle mentioned in Article 6(1) TEU, the Council may suspend certain of the rights of the offending Member State, including its voting rights. Were this provision used, it could have serious consequences for the Member State in question; such a Member State would lose its opportunity to influence the content of Union legislation by which it would be bound, even in sensitive areas where otherwise it could have vetoed legislation. Thus, one might suggest that the need to comply with fundamental principles is being taken seriously indeed. It is likely, though, that this provision will be used only rarely given the severity of the breach needed to trigger the procedure, which itself is long-winded, requiring unanimity

(excluding the offending Member State) in the first instance. Given the potential consequences for Member States, however, the complexity of the procedure is perhaps appropriate. The Lisbon Treaty contains a new provision, Article 269 TFEU, which gives the ECJ the jurisdiction to decide on the legality of such a decision on procedural grounds only.

6.3.3.4 *Relationship with international law*

The relationship between EU and international law has been the subject of consideration recently. The factual backdrop concerned Union measures implementing UN Resolutions on economic sanctions. Effectively, these measures allowed for the freezing of individuals' assets, without prior warning. The matter came before the CFI, as an action for annulment. It held that the courts are not empowered to review decisions of the UN, including the Security Council, even in the light of Community law or the fundamental rights recognised by Union law *(Ahmed AH Yusufand Others v Council of the European Union* (cases T-306 and 3 15/01), known as *Kadi).* The CFI based this decision on the fact that, according to its interpretation of the requirements of international law, the obligations of the Member States of the United Nations prevail over any other obligation. The Community, although not itself a member of the UN, must, in the CFI's opinion, be bound by the obligations flowing from the Charter of the United Nations. Nonetheless, the CFI reserved the rights of the Community courts to check the lawfulness of the Council Regulation (which implemented the UN Security Council Resolution and was under challenge in this case), and therefore implicitly the underlying resolution, by reference to the higher rules of international law *(jus cogens),* from which neither the Member States nor the bodies of the Union should, under international law, be able to derogate. This includes provisions intended to secure universal protection of fundamental human rights. On the facts, the CFI found the application unfounded.

The ECJ heard the appeal in *Kadi* (joined cases C-402 and 415/05 P) and approached the matter in a completely different way, overturning the CFI's internationalist approach. While the ECJ accepted that the EU (and its Member States) were subject to international obligations, such as those contained in the UN, this does not change the allocation of powers within the EU. Furthermore, the EU was characterised by the ECJ, drawing on its previous jurisprudence, as an autonomous legal order built on the rule of law and respect for fundamental human rights. Thus there is a distinction between international obligations and the effect of Community norms, and the fact that Community measures might arise from those international obligations does not affect the fact that Union law must comply with human rights, as recognised by the EU. On this basis, the ECJ reviewed whether the EU implementing measures (not the UN Resolutions) complied with a number of procedural rights and the right to respect for property, and in this, it is arguable that the ECJ was taking a stronger line that had the European Court of Human Rights. This is a significant judgment, which re-emphasises the centrality of the rule of law and the protection of human rights within the EU.

6.4 Relationship between the EC/EU and the ECHR in the protection of human rights: View from the ECHR

All Member States of the EU have signed the ECHR, and in most Member States, the Convention has been incorporated into domestic law. (It was incorporated in the UK by the Human Rights Act 1998, which came into force in October 2000.) When it is so incorporated, the Convention's provisions may be invoked before the domestic courts in order to challenge *national* rules or procedures which infringe the rights protected by the Convention. Even without the Convention being incorporated into domestic law, the Member States are bound by its terms and individuals, after they have exhausted national remedies, have a right of appeal under the Convention to the European Court of Human Rights.

The ECJ has done a great deal to ensure the protection of human rights within the context of the application of Community law, whether by Community institutions or by Member States. But, as the ECHR has not so far been incorporated into *Community* law, its scope has been limited and the relationship between the ECHR and the Union legal system is somewhat unclear. The difficulties are illustrated by the decision of the European Court of Human Rights in the *Matthews* case (European Court of Human Rights judgment, 18 February 1999).

Matthews concerned the rights of UK nationals resident in Gibraltar to vote in European Parliamentary elections. They were excluded from participating in the elections as a result of the 1979 agreement between the Member States which established direct elections in respect of the European Parliament. The applicants argued that this was contrary to Protocol 1, Article 3 of the ECHR, which provides that signatory States to the

Convention are under an obligation 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. The British government argued that not only was Community law not within the jurisdiction of the ECHR (as the Community had not acceded to the Convention), but also that the UK government could not be held responsible for joint acts of the Member States. The European Court of Human Rights found, however, that there had been a violation of the Convention.

The Court held that States which are party to the ECHR retain residual obligations in respect of the rights protected by the Convention, even as regards areas of lawmaking which had been transferred to the Union. Such a transfer of power is permissible, provided Convention rights continue to be secured within the Community framework. In this context the Court of Human Rights noted the ECJ's jurisprudence in which the ECJ recognised and protected Convention rights. In this case, however, the existence of the direct elections was based on a *sui generis* international instrument entered into by the UK and the other Member States which could not be challenged before the ECJ, as it was not a normal Community act. Furthermore, the TEU, which extended the European Parliament's powers to include the right to co-decision thereby increasing the Parliament's claim to be considered a legislature and taking it within the terms of Protocol 1, Article 3 of the ECHR, was equally an act which could not be challenged before the ECJ. There could therefore be no protection of Convention rights in this regard by the ECJ. Arguing that the Convention is intended to guarantee rights that are not theoretical or illusory, the Court of Human Rights held that:

The United Kingdom, together with all other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol 1, for the consequences of that Treaty. [Para 33.]

It may be noted that it is implicit in the reasoning in this judgment that the EU is regarded by the Court of Human Rights as being the creature of the Member States, which remain fundamentally responsible for the Community's actions—and for those of the Union. This corresponds with the conception of the EU expressed by some of the Member States' constitutional courts (eg, see the German constitutional court's reasoning in *Brunner* [1994] 1 CMLR 57).

Arguably, this judgment opens the way for the Member States to be held jointly responsible for those Community (or Union) acts that currently fall outside the jurisdiction of the ECJ, sealing lacunae in the protection offered to individual human rights within the Community legal order. The difficulty is, of course, that in this case only the UK was the defendant. The British government is dependent on the cooperation of the other Member States to enable it to fulfil its own obligations under the ECHR. It is possible that a case could be brought under the ECHR against all Member States jointly. (See, eg, *Societe Guerin Automobiles* (Application No 51717/99), inadmissible on other grounds; *DSR Senator Lines,* (Application No 56672/00) (Grand Chamber), dismissed as the applicant could not claim on the facts to be a victim, though note third-party representations, including that of the ICJ.) Although this would not obviate the need for cooperation to remedy any violation found, it would avoid the situation where one Member State alone was carrying the responsibility for Union measures that were the choice of all (or most) Member States. The implication that the European Court of Human Rights will step in only where there is no effective means of securing human-rights protection within an existing international body (ie, that the ECJ has primary responsibility for these issues in the EU) is underlined by its approach in another case involving another European supranational organisation, Euratom *(Waite and Kennedy v Germany,* European Court of Human Rights judgment, 18 February 1999). There the Court emphasised the necessity for an independent review board which is capable of protecting fundamental rights to exist within the organisational structure. More recently, we can see this approach in *Bosphorus Airways v Ireland* (European Court of Human Rights judgment, 30 June 2005 (GC)), which concerned alleged human-rights violations resulting from Community secondary legislation which the ECJ had upheld. There the European Court of Human Rights held that it would not interfere provided the rights protection awarded by the ECJ was equal to that under the ECHR, noting that in this context, 'equal' means equivalent or comparable rather than identical (para 155). It should be noted that in a concurring judgment, one of the European Court of Human Rights judges did make the point that, although there have been reviews of ECJ jurisprudence, they have looked at the level of protection in a general or formal way, rather than looking at the substance of a right in an individual case (Concurring Opinion of Judge Ress, para 2), highlighting a potential weakness in the system of protection awarded to individuals. Of course, this may all change should the EU accede to the ECHR.

6.5 The EU Charter of Fundamental Rights

6.5.1 Background

We have already seen that there has been a debate about whether the EC/EU should accede to the ECHR. In 1999, the Cologne European Council set up a Convention, under the chairmanship of Roman Herzog (a former German federal president), to produce a draft Union charter as an alternative mechanism to ensure the protection of fundamental rights. This was completed in time for the 2000 European Council meeting at Nice, where the European institutions solemnly proclaimed the charter (published at [2000] OJ C364/1— hereinafter EUCFR). At the present time, the EUCFR does not have legal effect. As with the Constitution, the Lisbon Treaty proposes to give legal effect to the Charter. It does so by a different route, though. The Constitution would have incorporated the Charter as Part II and Article 1-9(1) specified that 'the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights'. Lisbon instead refers to the Charter rather than incorporating it. Thus, Article 6(1) TEU (as amended by Lisbon) states:

the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights. . . which shall have the same legal value as the Treaties.

Nonetheless the scope of the rights granted is as limited as it was under the Charter (see 6.5.2). Further provisions clarify that the reference to the Charter does not create any new rights or extend the Union's competence.

Despite some contention about the status and impact of the Charter, the ECJ has alreadymentioned the EUCFR in a number of judgments by way of reference in confirming that the European legal order recognises particular fundamental rights (see, eg, *R v SoS ex parte BAT* (Case C-491/01), where the Court observed that 'the right to property ... is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR") and *enshrined in Article 17 of the Charter of Fundamental Rights of the European Union'* (para 144, emphasis added). See also *Jego-Quere et Cie v Commission* (case T-177/01 para 42; see further Chapter 12 and *Mannesmannrohren-Werke AG* v *Commission* (case T-l 12/98) paras 15 and 76). These have begun to cover a wide range of rights: we have already noted the *Kadi* judgment. In *Dynamic Medien,* the ECJ referred to the rights of the child protected by the Charter and in *Varec v Belgian State* (case C-450/06), the ECJ refers to the right to private life. However, there has been no judgment to date in which the ECJ has *based* its judgment on the EUCFR.

6.5.2 Scope

By virtue of Article 51(1) EUCFR, its provisions are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. As far as the institutions and bodies of the Union are concerned, due regard is to be had to the principle of subsidiarity. It is not entirely clear what the significance of this reference is, other than perhaps to confirm that the Union must always act in accordance with the principle of subsidiarity. With regard to the Member States, Article 51(1) EUCFR confirms existing case law which has held that there is only an obligation on the Member States to respect fundamental rights under EU law when they are acting in the context of Community law (see *Karlsson and ors* (case C-292/97), para 37). Outside this context, Member States are, of course, obliged to respect fundamental rights under the ECHR (see above, on 'residual obligations').

Article 52(1) EUCFR provides that limitations on the exercise of the rights and freedoms guaranteed by the EUCFR must be provided by law. Any such limitations must be proportionate and are only permitted if they are necessary and genuinely meet objectives recognised by the EU. In this, there are similarities to the approach taken with regard to the derogation provisions in the ECHR. Article 52(2) EUCFR further confirms that those rights which derive from the treaties are subject to the conditions and limitations that apply to the corresponding treaty provisions.

6.5.3 Substance

The EUCFR is divided into six substantive chapters. Chapter I, Dignity, includes:

(a) human dignity

(b) the right to life

(c) the right to the integrity of the person

(d) prohibitions on torture, inhuman or degrading treatment or punishment, slavery and forced labour.

Chapter II, Freedoms, provides for:

(a) right to liberty and security

(b) respect for private and family life

(c) protection of personal data

(d) right to marry and found a family

(e) freedom of: (i) thought, conscience and religion (ii) expression and information (iii) assembly and association (iv) the arts and sciences (v) a right to education; (vi) choice in an occupation and a right to engage in work; (vii) ability to conduct a business, right to property, right to asylum, and protection in the event of removal, expulsion or deportation.

Chapter III, Equality, guarantees:

(a) equality before the law, non-discrimination, cultural, religious and linguistic diversity

(b) equality between men and women

(c) the rights of the child and the elderly

(d) the integration of persons with disabilities.

The solidarity rights in Chapter IV are:

(a) the workers' right to information and consultation with the right of collective bargaining and action

(b) right of access to placement services

(c) protection in the event of unjustified dismissal

(d) fair and just working conditions

(e) prohibition of child labour and protection of young people at work

(f) family and professional life

(g) social security and social assistance

(h) health care

(i) access to services of general economic interest

(j) environmental protection

(k) consumer protection.

Chapter V provides for citizenship rights (see also Chapter 24), which are the right to:

(a) vote and stand as candidate at elections to the European Parliament and at municipal elections

(b) good administration

(c) access to documents

(d) access to the Ombudsman

(e) petition the European Parliament

(f) have freedom of movement and residence

(g) diplomatic and consular protection.

Finally, Chapter VI, Justice, guarantees a right to:

(a) effective remedy and to a fair trial

(b) presumption of innocence and right of defence

(c) principles of legality and proportionality of criminal offences and penalties;

(d) not to be tried or punished twice in criminal proceedings for the same criminal offence.

The preceding enumeration of all the rights contained in the EUCFR demonstrates that the Charter consists of a mixture of human rights found in the ECHR, rights derived from other international conventions and provisions of the EC Treaty. The Council of the European Union has published a booklet which explains the origin of each of the rights contained in the EUCFR (see 'Further Reading' at the end of this chapter).

6.5.4 Overlap between the Charter and the ECHR

Article 52(3) deals with the complex problem of overlap between the ECHR and the EUCFR. It specifies that those rights in the EUCFR which correspond with ECHR rights must be given the same meaning and scope as the ECHR rights. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments (Article 53).

At present, the question of overlap is not a cause for concern, because the EUCFR has no legal status. However, if the Lisbon Treaty comes into force, it will be necessary to determine to what extent the ECJ has jurisdiction to enforce the Charter. Presumably, Article 51 would mean that the EUCFR rights are not free-standing rights, but are only relevant in matters of European law. In that case, the position would probably not be any different from the current situation.

If, however, certain EUCFR rights (such as those based on the ECHR) are regarded as free-standing rights, then the ECJ may be in danger of 'competing' with the European Court of Human Rights. The ECJ would be obliged to interpret EUCFR rights in accordance with the ECHR, but a difficulty may arise if the ECJ interprets an ECHR-based right in one way and the Court of Human Rights subsequently takes a different view. Member States may then face a conflict between complying with their obligations under European law, in particular the doctrine of supremacy (see Chapter 4) and under the ECHR, respectively. It is submitted that in such a case, the ECHR should prevail. This seems to be the current position under the ECJ's case law. In *Roquette Freres* (case C-94/00), the question arose whether business premises could be protected under Article 8 ECHR against 'dawn raids' by the Commission under Regulation 17 (now replaced by Regulation 1/2003). In its earlier decision in *Hoechst* (case C-46/87), the ECJ had held that Article 8 required no such protection. However, subsequent ECHR case law has extended the scope of Article 8 to cover business premises. In *Roquette,* the ECJ held that the case law under the ECHR must be taken into account in applying the *Hoechst* decision. The ECJ therefore appears to recognise that ECHR case law can have an impact on the scope of fundamental rights guaranteed by Union law. Interestingly, it has been noted the Court of Human Rights has likewise taken account of relevant case law of the ECJ. It seems that in their respective jurisdictions the two courts are endeavouring to minimise conflict. Whilst this is good practice, the risk of inconsistency remains.

6.5.5 Conclusion on EUCFR

Currently, the EUCFR has only declaratory status and it remains to be seen whether it will become legally binding. If this were to happen, some thought would need to be given to the relationship between the ECHR and the EUCFR and the role of the ECJ in interpreting the fundamental rights contained in the EUCFR. The potential accession of the EU to the ECHR, which would be possible if the Lisbon Treaty became effective in its current form, would acknowledge the supremacy of the Convention and the European Court of Human Rights.

The general principles of Union law have been expanded through the case law of the ECJ to cover a wide variety of rights and principles developed from many sources. We will now look at some specific examples of those rights. The following is not, however, an exhaustive list, and there may be degrees of overlap between the categories mentioned.

6.6 Rules of administrative justice

6.6.1 Proportionality

This was the principle invoked in *Internationale Handelsgesellschaft mbH* (case 11/70). It is now enshrined in Article 5 (ex 3b) EC (see 6.8 below). The principle, applied in the context of administrative law, requires that the means used to achieve a given end must be no more than that which is appropriate and necessary to achieve that end. The test thus puts the burden on an administrative authority to justify its actions and requires some consideration of possible alternatives. In this respect it is a more rigorous test than one based on reasonableness.

The principle has been invoked on many occasions as a basis of challenge to EC secondary legislation, often successfully (eg, *Werner A Bock KG v Commission* (case 62/70); *Bela-Muhle JosefBergmann KG v Grows-Farm GmbH & Co KG* (case 114/76). It was applied *in Rv Intervention Boardfor Agricultural Produce, exparte ED & F Man (Sugar) Ltd* (case 181/84) in the context of a claim by ED & F Man (Sugar) Ltd before the English Divisional Court, on facts very similar to *Internationale Handelsgesellschaft.* Here the claimant, ED & F Man (Sugar) Ltd, was seeking repayment of a security of £1,670,370 forfeited when it failed to comply with an obligation to submit licence applications to the Board within a specified time limit. Due to an oversight they were a few hours late. The claimant's claim rested on the alleged illegality of the EC regulations governing the common organisation of the sugar market. The regulations appeared to require the full forfeiture of the deposit (lodged by the exporter at the time of the initial offer to export) in the event of a breach of both a *primary* obligation to export goods as agreed with the Commission and a *secondary* obligation to submit a licence application following the initial offer within a specified time limit. The ECJ held, on a reference from the Divisional Court on the validity of the regulations, that to require the same forfeiture for breach of the secondary obligation as for the primary obligation was disproportionate, and to the extent that the regulation required such forfeiture, it was invalid. As a result of this ruling, the claimant was held entitled in the Divisional Court to a declaration that the forfeiture of its security was unlawful: a significant victory for the claimant.

The proportionality principle has also been applied in the context of the EC Treaty, for example, in the application of the provisions relating to freedom of movement for goods and persons. Under these provisions States are allowed some scope for derogation from the principle of free movement, but derogations must be 'justified' on one of the grounds provided (Articles 30 (ex 36) and 39(3) (ex 48(3) post Lisbon Articles 36 and 45(3) TFEU). This has been interpreted by the ECJ as meaning that the measure must be *no more than is necessary* to achieve the desired objective (see Chapters 20 (goods), and 25 (persons)).

In *Watson* (case 118/75) the proportionality principle was invoked in the sphere of the free movement of persons to challenge the legality of certain action by the Italian authorities. One of the defendants, Ms Watson, was claiming rights of residence in Italy. The right of free movement of workers expressed in Article 39 EC is regarded as a fundamental Community right, subject only to 'limitations' which are 'justified' on the grounds of public policy, public security or public health (Article 39(3)). The Italian authorities sought to invoke this derogation to expel Ms Watson from Italy. The reason for the defendants' expulsion was that they had failed to comply with certain administrative procedures, required under Italian law, to record and monitor their movements in Italy. The ECJ, on reference from the Italian court, held that, while states were entitled to impose penalties for non-compliance with their administrative formalities, these must not be disproportionate; and they must never provide a ground for deportation. Here, it is worth noting, it is a Member State's action which was deemed to be illegal for breach of the proportionality principle. Likewise, in *Wijsenbeek* (case C-378/97) the ECJ held that, although Member States were still entitled to check the documentation of EC nationals moving from one Member State to another, any penalties imposed on those whose documentation was unsatisfactory must be proportionate: in this case, imprisonment for failure to carry a passport was disproportionate. (See further Chapter 25.)

Similarly, in the context of goods, in a case brought against Germany in respect of its beer purity laws (case 178/84), a German law imposing an absolute ban on additives was found in breach of EC law (Article 28 EC) and not 'justified' on public-health grounds under Article 30. Since the same (public health) objective could have been achieved by other less restrictive means, the ban was not 'necessary'; it was disproportionate.

More recently, however, there seems to have been a refinement of the principle of proportionality. In the case of *Sudzucker Mannheim/Ochsenfiirt AG v HauptzoUamt Mannheim* (case C-161/96) the ECJ confirmed the

distinction between primary and secondary (or administrative) obligations made in *R v Inteivention Board for Agricultural Produce* (case 181/84). The breach of a secondary obligation should not be punished as severely as a breach of a primary obligation. On the facts of the case, the ECJ held that a failure to comply with customs formalities by not producing an export licence was a breach of a primary and not a secondary obligation. The ECJ stated that the production of the export licence was necessary to ensure compliance with export requirements and thus the production of the export licence was part of the primary obligation. On this reasoning, it may be difficult to distinguish between primary and secondary obligations.

Further, the ECJ has held that, where an institution has significant discretion in the implementation of policies, such as in CAP, the ECJ may only interfere if the 'measure is manifestly inappropriate having regard to the objectives which the competent institution is seeking to pursue' *(Germany v Council (Re Banana Regime)* (case C-280/93), para 90). The same is also true of actions of Member States where they have a broad discretion in the implementation of Community policy (see *R v Minister ofAgriculture, Fisheries and Food,* ex parte *National Federation of Fishermen's Organisations* (case C-44/94)). In these circumstances, the distinction between proportionality and *Wednesbury* reasonableness is not great.

6.6.2 Legal certainty

The principle of legal certainty was invoked by the ECJ in *Defrenne v Sabena (No 2)* (case 43/75). The principle, which is one of the widest generality, has been applied in more specific terms as:

(a) the principle of legitimate expectations

(b) the principle of non-retroactivity (c) the principle of *resjudicata.*

The principle of legitimate expectations, derived from German law, means that, in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned. A legitimate expectation is one which might be held by a reasonable person as to matters likely to occur in the normal course of his affairs. It does not extend to anticipated windfalls or speculative profits. In *Efisol SA v Commission* (case T-336/94) the CFI commented that an individual would have no legitimate expectations of a particular state of affairs existing where a 'prudent and discriminating' trader would have foreseen the development in question. Furthermore, in *Germany v Council* (case C-280/93), the ECJ held that no trader may have a legitimate expectation that an existing Community regime will be maintained. In that the principle requires the encouragement of a reasonable expectation, a reliance on that expectation, and some loss resulting from the breach of that expectation, it is similar to the principle of estoppel in English law.

The principle was applied in *August Tbpfer & Co GmbH v Commission* (case 112/77) (see Chapter 2). August Topfer & Co GmbH was an exporter which had applied for, and been granted, a number of export licences for sugar. Under Community law, as part of the common organisation of the sugar market, certain refunds were to be payable on export, the amount of the refunds being fixed in advance. If the value of the refund fell, due to currency fluctuations, the licence holder could apply to have his licence cancelled. This scheme was suddenly altered by an EC regulation, and the right to cancellation withdrawn, being substituted by provision for compensation. This operated to Topfer's disadvantage, and it sought to have the regulation annulled, for breach, inter alia, of the principle of legitimate expectations. Although it did not succeed on the merits, the principle of legitimate expectations was upheld by the Court. (See also *CNTA SA v Commission* (case 74/74), monetary compensation scheme ended suddenly and without warning: Chapter 14.) In *Opel Austria GmbH v Council* (case T-l 15/94) the Court held that the principle of legitimate expectations was the corollary of the principle of good faith in public international law. Thus, where the Community had entered into an obligation and the date of entry into force of that obligation is known to traders, such traders may use the principle of legitimate expectations to challenge measures contrary to any provision of the international agreement having direct effect.

The principle of non-retroactivity, applied to Community secondary legislation, precludes a measure from taking effect before its publication. Retrospective application will only be permitted in exceptional circumstances, where it is necessary to achieve particular objectives and will not breach individuals' legitimate expectations. Such measures must also contain a statement of the reasons justifying the retroactive effect *(Diversinte SA v Administration Principal de Aduanos e Impuestos Especiales de la Junqueros* (case C-260/91)).

In *R v Kirk* (case 63/83) the principle of non-retroactivity of penal provisions (activated in this case by a

Community regulation) was invoked successfully. However, retroactivity may be acceptable where the retroactive operation of the rule in question improves an individual's position (see, for example, *Road Air BV v Inspecteur der Invoerrechten enAccijnzen* (case C-3 10/95)).

This principle also has relevance in the context of national courts' obligation to interpret domestic law to comply with Union law when it is not directly effective (the *Von Colson* principle, see Chapter 5). In *Pretore di Said v Persons Unknown* (case 14/86) in a reference from the Said magistrates' court on the compatibility of certain Italian laws with EEC Water Purity Directive 78/659, which had been invoked against the defendants in criminal proceedings, the Court held that:

A Directive cannot of itself have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the Directive.

The Court went further in *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86). Here, in response to a question concerning the scope of national courts' obligation of interpretation under the *von Colson* principle, the Court held that that obligation was '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 national courts are not required to interpret domestic law to comply with EC law in violation of these principles. This would appear to apply even where the EC law in question has direct effects, at least where criminal proceedings are in issue (see *Berlusconi* (joined cases C-387/02, C-391/02 and C-403/02), discussed in Chapter 5).

Problems also arise over the temporal effects of ECJ rulings under Article 234. In *Defrenne v Sabena (No 2)* (case 43/75) the Court held that, given the exceptional circumstances, 'important considerations of legal certainty' required that its ruling on the direct effects of the then Article 119 (now 141 post Lisbon, 157 TFEU) should apply prospectively only. It could not be relied on to support claims concerning pay periods prior to the date of judgment, except as regards workers who had already brought legal proceedings or made an equivalent claim. However, in *ArieteSpA* (case 811/79) and *Meridionale Industria Salumi Sri* (cases 66, 127 and 128/79) the Court affirmed that *Defrenne* was an exceptional case. In a 'normal' case a ruling from the ECJ was retroactive; the Court merely declared the law as it always was. This view was approved in *Barra* (case 309/85). However, in *Blaizot* (case 24/86), a case decided the same day as *Barra,* 'important considerations of legal certainty' again led the Court to limit the effects of its judgment on the lines of *Defrenne.* It came to the same conclusion in *Barber v Guardian Royal Exchange Assurance Group* (case 262/88). These cases indicate that in exceptional cases, where the Court introduces some new principle, or where the judgment may have serious effects as regards the past, the Court will be prepared to limit the effects of its rulings. *Kolpinghuis Nijmegen* may now be invoked to support such a view. Nevertheless, the Court did not limit the effect of its judgment in *Francovich* (cases C-6 and 9/90) contrary to Advocate-General Mischo's advice, despite the unexpectedness of the ruling and its 'extremely serious financial consequences' for Member States. Nor did it do so in *Marshall (No 2)* (case C-271/91) when it declared that national courts were obliged, by Article 5 of Directive 76/207 and their general obligation under Article 10 (ex 5) EC to ensure that the objectives of the directives might be achieved, to provide full compensation to persons suffering loss as a result of infringements of the directive, a matter which could not have been deduced either from the ECJ's case law or from the actual wording of the directive (see further Chapter 8).

The question of the temporal effect of a ruling from the ECJ under Article 234 EC was considered by the Italian constitutional court in *Fragd (SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) in the light of another general principle. Although the point did not arise out of the reference in question, the Italian court considered the effect that a ruling under Article 234 holding a Community measure void should have on the referring court if the ECJ had held that the ruling would apply for future cases only, excluding the judgment in which it was given. The Italian constitutional court suggested that in the light of the right to judicial protection given under the Italian constitution, such a holding should have effect in the case in which the reference was made. A finding of invalidity with purely prospective effect would offend against this principle and would therefore be unacceptable.

Resjudicata is a principle accepted in both the civil- and common-law traditions; its significance has been recognised also by the Human Rights Court in Strasbourg (see eg *Brumarescuv Romania* (28342/05)). Essentially it operates to respect the binding force of a final judgment in a matter; once any relevant time limits for appeal have expired, the judgment cannot be challenged. The ECJ has recognised this principle in many cases. In *Kobler* (case C-224/01), the ECJ held that:

attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *resjudicata.* In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. [Para 38.]

Applying this in *Kapferer* (case C-234/04) the ECJ ruled that in the light of *resjudi cata,* a national court does not have to disapply domestic rules of procedure con ferring finality on a decision, even though doing so would enable it to remedy an infringement of Community law by the decision at issue. Surprisingly, in *Lucchini Siderurgica* (case C-l 19/05), the ECJ came to the opposite conclusion. An undertak ing was seeking to claim state aid, which had been granted by the Italian government in breach of the state aid rules. The undertaking had a decision of an Italian court to this effect, whose judgment was protected by the principle of *resjudicata.*

In proceedings to challenge this decision, the ECJ addressed the question of whether Community law precluded the appplication of *resjudicata.* The ECJ concluded that it did. The Advocate-General in *Lucchini* pointed out that the principle is not absolute; the systems of the various Member States allow exceptions under certain strict conditions and the ECtHR has accepted this. Some commentators have questioned whether the circumstances in *Lucchini* come within the ECHR case law, however. Certainly, *Lucchini* is best regarded as an isolated case on exceptional facts.

6.6.3 Procedural rights

Where a person's rights are likely to be affected by EC law, EC secondary legislation normally provides for procedural safeguards (eg, Regulation 1/2003, competition law; and Directive 2004/38/EC, free movement of workers, Chapter 25). However, where such provision does not exist, or where there are lacunae, general principles of law may be invoked to fill those gaps.

6.6.4 Natural justice: The right to a hearing

The right to natural justice, and in particular the right to a fair hearing, was invoked, this time from English law, in *Transocean Marine Paint Association v Commission* (case 17/74) by Advocate-General Warner. The case, which arose in the context of competition law, was an action for annulment of the Commission's decision, addressed to the claimant association, that their agreements were in breach of EC law. The Court, following Advocate-General Warner's submissions, asserted a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his views known. Since the Commission had failed to comply with this obligation its decision was annulled. The principle was affirmed in *Hoffman-La Roche & Co AG v Commission* (case 85/76), in which the Court held that observance of the right to be heard is, in all proceedings in which sanctions, in particular fines and periodic payments, may be imposed, a fundamental principle of law which must be respected even if the proceedings in question are administrative proceedings.

Another aspect of the right to a fair hearing is the notion of 'equality of arms'. This is exemplified in a series of cases against the Commission following a Commission investigation into alleged anti-competitive behaviour on the part of ICI and another company, Solvay. In the *Solvay* case (case T-30/91) the Court stated that the principle of equality of arms presupposed that both the Commission and the defendant company had equal knowledge of the files used in the proceeding. That was not the case here, as the Commission had not informed Solvay of the existence of certain documents. The Commission argued that this did not affect the proceedings because the documents would not be used in the company's defence. The Court took the view that this point was not for the Commission to decide, as this would give the Commission more power vis-a-vis the defendant company because it had full knowledge of the file whereas the defendant did not. Equally, in the *ICI* cases (T-36 and 37/9 1) the Commission's refusal to grant ICI access to the file was deemed to infringe the rights of the defence.

There are, however, limits to the rights of the defence: in *Descom Scales Manufacturing Co Ltd v Council* (case T-171/94), the ECJ held that the rights of the defence do not require the Commission to provide a written record of every stage of the investigation detailing information which needed still to be verified. In this case, the Commission had notified the defendant company of the position although it had not provided a written record and the ECJ held that this was sufficient.

The right to a hearing within Article 6 ECHR also includes the right to a hearing within a reasonable period of

time. The ECJ, basing its reasoning on Article 6 ECHR, thus held that, in respect of a case that had been pending before the CFI for five years and six months, the CFI had been in violation of its obligation to dispose of cases within a reasonable time *(Baustahlgewerbe v Commission* (case C-1 85/95 P)).

The right to a hearing has arisen in more difficult circumstances, that of the freezing of assets of persons thought to be involved in or supporting terrorism. Even in these circumstances, the European courts have reiterated the principle of the right to be heard *(OMPI v Council (OMPI I)* (case T-228/02). Nonetheless, the CFI recognised that this right is subject to broad limitations in the interests of the overriding requirement of public security, which relate to all aspects of procedural justice rights, including the hearing of certain types of evidence, It seems in these circumstances the right to a hearing is limited to a right to be notified as soon as possible as to the adoption of an economic sanction; given this finding, the duty to state reasons has a still greater significance than it usually would have. The rule of law is protected by the right to seek a review of the decision-making process subsequently. In *OMPI II* (case T-256/07) the CFI clarified that the right to a hearing does not necessitate a formal hearing if the relevant legislation does not provide for it; nor is there a right to continuous conversation. Rather, it suffices if the persons involved have the right to make their views known to the competent authorities (See *OMPI II,* para 93; see also *Common Market Fertilisers* v *Commission* (cases T-l 34-5/03, para 108)).

6.6.5 The duty to give reasons

The duty was affirmed in *Union Nationale des Entraineurs et Cadres Techniques Professionels du Football (UNECTEF) v Heylens* (case 222/86). In this case, M Heylens, a Belgian and a professional football trainer, was the defendant in a criminal action brought by the French football trainers' union, UNECTEF, as a result of his practising in Lille as a professional trainer without the necessary French diploma, or any qualifications recognised by the French government as equivalent. M Heylens held a Belgian football trainers' diploma, but his application for recognition of this diploma by the French authorities had been rejected on the basis of an adverse opinion from a special committee, which gave no reasons for its decision. The ECJ, on a reference from the Tribunal de Grande Instance, Lille, held that the right of free movement of workers, granted by Article 39 EC, required that a decision refusing to recognise the equivalence of a qualification issued in another Member State should be subject to legal redress which would enable the legality of that decision to be established with regard to Community law, and that the person concerned should be informed of the reasons upon which the decision was based.

Similarly in *Al-Jubail Fertiliser Company (SAMAD) v Council* (case C-49/88) in the context of a challenge to a Council regulation imposing antidumping duties on the import of products manufactured by the applicants, the Court held that since the applicants had a right to a fair hearing the institutions were under a duty to supply them with all the information which would enable them effectively to defend their interests. Moreover if the information is supplied orally, as it may be, the Commission must be able to prove that it was in fact supplied.

The duty to give reasons was considered in the OMPI cases. These have a greater significance due to the potential for a limited right to a hearing. In *OMPI II,* the CFI emphasised that the Council was under an obligation to provide actual and specific reasons justifying the inclusion of a person on a sanctions list. This requires the Council not only to identify the legal conditions found in the underlying regulation, but why the Council considered that they applied to the particular person, justifying their inclusion on the sanctions list. The duty to give reasons does not, however, include the obligation to respond to all points made by the applicant.

6.6.6 The right to due process

As a corollary to the right to be informed of the reasons for a decision is the right, alluded to in *UNECTEF v Heylens* (case 222/86), to legal redress to enable such decisions and reasons to be challenged. This right was established in *Johnston* v *Chief Constable of the Royal Ulster Constabulary* (case 222/84). The case arose from a refusal by the RUC (now the Police Service of Northern Ireland) to renew its contracts with women members of the RUC Reserve. This decision had been taken as a result of a policy decision taken in 1980 that henceforth full-time RUC Reserve members engaged on general police duties should be fully armed. For some years women had not been issued with firearms nor trained in their use. Ms Johnston, who had been a full-time member of the Reserve for some years and wished to renew her contract, challenged the decision as discriminatory, in breach of EC Directive 76/207, which provides for equal treatment for men and women in all

matters relating to employment. Although the measure was admittedly discriminatory, since it was taken solely on the grounds of sex, the Chief Constable claimed that it was justified, arguing from the 'public policy and public security' derogation of Articles 30 (goods, see Chapter 20) and 39 (workers, see Chapter 25), and from Article 297, which provides for the taking of measures in the event of, inter alia, 'serious internal disturbances affecting the maintenance of law and order'. As evidence that these grounds were made out the Chief Constable produced before the industrial tribunal a certificate issued by the Secretary of State certifying that the act refusing to offer Ms Johnston further employment in the RUC Reserve was done for the purpose of safeguarding national security and safeguarding public order. Under Article 53(2) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) a certificate that an act was done for that purpose was 'conclusive evidence' that it was so done. A number of questions were referred to the ECJ by the industrial tribunal on the scope of the public order derogation and the compatibility of the Chief Constable's decision with Directive 76/207. The question of the Secretary of State's certificate and the possibility of judicial review were not directly raised. Nevertheless this was the first matter seized upon by the Court. The Court considered the requirement of judicial control, provided by Article 6 of Directive 7 6/207, which requires states to enable persons who 'consider themselves wronged' to 'pursue their claims by judicial process after possible recourse to the competent authorities'. This provision, the Court said, reflected:

a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides.

The Court went on to say that Article 5 3(2) of the Sex Discrimination (Northern Ireland) Order 1976, in requiring the Secretary of State's certificate to be treated as conclusive evidence that the conditions for derogation are fulfilled, allowed the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision was contrary to the principle of effective judicial control laid down in Article 6 of the directive. A similar approach has, in fact, been taken by the European Court of Human Rights in relation to such certificates issued in relation to a variety of substantive issues (eg, *Tinnelly and ors v UK,* ECHR judgment, 10 July 1998).

Although the ECJ's decision was taken in the context of a right provided by the directive it is submitted that the right to effective judicial control enshrined in the European Convention on Human Rights and endorsed in this case could be invoked in any case in which a person's Community rights have been infringed. The case of *UNECTEF* v *Heylens* (case 222/8 6) would serve to support this proposition. Further, the CFI has held that the Commission, in exercising its competition-policy powers, must give reasons sufficient to allow the Court's review of the Commission's decision-making process, if that decision is challenged (eg, *Ufex v Commission* (case C-1 19/97P)).

In the *OMPI* cases, the CFI made clear that reasons of public security could not remove the decisions and the decision making processes at issue from the scope of judicial review (see also *Kadi,* para 344 and see comments of Advocate-General at para 45), although that review may necessarily be limited. In *OMPI II,* the CFI clarified (at paras 138-41) the scope and standard of review, at least as regards decisions concerning economic sanctions. While the Council has broad discretion as to whether to impose sanctions, the CFI must ensure that a threefold test is satisfied: whether the requirements of the applicable law are fulfilled; whether the evidence contains all information necessary to assess the situation and whether it is capable of supporting the inferences drawn from it; and whether essential procedural guarantees have been satisfied. The CFI seems to have taken a surprisingly tough stance in favour of the protection of procedural rights here.

Thus general principles of law act as a curb not only on the institutions of the Union but also on Member States, which are required, in the context of EU law, to accommodate these principles alongside existing remedies and procedures within their own domestic systems of administrative law and may result eventually in some modification in national law itself. There are, in any event, problems in determining the boundaries between matters of purely national law and matters of Union law (see 6.9 below).

6.6.7 Right to protection against self-incrimination

The right to a fair trial and the presumption of innocence of 'persons charged with a criminal offence' contained in Article 6 ECHR are undoubtedly rights which will be protected as general principles of law under Community law. However, in *Orkem* (case 3 74/87) and *Solvay* (case 27/8 8) the ECJ held that the right under Article 6 not to give evidence against oneself applied only to persons charged with an offence in criminal proceedings; it was not a principle which could be relied on in relation to infringements in the economic sphere, in order to resist a demand for information such as may be made by the Commission to establish a breach of EC competition law. This view was placed in doubt following a ruling from the Court of Human Rights in the case of *Funke v France* (case SA 25 6A) ([1993] 1 CMLR 897) and has been the subject of some academic criticism.

Funke involved a claim, for breach of Article 6 ECHR, in respect of a demand by the French customs' authorities for information designed to obtain evidence of currency and capital transfer offences. Following the applicant's refusal to hand over such information fines and penalties were imposed. The Court of Human Rights held that such action, undertaken as a 'fishing expedition' in order to obtain documents which, if found, might produce evidence for a prosecution, infringed the right, protected by Article 6(1) ECHR, of anyone charged with a criminal offence (within the autonomous meaning of that phrase in Article 6 ECHR), to remain silent and not incriminate himself. It appears that Article 6, according to its 'autonomous meaning', is wide enough to apply to investigations conducted under the Commission's searchand-seizure powers under competition law, and that *Orkem* and *Solvay* may no longer be regarded as good law. This view, assimilating administrative penalties to criminal penalties, appears to have been taken by the ECJ in *Otto BVv Postbank NV* (case C60/92). Moreover, in *Mannesmannrbhren-Werke AG v Commission* (case T-l 12/98), also a case involving a request for information about an investigation into anticompetitive agreements, the CFI held that although Article 6 ECHR could not be invoked directly before the Court, Community law offered 'protection equivalent to that guaranteed by Article 6 of the Convention' (para 77). A party subject to a Commission investigation could not be required to answer questions that might involve an admission of involvement in an anticompetitive agreement, although it would have to respond to requests for general information.

6.7 Equality

The principle of equality means, in its broadest sense, that persons in similar situations are not to be treated differently unless the difference in treatment is objectively justified. This, of course, gives rise to the question of what are similar situations. Discrimination can only exist within a framework in which it is possible to draw comparisons, for example, the framework of race, sex, nationality, colour, religion. The equality principle will not apply in situations which are deemed to be 'objectively different' (see *Les Assurances du Credit SA v Council* (case C63/89), public export credit insurance operations different from other export credit insurance operations). What situations are regarded as comparable, subject to the equality principle, is clearly a matter of political judgement. The EC Treaty expressly prohibits discrimination on the grounds of nationality (Article 12 (ex 6) EC) and, to a limited extent, sex (Article 141 (ex 119) EC provides for equal *pay* for men and women for equal work). In the field of agricultural policy, Article 34(3) (ex 40(3)) prohibits 'discrimination between producers or consumers within the Community'. The To A introduced further provisions, giving the EC powers to regulate against discrimination on grounds of race, religion, sexual orientation or disability (Article 13 EC). There has been some discussion as to whether these aspects of discrimination constitute separate general principles of law, as seemed to be suggested by the ECJ in *Mangold* (Case C-l44/04). Although a number of Advocates-General have discussed the issue, it is indicative of the matter's sensitive nature that in each of the cases, the ECJ has handed down rulings without addressing the *Mangold* point. (See, eg, *Chacon Navas* (case C-l3/05) concerning disability discrimination and see Opinion of Advocate-General at paras 46-56; *Lindorfer* (case C-227/04) and the Opinion of the Advocate-General at paras 87-97 and 132-8; *Palacios de la Villa* (case C-41 1/05) and *Maruko* (case C-267/06) on discrimination based on sexual orientation—see Opinion of Advocate-General at para 78; *The Queen, on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for BERR* (case C-388/07) and *Bartsch v Bosch und Siemens Hausgerdte (BSH) Altersfursorge GmbH* (case C-427/06).) Directive 2000/43/EC ([2000] OJ L1 80, p 22) has been adopted to combat discrimination, both direct and indirect, on grounds of racial or ethnic origin, in relation to employment matters, social protection, education, and access to public goods and services (see, eg, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Feryn* (case C-54/07)). Directive 2000/78/EC ([2000] OJ L303, p 16) has been adopted to combat discrimination on the grounds of religion or belief,

disability, age, or sexual orientation with regard to employment and occupation. These directives are discussed further in Chapter 27.

However, a general principle of equality is clearly wider in scope than these provisions. In the first isoglucose case, *Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agricultural Produce* (cases 103 and 145/77), the claimants, who were glucose producers, together with other glucose producers, sought to challenge the legality of a system of production subsidies whereby sugar producers were receiving subsidies financed in part by levies on the production of glucose. Since glucose and sugar producers were in competition with each other the claimants argued that the regulations implementing the system were discriminatory, ie in breach of the general principle of equality, and therefore invalid. The ECJ, on a reference on the validity of the regulations from the English court, agreed. The regulations were held invalid. (See also *Ruckdeschel* (case 117/76); *Pont-d-Mousson* (cases 124/76 and 20/77).)

Similarly, the principle of equality was invoked in the case of *Airola* (case 21/74) to challenge a rule which was discriminatory on grounds of sex (but not pay), and in *Prais* (case 130/75) to challenge alleged discrimination on the grounds of religion. Neither case at the time fell within the more specific provisions of Community law, although would now fall within the scope of Directive 2000/78/ EC (see above).

6.8 Subsidiarity

The principle of subsidiarity in its original philosophical meaning, as expressed by Pope Pius XI (Encyclical letter, 1931), is that:

It is an injustice, a grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.

It was invoked in the Community context during the 1980s when the Community's competence was extended under the Single European Act. It was incorporated into that Act, in respect of environmental measures, in the then Article 1 30r (now 174) EC (post Lisbon Article 191 TFEU), and introduced into the EC Treaty in Article 5 (ex 3b) by the TEU. Article 5 EC requires the Community to act 'only if and 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 the effects of the proposed action, be better achieved by the Community'. Article 5 EC will, should Lisbon come into force, be replaced in substance by Article 5 TEU.

As expressed in Article 5 EC, subsidiarity appears to be a test of comparative efficiency; as such it lacks its original philosophical meaning, concerned with fostering social responsibility. This latter meaning has however been retained in Article 1 (ex A) TEU, which provides that decisions of the European Union 'be taken as closely as possible to the people'. Although it has not been incorporated into the EC Treaty it is submitted that this version of the principle of subsidiarity could be invoked as a general principle of law if not as a basis to challenge EC law then at least as an aid to the interpretation of Article 5 EC (see Chapter 3). The principle of subsidiarity in its narrow form in Article 5 has, on occasion, been referred to as a ground for challenge of EC legislation *(R v Secretary ofState for Health, exparte British American Tobacco and others* (case C-491/01); *R v SoSfor Health exparte Swedish Match* (case C-210/03)), but this has never succeeded.

6.9 Effectiveness

The doctrine of effectiveness is not usually recognised as a general principle of Union law, save—perhaps—when it is equated with the idea of effective judicial protection. Nonetheless, the principle is ubiquitous and has had a significant effect on the development of Union law. Notably, it was an effectiveness argument that was used to develop the doctrine of supremacy, direct effect *(Van Gend en Loos* (case 26/62) and *Costa vENEL* (case 6/64), and state liability *(Francovich and Bonifaci v Italy* (joined cases C-6 and 9/90), and was used to extend the loyalty principle found in Article 10 EC to the third pillar *(Pupino* (case C-105/03)). As we shall see in Chapter 8, it has been used to ensure effective protection for EC law, and for individuals' rights; indeed sometimes the ECJ seems to blur the boundaries between the two (eg *Courage v Creehan* (case C -453/99)). Should the Lisbon Treaty come into force, Article 19 TEU (as amended by Lisbon) expressly requires Member States to provide remedies so as to ensure effective legal protection of Union law rights. The concept is a somewhat slippery one, used in different contexts for different purposes. Crucially, it can operate both to determine the scope of Union law (identifying the boundary between national and EU law) and to determine the scope of any remedial action needed within the national legal system. While it may be argued that fundamental rights arguments may be used

on both these ways (see below), the broad and amorphous nature of the effectiveness principle(s) make it particularly difficult to determine its proper scope and appropriate use.

6.10 General principles applied to national legislation

It has been suggested that general principles of law, incorporated by the ECJ as part of Union law, also affect certain acts of the Member States. These fall into three broad categories:

(a) when EC rights are enforced within national courts

(b) when the rules of a Member State are in (permitted) derogation from a fundamental principle of Community law, such as free movement of goods (Articles 25 and 28 EC) or persons (Articles 39 and 49)

(c) when the Member State is acting as an agent of the Community in implementing Community law (eg, *Klensch v Secretaire d'Etat a VAgriculture eta la Viticulture* (cases 201 and 202/85)).

6.10.1 Enforcement of Community law in national courts

The ECJ has repeatedly held that, in enforcing Community rights, national courts must respect procedural rights guaranteed in international law; for example, individuals must have a right of access to the appropriate court and the right to a fair hearing (see, eg, *Johnston vRUC* (case 222/84) and *UNECTEF v Heylens* (case 222/86)). This applies, however, only where the rights which the individual seeks to enforce are derived from *Community* sources: Ms Johnston relied on the Equal Treatment Directive (Directive 76/207); M Heylens on the right of freedom of movement for workers enshrined in Article 39 EC. In *Konstantinidis* (case C-l68/91), a case concerning the rules governing the transliteration of Greek names, the ECJ handed down a judgment which did not follow the Opinion of the Advocate-General. The Advocate-General suggested that such rules, which resulted in a change in a person's name as a result of the way the transliteration was carried out, could constitute an interference with the rights protected by Article 8 ECHR. Although the ECJ agreed that this could be the case, it held that such rules would only be contrary to EC law where their application causes such inconvenience as to interfere with a person's right to free movement.

The constraints implied by this case seem to have been undermined. *Carlos Garcia Avello* (case C-148/02) concerned a Spanish national's right to register his children's names in the Spanish style in Belgium, where they were born. The case is based not on free-movement rights, but on European citizenship, a factor which both the European Commission and the Advocate-General agree allows a broader scope to EC protection of human rights. The ECJ agreed with the outcome without expressly considering human rights. The decision seems to limit the notion of the internal situation seen in *Kaur* (discussed above) and *Uecker and facquet* (joined cases C64/96 and C-65/96, discussed in Chapter 21) and to extend the scope of circumstances in which the ECJ would be required to respect ECHR rights (see 6.10.4 below). A similar extension can be seen in *Chen* (case C-200/02), in which a baby holding Irish nationality but born in the UK was deemed to have rights to have her mother, a Chinese national, remain in the UK with her (see further Chapter 21).

The extension of human-rights protection is not limited to circumstances in which citizenship is in issue, but arises in the context of any of the treaty freedoms. in *Karner* (case C-71/02), a case concerning advertising on the Internet, the ECJ held that the national rules complained of were not selling arrangements and therefore they would not fall within Article 28 EC (see Chapter 19). In this aspect, the case is different from the preceding cases, as those cases concerned situations where the national legislation fell within the relevant treaty provision. Despite the fact that the situation seemed to lie outside the prohibition in Article 28 (thus rendering a consideration of a derogation, discussed at 5.9.2, unnecessary), the ECJ then went on to give the national court 'guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures' (para 49). According to the ECJ, in this case the national legislation fell within the scope of application of EC law (see further 6.10.4 below).

Finally, any penalties imposed by national judicial bodies must be proportionate (eg, *Watson and Belmann* (case 118/75)).

6.10.2 Derogation from fundamental principles

Most treaty rules provide for some derogation in order to protect important public interests (eg, Articles 30 and 39(3)). The ECJ has insisted that any derogation from the fundamental principles of Community law must be narrowly construed. When Member States do derogate, their rules may be reviewed in the light of general prin-

ciples, as the question of whether the derogation is within permitted limits is one of Community law. Most, if not all, derogations are subject to the principle of proportionality (eg, *Watson* (case 118/75)). The *ERT*case *(Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* (case C-260/89)) concerned the establishment by the Greek government of a monopoly broadcaster. The ECJ held that this would be contrary to Article 49 (ex 59) regarding the freedom to provide services. Although the treaty provides for derogation from Article 49 in Articles 46 and 55 (ex 56 and 66), any justification provided for by Community law must be interpreted in the light of fundamental rights, in this case the principle of freedom of expression embodied in Article 10 ECHR. Similarly, in *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* (case C-368/95), the need to ensure plurality of the media (based on Article 10 ECHR) was accepted as a possible reason justifying a measure (the prohibition of prize games and lotteries in magazines) which would otherwise breach Article 28 EC. More recently, in *Schmidberger* (C-l 12/00), Advocate-General Jacobs argued that the right to freedom of expression and assembly permits a derogation from the free movement of goods (Article 28 EC)) in a context where the main transit route across the Alps was blocked for a period of 28 hours on a single occasion and steps were taken to ensure that the disruption to the free movement of goods was not excessive. The ECJ came to the same end conclusion, noting the wide margin of discretion given to the national authorities in striking a balance between fundamental rights and treaty obligations (and contrast *Commission v France* (case C-265/95)). (See also on Article 8 ECHR, *Mary Carpenter v SoS for the Home Department* (case C-60/00).)

One issue in this context is whether fundamental human rights should properly be seen as a derogation from treaty freedoms, perhaps falling within the scope of the public-policy objection, or whether they should be seen as operating to limit treaty freedoms at an earlier point in the legal analysis. In *Omega Spielhallen* (case C3 6/02), human dignity was seen as forming part of the public-policy grounds of derogation. In her Opinion in this case, Advocate-General Stickx-Hackl emphasised, the importance of the protection of human dignity, and suggested that public policy should be interpreted in the light of the Community-law requirement that human dignity should be protected. Nonetheless, this still leaves human-rights protection with the status of an exception to EC Treaty freedoms rather than constraining the scope of those rights in the first place. Recognition that human-rights protection forms part of the public-policy exception can be seen in *Dynamic Medien Vertiiebs GmbH v Avides Media AG* (C-244/06). The potential problem with this approach is that exceptions to the treaty freedoms are normally narrowly construed and subject to the proportionality test, which hardly puts them on the same footing as the economic treaty freedom. In *Schmidberger* (case C-l 12/00), the ECJ suggested that rather than the usual proportionality test, in such cases the different interests should be balanced; whether this approach is consistently adopted in cases concerning fundamental rights, remains to be seen.

6.10.3 State acting as agent

When Member States implement Union rules, either by legislative act or as administrators for the Union, they must not infringe fundamental rights. National rules may be challenged on this basis: for example, in *Commission v Germany* (case 249/86), the Commission challenged Germany's rules enforcing Regulation 1612/86 which permitted the family of a migrant worker to install themselves with the worker in a host country provided that the worker has housing available for the family of a standard comparable with that of similarly employed national workers. Germany enforced this in such a way as to make the residence permit of the family conditional on the existence of appropriate housing for the duration of the stay. The ECJ interpreted the regulation as requiring this only in respect of the beginning of their period of residence. Since the regulation had to be interpreted in the light of Article 8 ECHR concerning respect for family life, a fundamental principle recognised by Community law, German law was incompatible with Community law. When Member States are implementing obligations contained in Union law, they must do so without offending against any fundamental rights recognised by the Union. In *Wachaufv Germany* (case 5/88)) the ECJ held that 'Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements' (para 19).

6.10.4 Scope of Union law

In all three situations listed above, general principles have an impact because the situations fall within the scope of Union law, specifically Community law. The ECJ has no power to examine the compatibility with the ECHR of national rules which do not fall therein *(Cinetheque SA v Federation Nationale des Cinemas Frangaises* (cases 60 and 61/84), noting the different approach of Advocate-General and Court, and contrast *Karner* (case C-

71/02)). The problem lies in defining the boundary between Community law and purely domestic law, as can be seen in, for example, *Karner*. The scope of Community law could be construed very widely, as evidenced by the approach of the Advocate-General in *Konstantinidis v Stadt Altensteig-Standesamt* (case C-168/91). As noted above, he suggested that, as the applicant had exercised his right of free movement under Article 43 (ex 52) EC, national provisions affecting him fell within the scope of Community law; therefore he was entitled to the protection of his human rights by the ECJ. The Court has not expressly gone this far although some of the citizenship cases can be seen in this light (see *Garcia Avello* (case C-148/02), *Carpenter* (case C-60/00), *Chen* (case C-200/02)).

One particular problem area is where an individual seeks to extend the nature of the fundamental principles recognised in his or her home state by reference to rights protected in other Member States and recognised as such by the ECJ. This can be illustrated by contrasting two cases which arose out of similar circumstances: *Wachaufv Germany* (case 5/8 8) and *R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C-2/93).

Wachauf was a tenant farmer who, upon the expiry of his tenancy, requested compensation arising out of the loss of 'reference quantities' on the discontinuance of milk production. When this was refused, he claimed that this was an infringement of his right to private property, protected under the German constitution. The German authorities claimed that the rules they applied were required by the Community regulation, but the ECJ held that on its proper interpretation the regulation required no such thing: although the regulation did not itself provide the right to compensation, equally it did not preclude it. The discretion thereby given to the Member States by the regulation should be exercised in accordance with fundamental rights, thus, in practice meaning that the applicant should receive the compensation.

Bostock, similarly, had been a tenant farmer. Following *Wachauf* (case 5/8 8) he argued that he too should be entitled to compensation for the value of the reference quantities on the expiry of his lease. Unlike the situation in Germany, though, this right was not protected by British law at the time when Bostock's lease ended. Bostock therefore sought to challenge that British law on the basis that the provisions breached general principles of non-discrimination and unjust enrichment. Despite its approach in *Wachauf,* the ECJ ruled that the right to property protected by the Community legal order did not include the right to dispose of the 'reference quantities' for profit. The ECJ held that the question of unjust enrichment, as part of the legal relations between lessor and lessee, was a matter for national law and therefore fell outside the scope of Community law.

It is difficult to reconcile these two cases if one accepts that general principles accepted by the ECJ should apply across the EU. From recent case law we can still see differences in the approach to the scope of rights deemed worthy of protection. In *Omega Spielhallen* (case C-36/02), the German authorities sought to prevent a laser-dome game operating on the basis that a game based on shooting people infringed respect for human dignity; no such problem arose in the UK where the game operator originated. One clear message seems to be that there are limits to the circumstances when general principles will operate and that a challenge to national acts for breach of a general principle is likely to be successful only when national authorities are giving effect to clear obligations of Community law. In matters falling within the discretion of Member States, national authorities are not required to recognise general principles not protected by that state's national laws.

6.11 Conclusions

This chapter illustrates the importance of general principles of law in the judicial protection of individual rights. Member States' commitment to fundamental human rights has now been acknowledged in Article 6 TEU. Nonetheless, certain points should be noted.

The fact that a particular principle is upheld by the ECJ and appears to be breached does not automatically lead to a decision in favour of the claimant. Fundamental rights are not absolute rights. As the Court pointed out in / *Nold KG v Commission* (case 4/73), rights of this nature are always subject to limitations laid down in the public interest, and, in the Community context, limits justified by the overall objectives of the Community (eg, *O'Dwyer* v *Council* (cases T-466, 469, 473-4 and 477/93)). The pursuit of these objectives can result in some hard decisions (eg, *Dowling v Ireland* (case C-85/90)), although the Court has held that it may not constitute a 'disproportionate and intolerable interference, impairing the very substance of those rights' *(Wachauf (case* 5/88) at para 18). This principle was applied in *Germany v Commission (Re Banana Regime)* (case C-280/93), para 78, another harsh decision,

Thus, where the objectives are seen from the Union standpoint to be essential, individual rights must yield to the common good. In / *Nold KG* v *Commission* the system set up under an ECSC provision, whereby Nold, as a small-scale wholesaler, would be deprived of the opportunity, previously enjoyed, to buy direct from the producer, to its commercial disadvantage, was held to be necessary in the light of the system's overall economic objectives. 'The disadvantages claimed by the applicant', held the Court, 'are in fact the result of economic change and not of the contested Decision'.

The latitude shown to the Union institutions, particularly where they are exercising discretionary powers in pursuit of common Community policies (most notably the CAP) does not always extend to Member States in their implementation of Union law. Where Member States are permitted a certain discretion in implementation (and Member States have little discretion as regards the ends to be achieved), the Court will not substitute its own evaluation for that of the Member State: it will restrict itself solely to the question of whether there was a patent error in the Member State's action *{R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations* (case C-44/94)). Otherwise, general principles of law are strictly enforced. Thus, under the guise of the protection of individual rights, general principles of law also serve as a useful (and concealed) instrument of policy.

The adoption of the Charter of Fundamental Rights marks a significant further step. Although little more than a summary of the current level of protection recognised by the Union, it may evolve into a legally binding instrument which reaches beyond fundamental human rights to include employment and social rights and for this, we wait upon the ratification of the Lisbon Treaty. Nonetheless difficulties remain with its relationship with the ECHR, a convention to which the Union, it now seems, is intended to accede. Of crucial significance in the successful and equal protection of individuals' rights is the relationship between the European Court of Human Rights and both the CFI and, most importantly, the ECJ. This issue has yet to be fully resolved.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 9: State Liability

9.1 Introduction

The preceding chapters have identified that the ECJ, relying to a significant extent on the need to make EC law effective, extended the possible mechanisms by which individuals could seek access to rights derived from EC law in their national courts. Giving individuals incentives through the possibility of financial redress to bring legal action not only protects their rights but ensures enforcement of Community law. Whether these two objectives are equally weighted has been the subject of some debate. Perhaps the most significant development in this area over the past 25 years has been the creation and development of the principle of state liability under *Francovich* (cases C-6 and & 9/90). A logical development of the notion of direct effect, it can enable an individual, before his national court, to seek a remedy for losses suffered as a result of the failure by a Member State to implement, or apply correctly, provisions of EC law. While the national courts may have accepted this development, despite it potential impact on the autonomy of the national legal systems, there are still questions about the scope of the doctrine. This chapter will outline the development of the state liability doctrine and, in doing so, will examine its scope and the conditions for liability, as well identifying its relationship with other provisions. In all this, we question what the doctrine's underlying rationale is and, consequently, whether state liability can be extended beyond Community law to other pillars.

9.2 Principle of state liability under *Froncovich v Italy* 9.2.1 The *Francovich* ruling

The shortcomings of the principles of direct and indirect effects, particularly in the context of enforcement of directives, as outlined in Chapter 5, led the European Court of Justice (ECJ) to develop a third and separate principle in *Francovich v Italy* (cases C-6 and 9/90), the principle of state liability. Here the claimants, a group of ex-employees, were seeking arrears of wages following their employers' insolvency. Their claim (like that in the subsequent case of *Wagner Miret* (case C-334/92)) was based on Directive 80/987, which required Member States, inter alia, to provide for a guarantee fund to ensure the payment of employees' arrears of wages in the event of their employers' insolvency. Since a claim against their former employers would have been fruitless (they being insolvent and 'private' parties), they brought their claim for compensation against the state. There were two aspects to their claim. The first was based on the state's breach of the claimants' (alleged) substantive rights contained in the directive, which they claimed were directly effective. The second was based on the state's primary failure to implement the directive, as required under Article 249 and Article 10 EC (post Lisbon Articles 288 TFEU and Art 4 TEU). The Court had already held, in Article 226 EC post Lisbon Article 258 TFEU proceedings, that Italy was in breach of its Community obligations in failing to implement the directive *(Commission v Italy* (case 22/87)).

Withregard to the first claim, the Court found that the provisions in question were not sufficiently clear, precise, and unconditional to be directly effective. Although the content of the right, and the class of intended beneficiaries, was clear, the state had a discretion as to the appointment of the guarantee institution; it would not necessarily itself be liable under the directive. The claimants were, however, entitled in principle to succeed in their second claim. The Court held that where, as here, a state had failed to implement an EC directive it would be obliged to compensate individuals for damage suffered as a result of its failure to implement the directive if certain conditions were satisfied—that is, where:

(a) the directive involved rights conferred on individuals

(b) the content of those rights could be identified on the basis of the provisions of the directive and

(c) there was a causal link between the state's failure and the damage suffered by the persons affected.

The Court's reasoning was based on (i) the Member States' obligation to implement directives under Article 249 and their general obligation under Article 10 EC to 'take all appropriate measures ... to ensure fulfilment of their obligations under Community law; (ii) on its jurisprudence in *Van Gend en Loos* (case 26/62) and *Costa v ENEL* (case 6/64) that certain provisions of EC law are intended to give rise to rights for individuals; and (iii) that national courts are obliged to provide effective protection for those rights, as established in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (case 106/77) and *Factortame* (case C-213/89)—see further Chapter 4). It concluded that 'a principle of state liability for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty'.

Thus, where the three conditions of *Francovich* are fulfilled, individuals seeking compensation as a result of activities and practices which are inconsistent with EC directives may proceed directly against the state. There will be no need to rely on the principles of direct or indirect effects. Responsibility for the non-implementation of the directive will be placed not on the employer, 'public' or 'private', but squarely on the shoulders of the state, arguably, where it should always have been. Rather than changing the law, it provides compensation for a Member State's failure to do so and, as well as providing protection for individuals' rights, creates an indirect mechanism for enforcement of Community law.

9.2.2 Scope of the principle

The reasoning in *Francovich* is compelling; its implications for Member States, however, remained unclear. Although expressed in terms of a state's liability for the non-implementation of a directive, *Francovich* appeared to lay down a wider principle of liability for all breaches of Community law 'for which the state is responsible'. Would it then apply to legislative or administrative acts and omissions in breach of treaty articles or other provisions of EC law? Would it be an additional remedy, or available only in the absence of other remedies based on direct or indirect effects? Apart from the three conditions for liability, which are themselves open to interpretation, what other conditions would have to be fulfilled? Would liability be strict or dependent on culpability, even serious culpability, as was the case with actions for damages against Community institutions under Article 288 (2) (ex 2 15(2) EC, post Lisbon 340 TFEU) (see Chapter 14)? In the case of non-implementation of directives, as in *Francovich* itself, the state's failure is clear; *afortiori* when established by the Court under Article 226. But in cases of faulty or inadequate implementation it is not. The state's 'failure' may only become apparent following an interpretation of the directive by the Court (see, eg, the sex-discrimination cases such as *Marshall* and *Barber—see* Chapter 27). Here the case for imposing liability in damages on the state is less convincing.

9.2.2.1 *Type of action*

Many of these questions were referred to the Court of Justice for interpretation in *Brasserie du Pecheur SA v Germany* and *R v Secretary of State for Transport, exparte Factortame* (cases C46 and 48/93). The Court held that the principle of state liability is not confined to a failure to implement EC directives; rather, *all* domestic acts and omissions, legislative, executive, and judicial, in breach of Community law, can give rise to liability. Provided the conditions for liability are fulfilled it applies to breaches of *all* Community law, whether or not directly effective. However, arguing from the principles applicable to the Community's non-contractual liability under Article 288(2), the Court held that where a state is faced with situations involving choices comparable to those made by Community institutions when they adopt measures pursuant to a Community policy it will be liable only where three conditions are met (see paras 50 and 51 of the judgment):

(a) the rule of law infringed must be intended to confer rights on individuals

(b) the breach must be sufficiently serious

(c) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

The 'decisive test' for whether a breach is sufficiently serious is whether the institution concerned has 'manifestly and gravely exceeded the limits of its discretion' (para 55). The factors to be taken into account in assessing this question included:

the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or voluntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. [Para 56.]

9.2.2.2 *For whose actions is the state liable?*

One question left open by *Brasserie de Pecheur* is for whose action a Member State can be liable. There can be little doubt as to the state's liability for actions taken by the government itself in the context of the obligation to implement EC measures. But what about other parts of the state? In *Haim* v *Kassenzahnartzliche Vereinigung Nordrhein* (case C-424/97) it was established that a legally independent body may be liable under *Francovich,*

as well as the Member State itself.

In *AGM-COS MET Sri v Suomen Valtio and Tarmo Lehtinen* (case C-470/03), the Court held, without exploring the point fully, that an individual official may be liable in addition to a Member State for any damage caused by that individual's actions which are in breach of Community law. Article 4(1) of Directive 98/37/ EC on machinery requires that Member States do not restrict the marketing and use of machinery which complies with the Directive. Lehtinen was an official who had been involved in safety inspections of vehicle lifts in respect of which he had doubts as to their safety. His actions included making various public statements about his concerns, although Finland did nothing to arrange for the machinery to be withdrawn from the market. The manufacturer's sales plummeted in the wake of this, and an action was brought for state liability. The Court held that statements such as the ones made by Lehtinen, if attributable to the state as giving the impression of reflecting official rather than personal opinions (which was for the national court to determine), could give rise to liability. It went on to say that Lehtinen's statements could be a breach of Article 4(1) of the Directive and could not be justified on the basis of public health or freedom of expression. As the provision conferred rights on individuals and left no discretion to the Member States, the conditions for liability were satisfied. Crucially, as well as the Member State itself, the individual official could also be held liable under national law. The Court appears to treat this (cf para 98 of the judgment) as the corollary of its ruling in *Haim* that a public body may also be liable under the state liability principle. However, the prospect of individual officials being held liable for actions carried out in their official capacity is a worrying one. The Court has tempered its ruling on this point by adding the proviso that Community law does not *require* such liability, although it does not preclude it.

Of course, the argument that the Member State is the appropriate body to sue because it is at fault, is also challenged in these circumstances, as the behaviour complained of is hardly within the control of the Member State. A similar argument could be made about the actions of regional and local government. In these scenarios, it seems state liability is more about compensating individuals than enforcing EC law. The key point is that the liability—which remains with the state at central government level—is then decoupled from the body actually in breach. From the perspective of the individual claiming compensation, this matters not.

Brasserie de Pecheur also suggested that there may be liability for judicial failures, which was controversial. However, in *Kobler v Austria* (case C-224/01), the ECJ confirmed that such liability may arise in particular circumstances. The case concerned the refusal by the Austrian Administrative Supreme Court (Verwaltungsgerichtshof) to grant Mr Kobler a 'length of service' increment on the basis that the payment would be a loyalty bonus, for which time spent in similar positions in other Member States could not be taken into account. This was a wrong interpretation of EC law and in direct conflict with an earlier ruling by the ECJ *(Schoning-Kougebetopoulou* (case C15/96)), and Mr Kobler therefore brought a new claim under *Francovich* for the failure of the Verwaltungsgerichtshof to apply EC law correctly.

The ECJ stated that, in international law, state liability can arise on the basis of acts by the legislature, executive and judiciary, and that the same must be true of EC law (para 32). In addition, the principle of effectiveness (see 8.3) requires that there must be instances when a state will incur liability for actions by its courts which are in breach of EC law (para 33). However, the ECJ limited this to instances where courts are adjudicating at the last instance (para 33) and emphasised the mandatory jurisdiction of such a court under Article 234 to request a preliminary ruling on the interpretation of EC law (see Chapter 10). In order to ensure the effective protection of individual's rights under Community law, there has to be a possibility of claiming compensation for damage caused by an infringement of these rights by a court adjudicating at last instance (para 36). Such an infringement must be manifest, and it is for the national legal system to designate the courts that would hear such claims. This ruling, it is submitted, follows logically from the basic justification for state liability, and its restrictions to courts of last instance is entirely appropriate because at that point there would be no possibility of an appeal against a ruling which infringes an individual's Community rights. In order to avoid opening the floodgates to claims of state liability or Article 234 references in such circumstances, the ECJ is at pains to emphasise that 'state liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law' (para 53), although this is not limited to intentional fault or serious misconduct by the national court *(Traghetti del Mediterraneo SpA v Italy* (case C-l 73/03)). Whether this will serve as an appropriate brake to such actions remains to be seen.

In coming to its conclusion, the Court had to deal with several fundamental objections. The first was that the principle of *res judicata* (finality of judgments) might be undermined by imposing liability on the state for a serious infringement of EC law. The Court, somewhat optimistically, stated that state liability in such circumstances would not affect the finality of the judgment at issue, especially because the parties to the state liability action would be different, and a finding of liability would not result in a revision of the original decision (para 39). At a technical level, that may be correct, although it cannot be denied that the authority of the ruling in the original case would be undermined. Secondly, there was concern that the independence of the judiciary may be affected, and the authority of the court undermined, by the possibility of a state liability claim. This, too, was given short shrift by the Court, simply denying that there would be 'any particular risk to the independence' of the court concerned (para 42), and that the possibility of a state liability action might be 'regarded as enhancing the quality of a legal system and. . . the authority of the judiciary' (para 43). However, the Court did not expand on this in any detail, and its assertion remains somewhat unconvincing. Finally, there was concern as to whether there would be an appropriate domestic court which might hear a claim for state liability. In this regard, the ECJ referred back to established principles according to which it is for national legal systems to determine the appropriate court to hear such claims. That, however, does not solve the difficulties that may arise in practice. Presumably, a Member State found liable before a domestic court has a right of appeal. In the UK, this might produce the rather strange situation whereby the House of Lords might eventually be called upon to hear a case in state liability based on one of its own judgments. Whilst the basic outcome in *Kbbler* therefore can be defended at a purely logical level, there are many practical difficulties which remain unresolved by this decision. As a final point, it may be noted that in *Kobler* itself, the ECJ thought that the breach by the Austrian Verwaltungsgerichtshof was not sufficiently serious for a claim in state liability to succeed.

9.2.2.3 *Liability only where measure confers rights*

One of the key requirements of liability under *Francovich/Brasserie de Pecheur* is that the rule of law infringed must be intended to confer rights on individuals. Consequently, where a directive in issue does not confer rights on individuals, then there can be no claim under *Francovich.* Thus, in *Peter Paul v Germany* (case C222/02), the failure of the German banking supervisory authority correctly to supervise a bank, which subsequently failed, in accordance with the relevant directive (94/19/EC), did not permit depositors to maintain an action for compensation for lost deposits beyond the maximum threshold of 20,000 provided for in the directive. This was because the obligation to ensure supervision was not combined with an independent right to compensation for the consequences of any failure in that regard, and the individual rights under this directive were limited to a specified amount of compensation (which had been paid already).

9.2.3 Conditions of liability

For liability to arise it is not necessary for the infringement of Community law to have been established by the Court under Article 226 or 234; nor is it necessary to prove fault on the part of the national institution concerned *going beyond that of a sufficiently serious breach of Community law.* In *Brasserie du Pecheur* the Court rephrased the three conditions laid down in *Francovich* and incorporated a requirement that the breach be. sufficiently serious. Condition (b) of *Francovich* (the content of the right infringed must be sufficiently clear) may now be regarded as contained within the definition of 'sufficiently serious'.

The Court based its decision on its past case law, particularly its reasoning in *Francovich:* states are obliged under Articles 249 and 10 to provide effective protection for individuals' Community rights and ensure the full effect of Community law. As regards its own jurisdiction to rule on the matter of states' liability in damages, challenged by the German government, it reasoned that, since the EC Treaty had failed to provide expressly for the consequences of breaches of Community law, it fell to the Court, pursuant to its duty under Article 220 EC (ex 164, post Lisbon Article 19 TEU), to ensure that 'in the interpretation and application of this treaty the law is observed'. The application of the Court's ruling and questions of damages and causation are discussed further below.

Despite the hostility with which this decision was greeted in anti-European quarters, it is submitted that the Court's ruling on the question of, and conditions for, liability is *prima facie* consistent with existing principles and, provided that the multiple test in para 56 of what will constitute a 'sufficiently serious' breach is rigorously applied, strikes a fair balance between the interests of the Community in enforcing Community law and the interests of Member States in restricting liability to culpable breaches of Community law.

9.2.3.1 *Meaning of 'sufficiently serious'*

For liability to arise, the institution concerned must have 'manifestly and gravely exceeded the limits of its discretion': the breach must be 'inexcusable'. If there is to be equality of *responsibility* as between the liability of the Community under Article 28 8(2) EC and Member States under *Francovich,* the criterion of a 'sufficiently serious' breach laid down in *Brasserie du Pecheur* should be interpreted strictly. The question remaining was whether the Court would apply the 'sufficiently serious' test to *all* claims based on *Francovich,* including claims for damage resulting from breaches of Community law which do *not* involve legislative 'choices' analogous to those made by Community institutions when implementing policy. Alternatively it might continue to 'interpret' Member States' actions as involving such choices, as it did, surprisingly, in *Brasserie du Pecheur.* To limit the application of the sufficiently serious test to situations in which Member States are involved in 'legislative choices', by analogy with the position of Community institutions under Article 288(2) (see Chapter 14), as was suggested in *Brasserie du Pecheur,* would be to ignore the essential difference between the position of Member States, when *implementing* Community law, and that of Community institutions when *making* Community law. Since liability depends on the breach by a Member State of a Community obligation, liability should in all cases depend on whether the breach is sufficiently serious. This is reflected in the multiple test laid down in para 56.

Given the lack of clarity of much EC law, and that Member States have no 'choice' to act in breach of Community law, it is submitted that the crucial element in para 56 will often be the clarity and precision of the rule breached, as suggested by Advocate-General Tesauro in *Brasserie du Pecheur.*

This view obtained some support in *R v Her Majesty's Treasury, ex parte British Telecommunications pic* (case C-392/93), a case decided shortly after *Brasserie du Pecheur.* The case, brought by BT, concerned the alleged improper implementation of Council Directive 90/351 on public procurement in the water, energy, transport, and telecommunication sectors ([1990] OJ L297/1). BT, which claimed to have been financially disadvantaged as a result of this wrongful implementation, was claiming damages based on *Francovich.* The Court, appearing to presume that the other conditions for liability were met, focused on the question whether the alleged breach was sufficiently serious. It applied the test of para 56 of *Brasserie du Pecheur.* Although it found that the UK implementing regulations were contrary to the requirements of the directive, it suggested that the relevant provisions of the directive were sufficiently unclear as to render the UK's error excusable. At para 43 of its judgment the Court said that the article in question (Article 8(1)) was:

imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it [by the ECJ] the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely void of substance. The interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the Directive or to the objective pursued by it.

This interpretation was, it is submitted, generous to the UK. The Court held that in the context of the transposition of directives, 'a restrictive approach to state liability is justified' for the same reasons as apply to Community liability in respect of legislative measures, namely:

that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests. [Para 40.]

The Court adopted a rather different approach in *R v Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd* (case C-5/94). This case concerned a claim for damages by an exporter, Hedley Lomas, for losses suffered as a result of a UK ban on the export of live sheep to Spain. The ban was imposed following complaints from animal welfare groups that Spanish slaughterhouses did not comply with the requirements of Council Directive 74/5 77 on the stunning of animals before slaughter ([1974] OJ L3 16/10). The Spanish authorities had implemented the directive, but had made no provision for monitoring compliance or providing sanctions for non-compliance. The UK raised the matter with the Commission, which, following discussion with the Spanish authorities, decided not to take action against Spain under Article 226. Although the UK ban was clearly in breach of Article 29 of the EC Treaty, the UK argued that it was justified on the grounds of the protection of health of animals under Article 30 (for further discussion of the substantive issues see Chapter 20). However, the UK provided no evidence that the directive had in fact been breached, either by particular slaughterhouses or generally.

The Court found that the ban was in breach of Article 29, and was not justified under Article 30. The fact that the Spanish authorities had not provided procedures for monitoring compliance with the directive or penalties for non-compliance was irrelevant. 'Member States must rely on trust in each other to carry out inspections in their respective territories' (para 19). Furthermore, the breach was 'sufficiently serious' to give rise to liability under *Francovich.* The Court suggested (at para 28) that:

where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

This ruling, delivered two months after *R v Her Majesty's Treasury, ex parte British Telecommunications pic,* was surprising. While a finding that the UK would in principle be liable in damages was justified on the facts, the UK having produced no evidence of breach of the directive constituting a threat to animal health to justify the ban under Article 30, the suggestion that a 'mere infringement' of Community law might be sufficient to create liability where the state is not 'called upon to make any legislative choices' or has 'considerably reduced, or no, discretion' is questionable. While a state may have a choice as to the 'form and method of implementation' of directives, and some discretion under the treaty to derogate from basic treaty rules, its discretion is strictly circumscribed, and it has no discretion to act in breach of Community law. The UK had no more legislative discretion in implementing Directive 90/531 in *BT,* indeed possibly less, than it had under Article 30 in *Hedley Lomas.* Indeed, prior to the Court's decision in *Hedley Lomas,* it was thought that a Member State *would* have a discretion to derogate from the prohibition of Article 29 where this was necessary to protect a genuine public interest (see Chapter 20). To pursue the analogy between the Community's liability for 'legislative choices involving choices of economic policy' and Member States' liability under *Francovich,* as the Court has done in all these cases, is to disguise the fact that *the two situations are not similar.* The principal reason for limiting liability under *Francovich* is not because Member States' 'discretion' in implementing Community law must not be fettered, but because the rules of Community law are often not clear. To hold them liable in damages for 'mere infringements' of such rules, thereby introducing a principle akin to strict liability, would not only be politically dangerous, it would be contrary to the principle of legal certainty, itself a respected principle of Community law (for further analysis see Chapter 14).

Nevertheless the principle of liability for a 'mere infringement' of Community law in situations in which Member States are not required to make legislative choices was invoked by the ECJ in *Dillenkofer v Germany* (cases C-178,179,188,189 and 190/94). That case Germany's failure fully to implement Directive 90/314, designed to protect consumers in the event of travel organisers' insolvency, was on all fours with that of the Italian government in *Francovich,* was clearly 'inexcusable', and therefore, as the Court acknowledged, 'sufficiently serious' to warrant liability. Similarly, in *Rechberger and Greindle v Austria* (case C-140/97), concerning the same directive, the ECJ found that the implementing measures set the period for the commencement of claims at a date some months later than the time limit for implementation of the directive, which was 'manifestly' incompatible with the directive, and sufficiently serious to attract liability. In neither *Hedley Lomas* nor *Dillenkofer* did the Court attempt to apply the multiple test laid down in para 56 of *Brasserie du Pecheur.*

However, in *DenkavitInternationalBV v Bundesamt fur Finanzen* (cases C-283, 291 and 292/94), which were cases involving claims for damages resulting from the faulty implementation of a directive decided shortly after *Dillenkofer,* the Court followed its approach in *BT.* On the basis of a strong submission from Advocate-General Jacobs, it applied the criteria of para 56 of *Brasserie du Pecheur* and concluded that, as a result of the lack of clarity and precision of the relevant provisions of the directive, and the lack of clear guidance from the Court's previous case law, Germany's breach of Community law could not be regarded as sufficiently serious to justify liability. Significantly, the Court did not draw a distinction, for the purposes of liability, between acts of Member States involving 'choices of economic policy' and 'mere infringements' of Community law.

In an attempt to rationalise this aspect of state liability, Advocate-General Jacobs in *Sweden v Stockholm Lindopark AB* (case C-1 5 0/99) commented on the origins of the phrase 'sufficiently serious breach'. At para 59 of his opinion, he noted that:

In French, the Court has always used—originally with regard to liability incurred by the Community—the term 'violation suffisamment caracterisee'. This is now normally translated into English as 'sufficiently serious breach'. However, the underlying meaning of 'caracterise', which gives rise to its inherent implication of seriousness, includes the

notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a definite, clear-cut breach. This may help to explain why the term was previously translated as 'sufficiently flagrant violation' and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is 'sufficiently serious'.

On this reasoning, in order to be sufficiently serious, the breach of Community law would have to be definite and clear-cut. Nevertheless, establishing whether a breach is of that nature can be a difficult issue, and the approach by the ECJ to the assessment of the matter of a 'sufficiently serious' breach has not been fully consistent. In *Lindbpark* itself, the Court effectively followed *Hedley Lomas.* Lindopak had not been entitled to deduct VAT on goods and services used for the purposes of its business activities in breach of the sixth VAT directive (91/680/EEC, [1991] OJ L376/1). Sweden had amended its VAT legislation with effect from 1 January 1997, following which Lindopak was entitled to deduct VAT. It claimed for a return of VAT payments made between Sweden's accession to the Community on 1 January 1995 and 1 January 1997. The ECJ observed that the right to deduct VAT was capable of being directly effective. Although the question of Member State liability did not strictly speaking arise, the ECJ was nevertheless prepared to indicate whether Sweden had committed a sufficiently serious breach. It noted that 'given the clear wording of [the directive], the Member State concerned was not in a position to make any legislative choices and had only a considerably reduced, or even no, discretion'. The mere infringement of the directive was therefore enough to create liability.

Although the ECJ has, in some cases, concluded whether a breach was sufficiently serious to give rise to liability, that assessment is properly left to the national courts, with the ECJ only able to provide general guidance (which is correct, in principle, given the nature of the ECJ's jurisdiction under Article 234). Thus, in *Norbrook Laboratories Ltd v Minister of Agriculture, Fisheries and Food* (case C-l 27/95), a case involving a claim for damages for wrongful implementation of EC directives on the authorisation of veterinary products, the ECJ, following an extensive examination of the provisions of the directive allegedly breached, which revealed a number of clear breaches, invoked the *Hedley Lomas/Dillenkofer* mantra:

Where ... the Member State was not called upon to make legislative choices, and had considerably reduced, if no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The ECJ then left it to the national court to assess whether the conditions for the award of damages were fulfilled. Similarly, in *Klaus Konle v Austria* (case C-302/97), in a claim for damages for losses suffered as a result of laws of the Tyrol governing land transactions, allegedly contrary to Article 46 EC (ex 56) post Lisbon Article 52 TEFU and Article 70 of the Act of Accession, the Court examined these provisions for their compatibility with Community law. and finding some (but not all) of the laws to be 'precluded' by Community law, left it to the national court 'to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law in accordance with the guidelines laid down by the Court of Justice' (see also *Haim v KLV*(case C-424/97)). If national courts are to assess this crucial question of the seriousness of the breach, it is essential that these guidelines are clear. The multiple criteria laid down in para 56 of *Brasserie du Pecheur* are clear and comprehensive. The *Hedley Lomas* requirement, that in some circumstances a 'mere infringement' of Community law will suffice to establish liability, clouds the issue. It is submitted that if it is to be invoked, it will be applicable only *following* an examination of the Community law allegedly breached under the multiple test in para 56; for only then will the issue of whether the state has any 'discretion' in the exercise of its legislative powers be resolved. If the aim, and the substance, of the Community obligation allegedly infringed is 'manifest', the state will have no discretion to act in its breach. If it is not, the breach will not be sufficiently serious. The *Hedley Lomas* mantra is, it is submitted, superfluous. Nevertheless, it was invoked in *Haim vKLV* alongside the multiple test of para 56 and has been referred to since, though in cases in which the ECJ seems to suggest that the clarity and precision of the rule are key *(The Queen, on the application of: Synthon BVv Licensing Authority of the Department ofHealth* (case C-452/06), para 39).

One factor which may assist the national court is the rulings by the ECJ on the interpretation of the measure in issue. Indeed, it seems that even if there is some ambiguity in the text of the relevant measure, the *ex parte BT* approach will not be followed where the ECJ has interpreted a particular provision of Community law and a Member State has subsequently failed to apply that provision in accordance with the ECJ's interpretation *{Gervais Larsy v Lnstitut national d'assurances sociales pour travail-leurs independants (Inasti)* (case C-l 18/00)).

In that case, it can no longer be said that the Member State has a legislative choice. However, where the exact position only emerges gradually through several rulings by the Court, the national court can take this into account when considering the clarity of the rule in question and whether any errors of law were excusable or inexcusable *(Test Claimants in the FTI Group Litigation v Commissioners ofInland Revenue* (case C-446/04)). By way of contrast, see *Robins v SoSfor Work and Pensions* (case C-278/05), where the ECJ held that the UK had incorrectly implemented Article 8 of Directive 80/987/EEC on protecting employees in the event of insolvency of their employer by not ensuring that a sufficient proportion of expected pension benefits were protected. The UK's liability turned on the interpretation of 'protect' in Article 8, and as its meaning had been unclear prior to the interpretation given in this case, it seemed unlikely that the UK's breach would be sufficiently serious, although it was for the national court to come to a final decision.

9.2.3.2 *The claimant must prove that damage has been suffered*

It is also important that the claimant is able to establish that he has suffered loss or damage. In *Schmidberger v Austria* (case C-l 12/00), Austria had allowed a public protest to take place on the main motorway across the Alps which closed the motorway for 28 hours. Schmidberger claimed damages for delay to his business of transporting goods from Germany to Italy on the basis that this amounted to a breach of Articles 28-30 EC (post Lisbon Articles 34-36 TFEU) (see Chapter 19). Advocate-General Jacobs noted that it was necessary for the claimant to establish loss or damage which is attributable, by a direct causal link, to a sufficiently serious breach of Community law. Importantly, this included a right to claim for lost profit. However, if the claimant is unable to establish the existence of any loss or damage, then there cannot be a claim for state liability. The Advocate-General was willing to accept that it may not be possible to quantify exactly the loss suffered, in which case this may be calculated on an appropriate flat-rate basis. On the facts, the Advocate-General thought that the breach of Articles 28-30 in that case was not sufficiently serious. Austria had authorised a 28-hour demonstration which blocked the main transit route across the Alps, which was technically a breach of Articles 28-30, but this had to be balanced against the freedom of expression of the demonstrators (see further Chapter 6). This and the short duration of the disruption would not be a sufficiently serious breach of Community law. The ECJ, having decided that there was no breach of Articles 28-30, did not address the question of state liability in its judgment. As far as the requirement that damage be proven is concerned, it is submitted that the reasoning of this Advocate-General is sound.

9.2.3.3 *The damage must have been caused by the breach*

It is also necessary that the claimant can demonstrate that any damage suffered was caused by the Member State's breach of EU law. In *Brinkmann Tabakfabriken GmbH v Skatteministeriet* (case C-3 19/96), a case along the more moderate line in *BT* (case C-392/93), the Court found that the Danish authorities' failure properly to implement Directive 79/3 0 on taxes other than turnover taxes affecting the consumption of manufactured tobacco was not sufficiently serious to incur liability. The classification adopted by the authorities, which resulted in the applicant having to pay the higher rates of taxes, was not 'manifestly contrary' to the wording and aim of the directive. It was not clear from the directive whether the tobacco rolls imported by the applicant, which had to be wrapped in paper to be smoked, constituted 'cigarette tobacco' or 'cigarettes'. Significantly, both the Commission and the Finnish government supported the classification adopted by the Danish authorities. The question of liability turned on the question of causation. The directive in question had not been implemented in Denmark by legislative decree, although the authorities had given immediate (albeit imperfect) effect to its provisions. There was no direct causal link between that former (legislative) failure and the damage suffered by the applicant. It is implicit in the decisions that, contrary to the view of some commentators, provided that the requirements of a directive are complied with in practice, a failure to implement a directive by legislative means will not necessarily constitute a sufficiently serious breach to warrant liability.

9.2.4 *Brasserie du Pecheur* in the English courts

In 1997 the ECJ's ruling in *Brasserie du Pecheur* and *R v Secretary ofStatefor Transport, exparte Factortame Ltd* (cases C-46 and 48/93) was applied in the English High Court with a view to ascertaining whether the UK's action in introducing the Merchant Shipping Act 1988 in fact constituted a sufficiently serious breach of Community law *{R v Secretary ofStatefor Transport, exparte Factortame Ltd (No 5)* [1998] 1 CMLR 1353). Hobhouse LJ considered the ECJ's case law on state liability and concluded that whether or not a Member State's action involved the exercise of discretion (ie, 'legislative choices') the same test, requiring proof of a sufficiently serious breach of Community law, applied. That test, requiring a 'manifest and grave disregard of whatever discretion

the Member State might possess', was based on the same principles as applied to Community liability under Article 288(2), and was a relatively difficult one to meet. Having reasoned impeccably thus far he concluded that the UK's breach as regards the Merchant Shipping Act 1988 was sufficiently serious to warrant liability and referred the case back to the Divisional Court to decide the question of causation. Two factors in particular were cited by Hobhouse L as rendering the breach of Community law (Article 43 (ex 52) EC) sufficiently serious:

(a) The UK had introduced the measures in question in primary legislation in order to ensure that the implementation would not be delayed by legal challenge (at the time it was thought that primary legislation could not be challenged, but see now *R v Secretary of State for Transport, exparte Factortame Ltd* (case C-213/89), noted in Chapter 4).

(b) The Commission had from the start been opposed to the legislation on the grounds that it was (in its opinion) contrary to Community law.

Both the Court of Appeal and the House of Lords agreed with Hobhouse L that the UK's breach of Community law was sufficiently serious to warrant liability. Both courts applied the multiple test laid down in para 56 of *Brasserie du Pecheur* (cases C-46 and 48/93) (although they suggested that the list was 'not exhaustive') and found that the balance tipped in favour of the respondents. In pressing ahead with its legislation, against the advice of the Commission, despite its clear adverse impact on the respondents, and in a form (statute) which it was thought could not be challenged, the UK Government was clearly taking a 'calculated risk'. Lord Slynn did, however, express the opinion, contrary to the view of Hobhouse L and the Court of Appeal, that the considered views of the Commission, although of importance, could not be regarded as conclusive proof as to:

(a) whether there had been a breach of Community law

(b) whether the breach (if any) was sufficiently serious to justify an award of damages.

Lords Hoffmann and Clyde expressed a similar view; the position taken by the Commission was 'a relevant factor to be taken into account' in deciding whether a breach was sufficiently serious, but it was not conclusive.

Following the House of Lords' decision in *Factortame,* Sullivan in the English High Court, in assessing the seriousness of the Department of Social Security's breach of Article 7(1) of the Sex Discrimination Directive 79/7 in *R v Department of Social Security, ex parte Scullion* ([1999] 3 CMLR 798), also applied the multiple test of para 56 of *Brasserie du Pecheur,* which he described as the 'global' or 'basket' approach, and decided that, since there the scope of Article 7(1) was not clear at the relevant time, and there was no evidence that the Department had sought legal advice on the matter either from the Commission or from its own legal advisers, the breach was sufficiently serious.

9.2.5 Relationship of the principle of state liability with direct effect

The principle of state liability is an important complement to the principles of direct and indirect effect, particularly in the context of enforcement of directives. Of course, liability under the principles of both direct and indirect effect has been strict (this was confirmed in *Draehmpaehl v Urania Immobilienservice OHG* (case C-1 80/9 5)); there has been no need to consider whether the alleged breach of Community law is 'sufficiently serious'. For direct effects, the criteria have in the past been loosely applied; sometimes, in the case of indirect effects (and sometimes in the case of direct effects), they have not been applied at all. On the other hand, national courts' reluctance to apply these principles in some cases (eg, *Duke v GEC Reliance Ltd; Rolls-Royce pic v Doughty)* appears to have stemmed in part from the perceived injustice of imposing liability, retrospectively, on parties, public or private, when the precise nature of their obligations under Community law at the relevant time was not clear. The existence of a remedy under *Francovich* effectively completes the picture of ensuring the effective protection of individual rights under EU law. A good example is *Francovich* itself, following the ECJ's denial of the direct effects of the relevant provisions of Directive 80/987.

One question that arises is whether state liability can be used in preference to direct effect and indirect effect, or whether it can only be used if neither of these two mechanisms are available. In many decisions (eg, *Faccini Don),* the ECJ has pointed out a gap in protection— in particular due to the fact that directives do not have horizontal effect—can be remedied through the use of state liability. The doctrine on this view has a fallback role. In *Brasserie du Pecheur* the ECJ viewed state liability in a slightly different light, seeing it as a corollary of direct effect (para 22). Nonetheless, the preferred approach seems to see state liability as the approach of last resort. It was suggested in *Lindopark* that a damages claim is unnecessary where the applicant can obtain relief

by instituting an alternative course of action set down in national law. Some commentators have suggested that *Bonifaci v FNPS* (case C-94 and 95/95) implies it is possible to make admissibility of such proceedings dependent on the exhaustion of other domestic remedies which offer full reinstatement of rights. None of this however requires such an approach before an action in state liability may be brought.

9.2.6 State liability and the other pillars

The original judgment in *Francovich* refers to remedies for a breach of Community law. Does this mean that the remedy is not available for a failure to comply with Union law under the JHA and CFSP pillars? Member States certainly sought to exclude direct effect (but not other doctrines such as indirect effect and state liability), and the ECJ's jurisdiction is limited in both these pillars. Nonetheless, as we have seen in Chapter 5, the boundary between the pillars is porous and, in *Pupino* (case C-105/03), the ECJ held that the duty of cooperation which gave rise to the doctrine of indirect effect applied to Union law just as much as to Community law. This is a significant judgment. Of particular importance here is the fact that the doctrine of state liability is likewise based on Article 10 EC, which could imply that state liability—like indirect effects—applies to Union law. This is a contentious issue, but the removal of the pillar structure, should the Lisbon Treaty come into force, would reinforce this argument. For the time being, the question remains open.

9.2.7 Classifying state liability in national law

The principle of state liability remains a hybrid, part national, part Community law, with national courts ultimately responsible for applying the conditions to a particular case. This has created problems for national courts. Prior to *Brasserie du Pecheur* it was assumed, following *Francovich,* that a claim for damages against the state must be brought on the same basis, and according to the same rules, as the 'equivalent' claim based on national law.

However, regrettably, as noted above, the rules governing state liability laid down in *Brasserie du Pecheur* were not comprehensive. It was left to national courts to decide, according to the principles applicable to equivalent claims based on national law, whether the Community law breached was intended to benefit persons such as the applicant (condition (a)); whether there existed the appropriate direct causal link between the state's breach and the applicant's damage (condition (c), which was raised, but not decided, in *Schmidberger* (case C-l 12/00)); and whether the damage suffered was of a kind in respect of which damages might be awarded.

Although a principle of state liability for executive acts, and judicial remedies in respect of such acts, already exists in all Member States, these claims will now also be subject to the rules laid down in *Brasserie du Pecheur.* As with legislative acts, existing national remedies may need to be modified to ensure that they are effective in protecting individuals' rights; alternatively (and preferably) claims may be brought under a new *Francovich* tort.

A principle of liability for judicial acts in breach of Community law, as laid down in *Brasserie du Pecheur,* clearly breaks new constitutional ground in most if not all Member States. If available in theory, it is unlikely to be applied freely in practice. If only for reasons of polity, neither the ECJ nor a national court is likely to find a judicial breach of Community law sufficiently serious to warrant liability.

There is a degree of freedom for the Member States to specify the circumstances in which Member State liability may arise, provided that these are not stricter than those laid down in Community law. Thus, in *Traghetti del Mediterraneo SpA v Italy* (case C-l73/03), Italian legislation excluded state liability for judicial functions involving the interpretation of legal provisions or the assessment of facts and evidence. Following on from its ruling in *Kbbler* (case C-224/01), the Court observed that whilst the interpretation of the law is part of the essence of judicial activity, it is possible that a manifest breach of Community law might occur during the process of interpretation (paragraph 35). Consequently, excluding liability for damages caused by interpretation of law or assessment of facts is incompatible with national law, as is a limitation of liability to instances of intentional fault or serious misconduct by the national court, especially where this would narrow the criteria laid down in *Kobler.* In *AGM-COS MET Sri v Suomen Valtio and Tarmo Lehtinen* (case C-470/03), the Court held that national law may lay down specific conditions, provided that they do not make it impossible or excessively difficult in practice to obtain compensation caused by a Member State's breach of Community law. The Finnish limitation to damage caused by a criminal offence, the exercise of public authority, or on the basis that there are other especially serious reasons for awarding compensation were too restrictive because there may be conduct otherwise giving rise to liability not covered by these factors.

9.3 Conclusions

The principle of state liability provides individuals with a strong tool before their national courts to secure the enforcement of their rights under Community law. Although controversial, the decision in *Kobler v Austria* strengthens this further.

However, as the case law on state liability has shown, *Francovich* is not a universal panacea. To succeed in a claim for damages the applicant must establish that the law infringed was intended to confer rights on individuals and that the breach is sufficiently serious (as well as the requisite damage and causation). In cases of non-implementation of directives, as in *Francovich* or *Dillenkofer,* where there is no doubt about the nature of the Community obligation, the breach is likely to be sufficiently serious. However, where the Community obligation allegedly breached is less clear, the breach may well be found to be excusable. This then is a limitation on the ability of the doctrine to provide an effective remedy—or an effective enforcement mechanism—in every circumstance. Nonetheless, the introduction of state liability was a significant moment in the jurisprudence of the ECJ as it undermined the principle found in the legal systems of many Member States: that the state would not be liable for legislative (in)action. At a systemic level, the introduction of the doctrine emphasises that in the field of Community (if not Union) law, Member States play a subordinate role. It is surprising perhaps, that the doctrine has been so well accepted in the legal systems of the Member States.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 10: The Preliminary Rulings Procedure

10.1 Introduction

The European legal system has several enforcement mechanisms. The most obvious is the possibility for the Commission or Member States to begin actions against Member States for breaching the EC Treaty^ As we have seen however (and will see again in Part III), the role of individuals in the enforcement and development of EC law has been vital. This has been possible through private actions begun in the national courts where private litigants assert their directly effective rights derived from EC law against the state or, in some cases, other private persons. In practice this private enforcement has been critical to the success of the European legal order. Given the need to accord EC law priority, it is perhaps surprising, that the system created by the EC Treaty was not, however, one based upon an appellate structure whereby cases begun in national courts could be appealed to the European Court of Justice (ECJ) for final disposal. Rather the system is one of reference whereby national courts conduct the proceedings throughout but may (and sometimes must) ask the ECJ for its view on the interpretation pf any point of EC law relevant to the case before the national court. The national court is described as making a 'reference' to the ECJ to obtain a 'preliminary ruling'. After the ECJ has given its view on the point of EC law, the case is finally resolved by the national court in light of the legal opinion received. The ECJ does not have the power to make final orders or enforce its judgments in the Member States national legal systems. As a result, the willingness of the national courts to refer cases to the ECJ and follow its interpretations of the EC law in good faith has been critical to the whole evolution of the European legal system.

This chapter seeks to consider the relationship between the national courts and the ECJ in the context of preliminary rulings. In particular we consider the following key issues:

the relative importance of the Article 234 preliminary reference procedure to the development of EC law and European integration, and the role of individuals in that process;

the extent to which the national courts are willing and able to gain access to the ECJ in order to resolve questions of EC law before them;

how far the Article 234 system has ensured that EC law is interpreted uniformly throughout the Member States;

the nature of the relationship between the national courts and the ECJ, and whether that remains one of cooperation between equal partners or whether it has evolved into something more hierarchical, with the ECJ effectively acting as a supreme court for the Union; the extent to which the Article 234 procedures adequately protect fundamental rights and give effective remedies to private litigants; and

the problems raised by the special procedures laid down in the amended treaties which restrict references from national courts to the (ECJ in cases involving justice and home affairs.

10.2 The text of Article 234 and an overview of the procedure

Article 234 EC (EX 177) provides that:

(1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning: the interpretation of this Treaty;

the validity and interpretation of acts of the institutions of the Community;

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.

Lisbon makes some textual changes and renumbers the provision Article 267 TFEU

10.2.1 The historical importance of the Article 234 procedure

It is not clear that the framers of the EC Treaty realised the full significance that the Article 234 procedure, linking national courts to the ECJ, would come to have on the development of EC law. The text is fairly humble, suggesting that the ECJ might be called upon to adjudicate to avoid conflicting interpretations of EC law by the national courts. Thus its original purpose was to ensure, by authoritative rulings on the interpretation and validity of EC law, the correct and uniform application of EC law by the courts of Member States. By contrast, it is likely that the framers saw enforcement action by the Commission in cases brought directly before the ECJ (under Article 226 EC; post Lisbon, Article 258 TFEU) as the key to the effectiveness of Community law. The role of citizens and legal persons as enforcers was less obvious. In its early case law however the ECJ suggested that the possibility of individuals bringing cases to it through the national court reference procedure under Article 234 indicated that the treaty was more than simply an 'ordinary' international agreement between states. Citizens too could use Article 234 to gain access to the ECJ and this was one factor that inspired the development of the doctrines of direct effect and supremacy in *Van Gend en Loos* (case 26/62), *Costa vENEL* (case 6/64) (see Chapter 5). The ECJ jurisprudence giving powerful rights to individuals has in turn encouraged more litigation and thus more Article 234 references to be made.

10.2.1.1 *Impact on claimant*

The reference procedure has thus been very valuable to the individual, since it has provided him or her with the primary means of access to the ECJ to challenge Member State actions alleged to breach EC law. It will be recalled that there is no possibility for individuals themselves to begin enforcement action against a Member State under Article 226 EC Treaty. This is reserved to the Commission. In this way the individual has been able indirectly to challenge action by Member States (eg, *Van Gend en Loos).* Similarly, individuals have found it difficult to begin direct actions before the ECJ under Article 230 against the acts and legislation of Community institutions under because of the restrictive rules on standing (see Chapter 12). By bringing a case in the national courts to challenge domestic measures implementing EC law a reference can be made to the ECJ which can rule that the Community legislation is invalid. Using this 'indirect' action, the individual can then obtain an appropriate remedy from his national court, following the decision by the ECJ to declare a Community measure null and void (see Chapter 6 and, eg, *Royal Scholten-Honig*—EC regulation invalid for breach of principle of equality).

10.2.1.2 *Impact on development of Community law*

The importance of the Article 234 procedure has been greatly increased by the development by the ECJ of the concept of direct effects. Where originally only 'directly applicable' regulations might have been expected to be invoked before national courts, these courts may now be required to apply treaty articles, decisions, and even directives. Even where EC law is not directly effective it may be invoked before national courts on the principles of indirect effects or state liability under *Francovich.* As a result, national courts now play a major role in the enforcement of EC law. As we will see, the cooperative relationship between the ECJ and the national courts has been a key factor in the success of the preliminary-rulings procedure. The ECJ has also used the preliminary rulings to pronounce many new legal doctrines vital for the substantive development of EC law. A glance through the preceding chapters of this book will reveal that the majority of cases cited, and almost all the major principles established by the ECJ, were decided in the context of a reference to that court for a preliminary ruling under Article 234.

Cases such as *Van Gend en Loos* (case 26/62), *Costa v ENEL* (case 6/64) and *Defrenne v Sabena (No 2)* (case 43/7 5), concerned with questions of interpretation of EC law, enabled the ECJ to develop the crucial concepts of direct effects and the supremacy of EC law. *Internationale Handelsgesellschaft mbH* (rase 11/70); *Stauder v City ofUlm* (case 29/69) and *Royal Scholten-Honig (Holdings) Ltd* (cases 103 and 145/77) (see Chapter 6), which raised questions of the validity of EC law, led the way to the incorporation of general principles of law into EC law. The principle of state liability in damages was laid down in *Francovich* (cases C-6 and 9/90) in preliminary ruling proceedings. In all areas of EU law, the Article 234 procedure has played a major role in developing the substantive law. The procedure accounts for over 50 per cent of all cases heard by the ECJ. This percentage has of course increased as the Court of First Instance (CFI) has taken over responsibility for judicial review actions (Chapters 12 and 13) and actions for damages (Chapter 14). Nonetheless, the preliminary rulings procedure plays a central part in the development and enforcement of European law

10.2.2 Nature of the preliminary rulings procedure

The preliminary-rulings procedure is not an appeals procedure. An appeals procedure implies a hierarchy between the different types of court, some courts being higher and having more authority than those lower down the judicial architecture. Typically, appeal courts can overrule the decisions of lower courts. The decision whether or not to appeal lies, in the first place, in the hands of the parties, although in some instances leave to appeal from certain courts is required. In contrast, the preliminary-rulings procedure merely provides a means whereby national courts, when questions of EC law arise, may apply to the ECJ for a preliminary ruling on matters of interpretation or validity prior to themselves applying the law. In principle, it is a matter for the national courts to decide whether or not to make a reference. It is an example of shared jurisdiction, depending for its success on mutual cooperation. As Advocate-General Lagrange said in *De Geus en Uitdenbogerdv Robert Bosch GmbH* (case 13/6 1), the first case to reach the ECJ on an application under the preliminary-rulings procedure:

Applied judiciously—one is tempted to say loyally—the provisions of Article 177 [now 234] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdiction.

We shall consider how far the ECJ has attempted to go beyond this view and impose itself on the national courts in ways that may have departed from the original text and purpose of the treaty.

10.3.1 The generous approach of the EC to Article 234 references

We have noted above that the ECJ has relied heavily upon Article 234 references to develop the jurisprudence of EC law. It has adopted a purposive approach in its rulings on the meaning of EC law aiming to strengthen the effectiveness of EC law and build the single market. Article 234 has thus been crucial to the ECJ securing its own vision of European law. For this reason we can see that, for a long time, the ECJ adopted an open-door approach to national courts and tribunals seeking to refer questions to it. Certainly until fairly recently, the ECJ encouraged wide use of preliminary rulings in order to both secure uniformity of EC law throughout Member States but seemingly also to have more opportunity to develop new principles giving greater rights to individuals. As a result, the ECJ has followed a generous approach to the interpretation of Article 234 whenever parties or Member States sought to prevent a reference from being ruled upon by the court, by arguing that the reference was in some way inadmissible. This can be seen by the ECJ's willingness to accept reference from a wide range of bodies (see 10.3.1 and 10.3.2 below) but also by its lack of formality and flexibility in giving rulings on references from national courts in as many situations as possible (see 10.3.6 below).

We can however detect some changes in the outlook of the ECJ over time. One concern is that the ECJ has become overloaded with cases. This has caused delay, extra cost, and uncertainty for parties and the EC legal system overall. Consequently the ECJ has adopted certain decisions to limit the number of cases brought before it. Here, we can see the ECJ is becoming more like a superior court for Europe in that it wishes to be more than a passive recipient of whatever national courts send it. The ECJ has developed jurisprudence aimed at controlling the types of cases it will hear and a doctrine similar to precedent. Thus whilst the early period of the reference procedure saw the ECJ largely allow any reference to proceed to a hearing with a full preliminary ruling being given, this has changed overtime. The relationship between the ECJ and national courts has shifted to some extent from one of cooperation amongst equal partners towards a hierarchy with the ECJ attempting to position itself at the apex of the European legal system. This is, however, always subject to the important reality that the ECJ has no means of ensuring that national courts actually follow its rulings or make references when required to do so under Article 234 (but see *Kobler* (case C-244/01) 10.5.3).

10.3.1 What is a 'court or tribunal'?

Jurisdiction to refer to the ECJ under Article 234 is conferred on 'any court or tribunal'. With rare exceptions (eg, *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81) to be discussed below; *Corbiau* v *Administration des Contributions* (case C-24/92) (a fiscal authority is not a court or tribunal); *Victoria Film A/S v Riksskattenverkert* (case C-134/97) (a court exercising its administrative duties is not a court or tribunal)) this has been interpreted in the widest sense. Whether a particular body qualifies as a court or tribunal within Article 234 is a matter of *Community* law. National-law classifications are not determinative. Arguably, this facilitates equality of access across the Union. A broad interpretation reduces the risk of rulings which are inconsistent with EC law coming into being.

The ECJ is generally accepted as having set down a number of criteria by which a 'court or tribunal' might be identified. The early case law identified five criteria:

statutory origin

permanence

inter partes procedure

compulsory jurisdiction

the application of rules of law

(See also *Dorsch Consult v Bundesbaugesellschaft Berlin* (case C-54/96), para 23).

Subsequent decisions, such as *Preto di Salo vPersons Unknown* (case 14/86), made it clear than the independence of the body would also be a factor.In *Broekmeulen* (case 246/80) the Court was faced with a reference from the appeal committee of the Dutch professional medical body. One of the questions referred was whether the appeal committee was a 'court or tribunal' within what is now Article 234. The Court held that it was:

in the practical absence of an effective means of redress before the ordinary courts, in a matter concerning the application of Community law, the appeal committee, which performs its duties with the approval of the public authorities and operates with their assistance, and whose decisions are accepted following contentious proceedings and are in fact recognised as final; must be deemed to be a court of a Member State for the purpose of Article 177 [now 234].

It was held that it was imperative, to ensure the proper functioning of Community law, that the ECJ should have the opportunity of ruling on issues of interpretation and validity raised before such a body. More recently, the ECJ has held that a person appointed to hear appeals against home affairs ministry decisions in immigration cases, an Immigration Adjudicator, could make a reference *(El-Yassini v Secretary of Statefor the Home Department* (case C-4 16/96)). In this case, the office of Immigration Adjudicator was a permanent office, established by statute which gives the officer in question the power to hear and determine disputes in accordance with rules set down by statute. The ECJ further agreed with the Advocate-General, who had emphasised the *inter partes* nature of the procedure (para 20) and the fact that the adjudicators are required to give reasons for their decisions.

The ECJ has since been criticised by the Advocate-General in *de Coster* (case C-17/00) for an approach to the interpretation of a 'court or tribunal' that is confused, especially as regards the criteria of whether the body is established by law, the independent nature of the body and the need for *inter partes* procedure, as well as the requirement that the body's decision be of a judicial nature. Although in cases such as *Criminal Proceedings against X*(cases C-74 and 129/95), in which the ECJ declared it did not have jurisdiction because the prosecutor making the reference was not independent, and *Dorsch Consult* (case C-54/96), in which the Court emphasised the need for the referring body to carry out its responsibilities 'independently' (para 35), in other instances, such as *El-Yassini,* the ECJ has not stringently assessed the requirement of independence. Another such example is *Gabalfrisa v AEAT* (cases C-l 10-47/98). There the ECJ held that the Spanish Economic-Administrative Courts, which do not form part of the judiciary but are part of the Ministry of Economic Affairs and Finance, fell within Article 234. The ECJ accepted that the separation of functions between the departments of the Ministry responsible for tax collection and the Economic-Administrative Courts, which ruled on complaints lodged against the collection departments, was sufficient to ensure independence, despite the Opinion of Advocate-General Saggio in that case to the contrary.

In *de Coster,* the Court, contrary to the view of the Advocate-General, accepted the reference. It noted that the body in question was 'a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory' (para 12). In the subsequent *Schmid* case (case C-5 16/99), however, the ECJ went to great lengths to distinguish the Fifth Appeal Chamber for the Regional Finance Authority, the referring body in *Schmid,* from the bodies found to fall within the definition of a 'court or tribunal' in *Dorsch Consult* and *Gabalfrisa,* which the Advocate-General in *de Coster* had criticised. Like the bodies in those cases, the appeal chamber was linked in organisational terms to the body whose decisions it reviewed. The ECJ held that the appeal chamber was not independent. In *Synetairismos Farmakopoion Aitolias* & *Akamanias* v *GlaxoSmithKlinepic* (Case C-5 3/03), the ECJ held that the Greek

competition tribunal was subject to control by the relevant government department and therefore not sufficiently independent to be regarded as a 'court or tribunal' for the purposes of Article 234. Whether these cases indicate that the ECJ has taken the comments of the Advocate-General in *de Coster* into account, or rather reflects the fact that some administrative bodies simply cannot be seen as independent is debatable.

Moreover, the ECJ has sometimes emphasised the importance of the *inter partes* nature of proceedings (see, eg, *El Yassini* (case C-4 16/96)), although there have been cases, such as *Dorsch Consult* which concerned undefended proceedings, where this criterion has seemed less central to the determination of the question as to whether a body constitutes a 'court or tribunal'. In a more recent case, *Roda Golf and Beach Resort* (C-l 4/08) Advocate-General Ruiz Jarabo Colomer gave an opinion allowing a reference from a court where proceedings had not yet commenced and a single party was seeking to require the court to effect service a notice cancelling a contract on counterparties to the contract. He sought to argue that the *inter partes* rule should not be rigidly applied and it is suggested that this is right. Where there is a genuine issue of EC law that affects legal rights or remedies then a reference should be possible even in the absence of *inter partes* proceedings being on foot.

10.3.2 Can arbitrators be a 'court or tribunal'?

The position of arbitrators has always given rise to problems in this context. The Court took a narrow view of a 'court or tribunal' in the early case of *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81). The case arose from a joint shipbuilding project which involved the pooling of EC aid. The parties agreed that in the event of a dispute they would refer their differences to an independent arbitrator. Their agreement excluded the possibility of recourse to the ordinary courts. They fell into disagreement and a number of questions involving the interpretation of certain EC regulations were raised before the arbitrator. He sought a ruling from the ECJ as to, inter alia, whether he was a 'court or tribunal' within the meaning of Article 234. The Court held that he was not. According to the Court, the key issue was the nature of the arbitration. Here the public authorities of Member States were not involved in the decision to opt for arbitration, nor were they called upon to intervene automatically before the arbitrator. If questions of Community law were raised before such a body, the ordinary courts might be called upon to give them assistance, or to review the decision; it would be for *them* to refer questions of interpretation or validity of Community law to the ECJ.

The Court's decision in *Nordsee* ignored the fact that in this case recourse to the courts was excluded, and the arbitrator was thus required to interpret a difficult point of Community law, of central importance in the proceedings, unaided. Since in *Nordsee Deutsche Hochseefischerei GmbH* there was no effective means of redress before the ordinary courts and the decisions of the arbitrator were accepted following contentious proceedings and recognised as final it seems that the only factor distinguishing it from *Broekmeulen* was the element of *public* participation or control. This, it seems, will be essential. Certainly, in subsequent cases, such as *Danfoss* (case 109/88), the ECJ has focused on the compulsory nature of an arbitrator's jurisdiction, by contrast to the position in *Nordsee,* when the parties agreed to refer their dispute to arbitration.

The position was confirmed in *Denuit v Transorient* (C-l 25/04) involving a dispute under the Package Travel Directive (90/3 14/EEC) before the arbitration panel of the Belgian Travel Dispute Committee. Having confirmed its case law, the ECJ rejected the reference on the basis that the panel was not a 'court or tribunal', because the parties were 'under no obligation, in law or in fact, to refer their disputes to arbitration' (at para 16). No regard was had to the fact that, in a consumer situation,arbitration may be the only formal procedure which may practically be available to a consumer because of the comparatively high cost of court action; a matter which surprises in view of the increasing emphasis on out-of-court procedures in consumer cases.

10.3.3 'Court or tribunal': Evaluation

In general, the ECJ's approach to the definition of 'court or tribunal' for the purposes of Article 234 has been generous. This approach would seem to have been driven by the need to ensure correct and uniform interpretation of the treaty. One might argue that access to justice from the perspective of the parties would also argue in favour of such a broad definition, especially when the referring body did not meet the criterion of independence. Against this, however, a number of other factors should be weighed. One of the significant problems in the current jurisprudence is a lack of certainty as to where the ECJ will draw the line between a 'court or tribunal' for the purposes of the EC Treaty and other bodies. The current approach, which (usually) takes a broad view of the bodies permitted to refer, means that the ECJ receives more references. An approach which encourages references was understandable during the early years of the Community when both the substantive law and the

relationship between the ECJ and national courts needed to be consolidated, but what of the position now? It has been suggested that although there is much to be said for encouraging national courts, now more experienced in the application of EC law, to decide matters for themselves, there is no justification for a position whereby access to the ECJ is totally excluded. The Advocate-General in *de Coster,* however, commented that '[o]ne well thought out and well-founded decision resolves more problems that a large number of hasty judgments which do not go deeply into the reasoning and do not address the questions submitted to them'. Essentially, it seems that the ECJ is a victim of its own success, with longer delays in dealing with references, delays themselves that do not assist in the proper administration of justice. The Advocate-General suggested that the ECJ should tighten its definition of 'court or tribunal', with the likely consequence that the relationship between the national courts and the ECJ would change. The national courts from this perspective would need to take greater responsibility for Community law.

10.3.4 The question must be a matter of Community law

The Court is only empowered to give rulings on matters of Community law (and, as noted below, limited aspects of the second pillar on justice and home affairs (JHA)). It has no jurisdiction to interpret domestic law, nor to pass judgment on the compatibility of domestic law with EC law. The Court has frequently been asked such questions (eg, *Van Gend en Loos* (case 26/62); *Costa v ENEL* (case 6/64); *Netherlands v Ten Kate Holding BV*(case C-5 11/03)), since it is often the central problem before the national court. But as the Court said in *Costa v ENEL:*

a decision should be given by the Court not uppn the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the above-mentioned [Treaty] Articles in the context of the points of law stated by the Giudice Conciliatore.

Where the Court is asked to rule on such a matter it will merely reformulate the question and return an abstract interpretation on the point of EC law involved. This respects the division of competences laid down in the treaty and avoids the ECJ becoming involved in national law issues over which it has no jurisdiction.

The Court's role is one of interpretation of EC law not application to the facts

The Court maintains a dividing line in principle between interpretation and application. It has no jurisdiction to rule on the application of Community law by national courts. However, since the application of Community law often raises problems for national courts, the Court, in its concern to provide national courts with 'practical' or 'worthwhile' rulings, will sometimes, when interpreting Community law, also offer unequivocal guidance as to its application (see eg, *Stoke-on-Trent City Council v B&Q* (case C-l69/9 1); *R v Her Majesty's Treasury, exparte British Telecommunications pic* (case C-392/93); *Arsenal Football Club v Reed* (case C-206/01)).

The Court must not interfere with the matters within national court discretionThe Court maintains a strict policy of non-interference over matters of what to refer, when to refer, and how to refer. Such matters are left entirely to the discretion of the national judge. As the Court said in *De Geus en Uitdenbogerd v Robert Bosch GmbH* (case 13/61), its jurisdiction depends 'solely on the existence of a request from the national court'. However, it has no jurisdiction to give a ruling when, at the time when it is made, the procedure before the court making it has already been terminated *(Pardini* (case 338/85); *Grogan* (case C-159/90)). In contrast, the Court does have jurisdiction where a court is involved in preparatory inquiries in criminal proceedings which may or may not lead to a formal prosecution, where the question of EC law may determine whether the inquiries will continue (case C-60/02, *Criminal proceedings against X ('Rolex')).*

No formal requirements are imposed on the framing of the questions. Where the questions are inappropriately phrased the Court will merely reformulate the questions, answering what it sees as the relevant issues. It may interpret what it regards as the relevant issues even if they are not raised by the referring court (eg, *OTO SpA v Ministero delle Finanze* (case C-130/92)). Nor will it question the timing of a reference. However, since 'it is necessary for the national court to define the legal context in which the interpretation requested should be placed', the Court has suggested that it might be convenient for the facts of the case to be established and for questions of purely national law to be settled at the time when the reference is made, in order to enable the Court to take cognisance of all the features of fact and law which may be relevant to the interpretation of Community law which it is called upon to give *(Irish Creamery Milk Suppliers Association v Ireland* (cases 36 and 71/80); approved in *Pretore di Said* (case 14/8 6)). In *Telemarsicabruzzo SpA v Circostel* (cases C-320, 321, 322/90) it rejected an application for a ruling from an Italian magistrates' court on the grounds that the reference had provided no background factual information and only fragmentary observations

on the case. The ECJ has since reaffirmed this approach in several cases (eg, *Pretore di Genova v Banchero* (case C-1 57/92); *Monin Automobiles v France* (case C-386/92)). The ECJ has held, however, that the need for detailed factual background to a case is less pressing when the questions referred by the national court relate to technical points *(Vaneetveld v Le Foyer SA* (case C3 16/93)) or where the facts are clear, for example, because of a previous reference *(Crispoltoni* v *Fattoria Autonoma Tabacchi* (cases C-133, 300 and 3 62/92)). The concern seems to be that not only must the ECJ know enough to give a useful ruling in the context, but that there is also enough information for affected parties to be able to make representations. This, according to the ECJ, is especially relevant in competition cases *(Deliege* (case C-191/97), paras 30 and 36 (see further Chapter 29). The Court has issued an 'Information Note on references from national courts for a preliminary ruling' ([2005] OJ C 143/1, replacing guidance issued in 1996), consolidating its rulings in these cases. The circumstances in which the ECJ will decline jurisdiction are discussed further below.

The national courts may refer cases on the validity of EC measures As confirmed in Article 234 itself, the validity EC measures may be called into question within national proceedings. Thus for example a regulation or directive passed by the Council and Parliament may be said to be ultra vires the EC Treaty. If an individual is adversely affected by the measure, they may begin proceedings in the national courts to challenge it. The national courts have often made references to the ECJ in such cases. The ECJ has been receptive to such cases (subject to 10.4.4 below) and is willing to rule that EC measures are invalid in responding to Article 234 references. The only limit placed upon national courts is that they themselves do not have the power to declare EC measures invalid (see *Foto-Frostv Hauptzollamt Lubeck-Ost* (case 314/85)). The ECJ has been keen to maintain a monopoly over this power because of the danger that national courts may undermine the effectiveness of EC law if they were unilaterally to declare measures invalid. The ECJ did however confirm that national courts can grant interim relief suspending the implementation of EC measures that they believe to be invalid in *Zuckerfabrik Siiderdithmarschen AG v Hauptzollamt Itzehoe* (cases C-143/88 and C-92/89). The national courts must use this power with great care and make an urgent reference to the ECJ. This is a good example of the cooperative nature of the relationship between the ECJ and the national courts. The ECJ sought to balance the concerns of national courts about invalid EC legislation affecting individuals with its own concerns about the effectiveness and uniform application of EC law.

10.3.5. The practical reality of the ECJ's jurisdiction

Some of the above limitations of the Court's jurisdiction are more apparent than real. The line between matters of Community law and matters of national law, between interpretation and application are more easily drawn in theory than in practice. An interpretation of EC law may leave little room for doubt as to the legality of a national law and little choice to the national judge in matters of application if he is to comply with his duty to give priority to EC law. The Court has on occasions, albeit in abstract terms, suggested that a particular national law is incompatible with EC law (eg, *R v Secretary of Statefor Transport, exparteFactortameLtd* (case C-221/89); *Johnston v RUC* (case 222/84)). The Court may even offer specific guidance as to the application of its ruling. In the *BT* case (case C-392/93), for example, the ECJ commented:

Whilst it is in principle for the national courts to verify whether or not the conditions of State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

The Court then went on to hold that there had been no breach. Further, in rephrasing and regrouping the questions the Court is able to select the issues which it regards as significant, without apparently interfering with the discretion of the national judge.

It may be argued that some encroachment by the ECJ on to the territory of national courts' jurisdiction is necessary to ensure the correct and uniform application of Community law. However, its very freedom of manoeuvre in preliminary rulings proceedings, combined with its teleological approach to interpretation, have resulted on occasions in the Court overstepping the line, laying down broad general (and sometimes unexpected) principles, with far-reaching consequences, in response to *particular* questions from national courts (eg, *Barber* (case 262/88); *Marshall (No 2)* (case C-27 1/91)). This has not been conducive to legal certainty. Such activism has not gone without criticism, as calculated to invite 'rebellion', even 'defiance' by national courts.

The potential difficulties arising from the ECJ overstepping the boundary between its role of interpreting EC

law and the national courts' role of applying that ruling to the facts can be seen in the case of *Arsenal Football Club v Reed* ([2002] All ER (D) 180 (Dec)). The case before the national court concerned the action commenced by Arsenal to prevent Reed from continuing to sell souvenirs which carried its name and logos. The national court referred a number of questions to the ECJ on the interpretation of the Trade Mark Directive (see case C-206/01). The main issue was whether trade mark protection extended only to the circumstances in which the sign was used as a trade mark or whether an infringement would occur irrespective of how the marks were used. The ECJ handed down a judgment in the following terms:

In a situation which is not covered by Article 6(1) of the First Council Directive 89/104/ EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(l)(a) of that directive to prevent that use. It is immaterial that, in the context of fhat use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor.

The phrase 'in circumstances such as those in the present case' would seem to give the national court little freedom in its determination of the case for which the preliminary ruling was originally made. In the *Arsenal* case, however, the referring court accepted the argument of the defendant's counsel to the effect that in the course of its judgment and in particular by tying the operative part of its judgment to the facts of the case, the ECJ had made a determination of fact which in some aspects was inconsistent with the finding of fact made by the national court. On this basis, the national court commented: 'If this is so, the ECJ has exceeded its jurisdiction and I am not bound by its final conclusion. I must apply its guidance on the law to the facts as found at the trial' (para 27) It further remarked:

The courts of this country cannot challenge rulings of the ECJ within its areas of competence. There is no advantage to be gained by appearing to do so. Furthermore national courts do not make references to the ECJ with the intention of ignoring the result. On the other hand, no matter how tempting it may be to find an easy way out, the High Court has no power to cede to the ECJ a jurisdiction it does not have. [Para 28.]

Although the court has phrased this in terms of the limits ofjurisdiction, rather than an overt defiance, the assertion by the national court of the limits of the ECJ's jurisdiction was itself a form of rebellion because the trial judge refused to follow the application of law to the facts that had been suggested by the ECJ. The High Court before which the *Arsenal case* was heard did point out that there was the possibility of an appeal to the Court of Appeal, which might make a different application of the law to the facts but in the absence of this, he declined to accept the ECJ's, as he saw it, improper ruling on factual matters. This is what happened subsequently (see [2003] 2 CMLR 25), when the Court of Appeal held that the ECJ's reference to the facts was *not* at variance with those of the trial judge, but that there was a difference in legal reasoning. The trial judge had therefore been wrong to disagree with the ECJ in this case, although the Court of Appeal did confirm the principle on which the first-instance decision was based. We can see in *Reed* a good example of a case where the ECJ was perceived to have exceeded its proper jurisdiction as a court of reference by taking the final decision on the case away from the national court. The nature of cooperation requires that both national courts and ECJ respect each others jurisdictions.

10.4 The ECJ's refusal to give rulings in some cases

As was noted above, for many years, the ECJ generally encouraged national courts to refer and did not seek to limit the kinds of cases sent to it. There have however been important limitations upon the ECJ's policy of being willing to provide rulings in all cases referred to it. These limitations are controversial because some of them go against the text of Article 234 which seems to require the ECJ to give a ruling whenever this is 'necessary' to resolve an issue of EC law. There appears to be no inherent jurisdiction in the ECJ to refuse to give a ruling. Furthermore, refusal to answer may lead to uncertainty in national courts about when to refer and this may damage the uniform application of EC law. One practical, thus justifiable, limitation that we have already seen is that the ECJ will refuse jurisdiction when the referring court has not included enough information to enable the ECJ to give a ruling on the question referred (see eg, *Telemarsicabruzzo SpA v Circostel* (cases C-320, 321, 322/90)).

We now consider some more important limitations developed by the court. These show the ECJ developing the idea that, as a kind of supreme court for the EU, it should have the inherent power to decide which kinds of cases it will hear. This is sometimes referred to as the compentence to determine its own jurisdiction (Kompetenz-

Kompetenz is the German phrase). 10.4.1 The ECJ can decline to hear cases brought in artificial proceedings

The most important limitation was first laid down by the ECJ in the cases of *Foglia v Novello (No 1)* (case 104/79) and *Foglia v Novello (No 2)* (case 244/80). Here for the first time the Court refused its jurisdiction to give a ruling on a question of EC law. The questions, which were referred by an Italian judge, concerned the legality under EC law of an import duty imposed by the French on the import of wine from Italy. It arose in the context of litigation between two Italian parties. Foglia, a wine producer, had agreed to sell wine to Mrs Novello, an exporter. In making their contract the parties agreed that Foglia should not bear the cost of any duties levied by the French in breach of EC law. When duties were charged and eventually paid by Foglia, he sought to recover the money from Mrs Novello. In his action before the Italian court for recovery of the money that court sought a preliminary ruling on the legality under EC law of the duties imposed by the French. The ECJ refused its jurisdiction. The proceedings, it claimed, had been artificially created in order to question the legality of the French law; they were not 'genuine'. The parties were no more successful the second time when the judge referred the case back to the ECJ having not received a satisfactory answer to his previous reference. In a somewhat peremptory judgment the Court declared that the function of Article 234 was to contribute to the administration of justice in the Member States; not to give advisory opinions on general or hypothetical questions.

The ECJ's decision has been criticised. Although the parties had contrived their contractual arrangements so as to bring a claim in their own national court, rather than challenging the French duty in the French courts, they did genuinely think the duty was in breach of EC law and the Italian judge called upon to decide the case was faced with a genuine problem, central to which was the issue of EC law. If, in his discretion, he sought guidance from the ECJ in this matter, surely it was not for that Court to deny it. The principles expressed in *Foglia v Novello* were, however, applied in *Meilicke v AD V/OR GA AG* (case C-83/91). Here the Court refused to answer a lengthy and complex series of questions relating, inter alia, to the interpretation of the second Company Law Directive. The dispute between the parties centred on a disagreement as to the interpretation of certain provisions of German company law. It appeared that the EC directive was being invoked in order to prove the theories of one of the parties (a legal scholar). The Court held that it had no jurisdiction to give advisory opinions on hypothetical questions submitted by national courts (contrast *Mangold* (case C-144/Q4, discussed in Chapter 5), which also appeared to have been raised to prove an argument made by one of the parties (cf para 32), but a contract forming the basis of the dispute and the Article 234 reference had been performed—thereby causing the ECJ to reject the German government's claim that the case was artificial). It is not unusual for supreme courts to limit cases to those where parties really are in dispute with each other. The reasons are partly those of docket control but also to prevent the courts becoming the forum for political rather than legal disputes.

It has also been suggested that political considerations and national rivalries played their part in the *Foglia* decision (the Court held it 'must display special vigilance when ... a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law': *Foglia v Novello (No 2)).* This assessment is supported by the more recent case of *Bacardi-Martini SAS v Newcastle United Football Company Ltd* (case C-3 18/00). Bacardi entered into a contract for advertising time on an electronic revolving display system during a match between Newcastle and Metz, a French football club. The match was to be televised live in the United Kingdom and France. Although the advertising deal was in cbmpliance with English law, it contravened French law and Newcastle therefore pulled out of the advertising agreement. Bacardi brought an action against Newcastle, claiming that it could not rely on the French law to justify its actions, as the French law was incompatible with Article 49 EC (ex 59; post Lisbon 56 TFEU) on the freedom to provide services. The High Court made a reference on this point. When discussing the question of admissibility, the ECJ referred to *Foglia* and the special need for vigilance when the law of another Member State was in issue; it then reviewed whether the national court had made it clear why an answer was necessary. The ECJ concluded:

In those circumstances, the conclusion must be that the Court does not have the material before it to show that it is necessary to rule on the compatibility with the Treaty of legislation of a Member State other than that of the court making the reference. [Para 53.]

From this case, it seems that although a national court is not precluded from referring questions relating to the national laws of other Member States, the ECJ will review the justification for the reference more stringently than it would otherwise do.

10.4.2 The case must relate to a cross-border issue and not a purely internal situation

Another area in which the ECJ has sometimes limited references has been when the subject matter of the case is 'internal' and does not involve Community law directly. Internal law issues are governed by national not EC law. The ECJ has generally been careful not to rule on cases which appear to concern internal situations because to do so would be to assume a power not conferred upon it by the EC Treaty. This issue came before the Court in *Dzodzi v Belgium* (cases C-297/88 and C-l97/89). Here the Court was prepared to provide a ruling on the interpretation of EC social security law in a purely 'internal' matter, for the purpose of clarifying provisions of Belgian law invoked by a Togolese national. The Court held that it was 'exclusively for national courts which were dealing with a case to assess, with regard to the specific features of each case, both the need for a preliminary ruling in order to enable it to give judgment, and the relevance of the question'. Following *Dzodzi,* in *LeurBloem* (case C-28/95), the ECJ held that it has jurisdiction to interpret provisions of Community law where the facts of the case lie outside these provisions but are applicable to the case because the national law governing the main dispute has transposed the Community rule to a non-Community context ('spontaneous harmonisation'). This is subject to the proviso that national law does not expressly prohibit it *(Kleinwort Benson* (case C-346/93)). Similarly, the ECJ has accepted references for a preliminary ruling in circumstances where a national provision is tied into a Community rule in order to avoid nondiscrimination even in purely internal situations (case C-300/01, *Salzmann*—internal situation affected by rules on free movement of capital in Article 56 (ex 73b) EC; post Lisbon 63 TFEU).

10.4.3 A preliminary ruling must be 'objectively required'

Another potential limitation on the ECJ's willingness to accept references can be seen in *Motrin Automobiles—Maison du Deux-Roues* (case C-428/93). There the ECJ suggested that the questions referred must be 'objectively required' by the national court as 'necessary to enable that court to give judgment' in the proceedings before it as required under Article 234(2). This case concerned a company which was in the process of being wound up. The company argued that it should not be finally wound up until certain questions relating to EC law had been answered. Conversely, the company's creditors thought that the company had been artificially kept in existence for too long already and should be wound up immediately. The national court referred the EC-law questions to determine the strength of the company's argument. The ECJ held that, although there was a connection between the questions and the dispute, answers to the question would not be *applied* in the case. The ECJ therefore declined jurisdiction.

10.4.4 The parties must challenge EC measures directly under Article 230 if they have standing

Another limitation on the ECJ's willingness to give preliminary rulings relates to cases where a party is seeking to challenge an EC measure indirectly using proceedings in the national courts. Whilst we saw that often the ECJ will rule on such issues where national courts refer questions to the ECJ under Article 234 (see 10.3.7 above), there are some limits to this open-door policy. The Court has been concerned to prevent parties using Article 234 to get round the rules on direct challenges under Article 230. This was the situation in *TWD Textilwerke GmbHv Germany* (case C-l 88/92) where the Court refused to give a ruling on the validity of a Commission decision, addressed to the German government, demanding the recovery from the applicants of state aid granted by the government in breach of EC law. Its refusal was based on the fact that the applicants, having been informed by the government of the Commission's decision, and advised of their right to challenge it under Article 230, had failed to do so within the two-month limitation period. Having allowed this period to expire the Court held that the applicants could not, in the interests of legal certainty, be permitted to attack the decision under Article 234. This would defeat the restrictions on challenging Community acts imposed by Article 230 because a party could wait many months or years before attempting to invalidate long-standing EC decisions or legislation.

This decision, wholly out of line with its previous jurisprudence, which has been to encourage challenges to validity under Article 234 rather than (the more restrictive) Article 230, has caused concern, as calculated to drive parties, perhaps prematurely, into action under Article 230, for fear of being denied a later opportunity to challenge Community legislation under Article 234 (see further, Chapter 12). However, the ECJ has since mitigated some of the effects of its judgment in *TWD. InRv Intervention BoardforAgriculture, exparteAccrington Beef Co Ltd* (case C-24 1/9 5), the parties had not sought to bring an action for annulment within the time limits set out in the then Article 230. Nonetheless, the ECJ was prepared to hear the preliminary ruling reference because it was not clear, as the parties were seeking to challenge a regulation, that they would have had standing to bring an action under Article 230 (see also *Atzeni and others* (cases C-346 and 529/03), discussed at 11.4.3.4). It seems therefore

that Article 234 can be used in such cases as long as it is not obvious that the party would have had standing to challenge the EC measure directly under Article 230.

10.5 National courts and the reference procedure

We should note at the outset the position of the national courts is in some ways more powerful than that of the ECJ. Because there is no right of appeal to the ECJ, it is up to the national-court judge whether to decide to refer matters to Luxembourg. As will be seen, in some cases Article 234 imposes a duty to refer cases but there is no method of compelling this if a national court declines to do so. The ECJ has thus relied very much upon judges cooperating with it in order to develop European law and to ensure uniform application throughout the Member States. In this sense, national courts are also part of the Union legal order.

10.5.1 When must a national court refer and when does it have choice?

Although any court or tribunal may refer questions to the ECJ under Article 234, a distinction must be drawn between those courts or tribunals which have a discretion to refer ('permissive' jurisdiction) and those for which referral is mandatory ('mandatory' jurisdiction). Under Article 234(3), where a question concerning interpretation is raised 'in a case pending before a court or tribunal of a Member State, *against whose decisions there is nojudicial remedy under national law,* that court or tribunal *shall* bring the matter before the Court of Justice' (emphasis added). For all courts other than those within Article 234(3) referral is discretionary. The treaty therefore created a system whereby most of the time the national courts would have a choice about when to refer questions to the ECJ. Decisions of national courts which are disputed (including on points of EC law) could be appealed internally (subject to the national law regarding appeals of the particular Member State). Only when a case could go no further within the domestic legal system does the treaty require a reference to the ECJ.

10.5.2Article 234(3): The mandatory obligation to refer for courts against whom no appeal lies

The purpose of Article 234(3) must be seen in the light of the function of Article 234 as a whole, which is to prevent a body of national case law not in accordance with the rules of Community law from coming into existence in any Member State *(Hoffman-La Roche AG v Centrafarm Vertiebsgesellschaft Pharmazeutischer Erzeugnisse mbH* (case 107/76)). To this end Article 234(3) seeks to ensure that, when matters of EC law arise, there is an obligation to refer to the ECJ if the proceedings can go no further in the domestic court system. This purpose should be kept in mind when questions of interpretation of Article 234(3) arise.

The scope of Article 234(3) is not entirely clear. While it obviously applies to courts or tribunals at the apex of the legal system whose decisions are *never* subject to appeal (the 'abstract theory'), such as the House of Lords in England, or the Conseil d'Etat in France, it is less clear whether it applies also to courts whose decisions *in the case in question* are not subject to appeal (the 'concrete theory'), such as the Italian magistrates' court *{giudice conciliatore)* in *Costa v ENEL* (case 6/64) (no right of appeal because sum of money involved too small). Furthermore, if leave to appeal is required to go to a higher court and this is refused, does this mean the lower court becomes a court 'against whose decisions there is no judicial remedy under national law'? In the UK we see this in appeals from the Court of Appeal where leave to the House of Lords is refused, or when the High Court refuses leave for judicial review from a tribunal decision. These cases all involve courts not at the apex of the system but whose decision has effectively concluded the domestic proceedings. If a point of EC law remained in dispute, the parties would not have had the benefit of a ruling from the ECJ and so their fundamental rights might have been impaired. Furthermore, the interpretation and application of EC law in that Member State might be wrong thus threatening the uniformity of the EC law system across the Member States.

The judgment of the ECJ in *Costa v ENEL* was seen, albeit *obiter,* to support the wider, 'concrete' theory. In that case, in the context of a reference from the Italian magistrates' court, from which there was no appeal due to the small amount of money involved, the Court said, with reference to the then Article 177(3) (now 234(3)): 'By the terms of this Article ... national courts against whose decisions, *as in the present case,* there is no judicial remedy, *must* refer the matter to the Court of Justice' (emphasis added). Taking into account the function of Article 234(3) and particularly its importance for the individual, this would have seemed to be the better view.

The issue has finally been resolved by the ECJ in favour of the concrete theory in the *Lyckeshog* (case C-99/00). The ECJ ruled that where there was a right for a party to seek to appeal against the decision under challenge, that was not a final court. It followed that if there was no right to appeal against the decision then that court was a 'final court' regardless of its status in the judicial hierarchy.

In *Lyckeshog* case the ECJ was also referred the question of whether national courts are 'final' courts for the purposes of Article 234(3) if an appeal against their decision is possible but only with leave to appeal having been granted by a higher court (or the lower court itself). The ECJ noted that the function of the obligation on courts against whose decisions there was no judicial remedy to refer questions to the ECJ was to prevent a body of national case law coming into being that was inconsistent with the requirements of Community law. The ECJ argued that 'the fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy' (para 16). In coming to this conclusion, the ECJ noted that 'uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court' (para 17). In this light, the ECJ concluded that, where leave depends on permission from a superior 'final' court, that latter court is obliged to grant the requested leave and make a reference to the ECJ when a question of EC law arises. Any other course would frustrate the purpose of Article 234 and amount to a denial of the individual's Community law rights.

10.5.3 When does a 'question' of EC law arise?

Whether a national court is a final court or merely one that has a discretion to refer cases to the ECJ, the national judge must consider if a case raises a 'question' of Community law such that a ruling from the ECJ is *'necessary* to enable it to give judgment'. If the case does raise such a question then, if the court is a final court, the judge must, in principle, refer the case to the ECJ. Of course, not every case where a party relies on Community law may be said to involve a 'question' of EC law. Only those cases where the point of EC law concerned is in doubt really involve a question of law requiring the ECJ's interpretation.

Guidelines on these matters have been supplied by the ECJ and by national courts. It is submitted that as the ultimate arbiter on matters of Community law the ECJ must decide whether a 'question' of EC law arises. We can see a tension in relation to this issue. On the one hand the ECJ has been keen to encourage references to be made to ensure uniformity of application of EC law. On the other hand, there has been the concern that overloading the ECJ with references diminishes the effectiveness of judicial protection for parties because of delay this produces. The ECJ has also been mindful of national courts being reluctant to refer cases that are too 'obvious' seriously to raise EC law issues. It has sought to find a rule that allows national courts not to refer cases where there clearly is no danger that they will misinterpret the issue of EC concerned.

The ECJ considered a number of relevant matters in this context in the important case of *CILFIT Sri* (case 283/81). The reference was from the Italian Supreme Court, the Cassazione, and concerned national courts' mandatory jurisdiction under Article 234(3). On a literal reading of Article 234(2) and (3) it would appear that the question of whether 'a decision on a matter of Community law if necessary' only applies to the national courts' discretionary jurisdiction under Article 234(2). Thus in principle the highest national court would have to refer all questions of EC law to the ECJ even if not strictly necessary to resolve the case before it. This would have been an absurd result whereby the lower courts had more discretion than the supreme court. However, in *CILFIT* the ECJ held that:

it followed from the relationship between Article 177(2) and (3) [now 234(2) and (3)] that the courts or tribunals referred to in Article 177(3) [now 234(3)] have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment.

Thus both final courts and other courts have the power to consider if the 'question' of EC law that requires resolution through a ruling from the ECJ is actually material to deciding the case before them. While it is clearly not necessary for 'final' courts to refer questions of Community law in every case, a lax approach by such courts towards their need to refer, resulting in non-referral, may lead to an incorrect application of Community law and, for the individual concerned, a denial of justice. Since *Kbbler* (case C-224/01), 'final' courts choosing not to make a reference run the risk of incurring liability under *Francovich* should they get the point of EC law significantly wrong (see 9.2.2.2).

10.5.3.1 ***A doctrine of precedent in EC law***

One way in which the ECJ has allowed national courts to avoid referring cases was the early development of a form of principle of precedent. The doctrine was first invoked in the sphere of EC law by Advocate-General Lagrange in *Da Costa en Schaake NV* (cases 28-30/62), in the context of a reference on a question of interpretation almost identical to a matter already decided by the Court in *Van Gend en Loos* (case 26/62). Like *CILFITSrl,* it arose in a case concerning the court's mandatory jurisdiction under Article 234(3). While asserting

that Article 234(3) 'unqualifiedly' required national courts to submit to the ECJ 'every question of interpretation raised before the court', the Court added that this would not be necessary if the question was materially identical with a question which had already been the subject of a preliminary ruling in a similar case. This was an important step because it established the ECJ as laying down general interpretations that could and should be followed by all the national courts rather than individual rulings only addressed to the particular court that made the reference.

However, the *Da Costa* criteria are not foolproof and have been criticised as providing national courts with an excuse not to refer, undermining the very purpose of Article 234(3). In *R v Secretary of State for the Home Department, exparte Sandhu (The Times,* 10 May 1985), the House of Lords was faced with a request for a ruling on the interpretation of certain provisions of Regulation 1612/68 (concerning rights of residence of members of the family of workers), in the context of a claim by an Indian, the divorced husband of an EC national, threatened with deportation from the UK as a result of his divorce. The *Da Costa* criteria were cited, as was *Diatta v Land Berlin* (case 267/83), a case dealing with the rights of residence of a *separated* wife living apart from her husband, which was decided in the wife's favour. The House of Lords found that the matter had already been interpreted in *Diatta,* and, on the basis of certain statements delivered *obiter* in *Diatta,* decided not to refer. On their Lordships' interpretation Mr Sandhu was not entitled to remain in the UK.

The existence of a previous decision may not negate a national court's obligation to refer under Article 234(3) where the matter involves the legality of an *EC measure* (as opposed to a challenge to Member State measures). The ECJ has always been very concerned to ensure that it has a monopoly on declaring EC measures invalid rather than see national courts do so. Thus it made clear in *Gaston Schul v Minister van Landbouw* (case C-461/03) that invalidity cases should always be referred by final courts. This case involved a question as to the validity of Article 4(l)-(2) of Commission Regulation 1423/95 on import rules for products in the sugar sector ([1995] OJ L14 1/16). The provisions corresponded with those in another regulation (1484/95) which had been declared invalid by the ECJ in an earlier decision *(Kloosterbooer Rotterdam,* case C-3 17/99). The Dutch court in *Gaston* therefore asked whether it was still subject to the mandatory obligation to refer the question of validity to the ECJ under Article 234(3). The ECJ held that questions of *validity* of EC law differed from questions of *interpretation,* and a reference should always be made, even where there is an earlier ruling dealing with corresponding provisions in another measure (para 25). The possible time delay was not a justification for changing the position that questions of invalidity are only for the ECJ to decide upon (para 23).

10.5.3.2 *Acte clair*

For some time, it seemed that once a relevant 'question' of EC law had arisen before a final court, so long as the point had not been previously ruled upon by ECJ, the national court must make a reference. This was so even if the point of law was very simple and incapable of more than one interpretation. The ECJ was under some pressure from the highest courts within the Member States to allow them a means of not referring such cases which they felt they could safely rule upon themselves. The ECJ had no means to compel referral and faced the embarrassing prospect of final courts in Member States declining to pass cases on to it according to a variety of different national principles of interpretation. The solution fashioned by the ECJ was to create an EC law exception to Article 234(3) allowing final courts not to refer cases where the issue of law is particularly obvious. This is known as *acte clair.*

Acte clair is a doctrine originating in French administrative law whereby, if the meaning of a provision is clear, no 'question' of interpretation arises. The ECJ eventually accepted a very limited version of *acte clair* in *CILFIT Sri* (case 283/81) in the context of a question from the Italian Cassazione (Supreme Court) concerning its obligation under Article 234(3). The national court asked if Article 234 created an absolute obligation to refer, or was referral conditional on a prior finding of a reasonable interpretative doubt in relation to the question of EC law? The ECJ summarised its case law thus far saying that there was no need to refer if the matter was (a) irrelevant, (b) materially identical to a question already the subject of a preliminary ruling, or (c) so obvious as to leave 'no scope for reasonable doubt'. This third criteria may be taken as endorsing a version, albeit a narrow one, of *acte clair.* Of particular importance to its third criterion is the Court's rider that, in deciding whether a matter was free from doubt, account must be taken of the specific characteristics of Community law, its particular difficulties, and the risk of divergence in judicial interpretation. The ECJ also required the national court to consider each of the different language versions of the EC law measure under consideration. Thus, if *acte clair* is to be invoked by a final court so as not to refer a case to the ECJ, the issue of EC law must meet the *CILFIT* criteria. This will be rare. As such, the ECJ did not actually cede much power to national courts through the *acte*

clair doctrine. It set the benchmark so high that, whilst theoretically possible, in practice final courts will find it difficult to safely conclude that there is no 'question' of EC law requiring resolution. This means that whilst formally paying deference to the expertise of the national courts, the ECJ has maintained its monopoly over interpretation. The ECJ has however been urged by some commentators to relax the *CILFIT* criteria in recent years to help reduce the burden of its caseload.

The ECJ's caution is probably justified as there is some danger that national courts acting in accordance with their own views without seeking a reference may make errors of interpretation even in relation to matters they consider to be 'obvious'. This was revealed in the Court of Appeal in the case of *R v Henn* ([1978] 1 WLR 1031). There Lord Widgery suggested that it was clear from the case law of the Court of Justice that a ban on the import of pornographic books was not a quantitative restriction within Article 28 (ex 30) of the EC Treaty (post Lisbon, Article 34 TFEU). A subsequent referral on this matter by the House of Lords revealed that it undoubtedly was. Lord Diplock, giving judgment in the House of Lords ([1981] AC 850), warned English judges not to be too ready to hold that because the meaning of an English text seemed plain to them no question of interpretation was involved: the ECJ and the English courts have very different styles of interpretation and may ascribe different meanings to the same provision. He did, however, approve a version of *acte clair* consistent with that of the ECJ in *Da Costa en Schaake NV* and *CILFIT Sri* in *Garland v British Rail Engineering Ltd* ([1983] 2 AC 751) when he suggested that where there was a 'considerable and consistent line of case law' from the ECJ the answer would be 'too obvious and inevitable' to be capable of giving rise to what could properly be called a question within the meaning of Article 234.

Moreover, the doctrine, depending as it does on a subjective assessment as to what is clear, can all too easily be used as a means of avoiding referral. This appears to have occurred in *Minister of the Interior v Cohn-B endit* ([1980] 1 CMLR 543). In this case, heard by the French Conseil d'Etat, the supreme administrative court, Cohn-Bendit sought to invoke an EC directive to challenge a deportation order made by the French authorities. Certain provisions of the directive had already been declared by the ECJ to be directly effective (*Van Duyn v Home Office* (case 4 1/74); see Chapter 5). Despite urgings from the Commissaire du Gouvernement, M Genevois, that in such a situation the Conseil d'Etat must either follow *Van Duyn* and apply the directive or seek a ruling from the Court under Article 234(3), the Conseil d'Etat declined to do either. In its opinion, the law was clear. The directive was not directly effective.

10.5.3.3 *The question may not be relevant to the case*

The ECJ had confirmed in *CILFIT* that there was no obligation to refer questions relating to EC law that were not relevant to the case before the national court. This is in one sense obvious but there is potential for final national courts to misuse this discretion so as to decline to refer cases that should be referred. A court may avoid its obligations under Article 234(3) by deciding the case before it without considering the possibility of referral (see, eg, *Mees v Belgium* [1988] 3 CMLR 137, Belgian Conseil d'Etat). In *Wellcome Foundation Ltd v Secretary of State for Social Services* ([1988] 1 WLR 635) the House of Lords, in considering the factors to be taken into account by a licensing authority in issuing a licence to parallel import a trade-mark medicine, thought it 'highly undesirable to embark on considerations of Community law which might have necessitated a referral to the Court of Justice under Article 177 [now 234]'. This suggests the national court did not consider closely enough the relevance of EC law to the case in question.

In contrast, the German federal constitutional court has emphasised national courts' duty to refer under Article 234(3'),' according to the *CILFIT* criteria, in the strongest terms. In quashing the German Bundesfinanzhof's decision on the direct effects of directives in *Re VATDirectives* ([1982] 1 CMLR 527), *Kloppenburg v Finanzamt Leer* ([1989] 1 CMLR 873), it held that a court subject to Article 234(3) which deliberately departs from the case law of the ECJ and fails to make a reference under that article is acting in breach of Article 101 of the German constitution. The principle of *acte clair* could not operate where there existed a ruling from the ECJ to the contrary *(Re VAT exemption* [1989] 1 CMLR 113). In *Re Patented Feedingstuffs* ([1989] 2 CMLR 902), the same court declared that it would review an 'arbitrary' refusal by a court subject to Article 234(3) to refer to the ECJ. A refusal would be arbitrary:

where the national court gave no consideration at all to a reference in spite of the accepted relevance of Community law to the judgment and the court's doubt as to the correct answer

where the law consciously departs in its judgment from the case law of the ECJ on the relevant questions, and

nevertheless does not make a reference or a fresh reference

where there is not yet a decisive judgment of the ECJ on point, or such judgments may not have provided an exhaustive answer to the relevant questions or there is a more than remote possibility of the ECJ developing its case law further, and the national court exceeds to an indefensible extent the scope of its necessary judicial discretion, as where there may be contrary views of the relevant question of Community law which should obviously be given preference over the view of the national court.

It is suggested that these principles, applied in good faith, would ensure that a reference to the ECJ will be made in the appropriate case. Although a decision of a domestic court rather than of the ECJ, these principles should prove useful to the courts from all the Member States.

10.5.4 Article 234(2): Courts that have a discretion whether to refer or not

Courts or tribunals which do not fall within Article 234(3) enjoy, according to the ECJ, an unfettered discretion in the matter of referrals. This reflects the importance of the cooperative nature of the relationship between the ECJ and national courts. The ECJ has sought to respect the unfettered jurisdiction of national courts, where a case falls under Article 234(2), by refraining from being prescriptive about when cases should be referred to it. A court or tribunal at any level is free, 'if it considers that a decision on the question is necessary to enable it to give judgment', to refer to the ECJ in any kind of proceedings, including interim proceedings *(Hoffman-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* (case 107/76)), at any stage in the proceedings. In *De Geus en Uitdenbogerd v Robert Bosch GmbH* (case 13/61) the Court held that national courts have jurisdiction to refer whether or not an appeal is pending; the ECJ is not even concerned to discover whether the decision of the national judge has acquired the force of *resjudicata.* However, following *Pardini* (case 338/85) and *Grogan* (case C-l59/90), if proceedings have been terminated and the Court is aware of this fact, it may refuse jurisdiction on the grounds that its ruling is not necessary to enable the national court to give judgment.

10.5.4.1 ***Courts may make a referral even where there is a previous ECJ ruling on the issue***

Even if the ECJ has already ruled on a similar question, national courts are not precluded from requesting a further ruling. This point was made in *Da Costa en Schaake NV*(cases 28-30/62). There the Court held, in the context of a reference for interpretation of a question substantially the same as that referred in *Van Gend en Loos,* that the Court should retain a legal right to depart from its previous judgments. It may recognise its errors in the light of new facts. It ruled in similar terms in the context of a request concerning the effect of a prior ruling of validity in *International Chemical Corporation SpA v Amministrazione delleFinanze dello Stato* (case 66/80). Here it held that while national courts could assume from a prior declaration of invalidity that the regulation was invalid, they should not be deprived of an opportunity to refer the same issue if they have a 'real interest' in making a further reference.

10.5.4.2 ***National Courts can ignore national rules of precedent in order to refer cases***

This discretion to refer is in no way affected by national rules of precedent within the Member State. This important principle was established in the case of *Rheinmuhlen-Dusseldorf* (case 146/73). In this case, which concerned an attempt by a German cereal exporter to obtain an export rebate under Community law, the German federal tax court (the Bundesfinanzhof), hearing the case on appeal from the Hessian tax court (Hessische Finanzgericht), had quashed the Hessian court's judgment and remitted the case to that court for a decision on certain issues of fact. The Hessian court was not satisfied with the Bundesfinanzhof's ruling since questions of Community law were involved. It sought a ruling from the ECJ on the interpretation of the Community law, and also on the question of whether it was permissible for a lower court to refer in this way when its own superior court had already set aside its earlier judgment on appeal. On an appeal by Rheinmuhlen-Dtisseldorf to the Bundesfinanzhof challenging the Hessian court's right to refer to the ECJ, the Bundesfinanzhof itself referred certain questions to the Court of Justice. The principal question, raised in both cases, was whether Article 234 gave national courts an unfettered right to refer or whether that right is subject to national provisions whereby lower courts are bound by the judgments of superior courts. The Court's reply was in the strongest terms. The object of the preliminary rulings procedure, the Court held, was to ensure that in all circumstances the law was the same in all Member States. No provision of domestic law can take away the power provided by Article 234. The lower court must be free to make a reference if it considers that the superior court's ruling could lead it to give judgment contrary to Community law. It would only be otherwise if the question put by the lower court were substantially the same. The ECJ's view may be compared with that of Wood J in the

Employment Appeal Tribunal in *Enderby v Frenchay Health Authority* ([1991] ICR 382). Here he suggested that lower English Courts were bound even in matters of Community law by decisions of their superior courts; thus they should not make references to the ECJ but should leave it to the House of Lords, a fortiori when the House has decided on a particular issue that British law does not conflict with EC law. Wood J's observations are clearly at odds with Community law. It appears that *RheinmiihlenDiisseldorf* was not cited before the tribunal. A reference to the ECJ was subsequently made in this case by the Court of Appeal ([1992] 1RLR 15) resulting in a ruling (case C-1 27/92) and a decision on an important issue of equal pay for work of equal value contrary to that of Wood J and in the claimant's favour.

10.5.4.3 ***How should non-final courts exercise their discretion to refer?***

When the national court hears a case in which there arises a question of EC law a number of factors will obviously have to be taken into account in deciding whether or not to refer. These are largely questions for domestic courts according to the particular features of the domestic legal system. They have not been subject to detailed scrutiny by the ECJ because they are largely outside its jurisdiction.

There has been some interesting discussion in the lower courts of the UK on this question. In an early opinion, Lord Denning in *HP Bulmer Ltd v Bollinger SA* ([1974] Ch 401) sitting in the Court of Appeal adopted a broad approach which required the national judge to consider a wide range of factors before making a reference. He suggested that a decision would only be 'necessary' if it was 'conclusive' to the judgment. Even then it would not be necessary if:

the ECJ had already given judgment on the question or the matter was reasonably clear and free from doubt.

Although the criteria in both cases are similar, the first and third *CILFIT Sri* criteria are clearly stricter; it would be easier under Lord Denning's guidelines to decide that a decision was not 'necessary'. If courts within the area of discretionary jurisdiction consider, applying the *CILFIT* criteria, that a decision from the ECJ is necessary, how should they exercise their discretion? With regard to other factors, Lord Denning suggested in *HP Bulmer Ltd v JBollinger SA* that time, cost, workload of the ECJ, and the wishes of the parties should be taken into account by national courts in the exercise of their discretion. In a contrasting view, however, Bingham J in *Commissioners of Customs and Excise v Samex ApS* ([1983] 3 CMLR 194) said that factors such as time and cost need to be treated with care, weighing the fact that deferring a referral may in the end increase the time and cost to the parties: there may be cases where it is appropriate to refer at an early stage. He also stressed the ECJ's 'panoramic' view of the Community law system that a national judge would find it impossible to match. The more difficult and uncertain the issue of EC law, the greater the likelihood of appeal, requiring, in the end, a referral to the ECJ under Article 234(3). The workload of the ECJ is an increasing problem and no doubt a reason for some modification in recent years of its open-door policy. However, whereas it may justify non-referral in a straightforward case, it should not prevent referral where the point of EC law is difficult or novel. The *CILFIT* criteria should operate to prevent unnecessary referrals.

On the question of timing, the ECJ has suggested that the facts of the case should be established and questions of purely national law settled before a reference is made *(Irish Creamery Milk Suppliers Association v Ireland* (cases 36 and 71/80)). This would avoid referrals being made too early, and enable the Court to take cognisance of all the features of fact and law which may be relevant to the issue of Community law on which it is asked to rule. A similar point was made by Lord Denning MR in *HP Bulmer Ltd v IBollinger SA* ([1974] Ch 401) ('decide the facts first') and approved by the House of Lords in *R v Henn* ([1981] AC 850). However, Lord Diplock did concede in *R v Henn* that in an urgent, eg interim, matter, where important financial interests are concerned, it might be necessary to refer *before* all the facts were found.

The wishes of the parties also need to be treated with caution. If the point of EC law is relevant (which under *CILFIT* it must be) and difficult or uncertain, clearly *one* of the parties' interests will be better served by a referral. As Templeman LJ said in the Court of Appeal in *Polydor Ltd v Harlequin Record Shops Ltd* ([1980] 2 CMLR 413) when he chose to refer a difficult point of EC law in proceedings for an interim injunction, 'it is the right of the plaintiff [claimant] to go to the European Court'. Furthermore, the ECJ has held that the question of referral is one for the national court and that a party to the proceedings in the context of which the reference is made cannot challenge a decision to refer, even if that party thinks that the national court's findings of fact are inaccurate *(SATFluggesellschaft mbH v European Organization for the Safety ofAir Navigation* (case C-364/92)).

Another factor which might point to an early referral, advanced by Ormrod LJ in *Polydor Ltd v Harlequin Record*

Shops Ltd is the wider implications of the ruling. In *PolydorLtd v Harlequin Record Shops Ltd* there were a number of similar cases pending. The issue, which was a difficult one, concerned the protection of British copyright law in the context of an international agreement between the EC and Portugal, and affected not merely the parties to the case but the record industry as a whole.

Finally, in *R v Henn* Lord Diplock suggested that in a criminal trial on indictment it might be better for The question to be decided by the national judge and reviewed if necessary through the hierarchy of the national courts. Although this statement could be invoked to counter spurious defences based on EC law, and unnecessary referrals, it is submitted that where a claim is genuinely based on EC law, and a ruling from the ECJ would be conclusive of the case, delay would serve no purpose. The time and cost of the proceedings would only be increased.

10.6 What is the temporal effect of a ruling from the ECJ?

There are a number of issues concerning the effect of a preliminary ruling by the ECJ. These Ramifications can often go well beyond the particular proceedings that led to the reference. Particularly because of development of what is effectively a doctrine of precedent discussed earlier, important rulings from the ECJ can affect legal relations across all the Member States and lead to wide economic and social impacts. There have therefore been some cases in which the ECJ has limited the effects of its rulings so that they are only 'prospective' and do not affect prior legal relations. More narrowly, clearly a ruling from the ECJ under Article 234 is binding in the individual case and will govern the legal effects between the parties. Given Member States' obligation under Article 10 (ex 5) EC to 'take all appropriate measures ... to ensure fulfilment of the obligations arising out of this treaty or resulting from action taken by the institutions of the Community' the ruling should also be applied in all subsequent cases. This does not preclude national courts from seeking a further ruling on the same issue should they have a 'real interest' in making a reference *(Da Costa en Schaake* (cases 28-30/62)—interpretation; *International Chemical Corporation SpA* (case 66/80) validity).

10.6.1 Rulings involving interpretation are generally retrospective in effect

The question of the temporal effect of a ruling on persons not party to the case, namely whether it should take effect retroactively *(ex tunc,* ie from the moment of entry into force of the provision subject to the ruling) or only from the date ofjudgment *(ex nunc)* is less clear. In *Defrenne v Sabena (No 2)* (case 43/75) the Court was prepared to limit the effect of the then Article 119 (now 141) to future cases (including *Defrenne* itself) and claims lodged prior to the date of judgment. important considerations of legal certainty', the Court held, 'affecting all the interests involved, both public and private, make it impossible to reopen the question as regards the past'. The Court was clearly swayed by the arguments of the British and Irish governments that a retrospective application of the equal pay principle would have serious economic repercussions on parties (ie, employers) who had been led to believe they were acting within the law.

However, in *ArieteSpA* (case 811/79) and *Salumi Sri* (cases 66,127 andl28/79) the Court made it clear that *Defrenne* was to be an exceptional case. As a general rule an interpretation under Article 234 of a rule of Community law 'clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to be understood and applied*from the time ofits coming intoforce* (emphasis added). A ruling under that article must therefore be applied to legal relationships arising prior to the date of the judgment provided that the conditions for its application by the national court are satisfied. The court said:

It is only exceptionally that the Court may, in the application of the principle of legal certainty inherent in the Community legal order and in taking into account the serious effects which its judgments might have as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying on the provision as thus interpreted with a view to calling into question those legal relationships.

Moreover, 'such a restriction may be allowed *only* in the actual judgment ruling upon the interpretation sought' and 'it is for the Court of Justice *alone* to decide on the temporal restrictions as regards the effects of the interpretation which it gives'.

These principles were applied in *Blaizot* (case 24/86) and *Barra* (case 309/85). Both cases involved a claim for reimbursement of the Belgian minerval, based on *Gravier* (case 293/83, see Chapter 23). In both cases the claims were in respect of periods prior to the ECJ's ruling in *Gravier.* In *Barra* it was not disputed that the course for

which the minerval had been charged was vocational; but Blaizot's university course in veterinary medicine was, the defendant university argued, not vocational, not being within the scope of the *Gravier* ruling.

Since *Barra's* case fell squarely within *Gravier* and the Court had imposed no temporal limits on the effect of its judgment in *Gravier* itself, that ruling was held to apply retrospectively in *Barra s* favour. *Blaizot,* on the other hand, raised new issues. In deciding that university education could, and a course in veterinary science did, constitute vocational training the Court, clearly conscious of the impact of such a ruling on Belgian universities if applied retroactively, decided that 'important considerations of legal certainty' required that the effects of its ruling should be limited on the same lines as *Defrenne*— that is, to future cases and those lodged prior to judgment.

Unless the Court can be persuaded to change its mind and reconsider the question of the temporal effect of a prior ruling in a subsequent case when *no* new issues are raised, the question of the temporal effect will need to be considered in every case in which a retrospective application may give rise to serious repercussions as regards the past. Yet it is in the nature of this kind of ruling that it and, therefore, its consequences are unpredictable. Should a party wish, subsequently, to limit the effects of an earlier ruling, it will be necessary to ensure, as in *Blaizot,* that some new issue of EC law is raised.

In *Barber v Guardian Royal Exchange Assurance Group* (case C-262/88) the Court was again persuaded by 'overriding considerations of legal certainty' to limit the effects of its ruling that employers' contracted-out pension schemes fell within the then Article 119 (now 141) EC. Unfortunately the precise scope of the non-retroactivity principle that 'Article 119 [now 141] may not be relied upon in order to *claim entitlement* to a pension with effect prior to that of this judgment (except in the case of workers... who have initiated proceedings before this date or raised an equivalent claim under the applicable national law)' was disputed as being unclear. This lack of specificity, a characteristic of the Court's style ofjudgment, can create problems in the context of rulings on interpretation under Article 234. The Court's judgments can on occasions be too Delphic, leaving too much to be decided by national courts. It has taken a protocol to the Maastricht Treaty and further cases to spell out the precise scope of the *Barber* ruling (see Chapter 27). Only now are the *full* implications of the Court's rulings in *Francovich* (cases C-6, 9/90) and *Marshall (No 2)* (case C271/91) being revealed.

Despite its commitment to the principle of legal certainty the Court has chosen not to limit the effect of its rulings in a number of cases in which it has introduced new and unexpected principles with significant consequences for Member States and even (in the case of treaty articles) for individuals. It did not limit the effects of its judgment in *Francovich* despite Advocate-General Mischo's warnings as to the 'extremely serious' financial consequences for Member States if the judgment were not so limited: nor did it do so when it laid down a principle of full compensation for breach of a directly effective directive in *Marshall (No 2).* Where a ruling is likely to result in serious consequences, whether for states or 'public' or private bodies, for example employers, Member States would be advised to take advantage of their opportunity to intervene in Article 234 proceedings as they are entitled to do, to argue against retroactivity, as they did successfully in *Defrenne* and *Barber.* Other 'interested parties' may also apply to intervene.

The effects of the ECJ's strict approach to retroactivity may be mitigated by its more recent approach to Member States' procedural rules. In a number of cases *(IN CO GE* '90 (cases C-10 and 22/97) and *EDIS* (case C-23 1/96)), it has held that the principle of retroactivity should not prevent the application of detailed procedural rules (in these cases relating to limitation of actions) governing legal proceedings under national law, provided that these national rules do not make it 'impossible or excessively difficult' for individuals to exercise their Community rights (see further Chapter 8).

The impact of an interpretation on previous rulings by domestic administrative authorities which conflict with the ECJ's ruling was considered in *Kuhne & Heitz NV v Productschap voorPluimvee en Eieren* (case C-453/00). The case involved a claim for reimbursement of export refunds made by a Dutch administrative authority against Kuhne. The latter's objection had been rejected by a court and the claim had therefore become a final decision by the administrative authority. The ECJ then delivered a ruling *(Voogd Vleesimport en-export* (case C-1 51/93)) which rendered the previous Dutch decision incorrect. Kuhne therefore requested a reopening of the administrative procedure. The ECJ held that there was an obligation on administrative authorities to comply with an interpretation given by the Court in respect of all legal relationships, because the effect of a ruling is to clarify and define the meaning of a European rule 'as it ought to have been understood and applied from the time of its coming into force' (para 21). This was subject to the principle of legal certainty, requiring finality of

administrative decisions once a reasonable time-limit for legal remedies had expired or those remedies had been exhausted (para 24); in such circumstances, there was no obligation to reopen previous decisions which had become final. However, on the facts of the case, the Dutch authority could reopen its decision, and the ECJ held that in such a situation, where a decision had become final and was based on a misinterpretation of EC law adopted without a preliminary ruling, and the matter had been raised without delay after the ECJ's intepretation, the administrative authority should review its decision.

10.6.2 Rulings as to the validity of EC measures: More flexible temporal effects

The cases considered above relate to rulings on interpretation. Where matters of validity of EC measures are concerned, the Court's approach is more flexible. This is logical because where a prima facie valid EC measure has been in place for some time, the finding that it is invalid may cause serious disruption to those that relied upon it. On grounds of legal certainty there are good arguments to decide in each case what effect the finding of invalidity should have. The ECJ has adopted the same approach to the effects of a ruling of invalidity to those of a successful annulment action, as a result of which the illegal act is declared void. However, arguing from Article 231(2) (ex 174(2)), which enables the Court, in a successful annulment action, to limit the effects of a regulation which it has declared void (see Chapter 12), the Court has limited the effects of a finding of invalidity in a number of cases, sometimes holding the ruling to be purely prospective (ie, for the future only, *excluding* the present case, eg, *Roquette Freres v France* (case 145/79); policy doubted in *Roquette Freres SA v Hauptzollamt Geldem* (case C-228/92), see Chapter 12). The Court has not so far insisted that the effect of a ruling of invalidity can only be limited in the case in which the ruling itself is given. The Court is more likely to be prepared to limit the effects of a ruling on validity than one on interpretation. Where matters of validity are concerned parties will have relied legitimately on the provision in question. A retrospective application of a ruling of invalidity may produce serious economic repercussions: thus it may not be desirable to reopen matters as regards the past. On the other hand too free a use of prospective rulings in matters of interpretation would seriously threaten the objectivity of the law, its application to all persons and all situations. Moreover, as the Court no doubt appreciates, a knowledge on the part of Member States and individuals that the law as interpreted may not be applied retrospectively could foster a dangerous spirit of non-compliance.

10.7 Special limits on references in JRA

Thus far we have discussed the system that operates for references under Article 234. This constitutes the vast majority of cases. There is one notable exception to this system—that of home affairs. When the EC (and EU) came to have powers in the field of JRA, some of the Member States were reluctant to allow easy access to the ECJ from the national courts. This was partly because of concerns that the broad purposive approach to interpretation taken by the ECJ might lead to greater obligations being placed upon Member States than they anticipated. On the other hand, it was clear that there had to be some judicial means of resolving questions of interpretation relating to EC justice and home affairs legislation. The result was a compromise which created special, more restrictive, arrangements in relation to references in this field such that not all national courts can make references to the ECJ. The first instance of this was in the Maastricht Treaty, more properly known as the Treaty of the European Union (TEU), which introduced the possibility for preliminary references within the JRA second pillar by virtue of Article 35 TEU which relates to police and judicial cooperation issues in criminal and civil cases. Following this, the Treaty of Amsterdam (ToA) led to the introduction of the new Title IV into the EC Treaty relating to asylum and immigration cases.

This created a separate preliminary-rulings mechanism in Article 68 EC for questions relating to that title. Thus we have two separate systems for different aspects of JRA. As we shall see below, each has restrictions not found in Article 234.

The ECJ only has jurisdiction in relation to certain limited JRA provisions of the TEU comprising 'framework decisions and decisions' and conventions established under the JRA. Thus, cases regarding certain measures simply cannot be brought before the ECJ for a preliminary ruling. Furthermore, the ECJ only has jurisdiction to hear any references insofar as each Member State accepts its jurisdiction (Article 35 TEU). There is no compulsory jurisdiction. Even then, each Member State has the option of limiting the rights of the national courts to refer a question to the ECJ to courts against whose decision there is no judicial remedy under national law. So far, most Member States have accepted the ECJ's jurisdiction at least as regards 'final' courts and around half have conferred jurisdiction upon all national courts. This 'flexible' approach to jurisdiction has led to confusion, but may also be criticised for the uncertainties and inequalities it introduces into the system: individuals' rights

of access to the ECJ will vary depending on the Member State in which the action is brought. There is real danger that there will be a failure of effective legal protection, which is particularly significant because JRA measures touch upon individual liberty. This still may be better than the previous position under the TEU, where there was no such access. The courts of some Member States are availing themselves of the possibility to refer questions in the field of JRA (see Chapter 26).

The Article 68 provisions relating to asylum and immigration in Title IV of the EC Treaty create a different regime as regards the jurisdiction of the ECJ in respect of the provisions in Title IV. Although a preliminary ruling procedure will apply in all Member States to all these provisions, there are certain differences from Article 234. Most notably, only the courts against whose decisions there is no judicial remedy are required to ('shall') make a reference 'if they consider it necessary' to do so. Furthermore, the ECJ will not have jurisdiction in relation to measures taken under new Article 62(1) EC (concerning the crossing of external borders) relating to 'the maintenance of law and order and safeguarding of internal security'. These provisions create holes in the judicial protection offered; unlike the JRA Pillar of the TEU, the ECJ's jurisdiction under Article 234 prior to the ToA applied to the whole of the EC Treaty. The ToA amendments undermine the homogeneity and generality of access to the ECJ. Many important references under Article 234 came from the lower courts: now these courts are, in this new area, precluded from making references. Consequently, individuals seeking a European ruling will be forced to litigate through their national appeal structure. The provision also creates uncertainty: when will circumstances necessitating the maintenance of law and order or safeguarding internal security arise? Indeed, who decides this question? It affects those most in need of protection: an asylum seeker, for example, may not be in a position to exhaust national remedies. Even if he does, he may find he falls outside the ECJ's jurisdiction. This approach, accepted with reluctance by the Commission on the insistence of Member States, hardly matches up with a Union which claims to be based on the rule of law and respect for human rights. The position will be improved if the Lisbon Treaty comes into force because this provides for the normal preliminary rulings procedure to apply to justice and home affairs issues subject to limitations relating to validity of law enforcement and national security (Article 276 TFEU). CFSP, which remains in the TEU, continues by Article 275 TFEU to fall outside the preliminary rulings procedure contained in what will, should the Lisbon Treaty come into force, become Article 267 TFEU.

10.8 The increasing workload of the ECJ: The need for reform

The current system governing preliminary rulings is under stress as, despite the *acte clair* doctrine, the number of references made to the ECJ remains high. With enlargement, the backlog can only get worse. There will probably be an increased number of referrals as an enlarged geographic jurisdiction will lead to a greater number of people (and courts) covered by EU law. The very fact that the new Member States are still new to the EU legal system could mean that they are likely to create initially a disproportionate number of references. This arises from two linked points. The first is that there are more likely to be questions arising in the new Member States as their legal systems adjust to the Union legal order. Further, their courts are less likely to have the experience and confidence to deal with many EU law questions without guidance from the ECJ, especially given that many of the new Member States are relatively new to democracy and a market economy.

There are many proposals to reform the current system to ensure that the ECJ can better provide effective judicial protection by removing the delays in the reference system. The difficulty remains one of how to reduce the number of references without damaging the uniform interpretation of EU law. The easy access of national courts to the ECJ has been the key to the relationship between domestic and EU legal systems. Some have suggested that the ECJ should become a true appeal court which decides for itself which cases to hear by granting or refusing leave to appeal from the national courts. This would require treaty amendments and would be controversial because it would more openly establish the ECJ as the supreme court in the Union legal order. This would look rather too much like a federal state to be politically acceptable to the Member States. Other suggestions have been to create Union Courts located in the Member States (rather like the federal Circuit Courts in the United States of America).

The Treaty of Nice attempted to address the problem by providing in Article 225(3) that the CFI is to have jurisdiction to hear preliminary references in areas specified in the Statute of the Court. As a safety mechanism, the same paragraph further provides that where a 'case requires a decision of principle likely to affect the unity or consistency of Community law' the CFI 'may refer the case to the Court of Justice for a ruling'. Additionally, decisions of the CFI on preliminary references may be subject to review by the ECJ. This possibility is stated to be

available 'exceptionally' and 'where there is a serious risk of the unity or consistency of Community law being affected'. In the November 2005 version of the Statute, no areas were allocated to the CFI under Article 225(3).

Once the power in Article 225(3) is exercised, the restriction of access to the ECJ may cut down that Court's workload and, subject to the CFI not being swamped by the cases diverted to it, may reduce the backlog in cases—especially the preliminary references. In any event, this would constitute a significant change in the judicial architecture within the European Union.

More modestly the ECJ itself has introduced new rules into its Rules of Procedures and Statute that allow for expedited procedures to be used in some cases which are simple or raise no new issues. Thus the ECJ is taking steps to devote less resources to cases that do not merit them because they are legally straightforward. This change emphasises the importance of the ECJ in the Union's court system, suggesting a more hierarchical structure to the system than that found in the early days. Unlike the power in Article 225(3) EC, these steps are actually being put into practice. Thus Article 1 04a provides for an accelerated procedure where the case involves a matter of 'execeptional urgency'. This provision is particularly important in cases involving persons in detention, those facing deportation or children. The court can fix a hearing date within weeks in these cases. Article 104(3) allows the ECJ to dispense with oral hearings and proceed simply by issuing a 'reasoned order' where the case referred raises identical issues upon which the ECJ has already ruled or is free from reasonable doubt. Thus if a national court refers a case that meets the *CILFIT* rules, the ECJ can deal swiftly with the matter. The Statute was also amended by the Nice Treaty so that where no new point of law arises, the ECJ can dispense with the requirement for an Advocate-General's opinion. These procedural steps have helped to focus the ECJ's resources upon cases that really need them because they raise new issues of EU law but they have preserved the crucial right of access that national courts have to refer any question that they wish to.

10.9 Conclusions

The success of the preliminary rulings procedure depends on a fruitful collaboration between the ECJ (and, at some point, the CFI) and the courts of Member States. Generally speaking both sides have played their part in this collaboration. The ECJ has rarely refused its jurisdiction or attempted to interfere with national courts' discretion in matters of referral and application of EC law. National courts have generally been ready to refer; cases in which they have unreasonably refused to do so are rare. Equally rare are the cases in which the ECJ has exceeded the bounds of its jurisdiction without justification. However, this very separation of powers, the principal^ strength of Article 234, is responsible for some of its weaknesses. The decision whether to refer and what to refer rests entirely with the national judge. No matter how important referral may be to the individual concerned (eg, *Sandhu)* he cannot compel referral; he can only seek to persuade. And although the ECJ will extract the essential matters of EC law from the questions referred it can only give judgment in the context of the questions referred (see *Hessische Knappschaft v Maison Singer etFils* (case 44/65)). Thus, it is essential for national courts to ask the right questions. As the relevance of the questions can only be assessed in the light of the factual and legal circumstances of the case in hand, these details must also be supplied. A failure to fulfil both these requirements may result in a wasted referral or a misapplication of EC law. Given the increasing pressures on the ECJ, wasted references and the drafting of sloppy questions can also be seen as a waste of the limited judicial resources at the Union level.

As the body of case law from the ECJ has developed and national courts have acquired greater confidence and expertise in applying EC law and ascertaining its relevance to the case before them, there should be less need to resort to Article 234. The initial issue, of whether a decision on a 'question' of EC law arises during the proceedings, has become crucial. As we have seen *CILFITSrl* (case 283/81) has supplied guidelines to enable national courts to answer this question. Where a lower court is in doubt as to whether a referral is necessary the matter may be left to be decided on appeal. On the other hand, where a final court has the slightest doubt as to whether a decision is necessary, it should always refer—bearing in mind the purpose of Article 234(3) and its particular importance for the individual litigant. The danger that final courts will fail to refer seems to have been one of the factors that influenced the ECJ in its ruling in *Kobler* (Case C-224/0 1) which allows individuals to sue for damages where a reference was not made when it should have been. This case, along with others like *CILFIT* and *Foglia v Novello* is illustrative of the trend that we have noted whereby the ECJ has been positioning itself not as an equal partner in a horizontally structured relationship, but as a superior court. Some might even say it sees itself as the Supreme Court for the Union. In so doing, it has sought to put itself firmly in control of the development of European law and not simply to act as the servant of the national courts.

The historical significance of the ECJ's rulings and the Article 234 procedure has been well recognised by courts, commentators and Member States. The current issue of importance for the procedure is the delay inherent in the legal system of the expanded European Union which is jeopardising effective judicial proctection and uniform application of EC law. The solutions to these problems are not clear but the procedural steps taken by the ECJ so far have had some effect in limiting any increase in the length of references if not actually reducing it. Further steps would require serious changes to reduce the number of cases heard by the ECJ which would entail a system of prioritising cases. This would remove the ease of access to the ECJ that has hitherto been so successful. Nevertheless, such a change is probably justified given the growing maturity of the EC law system and the increased familiarity of judges with it. The alternative of increasing delay is just as unattractive as that of some risk of 'wrong' decisions being made by national courts.