BRITISH CENTRE FOR ENGLISH AND EUROPEAN LEGAL STUDIES
At Warsaw University, Faculty of Law and Administration

Sponsored by
Clifford Chance

Central and East European Moot Court Competition 2007

4th - 7th May 2007

hosted by

The Law Faculty
Pasmany Peter Catholic University
BUDAPEST

Competition rules, problem
Collected cases and materials available to participants

Warsaw 2007

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Participants should note that not all cases are provided in full and some may include only extracts. Should you wish to look at the full text of these cases, they may be found by doing a search at the following web-site: http://www.amicuria.org/service/cx3-fr.htm

Lucky Luke & ELF
v
The State of Yrettol

1. Yrettol is a new Member State of the EU, having joined in June 2006. Its population is made up in almost equal proportions of members of two rival religious faiths – the Keepers and the Chancers. Relations between adherents of the two faiths are largely friendly, even if their views differ on a number of points of doctrine; at elections, political parties however largely receive support along religious lines. One of the most marked distinctions between their political world views is that Keepers take a largely paternalistic stance and believe that the State should shield its citizens from all manner of social evils while Chancers think that State interference should be minimal and every citizen should be free to do whatever he pleases as long as he does not interfere with the freedoms of other citizens.

2. Until 2006, Chancers had for several decades had the upper hand in influencing and setting public policy, which had led to a very liberal approach being taken to a number of divisive issues: most drugs such as marihuana, cocaine, and heroin were legalised, as were prostitution, polygamy and gambling. However, increases in crime as well as a high-profile incident involving the President being photographed in compromising positions at an orgy, allowed the Keepers to win a landslide election victory at parliamentary elections in January 2006. The Keepers immediately sought to implement their election manifesto pledges and impose more socially restrictive measures. However, under Yrettol's constitution, only the President has the right to initiate legislation and the President, elected in 2002 for a 10-year term, remained deeply opposed to any restrictions on the freedom of citizens to pursue their leisure activities freely.

3. Nevertheless, by July 2006, senior members of the Keeper community had convinced the President to accept a compromise and cut back on some of the activities which they considered objectionable. As a result he initiates the legislation under a special fast track procedure which enables it to be brought into force within 2 months as the Gambling Control Act 2006. Under the compromise, there would be no changes as regards drug and prostitution control but gambling would be restricted.

4. In particular, gambling activities were to be brought under the control of a new State-controlled monopoly operator (MINILOT) which would offer only certain types of games involving low stakes (namely that no individual could place a bet of more than €1 per week) and limited jackpots (no individual prize monies could exceed €100). By virtue of the Gambling Control Act 2006, it also became unlawful to offer any other type of gambling opportunities to the public in Yrettol, save through the office of the authorised State operator MINILOT. Specific measures were also introduced to prevent national access in Yrettol to Internet websites, both in Yrettol and abroad, which promoted or offered gambling activities. Any individual caught placing bets illegally would be liable to a criminal sanction which might include imprisonment for up to a maximum of 10 years or an alternative non-custodial community sentence. In the view of the Keepers, these drastic "shock and awe" measures were necessary to scare the public away from the evil that is gambling and rein in crime generally.

5. Lucky Luke (as he is known to his friends due to his skills in gambling) is a citizen of Tcidda, who has recently moved to the neighbouring state of Yrettol, which was his parents' birthplace before their enforced departure as a result of the repressive measures taken by the Yrettol government in 1992. As a result of Yrettol's membership of the EU the Yrettol government has relaxed its law on property ownership by exiles and Luke's parents have been able to recover their property in Yrettol. Luke therefore agreed to move to Yrettol in order to manage the family holdings. Prior to his arrival in Yrettol Luke had been working for the European Lottery Foundation (ELF), a charitable foundation set up jointly by four of the existing EU member states, including Tcidda. The Foundation has an office in each of the four member states (which triples the expense of running the foundation as each office has a substantial staff). The Foundation runs a weekly European lottery in order to raise funds for environmental purposes. Of the monies raised by the lottery, 20% is used to fund the lottery prizes with the main prize being € 1 million, and 30% is used to cover the running costs of administration of the lottery and the Foundation offices and staff. In addition, 5% is given to each of the four Member State governments to be used nationally for environmental protection and 30% of the funds is given to a special environmental protection support fund set up and administered by the European Commission. For this reason the Commission is a keen supporter of the ELF.

6. Luke had been employed as a working director of the foundation in its Tcidda office and he planned to continue that employment whilst in Yrettol, expanding the lottery for use by Yrettol citizens. He is shocked to find that, when he is in Yrettol, his access to ELF's internet web site, as well as its Intranet service (which he uses to log onto his e-mail and access confidential Foundation Business files), has been blocked under powers laid down by Yrettol's Gambling Control Act 2006. This makes it impossible for him either to carry on his normal working activities or to promote the ELF's lottery in Yrettol. In addition, he has been threatened with prosecution locally for his attempts to promote ELF to residents in Yrettol due to his employment by the Foundation.

7. Luke believes that the provisions of The Gambling Control Act 2006 are contrary to Articles 43 and 49 of the EC Treaty. Luke believes that the strong controls imposed by the four Member States who set up the European Lottery act as a sufficient safeguard to protect customers from the dangers of excess gambling. These controls include compulsory on-line registration of all those wishing to gamble and financial limits restricting each individual registered to the purchase of a maximum of 100 tickets @ €1 per ticket from each lottery organised. Luke believes that the lottery gives greater economic opportunities to Yrettol citizens and so contributes to the Yrettol economy.

8. When Luke writes to the Yrettol government to complain about the restrictions imposed on him, the Yrettol government argues that any restrictions on free movement are justified under Articles 45 and 46 of the EC Treaty as well as the case law of the Court of Justice of the EC (the ECJ).

9. Luke disputes this. He has heard that the real reason why Yrettol passed the Gambling Control Act 2006 was to generate income directly for Yrettol through the taxing of the monopoly and the exclusion of foreign operators (who would have paid taxes abroad). In addition, the President of Yrettol is known as a keen gambler himself and has said publicly that he does not think excess gambling is actually a problem in Yrettol. Luke has been told that the President commissioned a private report on gambling, whose brief was to investigate both the dangers as well as the fiscal effect of gambling in Yrettol. This report was presented to the President in July 2006 on the day prior to his agreeing to initiate the Gambling Control Bill. Luke therefore believes that the conclusions of the report confirm that the President's decision to initiate and fast track this legislation was for purely economic reasons. He has accordingly requested the Yrettol government gives him access to the report which he wants to support his case.

10. Luke application for disclosure was refused under Yrettol national law. Luke is advised by his Tcidda office that his claim for disclosure of the report may be assisted by Article 5 of EU Regulation 1049/1, as it is common knowledge that the Yrettol delegation was present at a Council meeting of EU Member States in Brussels in July 2006 which discussed the effects of gambling in the EU. The Yrettol government is believed to have strongly opposed gambling at that time and put forward both oral and written submissions to that effect. In addition, the Yrettol representative quoted extensively from the commissioned report during the course of the meeting.

11. As a result Luke sought disclosure of the minutes of the meeting in Brussels where the report was quoted, as well as the representations of the Yrettol government with the report annexed, on the basis that these are documents within the meaning of paragraph 5(1) of Regulation 1049/1. Although the Yrettol government has the minutes in its possession, it rejected the request for disclosure, and refused to seek advice on this issue from the Council of the EU. It argued that it was not bound by Regulation 1049/1 as this had not been transposed into Yrettolian as required when this became an official EU language on Yrettol's accession in 2006. In fact due to a lack of sufficient Yrettolian translators only 25% of EU law is expected to be translated into Yrettolian by January 2007 and Regulation 1049/1 is not expected to be available in Yrettolian until January 2008. Yrettol had previously been a party to a 2002 Association Agreement with the EU which required Yrettol to start the process of harmonising its law with the requirements of European Community law. The Association Agreement also contained a term similar to Article 10 TEC.

Luke therefore initiates a claim both in his own right and in his capacity as a director of the ELF before the Yrettol High Court seeking

- a declaration that the minutes and written submissions of the Yrettol government with report attached should be disclosed to him under the provisions of the Regulation 1049/1; and
- a declaration that the provisions of the Gambling Control Act 2006 are contrary to Articles 43 and 49 of the EC Treaty in so far as it prohibits access to activities such as those provided by the European Lottery foundation either in person or by access through the internet and
- a declaration that by its refusal either to recognise or allow him to carry out the terms of his employment with the European Lottery Foundation, and so making the exercise of his employment contrary to national law and also subject to criminal sanction, Yrettol is acting contrary to the provisions of Articles, 43 and 49 of the EC Treaty.

The Yrettol High Court stays proceedings and refers the following questions to the Court of Justice of the EC under Article 234 EC:

1. a) Is a Member State entitled to justify the restrictions under the provisions of Articles 45 and 46 in relation to the freedom to provide services provided for in Article 49 of the EC Treaty in circumstances where the restrictions were imposed in pursuit of objectives which may include fiscal advantage, where the restrictions both limit the attainment of EC objectives and when the President and Parliament of the Member State concerned may in fact pursue different objectives with those restrictions?

b) If the answer to Question 1a) is in the affirmative and measures such as those imposed by Yrettol are in principle capable of being justified, are they proportionate to the aim pursued? If this is a matter for the national court to

decide, what considerations should it take into account?

(2) Is a Member State entitled to introduce measures, including imposing a criminal penalty, such as under the Gambling Control Act 2006 which restrict the ability of an EU citizen employed by an entity established in his home Member State to carry out his work in that Member State?

(3) Is a new Member State bound by the provisions of EU law such as Regulation 1049/1 even when such regulation has neither been translated nor transposed into in its own language which has been designated an official language of the EU? Does the principle of co-operation in Article 10 TEC impose such an obligation on a Member State?

(4) Are the Council minutes/submissions of the Yrettol government, documents covered by the provisions of Art. 5 (1) of the Regulation and if so in what circumstances can a government refuse to disclose them?

(5) What are the limits, if any, which EC law imposes on Member States as regards the imposition of criminal sanctions? Are measures such as those imposed by the Gambling Control Act 2006 capable of falling within such limits?

COMPETITION RULES 2007

1. Competition

2007 marks the thirteenthieth year of this annual competition and will be held in Budapest, Hungary. The competition was originally designed to assist countries from Central & Eastern Europe 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 which acceded to the EU in 2004 and 2007 and ot those countries from Central and Eastern Europe which are associated with the EU, but teams from Malta, Cyprus and Turkey are now also eligible to complete in the competition.

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IMPORTANT: To be eligible to participate in the competition, we require a registration form to be completed and sent to the British Centre by e-mail on or before **1st March 2007**. Written pleadings must be submitted by post and received on or before **1st April 2007** (address and contact details are given at the end of these rules).

A moot is an argument (and not a debate) between students acting as advocates and representing different parties in a legal action (a case). The facts and history of the case, together with supporting material and authorities, are provided to students in advance.

The aim is to reproduce, as closely as possible, the discussion and argument of a genuine hearing before the European Court of Justice. The case is based upon an area of European Community 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 Community law materials will vary greatly. Therefore this bundle (and any supplementary materials the organisers provide) includes all the authorities which teams are permitted to refer to directly in their written and oral arguments. The aim of this limitation is to ensure that no unfair advantage is gained from those have greater access to materials.

2. Language

This official language of the competition is English.

3. Participation

The competition is open to all students who are nationals of Central and East European states, including southern states which have applied for accession to the EU or have recently acceded (specifically Turkey, Cyprus and Malta). All eligible participants must be enrolled on a University course of study and must:

not be older than 30 years
not be practising as a lawyer and
not have previously participated in the competition.

Any university (with participants who are nationals from the aforementioned regions) may enter no more than one team, comprising 3 or 4 members who may be accompanied by one academic/coach. Should you wish further details or have any questions, please e-mail the organizers at the address below.

4. The Moot Case

The (fictional) case concerns areas of European Community substantive and/or procedural law which have been referred by a Member State national court for a preliminary ruling by the European Court of Justice under the Article 234 TEC procedure. Each team will be required to produce written and oral pleadings on behalf of *both* the applicant and *the* respondent in this case.

5. Scoring

The competition involves three rounds.

First Round
All teams are required to participate in two separate moots – in one moot, they will represent the *applicant* against another team representing the respondent, whereas in another moot they will represent the *respondent* against a different team representing the applicant. All members of the team must speak at some stage during the first round (ie. either as applicant or respondent), although there is no requirement that all team members must speak in both of the moots during the first round.
During the first round, the panels of judges will wish to hear argument on **questions 1, 2 and 3** of the moot problem.

Upon conclusion of the first round, scores will be allocated on the basis of each team's written and oral pleadings.

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

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

Second Round (Semi-Finals)
The second round involves only the best participating teams selected from the first round. Again, each team must participate in two moots, acting as applicant in one moot and as respondent in the other. During this round, it is necessary for ***all*** members of each team to speak in both of these moots.

During the second round, the panels of judges will wish to hear argument on **questions 2, 4 and 5** of the moot problem.

Points will be awarded using the same criteria as apply to the first round (see above), with the exception that marks from written pleadings are no longer counted.

Third Round (Final)
The final involves the two best teams, selcted by the judges from the second round. One team will represent the applicant and one team will represent the respondent (this will be chosen by lot).

The panel of judges will, prior to the final, indicate **which three of the moot court questions they wish to be addressed during the final.**

Each member of the team must speak during the final, so teams may need to re-allocate the questions their members have previously dealt with in earlier moots, in order to ensure that each team member speaks, although it is permissible for one team member's oral contribution to be limited to the reply or rejoinder at this stage. The time allowed for the main argument of each party will be extended by 10 minutes only.

Three judges will sit in the first and second round. A plenary court will be convened for the final.

The judges' decision shall be final as regards selection of the teams to participate in the semi-finalis and final and as regards selection of the 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 of the competition – sucha person may be chosen from any team which participated in the final *or* semi-final.

Written and oral pleadings
The competition shall consist of a written and oral part;

Written pleadings

All participating teams must prepare separate written pleadings for both applicant and defendant, containing the legal arguments relied upon by that team in answer to the various questions referred to the ECJ.

Written pleadings on behalf of each party (i.e. applicant and respondent) may not exceed 10 typed pages of A4 paper. No specific requirements for font or spacing are prescribed. A list of authorities (legal cases or legislation) used in those pleadings must be attached to the rear of the pleadings, but this is not taken into account as part of the 10-page total.

Written pleadings should be organised into numbered paragraphs and any arguments used should be supported by legal authority and properly referenced to the attached list of authorities.

All teams must submit three printed copies of each set of written pleadings and these must be ***received on or before the 1st April 2007 to the address given below.*** (All pleadings sent by post, should also confirm by e-mail the date on which they were posted). In addition, each team must submit by e-mail one copy of their written pleadings. Please note that we do not accept pleadings sent by fax.

In order to be eligible to participate in the oral stage of the competition, each team must have submitted the pleadings in the aforementioned manner and by the aforementioned date.

In the event that more than one team sends written pleadings from the same University, the team which is judged to have the best written pleadings will be invited to participate in the competition.

A prize will be awarded for the best written pleadings of the competition and will be presented at the end of the competition by our main sponsors, Clifford Chance.

Oral Argument

Oral argument during the various stages of the competition need not be limited to the scope of the team'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 Budapest.

Each team will have 20 minutes within which to present their oral arguments for the party they represent in that moot (this is extended to 30 minutes during the final).

Once the oral arguments have been made for each party, there will then be a 5 minutes period for reply (applicant) and rejoinder (respondent). These should be used to comment upon arguments raised during the other team's oral pleadings and not to repeat arguments which were already made during the 20 minutes of main pleadings.

In the event that a team exceeds the time limits mentioned here, the President of the Court (upon request by the relevant team) may, at his/her discretion, extend the time limit by a maximum of a further 5 minutes.

At each stage of the competition, time-limits will be monitored by time-keepers and the judges and teams will be kept aware of the progress of time throughout the moot.

6. Roles

Each team may have between 3-4 members. Teams must be in a position to argue the case for both applicant and respondent. Although teams have discretion in choosing which team member shall deal with each of the questions, please remember that by the end of the first round every team member must have spoken individually. During the semi-finals and final, each team member must speak in every moot.

7. Fees

Each participating team is responsible for their return travel costs to Budapest and any additional costs incurred due to earlier arrival or later departures. In addition a registration fee is payable upon arrival at Budapest of 170,000 Hungarian Forint's per team (this fee covers costs for 3-4 team members and an accompanying coach). Alternatively, payment may also be made in GBP sterling (£450).

Any team wishing to pay by bank transfer may do so provided that confirmation of payment is received at the

Warsaw address given below ***no later than 20th April 2007*** and that the original copy of the payment confirmation is produced during registration in Budapest.

Bank Details for payment by bank transfer.

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 CITICPLPX
Account number	PL 38103016540000000031691000 (GBP account)

Address for written pleadings and confirmation of bank transfer payments

British British Centre for English and European Legal Studies
(Moot Court Competition)
Ulica Rajcow 2 (Apartment 1)
00-220 Warszawa
Poland

Other contact Details

Tel/Fax:: +48 22 831 8634
E-mail: da208@cam.ac.uk or d.ashmore@uw.edu.pl

MOOTING TIPS FOR TEAMS

Mooting is an acquired skill which improves with practice and you should expect your performance to improve throughout the competition. Nevertheless, for those with little or no mooting practice, there are still a number of helpful tips which may be adopted to ensure that your first attempt is consistent with the behaviour the judges will expect from the advocates before them.

1. Opening speeches

The advocate opening the case on behalf of the appellant should, as a matter of courtesy, introduce himself/herself, his fellow team-mates ("My Learned Friends...") and the advocates for the respondent to the court. Check that you know the full names of the other team before the case begins.

The first advocate to speak should also ask the court if they require the facts of the case to be read out. If the court asks you to read out the facts, it is best to have prepared a brief summary of your own rather than simply reading the facts as they are contained in the bundle. You cannot change or depart from the facts in the bundle, although you are free to interpret them in the manner most favourable to your side.

2. Main arguments

Your main speech should begin by telling the judge which points of law you will be arguing and how the case will be divided between yourself and your team-mates. You cannot hope to convince the court of your answer unless they know which point you are addressing and what your main arguments will be *before* you begin discussing them in detail.

Your submissions should be logically structured and presented confidently and clearly. Although time is limited, it is better to take your arguments slowly to ensure the court understands them, rather than rushing them and having too deal with the resulting questions which the court asks to clarify your position. You should try to avoid reading a prepared speech, since the court will almost inevitably ask you questions which draw you away from your text and it will then be very difficult to rejoin your speech after such questioning. It is a better compromise to use 'prompt-cards' which you refer to occasionally to remind you of all the points you wished to make.

You should ensure, wherever possible, that you use legal authority to back-up your arguments. Be prepared to fully cite the details of the case (name, year etc.) and to provide the court with a brief résumé of the facts if the judges so request. Where such authority is not available, you should indicate why, for policy reasons, your proposed solution is to be preferred to alternative solutions. Remember that the only authorities that are to be cited before the court are those contained in this bundle: all others will be ignored by the judges.

You should conclude your submissions by reiterating the main points and asking the court whether you may be of any further assistance. If not, you may sit down and pass over to your team-mate or to the advocates for the opposition.

3. Questions

As mentioned earlier, you can expect to face questions from the judges. Listen carefully and make sure you have properly understood the question before attempting to give an answer: it is far better to ask for clarification than to begin providing information on a question which the court has not actually raised.

The advocate to whom the question is addressed should attempt to answer the questions but may, if necessary, consult with other members of the team before responding. A second member of the team may seek permission to address the court in response to its question to conclude the answer thereafter.

Watch for 'leads' from the questions asked by the court: they can sometimes help you to assess the courts willingness to accept your proposals and allow you to amend your arguments accordingly or use questions asked of your opponents to criticise their submissions.

4. Reply/Rejoinder

The secret of success of a good advocate is to be able to respond to the issues raised by your opponents, not simply to repeat the pre-prepared arguments in favour of your client whilst ignoring other issues or arguments

raised by the opposition. Although it is only the respondents who have the opportunity to address many of these issues in their main speech, both teams have the 5 minute reply/rejoinder to comment on the arguments of the opposition. You should not avoid issues raised by the opposition, since this gives the court the impression that you are unable to deal with them and this will clearly weaken the strength of your case.

Your reply/rejoinder should aim to avoid simply repeating arguments that you have put before the court and should instead be used as an opportunity to clarify any points of confusion which may have been left after your main speech and the questions posed to you by the court. You should also use the reply/rejoinder to highlight problems with the submissions made by the opposition.

5. Addressing the Court

When addressing a judge the following courtesies should be observed. You must investigate the title of the judge and qualification. If a Lord, he must be formally addressed as "My Lord" or "Sir". A more general term is "Your Excellency". If addressing a judge other than a Lord, you may use the general term "Your Honour".

Be polite to the judges. Listen carefully to their questions and try to ensure you follow their statements. Answer the questions they put and not those you wish they had asked or those to which you know the answer. Never argue with the judge and never talk whilst the judge is speaking, if you want to win your case. The same point could always be put politely and just as effectively. (e.g. "With respect Your Honour...")

Always address your arguments to the court rather than to the opposition: this is a moot *not* a debate. Also remember that, as the advocate, it is your role to *answer* questions posed by the judges, *not* to ask questions to the judges or the opponents.

Always try to stick to time-limits and do not automatically assume that the court will give you additional time to complete your submissions. Be prepared to adapt them and summarise some issues if you appear to be running out of time.

6. Organisation and Preparation

Although much of the skill in mooting lies in responding 'on your feet' to judges questions or the arguments of your opponents, even the best advocates do not rely solely on their quick-wits and instincts to deal with such problems. The presentation of the case in court is the culmination of many hours of careful preparation, rehearsal of the arguments to be made, study of the legal authority and policy arguments behind your submissions and anticipation of the arguments of your opponents. The more time you spend in organising and preparing your case the easier it will be to act 'on your feet' and yet it will look more impressive.

7. Conclusion

Although, this is a competition, we also want you to have fun. Preparing for a moot takes a lot of time and effort and you should try your best to enjoy the opportunity to show the judges how much law you have managed to learn during this preparation. Also, the more relaxed you are, the likelier it is that you will be able to provide a confident presentation style to the judges.

Good luck to all and we look forward to welcoming you in Budapest!

ORGANISING COMMITTEE
Denise Ashmore and Steve Terrett

BUDAPEST CONTACT
Allan Tatham/ Sandor Laszlo Esik
sandor.l.esik@gmail.com

PRELIMINARY INFORMATION ON THE ECJ

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

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

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

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

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

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

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

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

PROVISIONAL TIMETABLE

FRIDAY 4th May 2007

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

SATURDAY 5th May 2007

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 6th May 2007

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

13.30 LUNCH BREAK
(Announcement of finalists)

15.00 **FINAL**

20.00 Celebration dinner
23.00 Party

MONDAY 7th May 2007

Departure of teams and time for sightseeing.

ACKNOWLEDGMENTS

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

- Carsten Zatschler and Ronnie Graham, ECJ (referendaires)

- Catherine Barnard, Trinity College, Cambridge

- The University of Cambridge, the Court of Justice of the European Community and Lord Slynn of Hadley for their continuing support of the Moot Court Competition

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

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

CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article 2

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and no inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3

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

(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) a common commercial policy;

(c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

(d) measures concerning the entry and movement of persons as provided for in Title IV;

(e) a common policy in the sphere of agriculture and fisheries;

(f) a common policy in the sphere of transport;

(g) a system ensuring that competition in the internal market is not distorted;

(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;

(i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;

(j) a policy in the social sphere comprising a European Social Fund;

(k) the strengthening of economic and social cohesion;

(l) a policy in the sphere of the environment;.

(m) the strengthening of the competitiveness of Community industry;

(n) the promotion of research and technological development;

(o) encouragement for the establishment and development of trans European networks;

(p) a contribution to the attainment of a high level of health protection;

(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;

(r) a policy in the sphere of development cooperation;

(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;

(t) a contribution to the strengthening of consumer protection;

(u) measures in the spheres of energy, civil protection and tourism.

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

Article 10

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

Article 12

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

Article 43

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article

48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 21
Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194.
Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195. Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.

Article 44
1. In order to attain freedom of establishment as regards a particular activity, the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall act by means of directives.
2. The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:
(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Community of the various activities concerned;
(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 33(2);
(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community;
(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 45
The provisions of this chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this chapter shall not apply to certain activities.

Article 46
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 Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the abovementioned provisions.

Article 47
1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.
2. For the same purpose, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.

3. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Article 48
Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 49
Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

Article 50
Services shall be considered to be "services" within the meaning of this Treaty 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 State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 53
The Member States declare their readiness to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 52(1), if their general economic situation and the situation of the economic sector concerned so permit. To this end, the Commission shall make recommendations to the Member States concerned.

Article 54
As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49.

Article 55
The provisions of Articles 45 to 48 shall apply to the matters covered by this chapter.

Article 234
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 249
In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall

leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety upon those to whom it is addressed.
Recommendations and opinions shall have no binding force.

Article 254
1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 shall be signed by the President of the European Parliament and by the President of the Council and published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

3. Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001

regarding public access to European Parliament, Council and Commission documents

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,
Having regard to the proposal from the Commission(1),
Acting in accordance with the procedure referred to in Article 251 of the Treaty(2),

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties.

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

(7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.

(8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

(12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

(13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

(14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.

(15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

(16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.

(17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents(3), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents(4), European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents(5), and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed,

HAVE ADOPTED THIS REGULATION:

Article 1: Purpose

The purpose of this Regulation is:
(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,
(b) to establish rules ensuring the easiest possible exercise of this right, and
(c) to promote good administrative practice on access to documents.

Article 2: Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.
2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.
3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.
4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.
5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.
6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

Article 3: Definitions

For the purpose of this Regulation:
(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;
(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

Article 4: Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
(a) the public interest as regards:
- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;
(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
- commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,
unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.
5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.
6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5: Documents in the Member States
Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation. The Member State may instead refer the request to the institution.

Article 6: Applications
1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.
2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.
3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.
4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

Article 7: Processing of initial applications
1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.
2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.
3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.
4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

Article 8: Processing of confirmatory applications
1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.
2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.
3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

Article 9: Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

Article 10: Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

Article 11: Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

Article 12: Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

Article 13: Publication in the Official Journal

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

(a) Commission proposals;

(b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;

(c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;

(d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;

(e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;

(f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.

2. As far as possible, the following documents shall be published in the Official Journal:

(a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant

to Article 34(2) of the EU Treaty;
(b) common positions referred to in Article 34(2) of the EU Treaty;
(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.
3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

Article 14: Information
1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.
2. The Member States shall cooperate with the institutions in providing information to the citizens.

Article 15: Administrative practice in the institutions
1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.
2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Article 16: Reproduction of documents
This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

Article 17: Reports
1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.
2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

Article 18: Application measures
1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.
2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community(6) with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.
3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

Article 19: Entry into force
This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities. It shall be applicable from 3 December 2001.
This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 May 2001.

Protocol on the application of the principles of subsidiarity and proportionality

THE HIGH CONTRACTING PARTIES,

DETERMINED to establish the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the Treaty establishing the European Community with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions;

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union;

TAKING ACCOUNT of the Interinstitutional Agreement of 25 October 1993 between the European Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity;

HAVE CONFIRMED that the conclusions of the Birmingham European Council on 16 October 1992 and the overall approach to the application of the subsidiarity principle agreed by the European Council meeting in Edinburgh on 11-12 December 1992 will continue to guide the action of the Union's institutions as well as the development of the application of the principle of subsidiarity, and, for this purpose,

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community:
(1) In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

(2) The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the acquis communautaire and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article F(4) of the Treaty on European Union, according to which ‘the Union shall provide itself with the means necessary to attain its objectives and carry through its policies’.

(3) The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 3b of the Treaty shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.

(4) For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.

(5) For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

(6) The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities

the choice of form and methods.

(7) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

(8) Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.

(9) Without prejudice to its right of initiative, the Commission should:
- except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;
- justify the relevance of its proposals with regard to the principle of subsidiarity; whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect. The financing of Community action in whole or in part from the Community budget shall require an explanation;
- take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved;
- submit an annual report to the European Council, the European Parliament and the Council on the application of Article 3b of the Treaty. This annual report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.

(10) The European Council shall take account of the Commission report referred to in the fourth indent of point 9 within the report on the progress achieved by the Union which it is required to submit to the European Parliament in accordance with Article D of the Treaty on European Union.

(11) While fully observing the procedures applicable, the European Parliament and the Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 3b of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.

(12) In the course of the procedures referred to in Articles 189b and 189c of the Treaty, the European Parliament shall be informed of the Council's position on the application of Article 3b of the Treaty, by way of a statement of the reasons which led the Council to adopt its common position. The Council shall inform the European Parliament of the reasons on the basis of which all or part of a Commission proposal is deemed to be inconsistent with Article 3b of the Treaty.

(13) Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty.

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC
of 29 April 2004

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,
Having regard to the proposal from the Commission 1 ,
Having regard to the Opinion of the Economic and Social Committee 2 ,
Acting in accordance with the procedures laid down in Article 251 of the Treaty 4 ,

Whereas:
(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community 1, and to repeal the following acts:
Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families
Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services
Council Directive 90/364/EEC of 28 June 1990 on the right of residence
Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity
and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement 1 or, where appropriate, of the applicable national legislation.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State 1 and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during

the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health .

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

(29) This Directive should not affect more favourable national provisions.

(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: GENERAL PROVISIONS

Article 1:Subject

This Directive lays down:

(a) the conditions governing the exercise of the right to move and reside freely within the Member States by

Union citizens and their family members;
(b) the right of permanent residence in the Member States for Union citizens and their family members;
(c) the limits placed on these rights on grounds of public policy, public security and public health.

Article 2: Definitions
For the purposes of this Directive:
(1) *"Union citizen*" means any person having the nationality of a Member State;
(2) *"Family member*"means:
(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
(3) *"Host Member State*" means the Member State to which a Union citizen goes in order to exercise his right of free movement and residence.

Article 3:Persons entitled
1 This Directive shall apply to all Union citizens who move to and reside in a Member State of the Union other than that of which they are a national and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.
The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

CHAPTER II:RIGHT OF EXIT AND ENTRY

Article 4: Right of exit
1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.
3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.
4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5: Right of Entry
1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.
2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.
3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.
4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them

brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III: RIGHT OF RESIDENCE FOR UP TO SIX MONTHS

Article 6: Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7: Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(a) are workers or self-employed persons in the host Member State; or
(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
are enrolled at a private or public establishment, accredited or financed by the host
(c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).
3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
(a) he/she is temporarily unable to work as the result of an illness or accident;
(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.
4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

Article 8: Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.
2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.
3. For the registration certificate to be issued, Member States may only require that Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;
- Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;
- Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof

of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.
4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.
5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:
(a) a valid identity card or passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;
(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9: Administrative formalities for family members who are not nationals of a Member State
(1) Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned stay is for more than three months.
(2) The deadline for submitting the residence card application may not be less than three months from the date of arrival.
(3) Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory penalties.

Article 10: Issuing of residence cards
(1) The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issue of a document bearing the words “residence card of a family member of an EU citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately..
(2) For the residence card to be issued, Member States shall require presentation of the following documents:
(a) a valid passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11: Validity of the residence card
(1) The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.
(2) The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or third country.

Article 12: Retention of the right of residence by family members in the event of death or departure of the Union citizen
(1) Without prejudice to the second subparagraph, the Union citizen’s death or departure from the host Member State shall not affect the right of residence of the family members of a Union citizen who are nationals of a Member State.
Before acquiring the right of permanent residence, the persons concerned must themselves meet the requirements laid down in in points (a), (b), (c) or (d) of Article 7 (1).
(2) Without prejudice to the second subparagraph, the Union citizen’s death shall not entail loss of the right of residence of the family members of a Union citizen who are not nationals of a Member State and who have been

residing in the host Member State as family members for at least one year before the Union citizen's death.
Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).
Such family members shall retain their right of residence exclusively on a personal basis.
3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.
Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).
Such family members shall retain their right of residence exclusively on personal basis.

Article 14: Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.
4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
(a) the Union citizens are workers or self-employed persons, or
(b) the Union citizens entered the territory of the host Member State in order to seek employment. in this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15: Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.
2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion

from the host Member State.
3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV: RIGHT OF PERMANENT RESIDENCE
Section I: Eligibility

Article 16 : General rule for Union citizens and their family members
1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17: Exemptions for persons no longer working in the host Member State and their family members
(1) By way of derogation from Article 16, the right of permanent residence on the territory of the host Member State shall be enjoyed before completion of a continuous residence of five years of residence by:
(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.
If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;
(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.
If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;
(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.
For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.
Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.
2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.
3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.
4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:
(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or
(b) the death resulted from an accident at work or an occupational disease; or
(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply and who satisfy the conditions laid down therein shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

SECTION II: ADMINISTRATIVE FORMALITIES

Article 19: Document certifying permanent residence for Union citizens

1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.
2. The document certifying permanent residence shall be issued as soon as possible.

Article 20: ***Permanent residence card for family members who are not nationals of a Member State***

1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.
2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.
3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21: Continuity of residence

For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V: PROVISIONS COMMON TO THE RIGHT OF RESIDENCEAND THE RIGHT OF PERMANENT RESIDENCE

Article 22: Territorial scope

The right of residence and the right of permanent residence shall cover the whole territory of the Member State. Member States may impose territorial restrictions on the right of residence and right of permanent residence only where the same restrictions apply to their own nationals.

Article 23:Related rights

Irrespective of nationality, family members of an EU citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment and self-employment there.

Article 24:Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25: General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.
2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 23: Checks

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same

requirement applies to their own nationals as regards their identity card.
In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI: RESTRICTIONS ON THE RIGHT OF ENTRY AND RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH

Article 27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.
Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.
3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have.
Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.
4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28: Protection against expulsion

1 Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host country and the extent of his/her links with the country of origin.
2 A host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory or against family members who are minors, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
(a) have resided in the host Member State for the previous ten years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29: Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30: Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.
2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.
3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the

territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31: Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
where the expulsion decision is based on a previous judicial decision; or –
where the persons concerned have had previous access to judicial review; or –
where the expulsion decision is based on imperative grounds of public security under – Article 28(3).
3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32: Duration of exclusion orders

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.
The Member State concerned shall reach a decision on this application within six months of its submission.
2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33: Expulsion as a penalty or legal consequence

1 Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.
2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII: FINAL PROVISIONS

Article 34:Publicity

Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35: Penalties

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.
Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36: Sanctions

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than .....* and as promptly as possible in the case of any subsequent changes.

Article 37: More favourable national provisions

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38: Repeals

1 Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from 30th April 2006.

2 Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC are repealed with effect from 30th April 2006

3 References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39: Reports

No later than 30th April 2008, the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary recommendations notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30th April 2006

When Member States adopt those 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 the Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41: Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*

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Article 42: Addressees

This Directive is addressed to the Member States.

Done at Strasbourg 29th April 2004,

For the EP and the Council

The President

4 **Principle of supremacy of EC law**

4.1 **The problem of priorities**

The wide scope of the EC Treaty, covering a number of areas normally reserved to national law alone, coupled with the extended application by the ECJ of the principle of direct effects, led inevitably to a situation of conflict between national and EC law. In such a case, which law was to prevail? The way in which that conflict was resolved was of crucial importance to the Community legal order; it was a constitutional problem of some magnitude for Member States.

The EC Treaty is silent on the question of priorities. Perhaps this was a diplomatic omission; perhaps it was not thought necessary to make the matter explicit, since the extent to which Community law might be directly effective was not envisaged at the time of signing the Treaty. In the absence of guidance, the matter has been left to be decided by the courts of Member States, assisted by the ECJ in its jurisdiction under Article 234 (ex 177) EC (see chapter 26). As with the concept of direct effects, the Court has proved extremely influential in developing the law.

The question of priorities between directly effective international law and domestic law is normally seen as a matter of national law, to be determined according to the constitutional rules of the State concerned. It will depend on a number of factors. Primarily it will depend on the terms on which international law has been incorporated into domestic law. This in turn will depend on whether the State is monist or dualist in its approach to international law. If monist, it will be received automatically into national law from the moment of its ratification, without the need for further measures of incorporation. If dualist, international law will not become binding internally, as part of domestic law, until it is incorporated by a domestic statute. In the EC, France, for example, is monist; Germany, Belgium, Italy and the UK are dualist. But whether received automatically, by process of 'adoption', or incorporated by statute, by way of ‘transformation’, this does not settle the question of priorities. This will depend on the extent to which the State has provided for this, either in its constitution, where it has a written constitution, or, where it has no written constitution, in its statute of incorporation.

There is wide variation in the way in which, and the extent to which, Member States of the EC have provided for this question of priorities. Where States have a written constitution, provision may range from the whole-hearted acceptance of international law of the Dutch constitution (Article 66), which accords supremacy to *all* forms of international law, whether prior or subsequent to domestic law, to Article 55 of the French constitution, which, at the time of French accession to the Community, provided that treaties or agreements duly ratified 'have authority superior to that of laws' (thus leaving open the question of secondary legislation), to Article 24 of the German constitution, which provided, rather loosely, that the State 'may transfer sovereign powers' to international organisations (although Article 23 has been introduced to deal specifically with the EU) or Article 11 of the Italian constitution whereby the State 'consents, on conditions of reciprocity with other States, to limitations of sovereignty necessary for an arrangement which may ensure peace and justice between the nations'. (Under the principle of reciprocity, if one party to an agreement breaches his obligations, the other contracting parties may regard themselves as entitled to be relieved of theirs.)

A State which does not have a written constitution, and which is dualist, such as the UK, must provide for priorities in the statute of incorporation itself. This statute will have the same status as any other statute. As such it will be vulnerable to the doctrine of implied repeal, or *'lex posterior derogat priori'*, whereby any inconsistency between an earlier and a later statute is resolved in favour of the latter. The later statute is deemed to have impliedly repealed the earlier one (see *Ellen Street Estates Ltd* v *Minister of Health* [1934] 1 KB 590).

On a strict application of this doctrine, any provision of a domestic statute passed subsequent to the statute incorporating EC law, in the British case the European Communities Act 1972, which was inconsistent with EC law, would take priority.

Given the differences from State to State it is clear that if national courts were to apply their own constitutional rules to the question of priorities between domestic law and EC law, there would be no uniformity of application, and the primacy of EC law could not be guaranteed throughout the Community. This was the principal reason advanced by Advocate-General Roemer in *Van Gend en Loos* (case 26/62) for denying the direct effects of Article 12 of the EEC Treaty (now 25 ECJ. Not only would this weaken the effect of Community law, it would undermine solidarity among the Member States, and in the end threaten the Community itself.

It is no doubt reasons such as these which led the ECJ to develop its own constitutional rules to deal with the problem, in particular the principle of supremacy, or primacy, of EC law.

4.2 The Court of Justice's' contribution

4.2.1 Development of the principle of supremacy

The first cautious statement of the principle of supremacy of EC law came in the case of *Van Gend en Loos* (case 26/62). The principal question in the case was the quest ion of the direct effects of Article 25 (ex 12) EC. The conflict, assuming that Article were found directly effective, was between the Article 25 (ex 12) and an *earlier* Dutch law. Under Dutch law, if Article 25 were directly effective it would, under the Dutch constitution, take precedence over domestic law. So the questions referred to the ECJ under Article 234 (ex 177) did not raise the issue of sovereignty directly. Nevertheless, in addition to declaring that Article 25 was directly effective, the Court went on to say that:

. . . the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields.

Although the main emphasis of the judgment relates to the doctrine of direct effect, it is also significant because, by referring to the 'new legal order', the ECJ indicated that the Community was not just a 'normal' international law: organisation. In particular, the Community had a more independent status as well as, arguably, greater impact on the national legal systems of the Member" States.

The conflict in *Costa* v *ENEL* (case 6/64) posed a more difficult problem for the Italian courts. This case too involved an alleged conflict between a number of Treaty provisions and an Italian statute nationalising the electricity company of which the defendant, Signor Costa, was a shareholder, but here the Italian law was later in time. On being brought before the Milan *tribunale* for refusing to pay his bill (the princely sum of Ll,925, or approximately £1.10), Signor Costa argued that the company was in breach of EC law. They argued *'lex posterior';* the Italian Act nationalising the electricity company was later in time than the Italian Ratification Act, the Act incorporating EC law. Therefore it took priority. The Italian court referred this question of priorities to the ECJ. It also referred the matter to its own, constitutional court. This time the principle of supremacy was clearly affirmed by the Court. It cited *Van Gend;* the States had 'limited their sovereign rights'. It went further. It looked to the Treaty; it noted that Article 249 (ex 189) indicate that there had been a transfer of powers to the Community institutions; Article 10 (ex 5) underlined States' commitment to observe Community law. The Court concluded:

The reception, within the laws of each Member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity. . .

Such a measure cannot be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty. .

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called into question by subsequent legislative acts of the signatories. . .

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer, by Member States, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent *unilateral law, incompatible with the aims of the Community, cannot prevail. (Emphasis added.)*

The reasoning used by the ECJ is worthy of note as, in developing its argument, the ECJ uses a teleological - or purposive - approach that is not tied in particularly closely to the actual wording of the Treaty. The ECJ's arguments can be divided into two main groups:

(a) those relating to the *nature* of the Community; and
(b) those relating to the *purposes* of the Community.

The first category comprises the ECJ's assertion about the independent nature of the new Community legal order and the mechanism by which this legal order was created: the permanent limitation of Member States' sovereign rights. There is no express basis in the Treaty for either of these points. The other arguments, referring to the aims of the Treaty, are more practical. They look to the purpose of the Community and the need to ensure that those goals are not undermined. These arguments are based on the need to make Community law effective.

In the case of *lnternationale Handelsgesellschaft mbH* (case 11/70) the Court went even further. Here, the conflict was between not a treaty provision and a domestic statute, but between an EC regulation and provisions of the German constitution. The claimant argued that the regulation infringed, *inter alia,* the principle of proportionality enshrined in the German constitution and sought to nullify the regulation on those grounds. Normally, any ordinary law in breach of the constitution is invalid, since the constitution is superior in the hierarchy of legal rules to statute law. EC law had been incorporated into German law by statute, the Act of Ratification. There was no provision in the constitution that the constitution could be overridden by EC law. Article 24 merely provided for 'the transfer of sovereign powers to intergovernmental institutions'. So the question before the German administrative court (Verwaltungsgericht, Frankfurt) was: If there were a conflict between the regulation and the German constitution, which law should prevail? As in *Costa,* the German judge referred the question to the ECJ and his own federal constitutional court (Bundesverfassungsgericht).

The ruling from the ECJ was in the strongest terms. The legality of a Community act cannot be judged in the light of national law:

. . . the law born from the Treaty [cannot] have the courts opposing to it rules of national law of any nature whatever. *. . the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure. (Emphasis added.)*

Underlying this judgment one can see concerns similar to those expressed in *Costa:* the need to ensure the effectiveness of Community law, whatever the cost to the national legal order. If the Court's ruling seems harsh in the light of the importance of the rights protected in a State's constitution, many of which are regarded as fundamental human rights, it is worth adding that the Court went on to say that respect for such rights was one of the principal aims of the Community and as such it was part of its own (albeit unwritten) law (see chapter 7).

The principle of supremacy of Community law applies not only to internal domestic laws, but also to obligations entered into with third countries, that is, countries outside the EU. In the *ERTA* case (case 22/70) the ECJ held, in the context of a

challenge to an international road transport agreement to which the Community was a party, that once the Community, in implementing a common policy, lays down common rules, Member States no longer have the right, individually or collectively, to contract obligations towards non-Member States affecting these common rules. And where the Community concludes a treaty in pursuance of a common policy, this excludes the possibility of a concurrent authority on the part of the Member States. This means that where a State attempts to exercise concurrent authority it will be overridden to the extent that it conflicts with Community law. This principle does not, however, appear to apply to Member States' pre-accession agreements with third countries. Where such agreements are 'not compatible' with the EC Treaty, Member States are required to 'take all appropriate steps to eliminate the incompatibilities established' (Article 307 (ex 234) ECJ. In *R* v *Secretary of State for Home the Department, ex parte Evans Medical Ltd* (case C-324/93), the Court conceded that provisions of such an agreement contrary to Community law may continue to be applied where the performance of that agreement may still be required by non-Member States which are parties to it. The Court has, however, urged national courts to give effect to such provisions only to the extent that it is necessary to meet the demands of that agreement *(Minne* (case C-13/93). Thus, subject to this exception, as far as the ECJ is concerned *all* EC law, whatever its nature, must take priority over *all* conflicting domestic law, whether it be prior or subsequent to Community law. Given the fact that the Court was approaching the matter *tabula rasa,* there being no provision in the Treaty to this effect, on what basis did the Court justify its position?

All these cases show a common theme in the ECJ's approach: the need to ensure the effectiveness of Community law. The position can be summarised as follows. The Court's reasoning is pragmatic, based on the purpose, the general aims and spirit of the Treaty. States freely signed the Treaty; they agreed to take all appropriate measures to comply with EC law (Article 10 (ex 5) ECJ; the Treaty created its own institutions, and gave those institutions power to make laws binding on Member States (Article 249 (ex] 89) ECJ. They agreed to set up an institutionalised form of control by the Commission (under Article 226 (ex 69), see chapter 28) and the Court. The Community would not survive if States were free to act unilaterally in breach of their obligations. If the aims of the Community are to be achieved, there must be uniformity of application, This will not occur unless all States accord priority to EC law.

4.2.2 Problems for the national Courts

The reasoning is convincing. Nonetheless national courts were understandably reluctant to disregard their own constitutional rules and the Italian and German constitutional courts in *Costa* v *ENEL* [1964] CMLR 425 at p. 430 and *Internationale Handelsgesellschaft mbH (Solange I)* [1974] 2 CMLR 540, adhering to their own traditional view, refused to acknowledge the absolute supremacy of EC law.

There were other problems too for national courts - problems of application. Even if the principle of primacy of EC law were accepted in theory, what was a national judge to do in practice when faced with a conflict? No English judge can declare a statute void or unlawful; in countries with a written constitution only the constitutional court has power to declare a domestic law invalid for breach of the constitution. Must the national judge wait for the offending national law to be repealed or legally annulled before he can give precedence to EC law?

The *ECJ* suggested a solution to this problem in *Simmenthal SpA* (case 106/77). This case involved a conflict between a Treaty provision, the then Article 30 (now 28) EC on the free movement of goods, and an Italian law passed *subsequent* to the Italian Act incorporating EC law, a similar clash to the one in *Costa* v *ENEL* (case 6/64). Following *Costa,* the Italian constitutional court had revised its view and declared that it would be prepared to declare any national law conflicting with EC law invalid. When the problem arose in *Simmenthal* the Italian judge, the Pretore di Susa, was perplexed. Should he apply EC law at once to the case before him, or should he wait until his own constitutional court had declared the national law invalid? He referred this question to the ECJ. The Court's reply was predictable:

. . . any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community (para. 18).

. . . a national court which is called upon . . . to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing. . . to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (para. 24).

The reasoning behind the judgment is clear. Unless Community law is given priority over conflicting national law at once, from the moment of its entry into force, there can be no uniformity of application throughout the Community. Community law will be ineffective. According to the ECJ, national judges faced with a conflict between national law, whatever its nature, and Community law, must ignore, must shut their eyes to national law; they need not, indeed must not, wait for the law to be changed. Any incompatible national law is automatically inapplicable.

The principles expressed in *Simmenthal SpA* were applied by the Court in *R v Secretary of State for Transport, ex parte Factortame Ltd* (case *C-213/89),* in the context) of a claim before the English courts by a group of Spanish fishermen for an interim injunction to prevent the application of certain sections of the Merchant Shipping Act 1988, which denied them the right to register their boats in the UK, and which the claimants alleged were in breach of EC law. The question of the 'legality' of the British provisions under Community law had yet to be decided, following a separate reference to the Court of Justice. The British courts were being asked to give primacy to a *putative* Community right over an allegedly conflicting national law, and to grant an interim injunction against the Crown, something which *they* considered they were not permitted to do under national law. Following a reference by the House of Lords asking whether they were obliged to grant the relief in question as a matter of Community law, the ECJ pointed out that national courts were obliged, by Article 10 (ex 5) EC, to ensure the legal protection which persons derive from the direct effect of provisions of Community law. Moreover:

The full effectiveness of Community law would be . . . impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule (para. 21).

The obligation on Member States to ensure the full effectiveness of Community law requires national courts not only to 'disapply' the offending national law but also to supply a remedy which is not available under national law. It now seems that the obligation to disapply inconsistent national law extends beyond the courts to administrative agencies. In *Larsy* (Case C-118/00), reasoning from its judgments in *Simmenthal* and *Factortame* (Case *C-213/89),* the ECJ held that the national social security institution, INASTI, should disapply national laws that precluded effective protection of Larsy's Community law rights (para. 53). The issue of procedural rules and remedies is discussed further in chapter 6.
A finding that a provision of national law is 'inapplicable' because of its incompatibility with Community law does not, however, result in its annulment, or even prevent its application in situations falling outside the scope of Community law. In *IN. CO. GE. '90* (cases C-10 & 22/97) the Court held that *'it does not follow from Simmenthal that a domestic rule which is incompatible with EC law is non-existent'*. Similarly in *Arcaro* (case *C-168/95)* it made it clear that there was *'no method or procedure in Community law allowing national courts to eliminate national provisions contrary to a directive which has not been transposed where that provision may not be relied on before the national court'*. In *ICl* v *Colmer* (case *C-264/96)* the ECJ found a system of tax relief for holding companies with a seat in the EU discriminatory, and therefore contrary to EC law, when applied to subsidiary companies in other Member States, but lawful in a situation where holding companies control subsidiaries in non-Member States. Despite its inapplicability in the former context, the national court was under no obligation to disapply national law in the latter situation, since that lay outside the scope of Community law. However:

Where the same legislation must be disapplied as contrary to EC law in a situation covered by Community law it is for the competent body of the Member State concerned to remove that legal uncertainty insofar as it might affect rights deriving from Community rules.

4.2.3 EC rules which do not have direct effect
It may be noted that all the earlier landmark rulings of the Court, up to and including *Simmenthal* (case 106/77), were expressed in terms of directly effective Community law, that is, rules that gave rise to rights that could be relied on within the national legal system. Until the Court introduced the principle of indirect effects in *von Colson* (case 14/83) and the principle of State liability in *Francovich* (cases *C-6 &* 9/90) (see chapter 5), it was thought that national courts would only be required to apply, and give priority to, EC law which was directly effective. This proved not to be the case. The obligation on national courts to interpret domestic law to comply with EC directives which are not directly effective (because invoked horizontally), as extended in *Mar/easing,* impliedly requires those courts to give priority to EC law. Similarly, although the granting of a remedy in damages against the State under *Francovich* does not require the *application* of Community law, the remedy, based on Member States' obligation to guarantee full and effective protection for individuals' rights under Community law, is premised on the supremacy of EC law. This obligation was held in *Francovich* (at para. 42) to apply to all rights *'which parties enjoy under Community law'*. That protection cannot be achieved unless those rights prevail over conflicting provisions of national law. As *Brasserie du Pecheur* and *R* v *Secretary of State for Transport, ex parte Factortame* (cases *C-46* & 48/93) have now made clear, individuals' Community rights, including the right to damages, must prevail over *all* acts of Member States, legislative, executive or judicial, which are contrary to Community law.
[…]

4.4 Conclusions
The ECJ, in introducing the notion of supremacy, was instrumental in providing a view of the Community as a body that went beyond what was normal for an international law organisation. In a number of key judgments it identified the Community as an independent legal order, supreme over the national legal systems. One of the mechanisms used to justify this was the effectiveness of Community law, a doctrine that the ECJ has used again and again in different contexts to justify the development of Community law in a particular direction. As has been noted, however, the success of this project cannot be ascribed entirely to the ECJ. To a large part, it has been dependent on the cooperation of the Member States, particularly their courts. In a relatively short space of time the courts of Member States, despite their different constitutional rules and traditions, have adapted to the principle of supremacy of EC law where it is found to be directly effective. Their application of directives, particularly their indirect application, remains uncertain. Their reaction to *Francovich,* as refined in *Brasserie du Pecheur* (cases C-46 & 48/93) has been positive. Credit for national courts' acceptance of the principle of supremacy of EC law must go to the ECJ, which has supplied persuasive reasons for doing so. However, equal credit must go to the courts of Member States, which have contrived to embrace the principle of primacy of Community law while at the same time insisting that ultimate political and judicial control remains within the Member States. As *Fragd, Brunner* and *Carlsen* v *Rasmussen* indicate, the courts of Member States, particularly their supreme courts, will be vigilant, and use all the means at their disposal, to ensure that the EC institutions do not exceed their powers or transgress fundamental constitutional rights, particularly in the new post-Maastricht climate, with its emphasis on subsidiarity. As Kumm suggests, *'they need to keep a handle on the emergency brake'*; but they would disapply a Community act or a ruling from the ECJ only where that act or that ruling was manifestly and gravely erroneous. So far they have stopped short of outright defiance, thereby avoiding the unthinkable, a claim for damages against the State in respect of judicial breaches of Community law, as could in theory be brought following the ECJ's ruling in *Brasserie de Pecheur.*

5 Principles of direct applicability and direct effects: State liability under *Francovich*

5.1 Introduction

It has already been seen that EC 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 *ECJ* has developed three inter related 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 these three doctrines, as well as identifying difficulties in the jurisprudence. One particular area in which difficulties arise is that of ensuring the enforceability of directives.

5.2 Doctrine of direct effects

5.2.1 Direct applicability

As was noted in chapter 3, 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 *H.P. Bulmer Ltd* v *J. Bollinger 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? As far as the UK is concerned the European Communities Act, s. 2(1), provides that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

This section thus provides for the direct application of Community law but offers no guidance as to which provisions of EC law are to be directly effective. The EC Treaty merely provides in Article 249 (ex 189) that regulations (but only regulations) are 'directly applicable'.

Since, as has been suggested, direct applicability is a necessary pre-condition 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 (ex 177) EC 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

5.2.3.1 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 (ex 177), 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) EC 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 the then Article 12 (now 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 (ex 169) and 227 (ex 170) (see chapter 27) at the suit of the Commission or Member States. Advocate-General Roemer suggested that Article 25 (ex 12) was too complex to be enforced by national courts; if such courts were to enforce Article 25 (ex 12) directly there would be no uniformity of application. Despite these persuasive arguments the *ECJ* held that Article 25 (ex 12) was directly effective. The Court held:

. . . 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 defined 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 to 170 [now 226-227] 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.

5.2.3.2 Subsequent developments

It was originally thought that, as the Court suggested in *Van Gend,* only prohibitions such as Article 25 (ex 12) ('standstill' provisions) would qualify for direct effects; this was found in *Alfons Lutticke GmbH* v *Hauptzollamt Saarlous* (case 57/65) not to be so. The article under consideration in this case was Article 95(1) and (3) (now 90); this article contains a prohibition on States introducing discriminatory taxation; Article 95(3) contained a positive 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, 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 (ex 12) 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 Article 119 (now 141 EC) of the EEC Treaty. 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 12 (now 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 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.

As will become evident in the chapters of this book devoted to the substantive law of the Community, 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 (ex 189) 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 consequences for other operators. The ECJ held that, 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. In this, there seems to be the beginning of a divergence between the jurisprudence on regulations and that on directives (see the discussion at 5.6.6).

5.2.5 Directives

5.2.5.1 The problem of the direct effect of directives

A directive is (Article 249 (ex 189) 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 conc1usion reached by the ECJ, which found, in *Grad* v *Finanzamt Traunstein* (case 9/70) that a directive could be directly effective. The c1aimant in *Grad* was a haulage company seeking to challenge a tax levied by the German authorities which the c1aimant c1aimed 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. The decision required States 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 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 c1aim based on a free-standing directive in *Van Duyn* v *Home Office* (case 41/74). Here the c1aimant sought to invoke Artic1e 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 17). Article 3 of Directive 64/221 provides that measures taken on the grounds of public policy must be based exc1usively 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 c1ear the matter could be referred to the ECJ for interpretation under Artic1e 234 (ex 177) 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 implementation 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 harmonisation directives on the labelling of dangerous preparations to defend a criminal charge based on his own labelling practices. These practices, he c1aimed, were not legal 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 Community can ensure that national authorities have kept within the limits of their discretion. Arguably this principle 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 *Officer van Justitie* v *Kolpinguis Nijmegen* (case 80/86». This view gains some support from the case of *Inter-Environment Wallonie ASBL* v *Region 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.

5.2.5.3 Member States' 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* v *Home 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 (ex 189) 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 (ex 189) 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 Article 226 (ex 169) or Article 227 (ex 170). Moreover States are obliged under Article 10 (ex 5) 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?

5.2.5.4 Vertical and horizontal direct effects: a necessary distinction

The reasoning of the EC) 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 Miinster-Innenstadt* (case 8/81) 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 measures 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; 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 *Burrton* v *British Railways Board* (case 19/81) (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 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 76/207. 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) Whether a different retirement age for men and women was in breach of Directive 76/2077?
(b) If so, whether Directive 76/207 could 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 76/207 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 Slate 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 (ex 189), 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 the then Article 189 (now 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, e.g., *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.

5.2.5.5 Vertical direct effects

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 Milan Comune 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?

These issues arose for consideration in *Foster* v *British Gas plc* (case C-188/89). In a claim against the British Gas Corporation in respect of different retirement ages for men and women, based on Equal Treatment Directive 76/207, 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 plc* 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 and 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 Gas plc* [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 plc* v *Doughty* [1992] ICR 538, the 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 (i.e., 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 plc* 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 of England (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 British courts' approach to, and the outcome of the enquiry as 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 plc* 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.

5.2.5.6 Horizontal direct effects

In 1993, in the case of *Dori* v *Recreb Sri* (case C-91/92), 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 (ex 177) rulings see chapter 26).

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 (ex 189) 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 followed in two cases decided in 1996, *El Corte Ingles SA* v *Rivero* (case C-192/94) and *Arcaro* (case C-168/95).

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 & 9/90). *Francovich* was also suggested as providing an alternative remedy in *El Corte Ingles SA* v *Rivero.*

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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, Von Colson* v *Land Nordrhein-Westfalen* (case 14/83) and *Harz* v *Dcutsclle 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 (ex 177) 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 (ex 5) 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 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. Courts in the UK are constrained by the terms of the European Communities Act. It was thought by some commentators that s. 2(1) of this Act, which provides for the direct application of Community law within the UK, only applied to directly effective Community law. If such were the case it would leave little room for the application of the *von Colson* principle. This was the view taken by the House of Lords in *Duke* v *GEC Reliance Ltd* [1988] AC 618. However, special facts obtained in that case. The House of Lords was being asked to construe s. 6(4) of the Sex Discrimination Act 1975 to comply with EC Equal Treatment Directive 76/207, as interpreted in *Marshall.* The Sex Discrimination Act had been amended to comply with the Court's ruling in *Marshall,* but it had not been made retrospective. The claimant's claim for damages, based on unequal treatment (different retirement ages for men and women), was in respect of the period prior to the amendment of the Sex Discrimination Act. The House of Lords clearly felt that it would be most unfair to penalise the defendant, a 'private' party, by interpreting the section against its literal meaning in order to comply with the 'oblique language' of the Directive, *a fortiori* when Parliament had clearly chosen *not* to amend the Act retrospectively.

A similarly constituted House of Lords took a different view in *Litster* v *Forth Dry Dock* & *Engineering Co. Ltd* [1990] 1 AC 546. Here, in a 'private' claim against an employer based on EC Directive 77/187 (safeguarding employees' rights in the event of transfer of undertakings), the House was prepared to interpret a domestic regulation contrary to its prima facie meaning in order to comply with the directive as interpreted by the ECJ in the case of *Bork* (case 101/87). The reason for its so doing was that the domestic regulation in question had been introduced *for the purpose of* complying with the directive.

The House of Lords' approach in *Litster* clearly represented an advance on *Duke* v *GEC Reliance Ltd.* However, it could not ensure that the *von Colson* principle would be applied to give directives an indirect effect where, either deliberately or inadvertently, legislation has not been introduced for the purpose of complying with a directive; nor where the question of whether legislation which has been introduced, either before or after the EC directive, was intended to comply with

community law, is unclear.

In *Finnegan* v *Clowney Youth Training Programme Ltd* [1990] 2 AC 407, in a claim under the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042), on facts very similar to those of *Duke* v *GEC Reliance Ltd,* concerning different retirement ages for men and women, the House of Lords refused to interpret art. 8(4) of the order to comply with Directive 76/207, as interpreted in *Marshalll, even though the order had been made after the ECJ's decision* in *Marshall.* Their lordships' reason for so doing was that the provision in question, an exclusion from the non-discrimination principle for provision 'in relation to death or retirement' was enacted in terms identical to the parallel provision (s. 6(4)) of the Sex Discrimination Act 1975 which had been considered in *Duke* v *GEC Reliance Ltd,* and 'must have been intended to' have the same meaning as in that Act.

5.3.1 The scope of the doctrine: Marleasing

The ECJ considered these matters in *Marleasing SA* v *La Comercial Internacional de Alimentacion 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* hat national courts must *as far as possible* interpret national law in the light of 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 Miret* v *Fondo 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 & 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. In *Webbv EMO Air Cargo (UK)Ltd* [1993] 1 WLR 49, HL, Lord Keith of Kinkel noted that the ECJ in *Marleasing* had required national courts to construe domestic law to accord with the directive 'only if it was possible to do so'. Invoking his own remarks in *Duke* v *GEC Reliance Ltd* [1988] AC 618 he suggested that this would only be possible if it could be done without 'distorting' the meaning of domestic legislation, that is, where a domestic law was 'open to an interpretation consistent with the Directive whether or not it is also open to an interpretation inconsistent with it'. Happily, in its final decision *(Webb* v *EMO Air Cargo Ltd (UK) (No.* 2) 1 WLR 1454 the House found, contrary to its original view (but it is submitted legitimately), that it was able to interpret the relevant sections of the Sex Discrimination Act to accord with the ECJ's ruling on the substance of the claim. 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 p. 478b, ChD). Similarly, In *Re a Rehabilltation Centre* [1992] 2 CMLR 21, in a claim for damages based on Equal Treatment Directive 76/207, against a private party, the German Federal Supreme Labour Court refused to 'construe' certain sections of the German Civil Code to comply with the directive. It held that:

even an interpretation of statutes by reference to conformity with the Constitution reaches its limits when it could come into conflict with the wording and evident intention of the legislature. The position can be no different as regards the interpretation of national law in the light of the wording and purpose of a Directive under Article 189(3) [now 249(3)] EEC.

Although the case was decided before *Marleasing* it is doubtful whether the court would depart from this view, so strongly

stated, to give effect, albeit indirect, to a directive which was not directly effective. Thus the indirect application of EC directives by national courts cannot be guaranteed. This 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'.

However in the case of *Kolpinghuis Nijmegen* (case 80/86) the ECJ had suggested a limitation to the *von Colson* principle which might meet this objection. 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 7] 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 *a fortiori* where the State is seeking to invoke a Directive against an individual to determine or aggravate his criminal responsibility, as was the case in *Arcaro* (case C-168/95, see further below), the *Von Colson* principle will not apply. The decision in *Duke v GEC Reliance Ltd* could be justified on this basis; that of *Finnegan* v *Clowney Youth Training Programme Ltd,* concerning, as it did, an order made after *Marshall,* and capable of interpretation in compliance with *Marshall,* could not. 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. 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 domestic 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 now been acknowledged by the Court in *Wagner Miret* (case C-334/92) and *Arcaro* (case C-168/95).

Arcaro (Case C-168/95) 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'. Although the reference to criminal liability is not new, the 'imposition on an individual of an obligation' 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 confines 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 Gl1IbH* (Case C-456/98), para. 31-35).

In *Oceano Grupo Editorial* v *Rocio Murciano Quintero* (Case C-240/98), 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.

It may therefore be stated that the doctrine of indirect effect continues to be significant. However, there will be circumstances when it will not 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 & 9/90). It may be significant that in *El Corte lngtes SA* v *Rivero* (case C-192/94) 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.*

5.4 Principle of state liability under *Francovich* v *Italy*

5.4.1 The Francovich ruling

The shortcomings of the principles of direct and indirect effects, particularly in the context of enforcement of directives, as outlined above, led the Court to develop a third and separate principle in *Francovich* v *Italy* (cases C-6 & 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 it was required to do under Article 249 (ex 189) and Article 10 (ex 5) of the EC Treaty. The Court had already held, in Article 226 (ex 169) proceedings, that Italy was in breach of its Community obligations in failing to implement the directive *(Commission* v *Italy* (case 22/87)).

With regard 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, how ever, 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 Member States' obligation to implement directives under Article 249 (ex 189) and their general obligation under Article 10 (ex 5) EC to 'take all appropriate measures. . . to ensure fulfilment of' their obligations under Community law; 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 that national courts are obliged to provide effect-ive protection for those rights, as established in *Ammnistrazione delle Finanze dello Stato* v *Simmenthal SpA* (case 106/77) and *Factortame* (case C-213/89), see further chapters 4 and 6). 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.

5.4.2 Extending the principle: Brasserie du Pecheur

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 (ex 215(2) (see chapter 31))? In the case of non-implementation of directives, as in *Francovich* itself, the State's failure is clear; *a fortiori* when established by the Court under Article 226 (ex 169). 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, e.g., the sex discrimination cases such as *Marshall* and *Barber* in chapter 6). Here the case for imposing liability in damages on the State is less convincing. Many of these questions were referred to the Court of Justice for interpretation in *Brasserie de Pecheur SA* v *Germany* and *R* v *Secretary of State for Transport, ex parte Factortame* (cases C-46 &: 48/93). Advocate-General Tesauro suggested, in response to the questions referred, that:

(a) The principle of State liability should not be confined to failure to implement EC directives: it should attach to other failures to comply with Community law, including legislative failures.
(b) A remedy under *Francovich* should be available whether or not there were other means by which Community rights might be enforced, that is, on the principles of direct or indirect effects.
(c) As regards the conditions for liability, apart from the three conditions laid down in *Francovich*, the principles of State liability should be brought into line with the principles governing the Community's non-contractual liability under Article 288(2) (ex 215). A State should only be liable for 'manifest and serious breaches' of Community law. In order for the breach to be 'manifest and serious' the content of the obligation breached must be clear and precise in every respect, or the national authority's interpretation 'manifestly wrong'. If the provision allegedly breached is not in itself clear and precise, the Court's case law must have provided sufficient clarification as regards its meaning and scope in identical or similar situations. If these conditions are fulfilled there is no need to add a further criterion of fault in the subjective sense, requiring actual knowledge or a deliberate breach of EC law.

The Court's decision was broadly in line with the Advocate-General's submissions on most of these issues. It held that the

principle of State liability is applicable to *all* domestic acts and omissions, legislative, executive and judicial, in breach of Community law. In his opinion in *Kobler* v *Allstria* (case C-224/01), Advocate General Leger stated that a judgment by a supreme court which infringed EC-law could give rise to state liability (opinion of 8 April 2003).

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) (ex 215), 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; and
(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).

For liability to arise it is not necessary for the infringement of Community law to have been established by the Court under Article 226 (ex 169) or 234 (ex 177); 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 (ex 189) and 10 (ex 5) 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 (ex 164), 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 in chapters 4 and 6.

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.

5.4.3 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 288(2) (ex 215(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) (ex 215(2) (see chapter 31), 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 plc* (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 (OJ *L297/1,* 1990). 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 arc 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, 'to ensure 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 74/577 on the stunning of animals before slaughter (0) L316/l0, 1974). 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 (ex 169). Although the UK ban was clearly in breach of Article 29 (ex 34) of the EC Treaty, the UK argued that it was justified on the grounds of the protection of health of animals under Article 30 (ex 36) (for further discussion of the substantive issues see chap. 11). 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 plc,* 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 11). 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 31).

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) in a situation in which Germany's failure, 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. In neither *Hedley Lomas* nor *Dillenkofer* did the Court attempt to apply the multiple test laid down in para. S6 of *Brasserie du Pecheur.* However, in *Denkavit International BV* v *Bundesamt fur Finanzen* (cases C-283, 291 & 292/94), which were cases involving claims for damages resulting from the faulty implementation of a directive decided shortly after *Dillenkofer,* the Court reverted to its approach in *BT.* Following 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-150/99) commented on the origins of the phrase 'sufficiently serious breach'. At paragraph 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, a clear-cut breach of Community law would be sufficiently serious.

The ECJ's approach to the assessment of the matter of a 'sufficiently serious' breach remains inconsistent. In *Brinkman Tabakfabriken GmH* v *Skatteministeriet* (case C-319/96), it followed the more moderate line it had taken in *BT* (case C-392/93), and found that the Danish authorities' failure properly to implement Directive 79/30 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 was in fact decided by the Court on the basis 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.

Rechberger and Greindle v *Austria* (case C-140/97) concerned a claim for damages for losses suffered as a result of Austria's alleged imperfect implementation of Directive 90/314, designed to protect consumers in the event of travel organisers' insolvency. The ECJ found that the implementing measures, which failed to provide the level of protection required under the directive, and which set the period for the commencement of claims at a date some months later than the time-limit for implementation of the directive, were 'manifestly' incompatible with the directive, and sufficiently serious to attract liability.

In both *Brinkman* and *Rechberger*, the assessment as to whether the breach was sufficiently serious depended primarily on the clarity and precision of the provisions breached. However, in *Norbrook Laboratories Ltd* v *Minister of Agriculture, Fisheries and Food* (case C-127/9S), 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'. It was left to the national court to assess whether the conditions for the award of damages based on *Francovich* were fulfilled.

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 (ex 56) and Article 70 of the Act of Accession, the Court, having examined these provisions for their compatibility with Community law, and finding some (but not all) of the laws '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'. Thus the national court was required to decide whether Austria's breach of Community law was sufficiently serious. The ECJ took a similar approach in *Haim* v *KLV* (case C-424/97). However, it seems that the *ex parte BT* approach will not be followed where the ECJ has previously 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 *Institut national d'assurances sociales pour travailleurs independents (Inasti)* (Case C-118/00). In that case, it can no longer be said that the Member State has a legislative choice.

If national courts are to assess this crucial question of the seriousness of the breach, as was required in *Klaus Konle* (and as, in principle, given the nature of the ECJ's jurisdiction under Article 234 (ex 177), they should, see chapter 26), it is essential that these guidelines are clear. The multiple criteria laid down in para. S6 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* v *KLV* alongside the multiple test of paragraph 56. This case also made it clear that legally independent public bodies may also be liable under *Francovich.*

In *Sweden* v *Stockholm Lindopark AB* (Case C-150/99), the Court again 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, DJ L 376/1, 1991). 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. In contrast, in *Schmidberger* v *Austria* (Case C-112/00), Advocate-General Jacobs suggested that a breach of Article 28 in that case would not be sufficiently serious. Austria had authorised a 28-hour demonstration which blocked the main transit route across the Alps. Although technically a breach of Article 28, the Advocate-General thought that this had to be balanced against the freedom of expression of the demonstrators (see further chapter 7). 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 Article 28, declined to deal with this question (see judgment of 12 June 2003).

5.4.4 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-112/00), 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 Article 28 (see chapter 10). 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. As noted above, the ECJ did not address the question of State liability in its judgment.

5.4.5 Brasserie du Pecheur in the English courts

In 1997 the ECJ's ruling in *Brasserie du Pecheur* and *R* v *Secretary of State for Transport, ex parte 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 of State for Transport, ex parte 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, ex parte Factortame Ltd* (case C-213/89), noted in chapter 4); and (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 J 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 J 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, and
(b) whether the breach 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 J in the English High Court, in assessing the seriousness of the Department of Social Security's breach of Article 7(1) of 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.

5.4.6 Impact of the principle of State liability under Francovich

It remains to be seen whether, or the extent to which, the principle of State liability will have an impact on the principles of direct and indirect effects, particularly in the context of enforcement of directives. If it is necessary to prove in all cases the existence of a sufficiently serious breach - and this is a difficult test to satisfy - there will still be a need for individuals to rely on these principles. Until now, liability under the principles of both direct and indirect effect has been strict (this was

confirmed in *Draehmpaehl* v *Urania Immobilienservice OHG* (case *C-180/95*)); 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 (e.g., *Duke* v *GEC Reliance Ltd; Rolls-Royce plc* 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* could lead to a more rigorous application of the criteria for direct effects, especially following the denial by the Court of the direct effects of the relevant provisions of Directive 80/987 in *Francovich* itself. This latter fact was noted by, and appeared to be influential on, Blackburne J in *Griffin* v *South West Water Services Ltd* [1995] IRLR 15. In *Three Rivers District Council* v *Bank of England (No. 3)* [1996] 3 All ER 558, a case involving a claim for damages based on the defendants' breach of statutory duty in failing to supervise the credit institutions in the BCCI affair, Clarke J in the English High Court construed the EC directive which the defendants had allegedly breached, and on which the claimants based their claim, as *not intended to give rise to rights far individuals* and therefore not directly effective. Does this represent an attempt on the part of the Court to limit the direct effect of directives? lf so, is it legitimate?

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 Munster-Innenstadt* (case 8/81), in confirming and clarifying the principle of direct effects 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'.* Drawing on this statement in *Verholen* (cases C-87-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.

As noted in 5.2.5.7, individuals seeking to base their claim on a breach of a directive by the State will now need to establish that the breach interfered with a right or interest intended to be conferred on them. However, where this right or interest can be proved, the problem of adverse horizontal effects in cases involving third party situations, such as *CIA Security International SA* v *Signalson SA, Panagis Parfitis* and *Ruiz Bernaldez,* remains. Where individuals suffer damage in these situations, their only possible remedy lies in a claim under *Francovich.*

It is worthy of note that in *Three Rivers DC* v *Bank of England* (No. 3) (noted above), Clarke J invoked the same reasoning as he applied to the question of direct effects to the applicants' claim for damages under *Francovich.* He found that the directive allegedly breached contained no right intended to benefit the claimant. If they had no sufficient right or interest for direct effects, they had no claim under *Francovich,* because ‘here too it is necessary to establish the same right or interest' (at para. 66). The cases from the ECJ considered above suggest that it too may be moving towards the same approach, thereby achieving some sort of consistency between the rules relating to individual standing in claims based on the principle of direct effect and claims under *Francovich.* This approach was also adopted by Beldam J in the English Court of Appeal in *Bowden* v *South West Water Services [1999]* 3 CMLR 180. In examining the Environmental Directive 79/903, he found it to confer rights on the claimant for the purposes of a claim for damages based on direct effects and under *Francovich.*

5.5 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 (ex 169) and Member States under Article 227 (ex 170) (see further chapter 27). This control has now been reinforced by the rights which may be claimed by individuals under the principles of indirect effect and *Francovich.* 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 EC) 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 (but see the Conseil d'Etat's decision in *Campagnie Generale des Eaux* [1994] 2 CMLR 373, noted in chapter 4), 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. Its decision in

Francovich (cases C-6 & 9/90), that the relevant articles of Directive 80/987 were not sufficiently clear and precise for direct effects, appeared significant. While it is likely that it wished in that case to establish a separate principle of State liability to remedy the inadequacies of the principles of direct and (particularly) indirect effects, it is possible that *Francovich* was seen by the Court as providing a more legitimate remedy. In *Camitata di Caardinamenta per la Difesa della Cava* v *Regiane Lambardia* (case C-236/92), the Court found that Article 4 of Directive 75/442 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, ex parte 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 (Na* 2) (case C-271/91) it had upheld a claim for compensation for discriminatory treatment based on an identically worded Article 6 of Equal Treatment Directive 76/207. The Court's attempts to distinguish between the two claims ('amounts payable by way of social security are not compensatory') were unconvincing. In *El Carte Ingles SA* v *Rivero* (case C-192/94) it found the then Article 129a (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 upon 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), discussed in chapter 17).
Thus, a directive may be denied direct effects on the grounds that:

(a) the right or interest claimed in the Directive is not sufficiently clear, precise and unconditional; or
(b) the individual seeking to invoke the Directive did not have a direct interest in the provisions invoked *(Verholen,* cases C-87-9/90); or
(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-91/92), the EC), 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* and in *Arcaro* (case C-168/9S). In *Wagner Miret* (case C-334/92) the EC) 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.*

However, as subsequent 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. It will still be necessary to rely on the principles of direct and even indirect effects. In doubtful situations all possible remedies should be pursued.

7. General principles of law

7.1 Introduction

7.1.1 *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 ECJ has been the introduction of general principles of law into the corpus of EC 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 EC law in a number of ways. First, they may be invoked as an aid to interpretation: EC 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, 241, 234 and 236 (ex 173, 184, 177 and 179) EC), or to challenge inaction on the part of these institutions (under Articles 232 or 236 (ex 175 and 179) EC). 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 &: 202/85); *Wachauf* v *Germany* (case 5/88); *Lageder* v *Amministrazione delle Finanze dello Stato* (case C-31/91); but *cf. R* v *Ministry of Agriculture, Fisheries and Food, ex parte Bostock* (case C-2/93). This would follow in the UK from the incorporation into domestic law, by s. 2(1) of the European Communities Act 1972, of *'All* such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties'. The degree to which general principles of law affect actions by Member States will be discussed in more detail later in this chapter. Lastly, general principles of law may be invoked to support a claim for damages against the Community (under Article 288(2) (ex 215(2)). Where' damages are claimed as a result of an illegal act on the part of the Community Institutions, it is necessary (but not sufficient) to prove that a sufficiently serious breach of a *superior rule of law for the protection of the individual* has occurred *(Aktien-Zuckerfabrlk Schoppenstedt v Council* (case 5/71)) (see chapter 31).

7.1.2 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) EC) or nationality (Article 12 (ex 6) EC). General principles of law constitute the 'unwritten' law of the Community. This area has become a steadily evolving aspect of Community law. This chapter examines the general historical development of the Court's jurisprudence to explain how general principles have been received into Community 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 Community law. Such a discussion is beyond the scope of this book and readers should refer to the specialist texts which are now available.

7.2 Rationale for the introduction of general principles of law

The legal basis for the incorporation of general principles into community law is slim, resting precariously on three Articles. Article 230 (ex 173) 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) (ex 215(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 (ex 164), 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 Community 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 GmbH* (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 States of the Community 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 have expanded to such a degree that some check on the exercise of the institutions' powers is needed. Furthermore, the expansion of Community 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 EC 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 Community institutions and implementing measures taken by Member States on grounds of infringement of general principles.

7.3 Development of general principles

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7.3.2 Role of International human rights treaties

Following *Internationale Handelsgesellschaft* the scope for human rights protection was further extended in the case of *J. 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 fights 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 EC 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 (Joint Declaration, OJ No. CI03, 27.4.77, p. 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).)

Thus, it seems that any provision in the ECHR may be invoked, provided it is done in the context of a matter of EC law. In *Kaur v Lord Advocate* ([1980] 3 CMLR 79), Court of Session of Scotland, 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 EC 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-112/98), the 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 7.6.7, below). 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 e.g., *Roquette Freres* (Case C-94/00)).

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 76/207 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.

We saw at the beginning of this chapter that one of the central reasons for the introduction of fundamental rights into EC law was the resistance of some of the constitutional courts to giving effect to Community rules which conflicted with national constitutional principles. The EC]'s tactics to incorporate these principles and stave off rebellion were undoubtedly successful as exemplified by the *Wunsche* case ([1987] 3 CMLR 225), in which the German constitutional court resiled from its position in *Internationale Handelsgesellschaft* ([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 which, 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 which is inconsistent with the German constitution (see, e.g., *Brunner v European Union Treaty* [1994] 1 CMLR 57; *M GmbH v Bundesregierung* (case 2 B&Q 3/89) [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 11) (case C-122/95) and *T. Port*

GmbH v *Hauptzollamt HamburgJonas* (cases C-364 & 365/95) - discussed further in chapter 4). Although the supremacy of Community law *vis-à-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 Community ruling on these matters from the EC]. 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.

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 (e.g., *Orkem* (case 374/87) and *Funke* v *France* (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 has been one of the issues under discussion by the Convention on the Future of Europe preparing for the 2004 IGC. Treaty amendment, however, requires the unanimous agreement of all Member States, which is sometimes difficult to obtain. Nonetheless, recent Treaty amendments have seen a progressive raising of the profile of human rights protection within the Community.

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)). Additionally, Article 6(1) (ex F(1)) 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 re-numbered as Article 46 TEU), the ECJ's jurisdiction as regards the general Union provisions was excluded. The ToA amended Article 46 (ex L) TEU to give the ECJ express competence in respect of Article 6(2) (ex F(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.

The ToA also inserted a new Article 7 into the TEU. This provided that where there has been a persistent and serious breach of a principle mentioned in new Article 6(1) TEU, the Council may suspend certain of the rights of the offending Member State, including its voting rights. Were this provision to be 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 Community legislation by which it would be bound, even in sensitive areas where otherwise it could have vetoed legislation. On this viewpoint, 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. Nonetheless, it does detract from the effectiveness of the procedures.

7.4 Relationship between the EC/EU and the ECHR in the protection of human rights

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 (ECHR 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 I, 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 law-making 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 (e.g., 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 e.g. *Societe Guerin Automobiles* Application No. 51717/99, inadmissible on other grounds; *DSR Senator Lines*, Application No. 56672/00, pending before Grand Chamber.) 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 Member States.

The implication that the Court of Human Rights will step in only where there is no effective means of securing human rights protection within an existing international body (i.e., 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*, ECHR 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.

7.5 The EU Charter of Fundamental Rights

7.5.1 Background

We have already seen that there has been a debate about whether the EC/EU should accede to the European Convention on Human Rights. In 1999, the Cologne European Council set up a Convention, under the chairmanship of Roman Herzog, 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. However, the next IGC, which is scheduled for 2004, will consider whether the Charter should have full legal effect and if it should be made part of the treaties. However, the ECJ has already referred to the EUCFR in a number of judgments by way of reference in confirming that the European legal order recognises particular fundamental rights (see e.g., *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-I77 /01 para. 42; see further chapter 28 and *Mannesmannrohren-Werke AG* v *Commission* (Case T-1l2/98) paragraphs 15 and 76). However, there has been no judgment to date in which the EC) has *based* its judgment on the EUCFR.

7.5.2 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 others* (Case C-292/97), para. 37). Outside this context, Member States are, of course, obliged to respect fundamental rights under the ECHR (see 7.4., 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.

7.5.3 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 and
(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) choose an occupation and a right to engage in work;
(vii) 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; and
(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;
(9) social security and social assistance;
(h) health care;
(i) access to services of general economic interest;
(j) environmental protection; and
(k) consumer protection.

Chapter V provides for citizenship rights (see also chapter 18), 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) freedom of movement and residence; and
(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; and
(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.

7.5.4 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 2004

IGC decides to incorporate the EUCFR into the treaties (or the proposed 'constitution'), 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 (see chapter 22). 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 Community law.

7.5.5 Conclusion

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. It may be necessary to reconsider whether the EU should accede to the ECHR and thereby acknowledge the supremacy of the Convention and the European Court of Human Rights.

The general principles of Community 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.

7.6 Rules of administrative justice

7.6.1 Proportionality

This was the principle invoked in *Internationale Handelsgesellschaft mbH* (case 11/70). It is now enshrined in Article 5 (ex 3b) EC (see 7.8 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 (e.g., *Werner A. Bock KG* v *Commission* (case *62/70); Bela-Muhle Josef Bergmann KG* v *Grows-Farm GmbH* & *Co. KG* (case 114/76). It was applied in *R* v *Intervention Board for Agricultural Produce, ex parte E.D.* & *F. Man (Sugar) Ltd* (case 181/84) in the context of a claim by E.D. & F. Man (Sugar) Ltd before the English Divisional Court, on facts very similar to *Internationale Handelsgesellschaft.* Here the claimant, E.D. & 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))). 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 10 and 11 (goods), 15-18 (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 (ex 48) 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) (ex 48(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 18.)

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 30 (new 28 (ex 30) EC) and not 'justified' on public health grounds under Article 36 (new 30 (ex 36). 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/Ochsenfurt AG* v *Hauptzollamt Mannheim* (case C-161/96) the ECJ confirmed the distinction between primary and secondary (or administrative) obligations made in *R* v *Intervention 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 of Agriculture, 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.

7.6.2 Legal certainty

The principle of legal certainty was invoked by the Court of Justice 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.

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 (Re Banana Regime)* (case C-280/93), the EC} 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 Topfer* & *Co. GmbH* v *Commission* (case 112/ 77) (see chapter 28). 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 31.) In *Opel Austria GmbH* v *Council* (case T-1l5/4) 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 *Administracion 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 en Accijnzen* (case C-31O/95).

This principle also has relevance in the context of national courts' obligation to interpret domestic law to comply with Community law when it is not directly effective (the *Von Colson* principle, see chapter 5). In *Pretore di Sala* v *Persons Unknown* (case 14/86) in a reference from the Salo 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 *Officier 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 where EC law is not directly effective national courts are not required to interpret domestic law to comply with EC law in violation of these principles.

Problems also arise over the temporal effects of EC} rulings under Article 234 (ex 177). 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) 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 *Ariete SpA* (case 811/79) and *Meridionale Industria Salumi Sri* (cases 66, 127 & 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, 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 24).

The question of the temporal effect of a ruling from the ECJ under Article 234 (ex 177) 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.

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7.6.5 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 freemovement of workers, granted by Article 39 (ex 48) 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 Community 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.

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7.8 Subsidiarity

The principle of subsidiarity in its original philosophical meaning, as expressed by Pope Pius XI (Encyclical letter, 1931), 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

was invoked in the Community context during the 1980s when the Community's competence was about to be extended under the Single European Act. It was incorporated into that Act, in rather different form, in respect of environmental measures, in the then Article 130r (now 174) EC, 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.

As expressed in Article 5 (ex 3b) 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 at least as an aid to the interpretation of Article 5 (ex 3b) EC (see chapter 3).

7.9 General principles applied to national legislation

It has been suggested that general principles of law, incorporated by the EC} as part of Community 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 (ex 12 and 30) EC) or persons (Articles 39 and 49 (ex 48 and 59); and
(c) when the Member State is acting as an agent of the Community in implementing Community law (e.g., *Klensch* v *Secretaire d'Etat a l'Agriculture et a la Viticulture* (cases 201 &: 202/85).

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7.9.2 Derogation from fundamental principles

Most Treaty rules provide for some derogation in order to protect important public interests (e.g., Articles 30 (ex 36) and 39(3) (ex 48(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 principles, 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 (e.g., *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 (ex 59) 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 (ex 30) EC. More recently, in *Schmidberger* (C-112/00), Advocate-General Jacobs argued that the right to freedom of expression and assembly permits a derogation from the free movement of goods (Article 28 (ex 30) 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 agreed with this analysis, and noted 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).
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7.9.4 Scope of Community law

In all three situations listed above, general principles have an impact because the situations fall *within the scope* of 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 Fran~aises* (cases 60 & 61/84). The problem lies in defining the boundary between Community law and purely domestic law. 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 gone this far and seems, in recent cases, to be taking a more cautious approach than hitherto. This can be illustrated by contrasting two cases which arose out of similar circumstances: *Wachauf v Germany* (case 5/88) and *R* v *Ministry of Agriculture, 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 5/88) 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. 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. With the incorporation of the ECHR into British law, these principles have become part of domestic law, but their impact will depend on their interpretation by the British courts.

7.10 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 (ex F) 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 *J. 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 (e.g., *O'Dwyer* v *Council* (cases T-466, 469, 473-4 & 477 /93). The pursuit of these objectives can result in some hard decisions (e.g., *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 Community standpoint to be essential, individual rights must yield to the common good. In *J. 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'.

A similar example is provided in *Walter Rau Lebensmittelwerke* v *Commission* (case 279,280,285 & 286/84). Here the claimants were a group of margarine producers. They were seeking damages for losses suffered as a result of the Commission's 'Christmas butter' policy. This was an attempt to reduce the 'butter mountain' (surplus stocks acquired as a result of the Community's system of intervention buying under the common agricultural policy (CAP) by selling butter stocks at greatly reduced prices to certain groups of the population over the Christmas period. As a basis for their claim the claimants alleged that the regulations implementing the Christmas butter policy were in breach of the principles of equality and proportionality. Since margarine and butter are clearly in competition with each other it might have been imagined that, following the first isoglucose cases (e.g., *Royal Scholten-Honig Holdings Ltd* v *Intervention Board for Agricultural Produce* (cases 103 & 145/77), they had a good chance of success. But they failed. The Court held that the measure must be assessed with regard to the general objectives of the organisation of the butter market:

. . . taking into consideration the objective differences which characterised the legal mechanisms and the economic conditions of the market concerned, the producers of milk and butter on the one hand and the producers of oils and fats and margarine manufacturers on the other, are not in comparable situations.

The measures were no more than was necessary to achieve the desired objective.

This latitude shown to the Community 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 Community 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 Community, it may evolve into a legally binding instrument which reaches beyond fundamental human rights to include employment and social rights. If it is to assume legal status, the accession of the Community to the ECHR will have to be considered again to prevent the development of conflicting jurisprudence on fundamental rights between the ECJ and the European Court of Human Rights.

From: S. Weatherill, 'Cases & Materials on EC Law' (5th ed, London: Blackstone, 2000) pp 103-116, 128-136

(C) THE DIRECT EFFECT OF DIRECTIVES

(i) 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, because 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. 40. 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. Yet in *Van Duyn* (Case 41/74), at p. 93 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:

[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 1-7411. In advance of the deadline, Member States are obliged 'to refrain . . . from adopting measures liable seriously to compromise the result prescribed' by the Directive. 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:

E Mancini, 'The Making of a Constitution for Europe'
(1989) 26 CMLR 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 *Van 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 *Conseil 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.] 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 noncompliance, 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 have 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 a string of important Directives, often inadequately implemented at national level (see further Chapter 15).

(ii) 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] ECR 723; [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 7 6/207, 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 Colson 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 not 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 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

[47] That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

[48] With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized 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.

[491 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 *ratione 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 7 6/207 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 [1993] 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 2 6/62) (pp. 91-93). 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 4 1/74) (p. 93 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. 103 above) and in *Marshall* (Case 152/84) (p. 107 above), the Court appears to switch its stance away from the idea of 'useful effect' to '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. 37 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. 106 above), but the decision deserves further attention.

Minister of the Interior* v *Cohn Bendit

[1980] 1 CMLR 543
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 réglementaires)* '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 *Bundesfinanzhof* (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 be 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 I-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.

Paola Faccini Dori* v *Recreb Srl (Case C—91192)
[1994] ECR 1—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 harmonises 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 *Marshall.* 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 *Finanzamt Munster-Innenstadt* [1982] ECR 53).

[24] The effect of extending that case-law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

[25] It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

Note
Paragraph 48 of the ruling in *Marshall* expresses comparable sentiments to those expressed in para. 24 of the *Dori* ruling, but the emphasis in the latter on the limits of Community competence (specifically under Article 189 EC) is noticeably firmer. Although the Court did not consider that Ms Dori was wholly barred from relying on the Directive (see p. 122 below on 'indirect' effect and p. 130 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 Inglés* v *Cristina Blasquez Rivero* [1996] ECR 1-1281; Case C-97/96 *Verband Deutscher Daihatsu Handler eV v Daihatsu Deutschland GmbH* [1997] ECR 1-6843. (For discussion of an unusual sub-set of cases, see K. Lackhoff and H. Nyssens, 'Direct Effect of Directives in Triangular Situations' (1998) 23 EL Rev 397.) The reader is invited to consider whether, just as the Conseil d'Etat's ruling in *Cohn Bendit* (p. 111 above) may have prompted the European Court's caution in *Marshall,* so too the *Bundesverfassungsgericht's* anxiety about Treaty amendment in the guise of judicial interpretation (p. 15 above) may have prompted the European Court in *Dori,* less than a year later, 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.

(iii) *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 *Dori* (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 I-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.

[61 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 Münster-Innenstadt*, [1982] ECR 53 at paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

[17] The Court further held in its judgment of 26 February 1986 in Case 152/84 *(Marshall,* at paragraph 49) that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[181 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 8/8 1, *Becker*, cited above, and of 22 February 1990 in Case C-221/88 *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.

(G) THE COURT'S NOTES FOR GUIDANCE

In 1996 the Court issued guidelines on the use of what was then Article 177 EC, now Article 234 EC post-Amsterdam (p. 29 above). These serve as a useful distillation of the principles of law and the practice explained in the course of this chapter.

Note for guidance on references by national courts for preliminary rulings issued by the European Court of Justice

The development of the Community legal order is largely the result of cooperation between the Court of Justice of the European Communities and national courts and tribunals through the preliminary ruling procedure under Article 177 of the EC Treaty and the corresponding provisions of the ECSC and Euratom Treaties.[1]
In order to make this cooperation more effective, and so enable the Court of Justice better to meet the requirements of national courts by providing helpful answers to preliminary questions, this Note for Guidance is addressed to all interested parties, in particular to all national courts and tribunals.
It must be emphasised that the Note is for guidance only and has no binding or interpretative effect in relation to the provisions governing the preliminary ruling procedure. It merely contains practical information which, in the light of experience in applying the preliminary ruling procedure, may help to prevent the kind of difficulties which the Court has sometimes encountered.

1. Any court or tribunal of a Member State may ask the Court of Justice to interpret a rule of Community law, whether contained in the Treaties or in acts of secondary law, if it considers that this is necessary for it to give judgment in a case pending before it.
Courts or tribunals against whose decisions there is no judicial remedy under national law must refer questions of interpretation arising before them to the Court of Justice, unless the Court has already ruled on the point or unless the correct application of the rule of Community law is obvious.[2]

2. The Court of Justice has jurisdiction to rule on the validity of acts of the Community institutions. National courts or tribunals may reject a plea challenging the validity of such an act. But where a national court (even one whose decision is still subject to appeal) intends to question the validity of a Community act, it must refer that question to the Court of Justice.[3]
Where, however, a national court or tribunal has serious doubts about the validity of a Community act on which a national measure is based, it may, in exceptional cases, temporarily suspend application of the latter measure or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers that the Community act is not valid.[4]

3. Questions referred for a preliminary ruling must be limited to the interpretation or validity of a provision of Community law, since the Court of Justice does not have jurisdiction to interpret national law or assess its validity. It is for the referring court or tribunal to apply the relevant rule of Community law in the specific case pending before it.

4. The order of the national court or tribunal referring a question to the Court of Justice for a preliminary ruling may be in any form allowed by national procedural law. Reference of a question or questions to the Court of Justice generally involves stay of the national proceedings until the Court has given its ruling, but the decision to stay proceedings is one which it is for the natibnal court alone to take in accordance with its own national law.

5. The order for reference containing the question or questions referred to the Court will have to be translated by the Court's translators into the other official languages of the Community. Questions concerning the interpretation or validity of Community law are frequently of general interest and the Member States and Community institutions are entitled to submit observations. It is therefore desirable that the reference should be drafted as clearly and precisely as possible.

6. The order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court, and those to whom it must be notified (the Member States, the Commission and in certain cases the Council and the European Parliament), a clear understanding of the factual and legal context of the main proceedings.[5] In particular, it should include:

— a statement of the facts which are essential to a full understanding of the legal significance of the main proceedings;
— an exposition of the national law which may be applicable;
— a statement of the reasons which have prompted the national court to refer the question or questions to the Court of Justice; and
— where appropriate, a summary of the arguments of the parties.

The aim should be to put the Court of Justice in a position to give the national court an answer which will be of assistance to it.
The order for reference should also be accompanied by copies of any documents needed for a proper

[1] A preliminary ruling procedure is also provided for by protocols to several conventions concluded by the Member States, in particular the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[2] Judgment in Case 283/81 *CILFITv Ministry of Health* [1982] ECR 3415.
[3] Judgment in Case *314/85 Foto-Frost* v *Hauptzollamt Lubeck-Ost* [1987] ECR 4199.
[4] Judgments in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Suderdithrnarschen and Zuckerfabrik Soest* [1991] ECR 1-415 and in Case C-465/93 *Atlanta Fruchthandelsgcsselschaft* [1995] ECR 1-3761.
[5] Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR 1-393

understanding of the case, especially the text of the applicable national provisions. However, as the case-file or documents annexed to the order for reference are not always translated in full into the other official languages of the Community, the national court should ensure that the order for reference itself includes all the relevant information.

7. A national court or tribunal may refer a question to the Court of Justice as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment. It must be stressed, however, that it is not for the Court of Justice to decide issues of fact or to resolve disputes as to the interpretation or application of rules of national law. It is therefore desirable that a decision to refer should not be taken until the national proceedings have reached a stage where the national court is able to define, if only as a working hypothesis, the factual and legal context of the question; on any view, the administration of justice is likely to be best served if the reference is not made until both sides have been heard.[6]

8. The order for reference and the relevant documents should be sent by the national court directly to the Court of Justice, by registered post, addressed to:

The Registry
Court of Justice of the European Communities
L-2925 Luxembourg
Telephone (352) 43031

The Court Registry will remain in contact with the national court until judgment is given, and will send copies of the various documents (written observations, Report for the Hearing, Opinion of the Advocate General). The Court will also send its judgment to the national court. The Court would appreciate being informed about the application of its judgment in the national proceedings and being sent a copy of the national court's final decision.
9. Proceedings for a preliminary ruling before the Court of Justice are free of charge. The Court does not rule on costs.

[6] Jugdment on Case 70/77 *Simmenthal v Administrazione delle Finanze dello Statto* [1978] ECR 1453.

26 The preliminary rulings procedure

26.1 Introduction

The preliminary rulings procedure is important for a number of reasons relating not only to the substantive development of EC law, but also to the relationship between EC law and national 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 (ex 177) EC. Cases such as *Van Gend en Loos* (case 26/62), *Costa* v *ENEL* (case 6/64) and *Defrenne* v *Sabena (No.* 2) (case 43/75), 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* (case 11/70); *Stauder* v *City of Ulm* (case 29/69) and *Royal Scholten-Honig (Holdings) Ltd* (cases 103 & 145/77) (see chapter 7), 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, 9/90) in preliminary ruling proceedings. In all areas of EC 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 CFI has taken over responsibility for judicial review actions (chapters 28 and 29) and actions for damages (chapter 31). Nonetheless, the preliminary rulings procedure plays a central part in the development and enforcement of EC law.

If the procedure has been valuable from the point of view of the Community, as a means of developing and clarifying the law, it has been equally valuable to the individual, since it has provided him or her with a means of access to the ECJ when other, direct avenues have been closed. In this way the individual has been able to indirectly to challenge action by Member States (e.g., *Van Gend en Loos* – import charge levied in breach of the then Article 12 (now 25) or by Community institutions (e.g., *Royal Scholten-Honig* - EC Regulation invalid for breach of principle of equality) before the ECJ and obtain an appropriate remedy from his national court (see chapter 6).

The importance of the Article 234 procedure, both in absolute terms and relative to other remedies, 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 co-operative relationship between the ECJ and the national courts has been a key factor in the success of the preliminary rulings procedure.

Although the preliminary rulings procedure has assumed such an importance in the ways outlined above, its primary and original purpose was to ensure, by means of authoritative rulings on the interpretation and validity of EC law, the correct and uniform application of EC law by the courts of Member States. In assessing its effectiveness, and the attitudes of national courts and the ECJ towards its use, this function, as well as its importance both for individuals and for the Community, should be borne in mind.

26.2 The procedure

Article 234 EC provides that:
The Court of Justice shall have Jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if It considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Since the TEU, Article 234 is not the only preliminary reference mechanism. Maastricht introduced the possibility for preliminary references within the JHA pillar by virtue of Article 35 TEU. With Amsterdam and the introduction of the new title into the EC Treaty came a separate preliminary rulings mechanism In Article 68 EC for questions relating to that title. The majority of this chapter is devoted to Article 234; Articles 68 EC and 36 TEV will be discussed briefly below at 26.9.

26.2.1 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. (See further 25.6.7.) It is an example of shared jurisdiction, depending for its success on mutual cooperation. As Advocate-General Lagrange said in *De Gells ell Uitdenbogerd* v *Robert Bosch GmbH* (case 13/61), the first case to reach the ECJ on an application under Article 234:

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.

To assess how this collaboration operates, in principle and in practice, it is necessary to examine the procedure from the point of view of: (a) the ECJ, and (b) national courts.

26.3 **Jurisdiction of the Court of Justice**

The jurisdiction of the ECJ is twofold. It has jurisdiction to give preliminary rulings concerning:
(a) interpretation, and
(b) validity.

26.3.1 Interpretation

In its interpretative role, the Court may rule on the interpretation of the Treaty, of acts of the institutions, and of statutes of bodies established by an act of the Council, where those statutes so provide. Its jurisdiction with regard to interpretation is thus very wide. 'Interpretation of the Treaty' includes the EC Treaty and all treaties amending or supplementing it. It did not, however, pursuant to original Article L TEU, have jurisdiction to interpret Articles A-F, J and K TEU (save for Article K, 3(2)(c)(3) *(Grau Gomis* (case C-167/94), effectively excluding a number of the common provisions of the TEU, together with the JHA and CFSP pil1ars. As noted in chapter 2, the ToA amended the original Article L, now 46 TEU, to give the ECJ jurisdiction in relation to the JHA Pillar of the TEU (subject to the requirement in new Article 35 TEU that Member States must, by declaration, accept the ECJ's jurisdiction) and the TEU provisions on closer cooperation (now Articles 43-45 TEU). These changes will be discussed further below.

'Acts of the institutions' is a broad concept. It covers not only binding acts in the form of regulations, directives and decisions, but even non-binding acts such as recommendations and opinions, since they may be relevant to the interpretation of domestic implementing measures. On the same reasoning the Court has held that an act need not be directly effective to be subject to interpretation under Article 234 *(Mazzalai* (case 111/75), nor need the party concerned have relied on the act before his national court: that court can raise it before the ECJ of its own motion *(Verholen* (cases 87, 88 & 89/90). The Court has also given rulings on the interpretation of international treaties entered into by the Community, on the basis that these constitute 'acts of the institutions' (see *R.* & *V. Haegeman Sprl* v *Belgium* (case 181/73). This includes 'mixed agreements', such as the WTO agreement, where interpretation relates to obligations undertaken by the Community (*Hermes* (case C-53/96), noted (1999) 36 CML Rev 663). However, the Court has held in the context of a claim based on the Statute of the European School, that it has no jurisdiction to rule on agreements which, although linked with the Community and to the functioning of its institutions, have been set up by agreement *between Member States* and not on the basis of the Treaty or EC secondary legislation *(Hurd* v *lones* (case 44/84) - headmaster of European School unable to invoke Statute against HM Tax Inspectorate).

26.3.2 Validity

Here the Court's jurisdiction is confined to acts of the institutions. It has been suggested, by extension of the reasoning in *R.* & *V. Haegeman Sprl* v *Belgian State,* that 'acts of the institutions' would include international agreements entered into by the Community. Here, however, the ruling would be binding only on the Community members; it would be ineffective against third-party signatories. The grounds for invalidity are the same as in an action for annulment under Article 230 (ex 173) (see chapter 28).

As with interpretation, Article 46 (ex L) TEU excludes the majority of the TEU from the ECJ's jurisdiction, Although the ECJ has not had to consider the limits to its jurisdiction under Article 46 TEU in respect of references for a preliminary ruling, it has had to consider these matters in the context of a judicial review action *(Commission* v *Council (Airport transit visas)* (case C-170/96). The case concerned the appropriate Treaty base for airport transit visas, the Council arguing that the then Article K.3 TEU (which has been significantly amended by the ToA) was the appropriate base, the Commission (and the Parliament) considering that the then Article l00c EC (repealed by the ToA), which dealt with visas, was more appropriate. The Council claimed that the ECJ had no jurisdiction to hear the case as the then Article 46 (ex L) TEU, in its original form, applied to exclude the ECJ's jurisdiction. The ECJ emphasised that that provision was subject to Article 47 (ex M) TEU, which provides that nothing in the TEU shall affect the EC Treaty, which the ECJ has interpreted to include the *acquis* (i.e., the entire body of EC law). The ECJ from this basis argued that it had the duty to review measures made under TEU provisions to ensure that they did not erode Community law. Presumably, it would take a similar approach were a similar question to arise under an Article 234 EC reference on validity. This boundary would seem now be of less significance as the ToA, in amending Article 46 TEV, permitted the ECJ jurisdiction to interpret and review the validity of certain acts and agreements made under the JHA pillar, should the Member States agree thereto (see Article 35 TEV).

One important question in relation to the ECJ's jurisdiction under Article 234 and correspondingly the national courts' right to refer was identified in *T. Port GmbH* & *Co. KG* v *Bundesanstadt fur Landwirtschaft und Ernahrung* (case C-68/95). There the ECJ held that the preliminary ruling procedure did not give the Member States' courts the power to refer questions concerning an EC institution's alleged failure to act. Any such claim would have to be brought under Article 232 (ex 175) EC.

26.4 Scope of the Court's jurisdiction

26.4.1 Matters of Community law

The Court is only empowered to give rulings on matters of Community law. 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 (e.g., *Van Gend en Loos* (case *26/62)j Costa* v *ENEL* (case 6/64), 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 upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the abovementioned 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.

26.4.2 Interpretation, not application

The Court maintains a similarly strict 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 e.g., *Stoke-on-Trent City Council* v *B&Q* (case *C-169/91)j R* v *Her Majesty's Treasury, ex parte British Telecommunications plc* (case C-392/93); *Arsenal Football Club* v *Reed* (case C-206/01).

26.4.3 Non-interference

The 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).

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 (e.g., *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 & 71/80); approved in *Pretore di Salo* (case 14/86). 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 (e.g., *Pretore di Genova* v *Banchero* (case C-157/92); *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 C-316/93) or where the facts are clear, for example, because of a previous reference *(Crispoltoni* v *Fattoria Autonoma Tabacchi* (cases C-133, 300 & 362/92). 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 22.) The Court has issued 'Guidelines to National Courts Making References' (1996), consolidating its rulings in these cases. The circumstances in which the ECJ will decline jurisdiction are discussed further below.

26.4.4 Limitations in practice

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 (e.g., *R* v *Secretary of State for Transport, ex parte Factortame Ltd* (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 onto 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 (e.g., *Barber* (case *262/88); Marshall (No.* 2) (case C-271/91). 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 (see Rasmussen noted in chapter 2).

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 recent 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(1)(a) of that directive to prevent that use. It is immaterial that, in the context of that 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 of jurisdiction, rather than an overt defiance, the assertion by the national court of the limits of the ECJ's jurisdiction is itself a form of rebellion. Certainly there now appears to be a discrepancy between English law and that of the European Community. 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 finding on the facts and thereby remove this discrepancy. For the time being, however, it seems that English High Court has taken a stand, albeit in an isolated case, on the limits of the ECJ's jurisdiction. It remains to be seen whether the English Court of Appeal will overturn this judgment.

26.4.5 Restrictions on the type of reference

Although the ECJ has in a few, albeit increasing number of cases refused its jurisdiction, it has generally, despite a constantly growing workload, encouraged national courts to refer. We have already seen 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 (at 25.4.3; see e.g., *Telemarsicabruzzo SpA* v *Circostel* (cases C-320, 321, 322/90). Another example of an exception to this open door policy in the early years occurred 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 in both a first and a second application in the same case. 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. In a somewhat peremptory judgment the Court declared that the function of Article 234 (ex 177) 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 proceedings were to some extent artificial, in that the duty should ideally have been challenged at source, by the party from whom it was levied, 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 *ADV ORGA AG* (case C-83/91). Here the Court refused to answer a lengthy and complex series of

question 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 one of the parties' (a legal academic's) theories. The Court held that it had no jurisdiction to give advisory opinions on hypothetical questions submitted by national courts.

It has been suggested that political considerations and national (wine) 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 recent case of *Bacardi-Martini SAS* v *Newcastle United Football Company Ltd* (case C-318/00). 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 compliance 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 (ex 59) 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.

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. This issue came before the Court in *Dzodzi* v *Belgium* (cases C-297/88 and C 197/89). 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 *Leur Bloem* (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)).

The lines of reasoning established in *Foglia* and *Meilicke* on the one hand and *Dzodzi, Leur Bloem* and *Kleinwort Benson* on the other have been followed by others in which the ECJ declined jurisdiction either on the basis that the questions referred were not relevant to the dispute before the national court (e.g., *Dias* v *Director da Alfandega do Porto* (case C-343/90); *Corsica Ferries Italia Sri* v *Corpo dei Piloti del Porto di Genova* (case C-18/93) or because the matter was purely internal, although recent case law seems to have conflated these two points (see e.g., *Banque Internationale pour L'Afrique occidentale SA (BIAO)* v *Finanzamt fur Grossuntemehmen in Hamburg* (case C-306/99), para. 89). Another potential limitation on the ECJ's willingness to accept references can be seen in *Monin 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) (ex 177(2). This case concerned a company which was in the process of being wound up. It 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.

It is submitted that these cases should not be construed as constituting a restrictive approach on the part of the ECJ towards applications under Article 234 (ex 177). Admittedly, the ECJ has declined jurisdiction in a number of cases, but, looking at the facts of these cases, and of *Telemarsicabruzzo SpA* v *Circostel* (cases C320-2/90) and similar cases, it can be argued that rejection was justified in the circumstances. This point is reinforced if we contrast the above cases with *Lec1ercSiplec* v *TF1 Publicite SA* (case C-412/93), which, in effect, concerned a challenge to French law. The Commission suggested that, in the light of the *Foglia* cases, there was no dispute before the national court because the parties were agreed about the outcome and that, therefore, the ECJ did not have jurisdiction to answer the question. The ECJ disagreed, holding that the parties' agreement did not render the dispute less real and that the question needed an answer because, without it, the referring court could not deal with the dispute before it. Furthermore, in *LeurBloem* (case C-28/9S) the ECJ despite the opinion of the Advocate-General to the contrary, distinguished *Kleinwort Benson* and returned to its more generous approach in *Dzodzi.* Whether the ECJ should, in the light of increasing workload, the more established nature of the Community legal order and imminent further enlargement, impose greater controls on the cases referred to it is discussed further below.

26.4.6 Challenges to validity: relationship with Article 230

More worrying is the Court's decision, in March 1994, in *TWD Textilwerke GmbH* v *Germany* (case C-188/92). Here 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 (ex 173), 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 (ex 177). 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 28).

In a slightly more recent judgment, the ECJ mitigated some of the effects of its judgment in *TWD.* In *R* v *Intervention Board for Agriculture, ex parte Accrington Beef Co. Ltd* (case C-241/9S), the parties had not sought to bring an action for annulment within the time limits set out in the then Article 230 (ex 173). 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. In addition it may be noted that while a national court is able to interpret Community law without recourse to the Court under Article 234, it has no power to declare a Community law invalid *(Zuckerfabrik Suderdithmarschen AG* v *Hauptzollamt Itzehoe* (cases C-143/88, C-92/89)).

26.5 'Court or tribunal'

Jurisdiction to refer to the ECJ under Article 234 (ex 177) is conferred on 'any court or tribunal'. With rare exceptions (e.g., *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. 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:

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26.6.3 When will a decision be necessary?

The ECJ was asked to consider this matter in *CILFIT Sri* (case 283/81). The reference was from the Italian Supreme Court, the Cassazione, and concerned national courts' mandatory jurisdiction under what was then Article 177(3) (now 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). 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.

There would be no need to refer if:

(a) the question of EC law is irrelevant; or
(b) the provision has already been interpreted by the ECJ, even though the questions at issue are not strictly identical; or
(c) the correct application is so obvious as to leave no scope for reasonable doubt. This matter must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise, and the risk of divergences in judicial decisions within the Community.

These guidelines may be compared with Lord Denning's in *HP. Bulmer Ltd* v *J. Bollinger SA* ([1974] Ch 401), Court of Appeal. He suggested that a decision would only be 'necessary' if it was 'conclusive' to the judgment. Even then it would not be necessary if:

(a) the ECJ had already given judgment on the question, or
(b) 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'. Lord Denning's guidelines were applied by Taylor J in *R* v *Inner London Education Authority, ex parte Hinde* ([1985] 1 CMLR 716) and he decided not to refer (see also *Brown* v *Rentokil Ltd* [1995] 2 CMLR 85, Scottish Court of Session). The issues at stake in the former case have proved to be both important and difficult, and were only finally resolved by the ECJ in the cases of *Brown* (case 197/86) and *Lair* (case 39/86) (for full discussion of the issues see chapter 15).

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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 & 71/80). This would avoid precipitate referrals, 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 *H.P. Bulmer Ltd* v *Bollinger 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, e.g., interim matter, where important financial

interests are concerned, it might be necessary to refer *before* all the facts were found.
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26.6.7 National courts' ability to refer of their own motion

Another possible limitation on the ability of the national courts to refer questions to the ECJ concerns the degree to which national courts are free to refer an issue of Community law of their own motion. In *R* v *Secretary of Slate for the Environment, ex parte Greenpeace Ltd* ([1994] 4 All ER 352), the English High Court took the approach that since the parties did not request a preliminary rulings reference, then, despite the fact that national rules expressly permit the court to refer of its own motion, the court should not make a reference. It is submitted that this approach is unduly restrictive. It ignores the underlying purpose of Article 234 (ex 177), which is to ensure correct and uniform interpretation of EC law throughout the Community, and it undermines the effectiveness of the Community law remedies (see chapter 6). Although the ECJ has not discussed this point directly, it has itself assumed jurisdiction to rule on questions not referred *(OTO SpA* v *Ministero delle Finanze* (case C-130/92)) and it has more recently touched on these questions indirectly in *Peterbroeck Van Campenhout* & *Cie SCS* v *Belgium* (case C-312/93) and *van Schijndel* v *Stichting Pensioenfonds voor Fysiotherapellten* (cases C-430 & 431/93). Unlike the British example cited above, the last two cases involved applications to amend pleadings to include a new point of Community law. In *Peterbroeck* the ECJ held that because the claimant had, in the circumstances, not had the opportunity of amending its pleadings before the time limit for so doing had expired, the effectiveness of Community law would preclude the application of national procedural rules preventing the court from considering an issue of Community law. In *Van Schijndel* the applicants sought to introduce the Community law point on appeal. The ECJ held that if one could include new points of national law on appeal, one could not treat Community rules less favourably, but the national court was otherwise not obliged to raise the issue of its own motion in civil cases where the Community law point was beyond the existing ambit of the dispute. In civil litigation, both parties to the dispute have the opportunity to define the issues relevant to their dispute, and to allow the introduction of new issues might endanger legal certainty and procedural fairness. Thus one may conclude that Community law does not *prevent* national courts from raising issues of their own motion and, where it is desirable to ensure effective protection of individuals' rights, it should be done, provided that both parties have an opportunity to put forward their cases.

26.7 Effect of a ruling

Clearly a ruling from the ECJ under Article 234 is binding in the individual case although the English High Court has taken a narrow view of what this obligation means. In the *Arsenal* v *Reed* case, Laddie J., held that national courts were not, and could not be, bound regarding the ECJ's findings as to the facts, as the ECJ's jurisdiction was limited to interpreting community law. This reasoning enabled Laddie J to come to a decision on the facts diametrically opposed to that suggested, on the circumstances of the case, by the ECJ.

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' and, in the UK, under the European Communities Act 1972, s. 3(2), to take judicial notice of any decision of the ECJ, it 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).

The question of the temporal effect of a ruling, whether it should take effect retroactively *('ex tunc'*, i.e., from the moment of entry into force of the provision subject to the ruling) or only from the date of judgment *('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 (i.e., employers) who had been led to believe they were acting within the law.

However, in *Ariete SpA* (case 811/79) and *Salumi Sri* (cases 66, 127 & 128/79) 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 of its coming into force'* (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. 'It is only exceptionally', the Court said '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'.

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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 dangl'1'I HIS spirit of non-compliance.

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26.11 Conclusions

The success of the preliminary rulings procedure depends on a fruitful collaboration between the ECJ (and, in future, 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 (e.g., *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 et Fils* (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 be seen also as a waste of the limited judicial resources at the Community 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 (ex 177). The initial question, of whether a decision on a question of EC law is 'necessary', has become crucial. As we have seen *CILFIT Sri* (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. These courts would do well to follow the lead provided by the German Constitutional Court. They will be more likely to do so if they are confident that the ECJ will not abuse its power in these proceedings by interpreting EC law too freely and failing to pay sufficient regard to 'important considerations of legal certainty'.

The significance of the ECJ's rulings and the Article 234 (ex 177) procedure have been well recognised by courts, commentators and Member States, as was evidenced by the suggestion made in the run-up to the 1996 IGC that the original jurisdiction of the ECJ should be curtailed. As noted above, the ECJ's jurisdiction was not in the end limited. The restrictions placed on its new jurisdiction, however, indicate not only that these areas are sensitive, but that the Member States wished to limit the opportunities for the ECJ to deliver one of its more far-reaching judgments in these areas. One point seems certain: the creation of a new approach to references to the ECJ indicates that both the Court and the procedure have been a victim of their own success, and the occasional excess.

CHAPTER 10
Introduction to the Free Movement of Persons

A. Introduction

The right for persons to move freely from one state to another is a distinguishing feature of a common market. Yet although Article 3(1)(c) EC provided that the Community aspired to 'the abolition, as between Member States of obstacles to the free movement of ... persons',[7] the reality was rather different. The substantive provisions of the Treaty did not in fact provide a general right of free movement for all people: to qualify the individual had to be both a national of a Member State (with nationality being a matter for national—not Community—law)[8] and be engaged in an economic activity as a worker (Articles 39–42), a self-employed person (Articles 43–48) or as a provider or receiver of services (Articles 49–55). Those falling within the scope of these 'fundamental'[9] freedoms enjoy the right to free movement subject to derogations on the grounds of public policy, public security and public health, as well as a more tailored exception for employment in the public service which can be invoked in the absence of harmonisation.

Underpinning all three Treaty provisions (Articles 39, 43 and 49) is the principle of non-discirminaiton on the grounds of nationality: that the migrant must enjoy the same treatment as nationals in a comparable situation. However, as we sqaw in chapter one, the principle fo equal treatment gives Member States the autonomy to determine the rules applicable in their territory. In more redcent case law the Court has shown signs of moving beyond the discrimination model and, returning to the language of Article 3(1)(c), focused instead on removing obstacles or barriers to free movement. Such an approach poses a greater threat to Member State's legislative autonomy.

The reason for including Articles 39–55 in the Treaty was that these so-called 'factors of production' (workers, the self-employed and service providers) should be able to move freely from regions where jobs are hard to find to those needing extra workers. This would lead to an equalisation in the price of labour across the EU and, theoretically at least, greater prosperity for all. In fact, few people took advantage of the opportunity to move freely. This can be explained by various reasons: social (the wish not to move without their families), economic (the fear of losing entitlements to social benefits, especially pensions, if they moved out of their home states), cultural (the familiarity and enjoyment of the way of life in their own states) and linguistic (individuals often lacked necessary language skills). The EU has gone some way towards overcoming these obstacles: through secondary legislation adopted in the late 1960s/early 1970s (which has been broadly construed by the Court) and through various programmes like 'Socrates', facilitating the mobility of students. In 1990 the Community adopted three specific Directives conferring a general right of movement and residence on the retired, students and on those with independent means, provided that they have sufficient resources and medical insurance.[10]

Together these measures demonstrate both a gradual erosion of the link between economic activity and free movement and a shift in perception from viewing migrants as merely factors of production to seeing them as individuals with rights against the host state. At Maastricht this change in approach culminated in the recognition of the status 'citizen of the Union' for every national of a Member State with specific rights and duties attached (Articles 17–22). Recent judgments of the Court suggest that EU citizens—whether economically active or not—now enjoy a more general, free-standing right to move and reside freely in the Union subject to the limitations and conditions laid down in the Treaty and secondary legislation. This important development is considered in chapter 15.

The free movement of persons has always been an area of greater sensitivity than the free movement of goods. People raise security and welfare implications in a way that goods do not. This helps to explain why the original Treaty gave rights only to the economically active: they brought skills to the host state's economy and could support themselves financially. It also helps to explain why there is no equivalent of the CCP for persons. Fearing the pressure generated by an open border policy on national job markets and welfare systems, governments of the Member States refused to allow individuals holding the nationality of a non-Member State (known as 'third country nationals' (TCNs)) who have entered the EU to benefit from the rights of free movement laid down in Articles 39–55 EC. However, the conclusion of the Schengen Agreement in 1985 marked a move among at least some of the Member States towards a common policy in respect of immigration of TCNs and asylum seekers, a subject which is outlined in chapter 16. Further pressure has been put on the EU with the conclusion of GATS which opens up market access to trade in services. Yet the principal focus of this book is on the rights to free movement enjoyed by EU nationals, which form the subject of chapters 11–15. In this chapter we shall examine the principles common to Articles 39, 43 and 49.

B. Common Principles

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[7] See also Case 118/75 Watson and Belmann [1978] ECR 1185, paras. 16–17.

[8] See generally C. Greenwood, 'Nationality and the Limits of Free Movement of Persons in Community Law' (1987) 7 YEL 185, esp. 187–93; A. Evans, 'Nationality Law and the Free Movement of Persons in the EEC: with Special Reference to the British Nationality Act 1981' (1982) 2 YEL 173.

[9] See e.g. Case 222/86 Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others [1987] ECR 4097, paras. 8 and 14 (Art. 39).

[10] Council Dirs.: 90/364/EEC ([1990] OJ L180/26) on the rights of residence for persons of sufficient means (the 'playboy Directive'), 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity ([1990] OJ L180/28) and 90/366/EEC ([1990] OJ L180/30) on the rights of residence for students (now Dir.93/96 ([1993] OJ L317/59).

1. Introduction

Although Articles 39, 43 and 49 are 'mutually exclusive',[11] the Court in Royer[12] said that common principles applied both as regards the entry into and residence in the territory of the Member States and as regards the application of the prohibition of all discrimination on the grounds of nationality.[13] A unitary approach to Articles 39, 43 and 49 can be justified on the ground that at their core all three Treaty provisions concern nationals leaving one state to engage in an economic activity in another. On the other hand, there are differences between the provisions. When viewed from the perspective of the regulator, Article 43 on establishment has more in common with Article 39 on workers than with Article 49 on services. In the case of both Articles 39 and 43 the individual leaves State A to work in State B and it is the host state (State B) which has primary control over the individual's activities. This can be contrasted with services where the service provider continues to be based in State A while providing services in State B. This time the principal regulator is the home state (State A). In this respect services has more in common with the free movement of goods:[14] both services and goods are primarily subject to home state control with residual host state control. If so, this suggests that a different regulatory approach is required for workers and establishment on the one hand and goods and services on the other.

Despite these differences, the Court does appear to be moving towards applying common rules to Articles 39, 43 and 49,[15] albeit nuanced to reflect the different interests at stake. The common principles are outlined below; the differences are highlighted in the relevant chapters on workers (chapter 11), freedom of establishment (chapter 12) and services (chapter 13).

2. Refusal of Entry/Deportation

Refusal of entry to a state[16] or deportation from a state[17] are the most draconian steps a host state can take against migrants. Because, under international law states cannot deport their own nationals, deporation orders can be made only against migrants.[18] Such orders are the equivalent in the field of persons to quantitative restrictions for goods. They therefore breach the Treaty and can be saved only by reference to one of the express derogations (see figure 10.1).[19]

3. Non-Discrimination on the Grounds of Nationality

3.1 Introduction

Once an individual has been admitted to the territory of a Member States he or she cannot be discriminated against on the grounds of nationality in respect of access to, or exercise of, a particular trade or profession. The principle of non-discrimination on the grounds of nationality is central to the operation of the Treaty provisions on the free movement of persons. It is expressed in general terms by Article 12 EC:

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.[20]

In Data-Delecta[21] the Court said that the principle of non-discrimination required 'perfect equality of treatment in Member States of persons in a situation governed by Community law and nationals of the Member States in question'. Therefore, the Court found that a Swedish law requiring a foreign national to lodge security for costs, when no such security could be demanded from Swedish nationals, contravened Article 12.[22]

The consequence of the non-discrimination approach is that a migrant will enjoy equal treatment with nationals of the host state. This means that if a migrant from State A moves to State B which has lower social standards the migrant will enjoy only those lower standards. As the Court said in Perfili,[23] in prohibiting discrimination on the grounds of nationality, Articles 12, 43 and 49 were not concerned with disparities in treatment arising from differences between the laws in the Member States so long as the

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[11] Case C-55/94 Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para. 20, although cf Case C-70/95 Sodemare SA et al. v. Regione Lombarda [1997] ECR I-3395.

[12] Case 48/75 Procureur du Roi v. Royer [1976] ECR 497, para. 23.

[13] Case C-107/94 Asscher v. Staatssecretaris van Financiën [1996] ECR I-3089, para. 29 (concerning Arts. 39 and 43).

[14] For an early example see Case 155/73 Guiseppe Sacchi [1974] ECR 409, paras. 6–7 (transmission of a TV signal is a service but trade in sound recordings, films, apparatus concern goods).

[15] See e.g. Case C-19/92 Kraus v. Land Baden Württemberg [1993] ECR I-1663, para. 32, where the Court said that 'national measures liable to hinder or render less attractive the exercise of fundamental freedoms guaranteed by the Treaty' breach the relevant Treaty provisions (emphasis added). V. Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 CMLRev. 43, 70. For criticism of the 'globalised approach', see L. Daniele, 'Non-discriminatory Restrictions on the Free Movement of Persons' (1997) 22 ELRev. 191 and for criticism of the use of a model which is not based on non-discrimination, see G.Davies, Nationality Discrimination in the European Internal Market (The Hague, Kluwer, 2003).

[16] Case 41/74 van Duyn v. Home Office [1974] ECR 1337, paras. 22–3.

[17] Case 30/77 R v. Bouchereau [1977] ECR 1999; Case C-348/96 Criminal Proceedings against Calfa [1999] ECR I-11.

[18] Case C-348/96 Calfa [1999] ECR I-11, para. 20.

[19] Case 2/74 van Duyn [1974] ECR 6311, paras. 22–3; Case C-114/97 Commission v. Spain [1998] ECR I-6717, para. 42.

[20] In Case C-193/94 Criminal Proceedings against Skanavi [1996] ECR I-929 the Court said that Art. 12 EC applied independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition on discrimination.

[21] Case C-43/95 Data-Delecta v. MSL Dynamics [1996] ECR I-4661. See also Case C-122/96 Saldanha and MTS Securities Corporation v. Hiross Holding AG [1998] ECR I-5325; and Case C-411/98 Angelo Ferlini v. Centre hospitalier de Luxembourg [2000] ECR I-8081.

[22] Para.22.

[23] Case C-177/94 Criminal Proceedings against Gianfranco Perfili, civil party: Lloyd's of London [1996] ECR I-161.

laws affected all persons subject to them in accordance with objective criteria and without regard to nationality. The Court will intervene only if the rule is discriminatory and even then will require only that the discrimination be removed without interfering with the substance of the rule.[24]

The case law of the Court has elaborated on the principle of non-discrimination, recognising that the Treaty prohibits both direct discrimination and, unless objectively justified, indirect discrimination. More recently it has also recognised that non-discriminatory measures which hinder access to the market breach the Treaty unless objectively justified. We shall now consider each type of discrimination.[25]

3.2 Direct and Indirect Discrimination; Distinctly and Indistinctly Applicable Measures

Direct (or overt) discrimination means different and usually less favourable treatment on the grounds of nationality. This can be seen in Reyners[26] where Belgian law permitted only nationals to become lawyers. Such measures (sometimes referred to as 'distinctly applicable') breach Articles 39, 43 or 49. They may be lawful but only if they are caught by one of the express derogations provided by the Treaty (see figure 10.1).

The Treaty also prohibits indirect (or covert) discrimination. This involves the elimination of requirements which, while apparently nationality-neutral on their face (same burden in law), have a greater impact on nationals of other Member States (different burden in fact).[27] As the Court explained in Sotgiu,[28] the Treaty prohibits all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result as direct discrimination. In the fields of establishment and services, commentators tend to use the language of 'indistinctly applicable' to describe indirectly discriminatory measures.[29] However, in the field of the workers the Court uses the language of indirect discrimination. The Court has found national rules imposing requirements concerning residence[30] and language[31] to be indirectly discriminatory: nationals almost always satisfy the condition and so any requirement as to language or residence has a particular effect on migrants.

Requirements as to holding particular qualifications[32] or licences[33] are also considered to be indirectly discriminatory but in these cases because they create a double burden on migrants who have to satisfy two sets of rules (those of the home and host state) while nationals need to satisfy only one (those of the home state). While this double burden theory helps to explain the services case law where services, like goods, are subject to two regulators (those of the home and host state),[34] it is less satisfactory in respect of workers and establishment where in practice only one regulator (the host state) controls the migrant.

Nevertheless, the Court appears to gloss over this problem and the conceptual difficulty that double burden rules (eg qualifications and licences) are indirectly discriminatory but indirectly discriminatory measures (eg language and residence requirements) do not necessarily impose a double burden, by giving a broad definition to the phrase indirect discrimination. For example, in O'Flynn the Court said:[35]

18. [C]onditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers ... or the great majority of those affected are migrant workers, ... where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers ... or where there is a risk that they may operate to the particular detriment of migrant workers ...

19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by national law.

From this we can see that, unless objectively justified and proportionate to its aim (see fig.10.1), the provision of national law must be regarded as indirectly discriminatory and contrary to Community law if it is intrinsically liable to affect migrant workers more than national workers and if there is a risk that it will place migrant workers at a particular disadvantage.[36] The Court added that it was not necessary to find that the measure did in practice affect a substantially higher proportion of migrant workers. It

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[24] See Maduro's decentralised model considered in ch. 1.

[25] See generally C. Hilson, 'Discrimination in Community Free Movement' (1999) 24 ELRev. 445; C. Barnard, 'Fitting the Remaining Pieces into the Goods and Services Jigsaw' (2001) 26 ELRev. 35.

[26] Case 2/74 Reyners v. Belgian State [1974] ECR 631.

[27] See e.g. Case C-175/88 Biehl v. Admininstration des Contributions [1990] ECR I-1779, paras. 13–14; Case C-111/91 Commission v. Luxembourg [1993] ECR I-817, para. 9.

[28] Case 152/73 Sotgiu v. Deutsche Bundespost [1974] ECR 153.

[29] This reflects the Court's formulation of measures which are 'applicable without distinction to all'. See e.g. Case 143/87 Stanton v. INASTI [1988] ECR 3877, para. 9.

[30] Case C-350/96 Clean Car Autoservice GmbH v. Landeshauptmann von Wien [1998] ECR I-2521; Case C-388/01 Commission v. Italy (museums) [2003] ECR I-000, para. 14. Cf the case law on services, esp. Case C-288/89 Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media [1991] ECR I-4007, paras. 10–11 considered in ch. 13.

[31] Case 379/87 Groener v. Minister for Education [1989] ECR 3967.

[32] Case C-340/89 Vlassopoulou v. Ministerium für Justiz [1991] ECR I-2357.

[33] Case 292/86 Gullung v. Conseil de l'ordre des avocats [1988] ECR 111.

[34] Cf. Case C-70/95 Sodemare SA et al. v. Regione Lombarda [1997] ECR I-3395 and Case C-405/98 Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP) [2001] ECR I-1795.

[35] Case C-237/94 O'Flynn v. Adjudication Officer [1996] ECR I-2617, paras. 18–19.

[36] Para. 20. The fact that nationals may also be affected by the rule does not prevent the rule form being indirectly discriminatory, provided that the majority of those affected were non-nationals: Case C-281/98 Roman Angonese v. Cassa di Risparmio di Bolzano [2000] ECR I-4139, para.41.

was sufficient that it was liable to have such an effect.[37]

The broad formulation of indirect discrimination in O'Flynn, focusing on the potential effect on free movement means that, as with the case law on goods following Dassonville,[38] more national rules are liable to be caught by the Treaty and so more emphasis is placed on justification. It also means that there is a grey area between national rules which have the potential to interfere with free movement and those which are considered to apply to a wholly internal situation to which Community law does not apply. This is considered further below.

3.3 Non-discriminatory Measures

While the earlier cases concerned measures which either directly or indirectly discriminated against non-nationals, a number of more recent cases have concerned measures which are not discriminatory in the true sense of the term (no discrimination either in law or in fact) but still hinder access to the market. Should these also be caught by the Treaty? It will be recalled that the Court said in Keck[39] that non-discriminatory certain selling arrangements did not breach Article 28. This prompted various Member States to argue in the workers case, Bosman,[40] considered in Box 1 below, and in the services cases, Schindler[41] and Alpine Investments[42] that the Keck principle should apply equally to persons.

Alpine Investments concerned a Dutch law prohibiting cold-calling to sell financial services both within and outside the Netherlands. The Court said that the Dutch law was 'general and non-discriminatory and neither its object nor effect [was] to put the national market at an advantage over providers of services from other Member States'.[43] The British and Dutch governments argued that since this case was analogous to a non-discriminatory measure governing selling arrangements the principles of Keck should apply with the result that the rule should not breach Article 49. The Court disagreed, arguing that the rule deprived operators of a 'rapid and direct technique for marketing and for contacting potential clients in other Member States'.[44] For this reason the law was not analogous to the selling arrangements in Keck[45] because Keck concerned a situation where there was no hindrance of trade between Member States. By contrast, in Alpine the prohibition on cold-calling 'directly affect[ed] access to the markets in services in the other Member States and [was] thus capable of hindering intra-Community trade in services'.[46] Having established a breach, the Court then went on to consider the question of justification. It accepted that the prohibition on cold-calling could be justified by the need to safeguard the reputation of the Dutch financial markets[47] and that the measures taken were proportionate.

Does Alpine mean then that the Keck ruling does not apply to persons?[48] The answer is probably no. If Keck is removed from its specific goods context (certain selling arrangements, a non-legal category developed to curb the excesses of Dassonville) and considered instead in terms of its purpose (the removal of matters which do not substantially affect inter-state trade from the purview of Article 28), then it is possible to see how Keck-like principles will apply equally to the free movement of persons. Graf[49] provided a pointer in that direction. Graf, a German national, worked for his Austrian employer for four years when he terminated his contract in order to take up employment in Germany. Under Austrian law, a worker who has worked for the same employer for more than three years was entitled to unfair dismissal compensation provided that he was dismissed (and did not just resign). Graf argued that this rule contravened Article 39 because the effect of the Austrian rule was that he lost the chance of being dismissed and so was unable to claim compensation.

The Court disagreed: the Austrian law was genuinely non-discriminatory and did not preclude or deter a worker from ending his contract of employment in order to take a job with another employer. The Court explained that the entitlement to unfair dismissal compensation was not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event (being unfairly dismissed). In paragraph 25 the Court concluded that 'Such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder free movement for workers'. Thus paragraph 25 of Graf says that the event was too remote to be considered liable to affect free movement.[50] Putting it another way, measures which do not substantially hinder access to the market fall outside Article 39[51] (see fig 10.1) in much the same way as certain selling arrangements cases (Punto Casa,[52] Boermans[53] (see fig 7.3) which do not substantially hinder access to

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37 Para. 21. Cf. the position in respect of Art. 90 where actual disparate impact must be shown: Case 132/88 Commission v. Greece [1990] ECR I-1567.

38 Case 8/74 Procureur du Roi v. Benoit and Gustave Dassonville [1974] ECR 837.

39 Joined Cases C-267–8/91 Keck and Mithouard [1993] ECR I-6097, considered in chap.10.

40 Case C-415/93 Union Royale Belge de Société de Football Association v. Bosman [1995] ECR I-4921. See generally S. Weatherill (1996) 33 CMLRev. 991.

41 Case C-275/92 Customs and Excise v. Schindler [1994] ECR I-1039.

42 Case C-384/93 Alpine Investments BV v. Minister van Financiën [1995] ECR I-1141.

43 Para. 35. CHECK

44 Para. 28.

45 Para. 36.

46 Para. 38, emphasis added. See also the Golden Shares cases: See, e.g. Case C-463/00 Commission v. Spain [2003] ECR I-000 and Case C-98/01 Commission v. UK [2003] ECR I-000 on the free movement of capital considered in ch. 17.

47 Para.43.

48 See D. O'Keeffe and A. Barasso, 'Four Freedoms, One Market and National Competence. In Search of a Dividing Line', in D. O'Keeffe (ed.), Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley (Hague, Kluwer, 2000).

49 Case C-190/98 Graf v. Filzmozer Maschinenbau GmbH [2000] ECR I-493.

50 Cf. Case C-159/90 SPUC v. Grogan [1991] ECR I-4685, para. 24; Case C-168/91 Konstantinidis [1993] ECR I-1191, para.15.

51 For a discussion of the debate about the merits of the legal test based on remoteness and the economic test based on 'substantial' hindrance of market access, see ch.7. In the field of persons it is more legitimate to use the language of 'substantial' hindrance because the Court has never ruled out a de minimis approach. For criticisms, see G.Davies xx.

52 Case C-69 & 258/93 Punto Casa SpA v. Sindaco de Commune di Capena and others [1994] ECR I-2355.

the market fall outside Article 28.

So rules which merely structure the market[54] on which goods are sold and persons carry out their economic activities do not breach the Treaty. These are the rules of the game to which all of those conducting their activities in the state must comply. This can also be seen in Deliège.[55] A successful Belgian judo player complained that the Belgian judo federation's failure to select her for various international competitions breached Article 49. The Court disagreed, saying that, although selection rules inevitably had the effect of limiting the number of participants in a tournament, such a limitation was inherent in the conduct of an international high-level sports event. It continued that such rules could not in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 49.[56]

Graf, Deliège, Punto Casa and Boermans all concern non-discriminatory rules which did not substantially hinder access to the market and so did not breach the Treaty provision.[57] These rules stand at one stage removed from the individual good or person performing the economic activity. In the interests of subsidiarity, they are the very type of measures which should fall outside the purview of EC law. But, if the non-discriminatory measures had substantially hindered access to the market, then they would have breached the Treaty provision and would have had to be justified (see fig 10.1). This was the outcome in Alpine and Bosman, an outcome that may well apply to Article 28 if an equivalent case (eg a ban on the sale of a particular good) arose in the field of free movement of goods (see figure 7.3).[58]

3.4 Defences and Justifications

As we have seen, directly discriminatory measures breach the Treaty provision but defences can be found in one of the express derogations.[59] By contrast, indirectly discriminatory and non-discriminatory measures which hinder free movement also breach Articles 39, 43 and 49 unless the national measures can be objectively justified or saved by one of the express derogations (see fig. 10.1). In O'Flynn we saw that the language of objective justification was used in the context of free movement of workers. In respect of establishment and services, the Court tends to talk about justifications in the 'public' or 'general interest' or 'imperative requirements'.[60] It is likely that the term 'objective justification' is the functional equivalent to the 'public interest' requirements[61] which in turn are the persons' equivalent to mandatory requirements in goods. In all cases the Court recognises that there existed certain national interests which are worthy of protection[62] and should take precedence over the free movement provisions.

In Gebhard,[63] a case on establishment, the Court elaborated on the requirements necessary for the national rule to satisfy the test of justification. It said that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty had to fulfil four conditions in order not to breach Article 43. They had to:

- be applied in a non-discriminatory manner;
- be justified by imperative requirements in the general interest;
- be suitable for securing the attainment of the objective which they pursued; and
- not go beyond what was necessary to attain it.[64]

The operative part of the judgment in Gebhard makes clear that this test also applies to the free movement of workers and services.[65]

In the services case, Gouda,[66] the Court listed the public interest grounds which it had already recognised:

- professional rules intended to protect the recipients of a service;[67]

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53 Joined Cases C-401 & 402/92 Criminal proceedings against Tankstation 't Heukske vof and Boermans [1994] ECR I-2199.

54 I am grateful to Michael Dougan for this phrase. See also the use of the solidarity principle in Case C-70/95 Sodemare [1997] ECR I-3395, para. 29, to justify excluding the application of Art. 43 to national rules which allow only non-profit making private operators to participate in running old people's homes.

55 Joined Cases C-51/96 & C-191/97 Deliège v. Ligue Francophone de Judo et Disciplines Associés [2000] ECR I-2549, para. 64. See e.g. an English decision in the same vein: Wilander v. Tobin [1997] 2 CMLR 346.

56 Para. 64.

57 See also the views of Robert Walker LJ in the Court of Appeal of England and Wales in Professional Contractors' Group v. Commissioners of Inland Revenue [2002] 1 CMLR 46, para. 69.

58 See further ch. 7.

59 Case C-288/89 Stichting Collectieve Antennvoorziening Gouda v. Comissariaat voor de Media [1991] ECR I-4007.

60 Case C-76/90 Säger v. Dennemeyer & Co. Ltd [1991] ECR I-4221, para. 15; Case C-55/94 Gebhard [1996] ECR I-4165, para. 37.

61 This view is supported by the workers case, Case C-195/98 Österreicher Gewerkschaftsbund v. Republik Österreich [2000] ECR I-10497, para. 45, where the Court reported that the Austrian government contends that the restrictions on free movement are 'justified by overriding reasons of public interest and are consistent with the principle of proportionality', and the services case, Case C-118/96 Safir v. Skattemyndigheten i Dalarnas Län [1998] ECR I-1897, para. 22, 'Article [49] of the Treaty precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them'.

62 See AG Tesauro in Case C-118/96 Safir [1998] ECR I-1897, para. 29.

63 Case C-55/94 [1995] ECR I-4165.

64 Para. 37.

65 Para. 6.

66 Case C-288/89 [1991] ECR I-4007.

67 Joined Cases 110 & 111/78 Ministère public v. Willy van Wesemael and others [1979] ECR 35, para. 28. In Case C-3/95 Reisebüro Broede v. Sandker [1996] ECR I-6511, para. 38, the Court spelled out this justification more fully: 'the application of professional rules to lawyers, in particular those relating to organization, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the

- protection of intellectual property;[68]
- protection of workers;[69]
- consumer protection;[70]
- conservation of the national historic and artistic heritage;[71]
- turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country;[72] and
- cultural policy.[73]

As with Cassis, the list in Gouda is not exhaustive. Other justifications have been recognised. For example, in Alpine Investments,[74] the Court said that a national law prohibiting cold-calling for sales of financial services could be justified by the need to safeguard the reputation of the Dutch financial markets and to protect the investing public.[75] And in Schindler,[76] as justification for a national ban on lotteries, the Court recognised various grounds connected with the social ills of gambling (e.g. preventing gambling and avoiding the lottery from becoming the source of private profit; avoiding the risk of crime or fraud; avoiding the risk of incitement to spend, with damaging individual and social consequences).

The Court did not stop there. It has also recognised a number of other public interest grounds:

- road safety; [77]
- the coherence of a scheme of taxation;[78]
- the effectiveness of fiscal supervision;[79]
- preserving the financial balance of a social security scheme;[80]
- ensuring the adequacy of regular maritime services to, from and between islands;[81]
- guaranteeing the quality of skilled trade work and protecting those who have commissioned such work;[82]
- protection of the environment;[83] and
- ensuring the balance between sports clubs.[84]

However, the Court has not extended the list indefinitely[85] and is particularly sceptical of national justifications which hint of economic protectionism. For example, in SETTG[86] the Court said that a Greek law requiring all tourist guides to have a particular employment relationship with their employer (which effectively prevented self-employed tourist guides from other Member States from providing services in Greece) could not be justified on the grounds of 'maintaining industrial peace as a means of bringing a collective dispute to an end and thereby preventing any adverse effects on an economic sector and consequently on the economy of the state'.[87] The Court said that such a justification had to be regarded as an 'economic aim' which could not constitute a reason relating to the general interest that justified a restriction on the freedom of establishment'.[88] Despite this, the Court has allowed some largely economic justifications—ensuring the coherence of a scheme of taxation, the effectiveness of fiscal supervision, the preservation of the financial balance of a social security scheme and controlling control costs and preventing wastage of financial, technical and human resources[89] —to be successfully invoked by the Member States. Hatzopoulos explains this different treatment on the grounds that these latter objectives serve a 'structural' purpose and so are

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sound administration of justice are provided with the necessary guarantees in relation to integrity and experience'.

68 Case 62/79 Coditel [1980] ECR 881.

69 Case 279/80 Webb [1981] ECR 3305, para. 19; Joined Cases 62–63/81 Seco v. EVI [1982] ECR 223, para. 14; Case C-113/89 Rush Portuguesa [1990] ECR I-1417, para. 18. Subsequently in Case C-272/94 Guiot [1996] ECR I-1905, para. 16, the Court stressed the importance of the social protection of workers in the construction industry; Case C-79/01 Payroll Data Services (Italy) [2002] ECR I-8923, para. 31.

70 Case 220/83 Commission v. France [1986] ECR 3663, para. 20; Case 252/83 Commission v. Denmark [1986] ECR 3713, para. 20; Case 205/84 Commission v. Germany [1986] ECR 3755, para. 30; Case 206/84 Commission v. Ireland [1986] ECR 3817, para. 20; Case C-180/89 Commission v. Italy (Tourist Guides) [1991] ECR I-709, para. 20.

71 Case C-180/89 Commission v. Italy [1991] ECR I-709, para. 20.

72 Case C-154/89 Commission v. France [1991] ECR I-659, para. 17; Case C-198/89 Commission v. Greece [1991] ECR I-727, para. 21.

73 Case C-288/89 Gouda [1991] ECR I-4007, paras. 22–3; Case C-353/89 Commission v. Netherlands [1991] ECR I-4069 and Case C-23/93 TV10 [1994] ECR I-4795.

74 Case C-384/93 [1995] ECR I-1141, para. 44.

75 See also Case C-222/95 Parodi v. Banque H. Albert de Bary [1997] ECR I-3899, para. 22, where the Court noted that the banking sector is a particulary sensitive area from the perspective of consumer protection.

76 Case C-275/92 [1994] ECR I-1039, para. 60. See also Case C-124/97 Läärä v. Kihlakunnansyyttäjä [1999] ECR I-6067.

77 Case C-55/93 van Schaik [1994] ECR I-4837.

78 Case C-204/90 Bachmann [1992] ECR I-249; Case C-300/90 Commission v. Belgium [1992] ECR I-305; Case C-294/97 Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna [1999] ECR I-7447, para. 19. However, this has been marginalised in more recent case law: see e.g. Case C-264/96 ICI v. Colomer [1998] ECR I-4695, para. 29, possibly being confined to the sphere of pensions and insurance policies (N. Travers (1999) 24 ELRev. 403, 408).

79 Case C-55/98 Skatteministeriet v. Bent Vestergaard [1999] ECR I-7641, para. 23.

80 Case C-158/96 Kohll [1998] ECR I-1931, para. 41.

81 Case C-205/99 Analir v. Administración General del Estado [2001] ECR I-1271, para. 27.

82 Case C-58/98 Josef Corsten [2000] ECR I-7919, para. 38.

83 Case C-17/00 François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort [2001] ECR I-9445, paras. 36–7.

84 Case C-415/93 Bosman [1995] ECR I-4921, para. 106; Case C-176/96 Lehtonen v. FRSB [2000] ECR I-2681, para. 54.

85 Eg Case C-18/95 Terhoeve [1999] ECR I-345, para.45 where the Court held that considerations of a purely administrative nature could not make lawful a restriction on the free movement of persons.

86 Case 398/95 SETTG v. Ypourgos Ergasias [1997] ECR I-3091.

87 Para. 25. See also 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, paras.38-39 and Case C-164/99 Portugaia Construçõnes Lda [2002] ECR I-787, paras.25-26 where the Court rejected the justification for the imposition of national social legislation on posted workers of protecting the domestic construction industry and reducing unemployment to avoid social tensions.

88 Para. 23.

89 Case C-157/99 Geraets-Smits and Peerbooms [2001] ECR I-5473, paras.78-9.

regarded more leniently than those which do not.[90]

3.5 Proportionality

Once the Member State has identified a public interest requirement which the Court has accepted, a court (theoretically the national court but often the Court of Justice) will determine whether the steps taken by the Member State to realise that objective were proportionate. The Court offers various formulations of this test[91] but, as we saw in chapter 5, it essentially raises two questions: first, whether the measures are suitable for securing the attainment of the objective and, secondly, whether they go beyond what is necessary in order to attain it.[92] As Straetmans observes,[93] the first question requires only a marginal control of the aptitude or suitability of the national legislation to obtain the aim pursued. By contrast, the second question requires courts to determine whether the interest pursued cannot be satisfied by other, less restrictive means.

The application of this two-stage approach can be seen in De Coster[94] concerning a decision by the Belgian authorities to tax satellite dishes. This had the effect of imposing a charge on the reception of television programmes by satellite while no equivalent charge was payable on those received by cable. The tax was found to interfere with the provision of services because broadcasters from other states were not allowed the unlimited access to cable distribution which Belgian broadcasters enjoyed. However, the Belgian authorities argued the tax could be justified on the grounds of preventing 'the uncontrolled proliferation of satellite dishes in the municipality and thereby [preserving] the quality of the environment'. While the Court doubted whether the measure was suitable to attain that objective,[95] it was convinced that the tax exceeded what was necessary to achieve the objective of protecting the urban environment. It suggested that alternative, less restrictive methods existed for achieving this objective;[96] such as laying down rules about the size of the dishes, their position and the way in which they were fixed to a building or the use of communal dishes.[97]

By contrast, the Court thought that the proportionality test had been satisfied in Alpine Investments. It agreed that the national law banning cold-calling was suitable, noting that the consumer was generally caught unawares by a cold call and so was in no position either to ascertain the risks inherent in the type of transactions or to compare the quality and price of the caller's services with competitors' offers. On the question of necessity, the Court found that the rules were no more restrictive than necessary: although cold-calling was prohibited, other techniques for making contact were still permitted. It also noted that the rules applied only to potential clients but not to existing clients and that the prohibition was limited to the sector in which abuses had been found (the commodities futures market).[98] The Court added that just because other Member States imposed less strict requirements to achieve the same objectives[99] did not mean that the Dutch rules were disproportionate.[100]

3.6 Fundamental Human Rights

A Member State can invoke reasons of public interest to justify a national measure only if that measure is compatible with fundamental rights.[101] This can be seen in Carpenter[102] where the UK proposed to deport Mrs Carpenter, a Filipino national, who, having overstayed her entry permit to the UK, married a British national. Faced with the threat of deportation, Mrs Carpenter argued that this would restrict her husband's ability to carry on business as a service provider in other Member States since she looked after his children while he was away.[103] The Court said that a Member State could 'invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures'.[104] On the question of fundamental rights, the Court said that the decision to deport Mrs Carpenter constituted

> an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the [ECHR] ... which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.[105]

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90 Hatzopoulos (2000) 37 CMLRev. 43, 79.

91 See e.g. Case C-288/89 Gouda [1991] ECR I-4007, para. 15: 'the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules' (emphasis added); Case C-157/99 B.S.M Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473, para. 75: 'to make sure that the measures do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules'.

92 See e.g. Case C-67/98 Questore do Verona v. Diego Zenatti [1999] ECR I7289, para. 29.

93 G. Straetmans (2000) 37 CMLRev. 991, 1002.

94 Case C-17/00 [2001] ECR I-9445.

95 Para. 37. See also Case C-79/01 Payroll Data Services [2002] ECR I-8923, paras. 32–7.

96 Ibid.

97 For another good example of the Court applying the 'necessity' limb of the proportionality test, see Case 352/85 Bond van Adverteerders and Others [1988] ECR 2085, para. 37.

98 Para. 54.

99 For example, in the UK broking firms were required to tape-record unsolicited phone calls (para. 50).

100 Paras. 50–1.

101 Case C-260/89 ERT [1991] ECR I-2925, para. 43, and Case C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag [1997] ECR I-3689, para. 24; Case C-413/99 Baumbast and R v. Secretary of State for the Home Department [2002] ECR I-7091, para. 72.

102 Case C-60/00 Mary Carpenter v. Secretary of State for the Home Department [2002] ECR I-6279, paras. 40–1, considered further in ch. 13.

103 Para. 17.

104 Para. 40, citing Case C-260/89 ERT [1991] ECR I-2925, para. 43, and Case C-368/95 Familiapress [1997] ECR I-3689, para. 24.

105 Para. 41. See also Case C-63/99 R v. Secretary of State for the Home Department, ex parte Gloszczuk [2001] ECR I-6369, para. 85; Case C-

Drawing on the case law of the European Court of Human Rights, the Court then said that even though no right of an alien to enter or to reside in a particular country was guaranteed by the Convention, 'the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention'. It continued that such an interference would infringe the Convention if it did not meet the requirements of Article 8(2), namely that the deportation had to be in accordance with the law, motivated by one or more of the legitimate aims under Article 8(2) and 'necessary in a democratic society' (justified by a pressing social need and proportionate).[106] The Court concluded that a decision to deport Mrs Carpenter did not 'strike a fair balance' between the competing interests of the right of Mr Carpenter to respect for his family life on the one hand and the maintenance of public order and public safety, on the other.[107] Even though Mrs Carpenter had infringed UK immigration laws by overstaying she did not constitute a danger to public order and safety. Therefore, the decision to deport her was not proportionate.

Box 1
Sport and the Free Movement of Persons

Sport, particularly the big money world of professional sport, provides an interesting case study of how the general principles outlined above - of non-discrimination, market access, justification and proportionality - have been used to justify, and at times remove barriers to, the mobility of sportsmen and women. Those running professional sport have long claimed that 'sport is special' due to its social and educational function and so should not be subject to Community law at all. The Court disagrees.

Relatively early in its jurisprudence the Court made clear that sport was subject to Community law but only in so far as it constituted an economic activity.[108] Therefore, in Donà v. Mantero[109] the Court ruled that the activities of professional or semi-professional football players who were employed or provided a service fell within the scope of Articles 39 and 49. However, perhaps in recognition of the special nature of sport, the Court built in a de facto exception to this rule for national teams. Relying on the contentious justification that such national games were not commercial in nature, it said that Community law did not prevent the adoption of rules:[110]

... excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relates to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.

The Court did add that 'This restriction on the scope of the provisions in question must however remain limited to its proper objective'. Therefore, in respect of the nationality of players that can be fielded, clubs (e.g. Manchester United and Chelsea) are subject to Community law, while national sides (e.g. England and France) are not.[111]

This national team rule is not the only exception carved out by the Court from the provisions on the free movement of persons. As we saw in Deliège,[112] the Court said that federation rules concerning the selection of athletes for international competitions did not constitute a restriction on the provision of services[113] and so fell outside Article 49. In this way the Court has ensured a considerable degree of autonomy for sporting organisations to set their own rules.

For those sporting situations which do fall within the scope of Community law, the principles of non-discrimination on the grounds of nationality applies. The early cases concerned issues of direct discrimination. For example, Donà[114] concerned national rules which provided that only those football players who were affiliated to the Italian Football Federation (affiliation being open only to Italian players) could play in professional matches and the Court said that this breached Community law. This ruling led to a 'gentleman's agreement' between the Commission and Union of European Football Associations (UEFA) under which national associations had to allow each first division team to field at least three foreign players and two 'acclimatised'[115] foreigners in domestic league matches from the 1992 season—the so-called '3+2 rule'.[116] This was one of the rules challenged in Bosman.[117]

Bosman was a Belgian national employed by the Belgian first division club RC Liège. When his contract expired he wanted to play for the French second division club, US Dunkerque. Because no transfer certificate had been sent to the French Football Federation Bosman was left without a club for the following season. He did manage to sign two short contracts with French clubs before ending up at Olympic de Charleroi, a Belgian third division club. There was strong circumstantial evidence

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235/99 R v. Secretary of State for the Home Department, ex parte Kondova [2001] ECR I-6427, para. 90; Case C-413/99 Baumbast [2002] ECR I-7091, para. 72; Case C-109/01 Secretary of State for the Home Department v. Akrich [2003] ECR I-000, paras. 58-9 considered further in ch. 15.

106 Para. 42, citing Boultif v. Switzerland, No. 54273/00, paras. 39, 41 and 46, ECHR 2001-IX.

107 Para. 43.

108 Case 13/76 Donà v. Mantero [1976] ECR 1333, para. 12.

109 Ibid. See also Case 36/74 Walrave and Koch v. Association Union Cycliste Internationale [1974] ECR 1405, para. 4.

110 Para. 14.

111 Para. 15.

112 Joined Cases C-51/96 & C-191/97 [2000] ECR I-2549, para. 64. See S. Van den Bogaert, 'The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?' (2000) 25 ELRev. 554.

113 Para. 64.

114 Case 13/76 [1976] ECR 1333. See also Case 36/74 Walrave and Koch [1974] ECR 1405.

115 Players who have played in the country for an uninterrupted period of five years.

116 Financial Times, 27 Jan. 1990 and 19 Apr. 1991.

117 Case C-415/93 [1995] ECR I-4921.

that Bosman was being boycotted by other clubs which might have employed him.[118] He argued that the 3+2 rule contravened Article 39. The Court agreed, arguing that the principle of non-discrimination applied to clauses contained in the regulations of sporting associations which restricted the rights of nationals of other Member States to take part in football matches. It said that the nationality clause related to the essence of the activity of professional players: if Community law did not apply to this situation, then Article 39 would be 'deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the Community rendered nugatory'.[119]

While Donà and the 3+2 rule in Bosman concerned direct discrimination, Heylens[120] concerned indirect discrimination.[121] The case concerned a French rule requiring football trainers to hold a French football-trainer's diploma or a foreign diploma recognised as equivalent. Heylens, a Belgian national with a Belgian diploma, was employed as a trainer by the French club, Lille Olympic. Since his diploma had not been recognised as equivalent by the French authorities (for which no reasons were given) he was prosecuted by the French footballer's trade union. Although the Court recognised that, in the absence of harmonisation, Member States were entitled to lay down the knowledge and qualifications needed to be a football trainer, it said that these requirements had to be reconciled with those of free movement.[122] This reconciliation was to be achieved through mutual recognition of diplomas.[123] This meant that national authorities had to check that the foreign diploma was at least equivalent to the national diploma, by examining the nature and duration of the studies and practical training.[124] The Court also added that, since free access to employment was a fundamental right, Community law required a 'remedy of a judicial nature' against any decision of a national authority refusing the benefit of that right.[125]

In more recent cases the Court has gone beyond the discrimination model, focusing instead on whether the measure has restricted access to the market. This can be seen in respect of the other rule in Bosman concerning the federation rules on transfer fees. According to these rules, on the expiry of a contract with club A a professional footballer could not play for club B until club A had released his registration. This was usually conditional on club B paying a transfer fee to club A. The Court said that these rules were not discriminatory because they applied equally to transfers between clubs belonging to different national associations within the same Member State and were similar to those governing transfers between clubs belonging to the same national association.[126] Nevertheless, the Court concluded that since the transfer rules 'directly affect players' access to the employment market in other Member States', they were capable of impeding free movement of workers and so breached Article 39.[127] For this reason UEFA's rules could not be deemed comparable to those on selling arrangements for goods to which the principle in Keck applied.[128] The Court reached a similar conclusion in Lehtonen[129] where the rules of a national sporting association prohibited a basketball club from fielding players from other Member States (who had been transferred after a specific date) in the national championship matches. The Court said that such rules were liable to restrict the freedom of movement of players which was contrary to Article 39.[130]

Having established a breach of Article 39 in both Bosman and Lehtonen, the Court then turned to the question of justification. In Lehtonen the Court recognized that transfer periods could be justified on the grounds of ensuring the regularity of sporting competitions:[131] late transfers could substantially change the sporting strength of one or other team in the course of the championship. The Court noted that this would call into question the comparability of results between the teams taking part in that championship and consequently the proper functioning of the championship as a whole.[132] However, the Court said that such measures had to be proportionate and suggest that, on the facts, this was not the case because looser deadlines applied to players from non-European zone countries without that jeopardizing competitions.

In Bosman the Court reached a similar conclusion. It accepted that sport was special:[133]

In view of the considerable social importance of sporting activities and in particular football in the Community, the aims

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118 Para. 37.

119 Para. 129. The Court reached the same conclusion in respect of an equivalent rule applied to a Slovakian handball player employed by a German club in the context of the Association Agreement between the Communities and Slovakia: Case C-438/00 Deutscher Handballbund eV v. Maros Kolpak [2003] ECR I-000.

120 Case 222/86 [1987] ECR 4097.

121 See also Dec. 2000/12 1998 Football World Cup ([2000] OJ L5/55) on the distribution of tickets for the World Cup in France which was restricted to residents in France. The Commission said that this rule offended against 'Fundamental Community principles' (para. 102). See also S. Weatherill, '0033149875354: Fining the Organisers of the 1998 Football World Cup' [2000] ECLR 275.

122 Paras. 10–11.

123 Para. 11.

124 Para. 13.

125 Para. 14.

126 Para. 103.

127 Ibid.

128 Ibid. See also the discussion of Case C-384/93 Alpine Investments [1995] ECR I-1141, paras. 36–8, and Case C-275/92 Schindler [1994] ECR I-1039, para. 45.

129 Case C-176/96 Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) [2000] ECR I-2681.

130 Para. 49.

131 Para. 53.

132 Para. 54.

133 See Declaration (No. 29) on Sport annexed to the Treaty of Amsterdam where the states emphasised the 'social significance of sport'. This is more fully articulated in the Declaration annexed to the Conclusions of the Nice European Council in Dec. 2000 which talks of 'the specific characteristics of sport and its social function in Europe'. See also the Commission Staff Working Paper, 'The Development and Prospects for Community Action in the Field of Sport', 29 Sept. 1998; the Helsinki Report on Sport COM(99)644, para. 4.2.1.3, and a discussion of this report: S. Weatherill, 'The Helsinki Report on Sport' (2000) 25 ELRev. 282.

of maintaining a balance between the clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players the transfer fees had to be accepted as legitimate.[134]

In other words, as Weatherill explains, unlike the widget market where producers aim to gain the largest market share, if necessary by driving their rivals off the market, sport is based on a notion of mutual interdependence. In sport opponents are there to be beaten but the whole point of the endeavour is destroyed if opponents are, literally, beaten out of sight.[135] The Court then considered the proportionality question. It said that the transfer rules were not an adequate means of maintaining financial and competitive balance in the world of football because neither precluded the richest clubs from securing the services of the best players nor prevented the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.[136]

In respect of the argument about training new talent, the Court accepted that the prospect of receiving transfer fees was likely to encourage football clubs to seek new talent and train young players.[137] However, it said that because it was impossible to predict with any certainty the sporting future of young players (only a limited number went on to play professionally), those fees were by nature contingent and uncertain. They were also unrelated to the actual cost borne by clubs of training both future professional players and those who would never play professionally. The Court therefore concluded that the prospect of receiving such fees could be neither a decisive factor in encouraging recruitment and training of young players nor an adequate means of financing such activities, particularly in the case of smaller clubs.

For these reasons the Court rejected football's arguments on the basis of suitability. For good measure, it also suggested that the transfer fee rules went beyond what was necessary to attain the objectives. Referring to Advocate General Lenz's opinion, the Court accepted that the same aims could be achieved at least as efficiently by other means which did not impede freedom of movement of workers.[138] He had suggested two more proportionate possibilities: 1) to negotiate collectively specified limits for the salaries of the players; 2) to distribute the clubs' receipts among the clubs. Specifically, this meant that part of the income obtained by a club from the sale of tickets for its home matches should be distributed to other clubs. Similarly, the income received for awarding the rights to transmit matches on television could be divided up between all the clubs. The Court therefore concluded that Article 39 precluded the application of rules relating to transfer fees.

Although Bosman was decided on the basis of Article 39, rumbling in the background were Articles 81 and 82 of the Treaty on competition which had so influenced the Advocate General.[139] It is in the arena of competition law that most of the subsequent challenges to sport rules have been thrashed out: for example, complaints to the Commission about FIFA rules on football player agents;[140] UEFA Regulations allowing national football associations to block the broadcasting of football;[141] and UEFA's rule prohibiting multiple ownership of clubs.[142] There is a degree of convergence between the Court's case law on Article 39 and that on competition law.[143] This can be seen in the Commission's Decision in the Mouscron case which anticipated the Court's ruling in Deliège. In Mouscron the Commission said that the UEFA Cup rule requiring each club to play its home match at its own ground (and not at a neighbouring ground) was a sports rule that did not fall within the scope of the Treaty's competition rules.[144]

The Bosman transformed professsional football, changing the composition of many teams and putting an end to transfer fees for players out of contract.[145] Clubs have responded by hiring stars on longer contracts, with money previously used for transfer fees being diverted into wage packets,[146] making millionaires out of many European players. But for Jean-Marc Bosman the litigation did not pay. He was left heavily in debt and, with his professional career over and his marriage in tatters, he moved back in with his parents.[147] In early 1997 some of the world's top players planned a testimonial for him in Barcelona

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134 Para. 106.

135 S.Weatherill, "Fair Play Please", above n.X.

136 Para. 107.

137 Para. 108.

138 Para. 110.

139 The Court would have been forced to consider the issue in Case C-264/98 Balog v. ASBL Royal Charleroi, removed from the register on 2 April 2001. Much of the AG's unpublished Opinion in that case can be found in A. Egger and C. Stix-Hackl, 'Sports and Competition Law: a Never-Ending Story?' [2002] ECLR 81.

140 The case was closed with the Commission recognising that FIFA could regulate the profession in an attempt to promote good practice as long as access remained open and non-discriminatory: IP/02/585, 18 Apr. 02.

141 The Commission permitted revised regulations allowing a block of two and a half hours on Saturday or Sunday (and not the weekend as a whole): IP/01/583, 20 Apr. 01. However, the Commission's views are not always correct: see Joined Cases T-185, 299 & 300/00 M6 v. Commission, judgment of 8 Oct. 2002.

142 The Commission found that the rule which provides that no two clubs or more participating in a club competition could be directly or indirectly controlled by the same entity or managed by the same person could be justified by the need to guarantee the integrity of the competitions: IP/02/942, 27 June 02. See also the Commission's Communication in [1999] OJ C363/2.

143 Case C-309/99 JCJ Wouters, J.W. Savelbergh, Price Waterhouse Belasting adviseuss Bv v. Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577, para. 122. See also the Helsinki Report on Sport COM(99)644, para. 4.2.1.3, and S. Weatherill, '"Fair Play Please!" Recent Developments in the Application of EC Law to Sport' (2003) 40 CMLRev. 51, 85'.

144 'Limits to application of treaty competition rules to sport: Commission gives clear signal', IP/99/965.

145 The Bosman ruling also applied to those players from states which had trade agreements with the EU: see e.g. the case of the Polish basketball player Lilia Malaja who wished to move to France and the Russian football player Valery Karpin who wished to play in Spain, discussed by D. McAuley, 'They Think it's all Over ... It might just be for now: Unravelling the ramifications for the European transfer system post-Bosman' (2002) 23 ECLR 331. See also Case C-264/98 Balog v. ASBL Royal Charleroi, removed from the register on 2 Apr. 2001.

146 Weatherill, 'Fair Play Please!', above n. X.

147 J. Northcroft, 'The Abandoned Pioneer', Scotland on Sunday, 15 Sep. 1996, 25. A. Dunn, 'Jean-Marc's the Boss Man; His Fight for Freedom was Worth Fortune to Football Stars', The People, 2 Jan. 2000, 54. On the ripple effect of the Bosman ruling to Eastern European players, see M. Butcher, 'Football: Transfer Barriers Come Down and Nationawide League Action: Here come the Latvians', Observer, 3 Dec. 2000, 10.

between a Europe XI. However, the Spanish FA and FIFA objected to the match, blaming Bosman for the large number of foreign players in the Spanish league.[148] The match did eventually go ahead but Bosman's name could not be officially connected with the event.[149] An out-of-court settlement of £312,000[150] was finally paid by the Belgian football authorities in December 1998—more than eight years after the expiry of his contract.

On a more positive note, the formula given by the Court at paragraph 106 of Bosman provided the framework for the football industry to negotiate new transfer rules.[151] A breakthrough came in 2001[152] when new rules were agreed by UEFA, FIFA and the Commission[153] which inter alia provided for:

- a system of training compensation to encourage and reward the training effort of clubs, in particular small clubs, for players aged under 23;
- the creation of solidarity mechanisms redistributing a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs;
- the creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season;
- minimum and maximum duration of contracts of respectively 1 and 5 years.

4. Reverse Discrimination

Articles 39, 43 and 49 can be invoked only by those nationals who move from one Member State to another. This is made explicit in Article 43 which refers to 'the freedom of establishment of nationals of a Member State in the territory of another Member State'.[154] As the Court said in Saunders,[155] the free movement provisions cannot be applied to situations which are 'wholly internal to a Member State'. Therefore, a British woman could not use Community law to challenge an undertaking given to a criminal court in England that she return to Northern Ireland and that she did not visit England or Wales for three years. As the Court said, Community law does not apply to activities which have no factor linking them with any of the situations governed by Community law[156] and which are confined in all aspects within a single Member State.[157] This was also the situation in Gauchard[158] where the manager of a French supermarket who was prosecuted for extending his supermarket without permission argued that the French rules breached Community law. The Court disagreed, saying that Community law did not apply because the company operating the supermarket was French and established in France, and its manager was French who resided in France; therefore the case was exclusively internal to a Member State.

A purely hypothetical prospect of employment in another Member State will not suffice. In Moser[159] a German national was denied access to a teacher training course in Germany because he was a member of the Communist party. He argued that the refusal to admit him to the course prevented him from applying for teaching posts in schools in other Member States. The Court said that this 'hypothetical' possibility did not establish a sufficient connection with Community law to justify the application of Article 39.[160] Similarly, in Kremzow[161] a retired Austrian judge, sentenced to life imprisonment after having murdered another lawyer, could not invoke Community law on a question of fundamental human rights under the ECHR. The Court said that while any deprivation of liberty could impede the exercise of free movement, a purely hypothetical prospect of exercising the right of free movement did not establish a sufficient connection with Community law.[162] This comes very close to the principle of remoteness laid down in Graf.[163]

These cases demonstrate that nationals cannot invoke the free movement provisions against their own Member States if they have not exercised their rights of free movement in some way.[164] Migrant workers who can take advantage of their Community law rights may therefore enjoy more favourable treatment than nationals who cannot, a situation referred to as 'reverse discrimination'.[165] This rule has been much criticised and some commentators have advocated its abolition, particularly

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148 J. Webster, 'Spanish ire over Bosman fundraiser', The European, 20 Feb.1997, 15; B. Oliver, 'Sport Around the World: Bosman out in the cold in Spain', The Daily Telegraph, 1 Mar.1997, 18. See also D. Campbell, '"Foreigners killing football": UEFA Chief's call for firm action against "Global teams" at Big Clubs', Observer, 11 Mar. 2001, 1.

149 B. Sutherland, 'Stars turn out for Bosman', The Herald, 28 Apr. 1997; J. Culley, 'Bosman reaps belated reward', Independent, 28 Apr. 1997.

150 The Independent, 23 Dec. 1998, 20, cited in Weatherill (2000) 25 ELRev. 282, 283.

151 MEMO/02/127, 2.

152 IP/01/314, 6 Mar. 01.

153 On the legal (or otherwise) status of this agreement, see Weatherill, 'Fair Play Please!', above n. X, 66–73.

154 Emphasis added.

155 Case 175/78 R v. Saunders [1979] ECR 1129, para. 11.

156 Ibid.

157 See e.g. Case C-18/95 Terhoeve v. Inspecteur van de Belastingdienst Particulieren [1999] ECR I-345, para. 26; Joined Cases C-64–65/96 Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen [1997] ECR I-3171, para. 16.

158 Case 20/87 Minstère public v. Gauchard [1987] ECR 4879, para. 10. See also e.g. Joined Cases C-330–331/90 Ministerio Fiscal v. Lopez Brea [1992] ECR I-323; Case 136/78 Ministère public v. Auer (No. 1) [1979] ECR 437; Joined Cases C-54 & 91/88 & C-14/89 Criminal Proceedings against Niño [1990] ECR I-3537.

159 Case 180/83 Moser [1984] ECR 2539, para. 15.

160 Para. 18.

161 Case C-299/95 Friedrich Kremzow v. Republik Österreich [1997] ECR I-2629.

162 Para. 16.

163 Case C-190/98 [2000] ECR I-493.

164 Although cf Joined Cases C-321–4/94 Pistre [1997] ECR I-2343.

165 'Reverse discrimination arises when a national of a Member State is disadvantaged because he or she may not rely on a protective provision of Community law when a national of another Member State in otherwise identical circumstances may rely on that same provision' (D. Pickup, 'Reverse Discrimination and Freedom of Movement for Workers' ((1986) 23 CMLRev. 135, 137).

following the introduction of 'citizenship of the Union'.[166] However, in Uecker and Jacquet[167] the Court dismissed any such suggestions:

... citizenship of the Union, established by Article [17] of the EC Treaty, is not intended to extend the scope ratione materiae [material scope] of the Treaty also to internal situations which have no link with Community law .... Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State.[168]

Therefore Ms Uecker and Ms Jacquet, a Norwegian and a Russian national who were both employed as language assistants in German universities and married to German nationals, could not invoke Community law to secure permanent (as opposed to fixed-term) contracts. The Court said that Community legislation on the free movement of workers could not be applied to the situation of workers (the women's husbands) who had never exercised their rights to freedom of movement within the Community.[169]

Conversely, Community law can be invoked by nationals against their own Member State when they are exercising[170]—or have exercised[171]—their rights of free movement, as Surinder Singh[172] shows. In 1982 Mr Surinder Singh, an Indian national, married a British citizen. From 1983 to 1985 they lived in Germany where Mrs Singh was employed on a part-time basis which meant that under Community law she was a worker who was entitled to be joined by her spouse.[173] In 1985 the couple returned to the UK to run a business. The question raised was whether this was a wholly internal situation to which domestic law only applied, with the result that Mr Singh could be deported from the UK, or whether Community law applied in which case Mr Singh could enter and remain in the UK, relying on Articles 39 and 43 EC read in conjunction with the secondary legislation which allows a Community national to be joined by a spouse.

The Court said that Community law did apply: nationals who have gone to work in another Member State to exercise their Community law rights under Articles 39 and 43 were entitled to benefit from Community secondary legislation, even against their own state.[174] It reasoned that a national like Mrs Singh might be deterred from exercising her Community law rights of free movement if, on returning to her state of origin (UK), the conditions of entry or residence were not at least equivalent to those which she would enjoy on entering the territory of another state (e.g. France),[175] including the right to be accompanied by her spouse.[176] This can be contrasted with Akrich[177] concerning a British woman married to a Moroccan citizen. He was unlawfully resident in the UK, having been convicted of theft in the UK and deported to Algeria. He then returned to the UK on a false French identity card, deported again and then clandestinely returned to the UK. He then married Mrs Akrich who went to work in Ireland; he was deported to Ireland. Relying on the principles in Singh she wanted to return to the UK and bring her husband with her. This time the Court said that Community law would not help her. It said that where a citizen of the Union, established in a Member State (the UK) and married to a national of a non-Member State without the right to remain in that Member State, moved to another Member State (Ireland) to work there as an employed person, the fact that that he had no right under Community law to install himself with his spouse in Ireland could not 'constitute less favourable treatment than that which they enjoyed before the citizen made use of the opportunities afforded by the Treaty as regards movement of persons'.[178] In other words, since Mr Akrich could not stay with Mrs Akrich in the UK, the fact that he could not join her in Ireland either did not deter Mrs Akrich from exercising the rights in regard to freedom of movement conferred by Article 39 EC.[179]

In Singh there was a sufficient Community element to enable the couple to rely on their Community law rights.[180] In this way Singh serves to confirm the earlier case of Knoors[181] where the Court had found that a Belgian-qualified Dutch plumber who had worked in Belgium was entitled to rely on his Community law rights to work in the Netherlands (his home state) using his Belgian qualifications. The Court said that his position was 'assimilated to that of another person enjoying their rights and liberties guaranteed by the Treaty'.[182]

In Knoors and Singh there was a clear (actual) Community element: Mr Knoors had worked in Belgium for nearly ten years, Mrs Singh in Germany for two years. In other cases the Court has been prepared to find somewhat tenuous connections with Community law. For example, in Deliège[183] the Court said that in principle Community law applied because 'a degree of

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166 See N.Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39 CMLRev. 731.
167 Joined Cases C-64–65/96 [1997] ECR I-3171, para. 23.
168 Para. 23.
169 Para. 17.
170 Case C-384/93 Alpine Investments [1995] ECR I-1141, paras. 15 and 20–2; Case C-60/00 Carpenter [2002] ECR I-6279, para. 29.
171 Case C-419/92 Scholz [1994] ECR I-505, para. 9.
172 Case C-370/90 R v. IAT and Surinder Singh, ex parte Secretary of State for the Home Department [1992] ECR I-4265. See also Case C-18/95 Terhoeve [1999] ECR I-345.
173 Art. 10 of Reg. 1612/68, considered further in ch. 12.
174 Para. 21.
175 Para. 19.
176 Para. 21.
177 Case C-109/01 Secretary of State for the Home Department v. Akrich [2003] ECR I-000.
178 Para. 53.
179 Ibid.
180 Cf. in an earlier English court case, R v. Secretary of State for the Home Department, ex parte Muhammad Ayub [1983] 4 CMLR 140: three weeks in another Member State was insufficient to establish the necessary Community link.
181 Case 115/78 Knoors v. Secretary of State for Economic Affairs [1979] ECR 399. See also Case C-107/94 Asscher [1996] ECR I-3089.
182 Para. 24.
183 Joined Cases C-51/96 & C-191/97 [2000] ECR I-2549, para. 58. See also Case C-281/98 Angonese [2000] ECR I-4139, paras. 17–18, and the

extraneity, derived from the fact that an athlete participated in a competition in a Member State other than that in which he is established'. And in Carpenter[184] the Court said that Community law applied to the situation of the deportation from the UK of a Filipino woman married to a British man because Mr Carpenter to provide services to advertisers established in other Member States. By implication, the presence of Mrs Carpenter in the UK, looking after Mr Carpenter's children from a previous marriage, enabled him to travel abroad to provide these services.[185]

Thus, although the Court has reasserted the basic rule in Uecker and Jacquet that EC law does not apply to wholly internal situations, in fact it is gradually eroding the rule by finding that a looser, more 'potential' link with Community law is sufficient.[186] However, wary of abuse, the Court did say in Singh that the provisions of the Treaty could not be used as a means of evading the application of national legislation[187] and of prohibiting Member States from taking the necessary measures to prevent such abuse.[188] The scope of this doctrine is also unclear. When does the exploitation of Community rights becomes abuse? In Centros[189] the Court said the fact that a national of a Member State chose to establish a company in a Member State whose company law seemed the least restrictive and to set up branches in other Member States could not, in itself, constitute an abuse of the right of establishment; and in Akrich[190] the Court confirmed that the motives prompting Mrs Akrich to seek employment in Ireland were not relevant either in respect of the right to enter and reside in Ireland or the right to return to the UK.[191] The Court said that such conduct could not constitute abuse, even if the spouse did not, at the time when the couple went to Ireland, have the right to remain in the UK.[192] However, the Court added that there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into to circumvent the provisions relating to entry and residence of nationals of non-Member States.[193] The question of abuse will be considered further in chapters 12 and 13.

5. Going Beyond the Model of 'Discrimination on Grounds of Nationality'

5.1 Restrictions liable to Prohibit or Otherwise Impede Free Movement

So far we have concentrated on the fact that Articles 39, 43 and 49 prohibit discrimination on the grounds of nationality. In cases such as Alpine, Schindler and Bosman we have also seen how the Court has brought non-discriminatory national measures within the scope of the Treaty where they prevented or substantially hindered access to the market. These cases, decided in the mid-1990s, were indicative of a more general change of approach by the Court away from a discrimination analysis towards one based on market access. This shift can be traced back to Säger[194] where the Court said that Article 49 required

... not only the elimination of all discrimination against a person providing services on the ground 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.

The Court continued that any such restriction could only be justified by imperative reasons relating to the public interest.[195] This judgment demonstrates a greater willingness by the Court to scrutinise national rules which, even potentially, interfere with the individual's right to free movement. From this perspective the Court is making a more significant incursion into national regulatory autonomy: unless Member States can justify their conduct, the national rule will breach Community law, even if it does not discriminate against nationals.

The facts of Kraus[196] demonstrated the importance of the change in approach signalled by Säger. Kraus, a German student, complained that he was not allowed to use his British LLM title in Germany without prior authorisation from the German authorities. If he had obtained an academic diploma from a German university, no such authorisation would have been required. Kraus concerned discrimination not on the grounds of nationality (after all Kraus was German) but rather on the grounds that he had received the training in another Member State which disadvantaged him when he returned to his country of origin (Germany).[197] Thus, he suffered discrimination based on the fact that he had exercised his rights of free movement and received some of his education in another Member State.[198] Focusing on the obstacles to free movement created by the German

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comment by R. Lane and N. Nic Shuibhne (2000) 37 CMLRev. 1237, 1242–5.

184 Case C-60/00 [2002] ECR I-6279.

185 See Mrs Carpenter's submissions to the Immigration Appeal Tribunal (para. 17).

186 See also Case C-281/98 Angonese [2000] ECR I-4139.

187 See also Joined Cases C-369 & 376/96 Arblade, Leloup and Sofrage SARL [1999] ECR I-8453, para. 32, where the Court noted that the activities of the service provider were not wholly or principally directed towards the host state with a view to avoiding the rules which would apply to them if they were established within its territory.

188 Para. 24.

189 Case C-212/97 Centros v. Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459, para. 27.

190 Case C-109/01 Secretary of State for the Home Department v. Akrich [2003] ECR I-000.

191 Paras. 55-6.

192 Para. 56.

193 Para. 57

194 Case C-76/90 [1991] ECR I-4221, para. 12, emphasis added.

195 Para. 15.

196 C-19/92 [1993] ECR I-1663.

197 See also Case C-370/90 Surinder Singh [1992] ECR I-4261, para. 23.

198 See also Case C-224/98 D'Hoop v. Office national de l'emploi [2002] ECR I-6191, para. 34, where the Court said that by linking the grant of tideover allowances to the condition of having obtained the required diploma in Belgium, Belgian law thus 'places at a disadvantage certain of its nationals simply because they have exercised their freedom to move in order to pursue education in another Member State' (considered further in ch. 15).

rule, the Court said that Articles 39 and 43 precluded any national measure governing the conditions under which an academic title obtained in another Member State could be used, where that measure, even though applicable without discrimination on grounds of nationality, was 'liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty'.[199] The Court then considered whether this national rule could be justified. According to the Court it was legitimate for Germany to impose the restriction on the grounds of 'the need to protect a public which will not necessarily be alerted to abuse of academic titles',[200] provided that:

- the authorisation procedure was intended solely to verify whether the postgraduate academic title was properly awarded;
- the procedure was easily accessible and was not excessively expensive;
- reasons be given for any refusal of authorisation;
- the refusal could be the subject of judicial procedures; and
- any penalty for non-compliance with the authorisation procedure is not disproportionate to the gravity of the offence.[201]

The Kraus judgment, focusing on the question of hindrance to the exercise of one of the fundamental freedoms rather than on discrimination, was not an isolated decision. Its formulation has been more or less repeated in similar terms in a number of subsequent cases.[202] In Gebhard,[203] a German national authorised to practise as a 'Rechtsanwalt' in Germany, opened chambers in Milan where he described himself as 'avvocato' without previously having registered with the Milan Bar as required by national law. The Court said that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms' breached Article 43,[204] unless they could be justified by the general good, such as for reasons relating to organisation, qualifications, professional ethics, supervision and liability.[205]

At a push, the measures in both Kraus and Gebhard could have been considered indirectly discriminatory on the grounds of nationality: the requirement for the qualification to be authorised prior to use (Kraus) and to be registered with Milan Bar before using the title 'avvocato' (Gebhard) might have had a disparate impact on migrants.[206] The measure in Kraus could even have been considered directly discriminatory because only qualifications obtained in other Member States needed prior authorisation.[207] Yet, in Kraus, Gebhard and the subsequent case law the Court did not go down either route, focusing instead on the more general question of whether the measure was liable to prevent or hinder access to the market or exercise of the freedom. Where the hindrance was substantial (to deal with the issue raised by Graf), then the national measure breached the relevant Treaty provision and the question was whether the measure could be justified; where the hindrance was not substantial then there was no breach of the Treaty (see figure 10.2).

5.2 Access to the Market and Exercise of the Freedom

Some of the case law appears to distinguish between access to the market and exercise of the freedom. National rules preventing or restricting access to the market would include those requiring individuals to hold a particular nationality or to have certain qualifications, linguistic skills or a licence before they do a particular job. National rules preventing or restricting exercise of the freedom would include those rules on terms and conditions of employment and those on tax and social advantages. There has been some dispute as to whether one type of rules has a more serious impact on market integration than the other. For example, while Advocate General Lenz in Bosman[208] considered that national rules preventing or restricting market access were more serious, Advocate General Alber in Lehtonen reached the opposite conclusion. Referring to Keck, Advocate General Alber said that rules relating to exercise were closer to product rules than to those regarding selling arrangements in that they directly affected citizens who might have to take into account different rules and to acquire new skills every time they migrated from one Member State to another.[209] In Graf[210] Advocate General Fennelly sought to explain 'the apparent disagreement' by arguing that national rules, especially those governing qualifications and requiring certain skills of economic actors, tend to subject migrant workers to a dual regulatory regime. He said that they were more readily classifiable as formally affecting access.[211]

Yet the Court has not always been consistent in maintaining the distinction between access and exercise and can conflate the two. For example, in Kraus the Court said: 'the situation of a Community national who holds a postgraduate academic title which, obtained in another Member State, facilitates access to a profession or, at least, the pursuit of an economic activity, is governed by Community law'.[212] While the concept of access and exercise may merge one into the other, the distinction underpins some of the

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199 Para. 32, emphasis added.
200 Para. 35.
201 Para. 42.
202 See e.g. Joined Cases C-369 & 376/96 Arblade v. Leloup [1999] ECR I-8453, para. 33, Case C-3/95 Sandker [1996] ECR I-6511, para. 25, and Hatzopoulos (2000) 37 CMLRev. 43, 70.
203 Case C-55/94 [1995] ECR I-4165.
204 Para. 37.
205 Para. 35.
206 This was the approach adopted in Case C-281/98 Angonese [2000] ECR I-4139, paras. 40–6.
207 However, this would have been discrimination based on the place where the service was provided and not on the nationality of the claimant. Case C-158/96 Kohll [1998] ECR I-1931, para. 33. See also Case C-55/98 Skatteministeriet v. Bent Vestergaard [1999] ECR I-7641, para. 22. These cases are considered further in ch. 13.
208 Paras. 203 and 205. In Graf the Commission, Denmark, Italy and the UK urged the Court to follow the distinction drawn by AG Lenz between national rules regulating access to the labour market and those merely governing the exercise of a particular activity e.g. employee protection, pay scales and working conditions.
209 Case C-176/96 [2000] ECR I-2681, para. 48.
210 Case C-19098 [2000] ECR I-493.
211 See also AG Gulmann in Case C-275/92 Schindler [1994] ECR I-1039, para. 56.
212 Para. 23, emphasis added. See also para. 28: the provisions of national law must not 'constitute an obstacle to the effective exercise of the

secondary legislation and the Court's case law. For this reason the distinction is used in chapters 11–13 to help chart a way through the case law.

The Court sometimes abandons the Säger/Kraus/Gebhard formula, perhaps because of the problematic distinction between access and exercise as well as the cumbersome language involved, in favour of the simpler wording based on Article 3 EC, examining whether the national measure constitutes an obstacle to free movement.[213] For example, in Bosman[214] the Court concluded that the transfer rules constituted an 'obstacle to freedom of movement of workers prohibited in principle by Article [39]' and in Carpenter[215] the Court said that Mr Carpenter's freedom to provide services could not be 'fully effective' if he was 'deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse'.[216]

There is little to choose between the Säger formula and that based on obstacles and in cases such as Kraus and Schindler the Court used both,[217] although both have disadvantages. First, the meaning of the individual terms 'hindrance' and 'obstacles' is far from clear. Take Carpenter as an example: what was the obstacle which 'deterred' Mr Carpenter from exercising his freedom to provide cross-border services—the separation of husband and wife which would be 'detrimental to their family life',[218] the potential loss of child care,[219] or the emotional distress involved? Secondly, the shift away from a model focused on removing discriminatory obstacles to free movement to one based on removing any (substantial) obstacles to free movement aligns the persons jurisprudence more closely with that following the decision in Dassonville.[220] This raises concerns that the problems generated by Dassonville in the field of goods will be repeated in persons. In particular, as ever more measures are caught in the net of the Treaty, more emphasis is placed on examining the justifications put forward by the Member States and the proportionality of the steps taken to achieve their objectives.

Despite the developments in Säger and beyond, the discrimination model is by no means redundant.[221] It continues to constitute the main framework of analysis when addressing national tax and social security laws which may contravene the Treaty provisions on the free movement of persons. In other areas, the Court might refer to both a discrimination analysis or one based on hindrances/obstacles to free movement. For example, in Commission v. Belgium (air traffic)[222] the Court said that the conditions laid down for the registration of aircraft could not 'discriminate on grounds of nationality or form an obstacle to the exercise of the freedom'.

C. Direct Effect of Articles 39, 43 and 49

It is clear that Articles 39, 43 and 49 are directly effective and have been since the expiry of the transitional period. In respect of Article 39 this was first acknowledged by the Court in French Merchant Seamen[223] and confirmed in van Duyn[224] where the Court ruled that, despite the derogations to the principle of free movement contained in Article 39(3), the provisions of Articles 39(1) and (2) imposed a sufficiently precise obligation to confer direct effect. The Court also ruled that Articles 43 and 49 were directly effective in Reyners[225] and Van Binsbergen[226] respectively. Applicants can rely on the direct effect of Articles 39, 43 and 49[227] against both the host state (the more usual situation)[228] and the home state,[229] provided the situation is not wholly internal.

While in principle Treaty provisions can have both vertical and horizontal direct effect (and so can be relied on by an individual against both the state and a private body),[230] for many years it was not clear whether Articles 39, 43 and 49 had vertical and horizontal direct effect or only vertical direct effect. In Walrave and Koch[231] the Court suggested that the Treaty provisions had both: it said 'the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place they are entered into or the place where they take effect, can be located within the territory of the Community'. The Court also said that in addition to public authorities the ban on discrimination 'extends likewise to rules of any other nature aimed at collectively regulating gainful employment and services'.[232] Yet subsequent cases concerned action taken by public

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fundamental freedoms guaranteed by Arts. [39 and 43] of the Treaty'.

213 See e.g. Case 36/74 Walrave and Koch [1974] ECR 1405, para. 18, and Case 118/75 Watson and Belmann [1976] ECR 1185, para. 16.

214 Case C-415/93 [1995] ECR I-4921, para. 104. See also Case C-18/95 Terhoeve [1999] ECR I-345, para. 39; Case C-275/92 Schindler [1994] ECR 1039, para. 45. See also Case C-221/89 ex parte Factortame Ltd and others [1991] ECR I-3905, para. 32; Case C-114/97 Commission v. Spain [1998] ECR I-6717, para. 44.

215 Case C-60/00 [2002] ECR I-6279.

216 Para. 39. See also para. 38.

217 Cf. paras. 28 and 32 in Case C-19/92 Kraus [1993] ECR I-1663 and paras. 43 and 45 in Case C-275/92 Schindler [1994] ECR I-1039. See also Case C-118/96 Safir [1998] ECR I-1897, paras. 23 and 25; Case C-79/01 Payroll Data Services [2002] ECR I-8923, paras. 26–7.

218 Para. 39.

219 Para. 44.

220 Case 8/74 [1974] ECR 837.

221 See, e.g. Case C-164/99 Portugaia Construções Lda [2002] ECR I-787, paras.34-5.

222 Case C-203/98 Commission v. Belgium [1999] ECR I-4899, para. 12, emphasis added.

223 Case 167/73 Commission v. France [1974] ECR 359, para. 41.

224 Case 41/74 [1974] ECR 1337, para. 8.

225 Case 2/74 [1974] ECR 631, para. 32.

226 Case 33/74 Johannes Hervicus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299, para. 27.

227 The applicants can be the workers, self-employed or service providers themselves or employers applying on their behalf: Case C-350/96 Clean Car [1998] ECR I-2521, para. 24.

228 E.g., Case 41/74 van Duyn [1974] ECR 1337.

229 This arises in cases concerning impediments to the 'export' of the worker, self-employed person or company and service: e.g. Case C-384/93 Alpine Investments [1995] ECR I-1141, para. 30; Case C-107/94 Asscher [1996] ECR I-3089, para. 32; C-18/95 Terhoeve [1999] ECR I-345, para. 39; but also in cases about returners: e.g. Case C-19/92 Kraus [1993] ECR I-1663, para. 15.

230 See e.g. Case 43/75 Defrenne v. Sabena [1976] ECR 455 concerning Art. 141 on equal pay but not goods (see ch.5).

231 Case 36/74 [1974] ECR 1405, dispositif, emphasis added.

232 Para. 17.

authorities[233] or professional regulatory bodies (e.g. the Bar Council,[234] the Italian football association[235] or the International Cycling Union[236]) which suggested an extended form of vertical direct effect only.

However, in Clean Car[237] the Court provided a strong hint that the free movement of workers provisions had both vertical and horizontal direct effect, and this was subsequently confirmed in Angonese.[238] Applicants applying for jobs in a private bank had to produce a certificate of bilingualism issued by the local authority.[239] The Court noted that since working conditions were governed not only by laws but also by agreements and other acts adopted by private persons, there would be inequality in the application of Article 39 if it applied only to acts of a public authority.[240] Drawing on the long-established case law interpreting Article 141 on equal pay,[241] the Court then ruled that the prohibition of discrimination in Article 39 applied both to agreements intended to regulate paid labour collectively and to contracts between individuals.[242] Therefore Article 39 had horizontal direct effect and so applied to private persons.[243]

D. Conclusions

The case law on persons ranges from the highly personal (as in Carpenter where deportation risked breaking up the family unity) to the highly commercial (provision of TV signals by large companies). While common principles apply across this spectrum, notably non-discrimination on the grounds of nationality, the Court has adapted the principles to take account of the subject matter. In particular, the principle of citizenship of the Union has begun to shape the case law relating to these 'personal' cases where the Court is prepared to prioritise the protection of fundamental human rights.

The most important development in the case law is the shift from the discrimination model towards one based on market access. From the perspective of market integration, this is clearly an important development. As Advocate General Jacobs said in Leclerc-Siplec[244] 'If an obstacle to trade exists it cannot cease to exist simply because an identical obstacle affects domestic trade'. However, by focusing on market access the Court has made an important policy shift away from respecting the autonomy of the Member States and the integrity of their rules (the effect of the discrimination model) towards greater Community intervention (the market access model). The result may well be deregulatory if national rules are found to obstruct trade and no single Community norm is put in its place. To avoid this outcome much depends on the interpretation and application of the public interest requirements and the principle of proportionality. Here the Court has shown sensitivity to national interests. In important, politically sensitive cases such as Schindler the Court has given a wide reading to the public interest requirements and adopted a light touch to the review of proportionality. However, where the Court considers that the broader interests of the internal market are at stake, it is prepared to deliver robust rulings which may, as in Bosman, turn the relevant sector upside down.

We turn now to consider the detailed rules in respect of workers, establishment, services, citizenship and third country nationals (TCNs). We begin by examining the rules on workers.

[…]

CHAPTER 12
the right of establishment

A. Introduction

While Article 39 concerns workers – those who are employed – Article 43 concerns the self-employed and companies. Both have the right to take up and pursue activities in other Member States without discrimination. As the Court put it in Factortame II, the essence of Article 43 is 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'. In this chapter we consider restrictions on both access to and exercise of freedom of establishment. However we begin by considering the beneficiaries of the right of establishment.

B. Who is Entitled to Benefit from the Right of Establishment?

The right of establishment is granted both to natural persons who are nationals of a Member State and to legal persons. We shall examine these situations in turn.

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233 See e.g. the Home Office in Case 41/74 van Duyn [1974] ECR 1337 and local authorities in Case 197/84 Steinhauser v. Ville de Biarritz [1985] ECR 1819 and Case C-168/91 Konstantinidis v. Stadt Altensteig-Standesamt [1993] ECR I-1191.

234 Case 71/76 Thieffry v. Conseil de l'ordre des avocats de la cour de Paris [1977] ECR 765; Case C-309/99 Wouters [2002] ECR I-1577, para. 120.

235 Case 13/76 Donà [1976] ECR 1333.

236 Case 36/74 Walrave and Koch [1974] ECR 1405.

237 Case C-350/96 [1998] ECR I-2521, itself confirming the hint in Case C-415/93 Bosman [1995] ECR I-4921, para. 86.

238 Case C-281/98 [2000] ECR I-4139.

239 See above n. X for a full discussion of this case.

240 Para. 33.

241 Esp. Case 43/75 Defrenne v. Sabena [1976] ECR 455.

242 Para. 34.

243 Para. 36.

244 Case C-412/93 Leclerc-Siplec v. TF1 Publicité SA [1995] ECR I-179.

1. The Right of Establishment for Individuals

Article 43 provides that 'restrictions on the freedom of establishment of nationals in the territory of another Member State shall be prohibited'. In practice this means that the self-employed have the right to establish themselves in another Member State. The Treaty does not define 'self-employed' but in Jany the Court explained that, unlike workers, the self-employed work outside a relationship of subordination, they bear the risk for the success or failure of their employment and they are paid directly and in full. The case concerned Czech and Polish women working as prostitutes in the Netherlands. They paid rent to the owner of the premises and received a monthly income (of between NLG 1500 and 1800) which they declared to the tax authorities. The Court considered them to be self-employed. The fact that prostitution was considered immoral in some quarters did not alter the Court's conclusions: recognising the margin of discretion allowed to the Member States in these sensitive areas, the Court said that it would not substitute its own assessment for that of the Member States where an allegedly immoral activity was practised legally.

Jany suggests that Article 43 permits individuals to engage in a wide range of economic activities and still be considered self-employed. As the Court put it in ex parte Barkoci and Malik, a self-employed person could conduct 'activities of an industrial or commercial character, activities of craftsmen, or activities of the professions of a Member State'. Individuals can exercise their right of establishment in another way: by participating in the formation of a company in another Member State within the meaning of Article 48 (by, for example becoming a shareholder in a company or a director). As Gebhard made clear:

... the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefrom, so contributing to social and economic penetration within the Community in the sphere of activities as self-employed persons.

2. The Right of Establishment for Companies

In respect of companies the Treaty contemplates two forms of establishment:

- the right to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48 (primary establishment);
- the right to set up agencies, branches or subsidiaries by nationals of any Member State established in the territory if any Member State (secondary establishment).

The rights for legal persons are discussed in detail below in section D. First we turn to the rights enjoyed by individuals under Article 43.

C. The Rights Conferred on Natural Persons: the Self-Employed

1. Introduction

According to Article 43, freedom of establishment includes the right to take up and pursue activities as a self-employed person 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. Article 43 therefore distinguishes between the right to take up an activity (access) and the right to pursue an activity (exercise). In this section we consider the application of the equal treatment principle (and beyond) to an individual's rights to gain access to the profession (the right to work as a self-employed person, licensing requirements, qualifications) followed by the application of the equal treatment principle to the exercise of the profession (the terms and conditions of employment and the facilities necessary to exercise that profession). However, we begin with the rights of entry and residence.

2. Rights of Departure, Entry and Residence

Article 1 of Directive 73/148/EEC provides that Member States must abolish restrictions on the movement and residence of nationals (but not of companies) wishing:

- to establish themselves in another Member State as a self-employed person; or
- to provide services in another Member State; or
- to enter another Member State to receive services.

Article 1 also imposes the same obligations on Member States in respect of members of the self-employed person's family as defined in Article 10(1) and (2) of Regulation 1612/68. Articles 2 and 3 govern the rights of departure from one Member State and the entry into another Member State. These Articles merely spell out the rights already protected by Article 43 itself which prohibits the state of origin from hindering the establishment of one of its own nationals in another Member State.

Articles 4(1), 5, 6 and 7 provide details of the grant of residence permits for those wishing to establish themselves in the host Member State. As with Articles 2 and 3, these provisions elaborate on the right of residence conferred directly by the Treaty. Therefore, the grant of a residence permit has merely probative value; it is not constitutive of the right of residence. For this reason, the Court ruled in Roux that a requirement that a migrant be registered with the relevant authorities before obtaining the

right of residence breached Article 43, as did a rule providing that failure to register would result in deportation, since this would negate the right of residence conferred by the Treaty.

3. The Right of Access to Self-Employment

3.1 Primary and Secondary Establishment

Article 43 applies to both primary and secondary establishment. With primary establishment an individual leaves State A to set up a permanent establishment in State B; with secondary establishment an individual maintains an establishment in State A while setting up and maintaining a second professional base (e.g. an office or chambers) in State B. This was the situation in Klopp where a German national and member of the Düsseldorf bar wished to practise in Paris as an avocat while remaining a member of the Düsseldorf bar and retaining his residence and chambers there. His application was rejected by the Paris bar on the grounds that an avocat could have only one set of chambers which had to be in the region of Paris, thereby ensuring the availability of avocats to both the courts and their clients. In other words, the French rules allowed avocats to have a primary, but not secondary, establishment. For lawyers established in other Member States this meant that they could exercise their rights of establishment only once they had given up their first place of establishment. This breached Article 43 which entitled individuals to maintain more than one establishment. In the interests of the administration of justice, the Court said that France was justified in requiring lawyers to abide by its rules of professional ethics and to practise in such a way as to maintain sufficient contact with their clients and the courts but this could be facilitated by 'modern methods of transport and telecommunications'.

3.2 Equal Treatment and Beyond

The principle of equal treatment laid down in Article 43 means that, in the absence of specific Community rules, each Member State is free to regulate the exercise of the profession in its territory, provided it does not directly or indirectly discriminate on the grounds of nationality (see figure 10.1). A directly discriminatory measure (one which treats migrants less favourably than nationals) breaches Article 43 and can be saved only by reference to one of the express derogations. Therefore, in Reyners the Court said that a Belgian rule preventing a qualified Dutch national from practising as a lawyer in Belgium breached Article 43. Indirectly discriminatory measures (those which ostensibly treat the migrant and the national in the same way but in fact disadvantage the migrant) also breach Article 43 unless they can be objectively justified or saved by an express derogation. They include national laws requiring professionals to hold a licence before they can practise and/or to be registered with a professional body, usually after having passed the relevant examinations and holding certain qualifications. These rules can be considered indirectly discriminatory because they require migrants to shoulder the dual burden of having to satisfy first the home and then the host state authorities of their suitability to practise, while nationals have to satisfy only one authority (the home state). This reading holds true in the case of secondary establishment (where the requirements of the home and host state apply simultaneously) but less so in the case of primary establishment where only one set of registration requirements apply at any given time (those of the home state followed by those of the host state). Nevertheless, the Court usually finds that such requirements can in principle be justified. For example, in Gullung the Court said a French requirement for all lawyers to be registered at the bar before practising could be justified on the grounds of ensuring 'the observance of moral and ethical principles and the disciplinary control of the activity of lawyers' or as the Court put it in Vlassopoulou for reasons relating to the organisation of the profession, qualifications, professional ethics, supervision and liability.

Since measures which do discriminate on grounds of nationality breach Article 43, it should follow that measures which do not discriminate do not breach Article 43. This was the approach taken by the Court in the Clinical Biology Laboratories case. Belgian law provided that for a laboratory to qualify for reimbursement from a sickness insurance scheme, all of its members, partners and directors had to be doctors or pharmacists. The Court found that since the legislation applied without distinction to Belgian nationals and those from other Member States, it did not breach Article 43. Subsequent case law, particularly in the field of workers and services, cast doubt on this ruling. In these cases the Court said that a non-discriminatory rule which hindered access to the market breached Community law unless justified. Some argue that Gebhard was authority for this proposition in the field of establishment. Gebhard, a German lawyer (Rechtsanwalt) with chambers in Stuttgart established a set of chambers in Milan and called himself avvocato. He was eventually suspended by the Milan bar because he had been practicing under the title avvocato without being registered. The rule restricting the use of the title avvocato could be seen as non-discriminatory (neither Italian nationals nor non-nationals could use the title without fulfilling the criteria laid down by the Milan bar) or it could be seen as indirectly discriminatory (although neither Italian nationals nor non-nationals could use the title without fulfilling the criteria laid down by the Milan bar it was more likely that non-nationals would not satisfy the criteria than nationals). In fact, the Court did not go down either route. Having decided that Gebhard was established in Italy because he pursued a professional activity on a 'stable and continuous basis' there, the Court focused instead on the obstacles to freedom of establishment created by the Italian rules. It said:

... national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it ...

Since Gebhard the emphasis of the case law has generally been on whether the national measure is liable 'to prohibit, impede or render less attractive' access to, or exercise of, the right of establishment rather than the elimination of discrimination (the 'restriction', 'hindrance' or 'obstacle' approach). With the exception of the situation where the measure does not substantially

impede the exercise of the freedom or the impediment is too remote, the Court usually finds that the Gebhard test is satisfied and so there is a prima facie breach of Article 43 which needs to be justified. For example, in Commission v. Italy the Court said that a national rule requiring the authorities to give their approval before a trade fair could take place constituted a restriction on the freedom of establishment; in Haim II the Court found that a language requirement imposed on dentists wishing to practise in Germany restricted the exercise of Article 43; and in Wouters the Court assumed that a Dutch rule prohibiting multi-disciplinary partnerships between members of the bar and accountants constituted a restriction on the right of establishment. In all three cases the focus then shifted to justification.

As with services, the Court has tended to recognise a broad range of justifications out forward by the Member State but then subjected the national measure to a rigorous proportionality review. This can be seen in Haim II. The Court found that while the German language requirement could be justified on the grounds that dentists had to be able to communicate with their patients, the administrative authorities and professional bodies, the Court suggested that given that German was not the mother tongue of a number of patients, particularly among the Turkish community, there needed to be a certain number of dentists capable of communicating in their own language. However, it indicated that the language requirement could be justified on the facts.

3.3 Qualifications

The refusal by a host state to recognise qualifications acquired in other EU states has represented a serious practical obstacle to freedom of establishment. Although Article 47 allows the Council to adopt Directives for the mutual recognition of diplomas, for many years the requirement of unanimity in Council slowed the process. As a result the Court was left with the task of reconciling the host state's legitimate need for qualified people to do certain jobs with the fundamental principle of freedom of movement.

(a) Where there is No Community Legislation

At first the Court gave effect to the non-discrimination principle contained in Article 43. It said that if Community law had not laid down provisions to secure the objective of freedom of establishment, the Member States and legally recognised professional bodies retained the jurisdiction to adopt the necessary measures, provided that they complied with the obligations of cooperation laid down by Article 10 and the principle of non-discrimination. This point was made in Patrick where a British architect applied for authorisation to practise in France but his application was rejected on the ground that there was neither a diplomatic convention between the UK and France concerning the mutual recognition of certificates nor was there an EC directive on recognition of architectural qualifications. However, the Court said that the need for directives had 'become superfluous with regard to implementing the rule on nationality since this is henceforth sanctioned by the Treaty itself with direct effect'. Therefore the French authorities could, not on the grounds of nationality, deny Patrick the right to establish himself nor could they require him to satisfy additional conditions (such as being authorised to practise) which were not applicable to nationals.

In Thieffry the Court began to shift its focus from the principle of non-discrimination to one of mutual recognition. The case concerned a Belgian advocate who held a Belgian diploma of Doctor of Laws which had been recognised by a French university as equivalent to the French licenciate's degree in law. He subsequently obtained a French avocat's certificate, having passed a French exam. However, he was refused admission to the Paris bar on the grounds that he lacked a French degree. The Court held that this requirement constituted an unjustified restriction on the freedom of establishment because Thieffry held a diploma recognised as an equivalent qualification by the competent authority in France and had passed the French bar exams.

The importance of the principle of mutual recognition was made clear in Vlassopoulou. Vlassopoulou, a Greek lawyer, worked in Germany advising on Greek and EC law. Her application to join the local German bar was rejected on the grounds that she had not pursued her university studies in Germany, had not sat the two German state exams and had not completed the preparatory stage, although she did hold a German doctorate. The Court, relying not on the non-discrimination model but on one based on hindrance of access to the market, ruled that :

... national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article [43]. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.

Thus, by focusing on the obstacles to free movement created by qualification requirements, the Court was able to elaborate on the principle of mutual recognition. It said that the host State had to compare a migrant's qualifications and abilities with those required by the national system to see if the applicant had the appropriate skills to join the equivalent profession. If the comparison revealed that the holder had the knowledge and qualifications which were, if not identical, then at least equivalent to the national diploma, then the host State was obliged to recognise the diploma. If, on the other hand, the comparison revealed that the applicant only partially fulfilled the necessary qualifications, then the host Member State could require the applicant to demonstrate that she had acquired the relevant knowledge and qualifications which then had to be taken into account. The Court added that to ensure that the Member States complied with the obligations inherent in the principle of mutual recognition, the decision-making body had to give reasons for its decisions which also had to be reviewable by the courts to verify compatibility with Community law.

Vlassopoulou effectively preempted the 'diabolically complex and completely unnecessary' Council Directive 89/48/EEC on mutual recognition of higher education diplomas and the complementary Directive 92/51/EEC. Nevertheless,

the Community proceeded with the adoption of these two 'horizontal' Directives to complement and gradually replace the existing vertical directives.

(b) Where there is Community Legislation

The Vertical Approach

In its first wave of harmonisation legislation the Council adopted a vertical approach, harmonising the diverse national rules profession by profession. This led to Directives on doctors, nurses, dentists, and vets as well as a number of Directives concerning a range of industries such as manufacturing and processing, small craft, food and retail, the activities of intermediaries and the building industry. These Directives lay down minimum standards on training. The advantage of these Directives is that once the individual has completed the training and acquired the qualification then recognition is automatic: the host state must accept the equivalence of the qualifications and cannot require the individual to comply with requirements other than those laid down by the relevant Directives.

However, the process of negotiating these Directives was interminably slow (the Directive on architects alone took 17 years to agree) and they were also limited in scope (for example, the Directive on Lawyers' Services applied only to services and not to establishment). Consequently single market programme heralded a new appraoch: horizontal harmonisation based on the principle of mutual recognition derived from the Court's rulings in Cassis de Dijon and Vlassopoulou. The result of this initiative was Directive 89/48 on the mutual recognition of higher education diploma—the first 'general system' or horizontal directive.

The Horizontal Approach

Directive 89/48 applies to any Member State national wishing to pursue a regulated profession as an employed or self-employed person in a host Member State, unless the profession is covered by a specific sectoral directive. A regulated profession involves the pursuit of a 'regulated professional activity' which is defined as an activity subject directly or indirectly to the possession of a diploma. A diploma is defined as a certificate or other formal qualification which:

- has been awarded by a competent authority in a Member State;
- shows that the holder has successfully completed a post-secondary course of at least three years duration, or equivalent part-time, at a university or establishment of higher education, and, where appropriate, has successfully completed the professional training required in addition to the post-secondary course; and
- shows that the holder has the professional qualifications required to take up or pursue a regulated profession in that Member State.

Therefore, a solicitor awarded the title by the Law Society, having completed a three year university degree followed by a vocational training course (the legal practice course) and who has done a two year training contract, holds a 'diploma' for the purpose of the Directive.

Article 3 lays down the basic principle of automatic recognition by the host State. It provides that where the taking up and pursuit of a regulated profession in a host state is subject to the possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of another Member State to take up or pursue that profession on the same terms as apply to its own nationals, provided either that the applicant holds a diploma (as defined above) or has pursued that profession for at least two years during the previous ten years in a state that does not regulate that profession and possesses evidence of one or more formal qualifications. In addition, Community nationals who fulfil the conditions for taking up a regulated profession in their territory can use the professional title of the host Member State corresponding to that profession.[245]

Article 4 contains the exceptions to the basic principle of mutual recognition laid down in Article 3. Article 4(1)(a) concerns differences between the home and host state in respect of the duration of training. It provides that where the applicant's education and training is at least one year shorter than that required by the host state, the host state may require the applicant to produce evidence of professional experience. This may neither exceed the shortfall in supervised practice nor be twice the duration of the shortfall in education and training required by the host state. In any event the host state cannot require professional experience of more than four years.

Article 4(1)(b) concerns the situation where the substance of the training differs significantly between the home and host states (for example, in professions requiring detailed knowledge of local law). In this case the Member State may also require the applicant to take an aptitude test or complete period of adaptation not exceeding three years when:

- the matters covered by the applicant's training and education differ substantially from those covered by the diploma required by the host state; or

[245] Art. 7(1).

- where the profession regulated in the host state comprises activities which are not pursued in the state from which the applicant originates, provided the difference corresponds to specific education and training and covers matter which differ substantially from those covered by the evidence of the formal qualifications adduced by the applicant; or

- the profession regulated in the host state comprises regulated professional activities which are not in the profession in the state of origin.

Usually it is for the individual to choose between the aptitude test or adaptation period but, in the case of the legal profession or other professions which depend on the precise knowledge of national law, the host state decides which of the two alternatives should apply.

The system of mutual recognition has been extended by the second general system Directive 92/51/EEC,[246] to professions for which the level of training is lower. Directive 92/51 closely follows the pattern of Directive 89/48/EEC. It distinguishes between 'certificates' and 'diplomas'. Certificates show that the holder, after having followed a course of secondary education, has completed a course of education and training provided at an educational or training establishment or on the job.[247] Diplomas show that the holder has completed either a post-secondary course of at least one year's duration and the necessary professional training or one of the education or training courses listed in an annex to the Directive.[248] These certificates and diplomas are to be recognised by the host State[249] but, as with Directive 89/48, compensatory measures may be required from a migrant whose education and training differ significantly in terms of substance or duration from that provided in the host State.[250]

The third general system Directive 99/42/EC[251] has extended the mutual recognition approach to the industrial and professional sectors previously covered by earlier vertical directives. This Directive also gives recognition not only to formal qualifications but also to experience and skills.

These horizontal directives differ markedly from their sectoral forbears: they apply to all professions satisfying the criteria laid down by the directive rather than to a single profession;[252] recognition is based on the principle of mutual trust without prior coordination of the preparatory and educational courses for the various professions;[253] and recognition is granted to the 'end product'—to fully qualified professionals who have already received any professional training.[254] Although this approach has avoided some of the problems associated with the negotiation of sectoral specific Directives, the gain has come at a price. The general system directives do not guarantee recognition; they merely require the host state authorities to consider the migrant's qualifications and, if the qualifications prove to be lacking in terms of duration and content, the Member State can impose additional requirements.

The Legal Profession

The legal profession has been more regulated than most. The first Directive, 77/249 on the provision of services,[255] enabled lawyers to provide services in other Member States under the control of the home state, and using the home state title, but subject to the same conditions laid down for lawyers established in the host state. Subsequently, Directive 89/48/EEC requires lawyers trained in a system which differs from that of the host state either to sit an aptitude test or to complete an adaptation period before their diplomas are recognised by another Member State. The Lawyers Directive, 98/5/EC,[256] represents a new phase in the recognition of qualifications because it specifically recognises that a person's authorisation to practise in their home Member State must be taken into account by the host state. The Directive enables lawyers to practise permanently and without restriction under their original professional title[257] in another Member State and on the same basis as the host state's own lawyers,[258] giving advice on the laws of the home and host states as well as Community and international law. Lawyers who are fully qualified in one Member State will simply have to register with the bar or other competent authority in the host state on the basis of their

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246 [1992] OJ L209/25 as amended. Council Res. of 18 June 1992 ([1992] OJ C187/1) accompanying Dir. 92/51 EEC invites the Member States to allow EC nationals who have been awarded diplomas, certificates or other qualifications by third countries to take up and pursue professions in the Community be recognising these diplomas and certificates in their territories.

247 Art. 1(1)(b).

248 Art. 1(1)(a).

249 Arts. 3 and 5 respectively. No additional requirements (e.g. of reciprocity) can be added by the Member State: Case C-142/01 Commission v. Italy (ski monitor) [2002] ECR I-4541.

250 Art. 4.

251 [1999] OJ L201/77. See also the proposal for a single Directive replacing the two general system Directives: COM(2002)119.

252 Bull. EC 6-1988, 11.

253 Ibid.

254 Ibid.

255 Dir.77/249/EC ([1977] OJ L78/17).

256 [1998] OJ L77/36. The validity of this Directive was unsuccessfully challenged in Case C-168/98 Luxembourg v. European Parliament and Council [2000] ECR I-9131.

257 Art. 2.

258 Arts. 6 and 7.

registration in the home state,[259] without the need for either an aptitude test or an adaptation period. The Directive also makes it easier to acquire the professional title of the host state. A migrant lawyer who has 'effectively and regularly' practised in the law of the host state, including Community law, for at least three years under his home state title can seek admission to the profession of lawyer in the host state (i.e. can use both the host state's and the home state's title) without having to undergo an aptitude test or adaptation period.[260]

Non-application of Horizontal Directives

If the activity does not fall within the scope of one of the general system directives, then, as Bobadilla[261] demonstrates, the principles laid down in Gebhard and Vlassopoulou continue to apply. Bobadilla, a Spanish national, undertook a postgraduate course in fine arts restoration in the UK with financial help from the leading Spanish museum, the Prado. Although she then worked in the Prado on a temporary contract, she was refused a permanent job on the grounds that her British qualification had not been recognised as equivalent to a Spanish degree. The Court said that if the national court found that the profession was not regulated within the meaning of the two horizontal directives, the Prado had to investigate whether Bobadilla's diploma and professional experience were regarded as equivalent to the qualification required. The Court added that the Prado was 'ideally placed' to assess Bobadilla's actual knowledge and abilities, given that it had helped to fund her course and had already employed her.[262]

In the absence of harmonisation the host Member State remains competent to define the exercise of those activities,[263] including the power to impose criminal penalties on a national of another Member State for the illegal pursuit of a regulated profession,[264] provided that it respects Article 43. In practice this means that any requirement imposed by the host state is liable to hinder or make less attractive the exercise of the right of establishment and so will breach Article 43 unless it can be justified.[265] In Bouchoucha[266] the Court said that the French authorities could prevent a French national with a British qualification in osteopathy from practising on public health grounds because the qualification enjoyed no mutual recognition in the Community and the activity was confined to doctors in France. For much the same reason the Court ruled in MacQuen[267] that a Belgian law restricting the conduct of eye examinations to ophthalmologists, to the exclusion of opticians who were not qualified medical doctors, could be justified on the grounds of public health. For much the same reason.

(c) Qualifications Obtained in Third Countries

A particular problem has arisen in respect of Community nationals who, after acquiring professional qualifications in a third country, return to work in Member State A which does recognise their qualification before going to work in State B which does not. Does Community law require the authorities in State B to apply the Directives or the Vlassopoulou principles? At first the answer seemed to be no. In Tawil-Albertini[268] a French national obtained Lebanese dentistry qualifications which were subsequently recognised by the Belgian authorities. Relying on this fact and on the provisions of Dentists' Directive 78/686/EEC, he applied to the French Ministry to practise in France. His application was refused and this decision was upheld by the Court which said that the recognition by one Member State of qualifications awarded by non-Member States did not bind the other Member States.[269]

In Haim[270] the Court qualified Tawil-Albertini. Haim was an Italian national who had acquired Turkish dentistry qualifications which had been recognised by the Belgian authorities. Haim was not, however, allowed to practise in Germany on the grounds that he had not completed the two-year preparatory training required by German law. This time the Court said that, while the German authorities had not breached the Directive (since the Directive did not require Germany to recognise Turkish qualifications recognised by Belgium) they had breached Article 43 by failing to do a Vlassopoulou-type comparison, examining whether and to what extent the experience already acquired in another Member State corresponded to that required by German law.[271]

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259 Art. 3(1).

260 Art. 10.

261 Case C-234/97 Fernández de Bobadilla v. Museo Nacional del Prado [1999] ECR I-4773 was in fact decided under Art. 39 on free movement of workers, not Art. 43 on establishment. See also Case C-108/96 Criminal proceedings against MacQuen and others [2001] ECR I-837, paras. 24–6.

262 Para.35.

263 Case C-108/96 MacQuen [2001] ECR I-837, para. 24.

264 Case C-104/91 Borrell [1992] ECR I-3003, para. 19.

265 Case C-108/96 MacQuen [2001] ECR I-837, paras.24-26.

266 Case C-61/89 [1990] ECR I-3551. See also J. Lonbay, 'Picking over the bones: rights of establishment reviewed' (1992) 17 ELRev. 507, 509.

267 Case C-108/96 [2001] ECR I-837. See also Case C-294/00 Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner (Heilpratikers) [2002] ECR I-6515.

268 Case C-154/93 [1994] ECR I-451.

269 Para. 13.

270 Case C-319/92 [1994] ECR I-425.

271 Para. 29. Haim then sued the German Association of Dental Practitioners of Social Security Schemes for Factortame III damages for the loss suffered by being denied the possibility of practising as a dentist for the scheme: Case C-424/97

In Hocsman[272] the Court went one stage further. It required State B to take account of all of the formal qualifications acquired elsewhere as well as practical experience when making the Vlassopoulou comparison. Hocsman, an Argentinian, acquired Spanish nationality in 1986 and then became a French citizen in 1998. His Argentinian medical diploma was recognised by the authorities in Spain where he was authorised to practise as a specialist in urology in 1986. He was, however, refused permission to practise in France due to the fact he held an Argentinian diploma. Clarifying its earlier case law,[273] the Court said that the French authorities had to take into consideration

all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by the national rules.[274]

3. The Exercise of Activities as a Self-employed Person

3.1 Equal Treatment and Beyond

So far we have considered the application of both the non-discrimination principle and the Gebhard principle to national rules affecting access to self-employment. We turn now to consider the application of the principle of equality to measures which interfere with the exercise of the profession. As we have already seen, national measures which directly or indirectly discriminate on the grounds of nationality in respect of access to a profession are prohibited. The same applies to the exercise of a profession. For example, in Commission v. Italy (dentists)[275] Italian law provided that dentists who transferred their residence to another Member State lost their registration with the Italian dental association. Since this rule did not apply to Italian nationals the Court found that it breached Article 43. Similarly, in Commission v. Belgium (air traffic)[276] the Court said that a Belgian law requiring 'foreigners' (i.e. non-Belgians) to have been resident in Belgium for at least one year in order to register an aircraft breached Article 43. The Court said the rule 'clearly constitute[s] discrimination on the grounds of nationality which impedes the exercise of the freedom of establishment of those persons'.[277]

Indirect discrimination is also prohibited, as Commission v. Italy (lawyers)[278] demonstrated. The Court found that an Italian law requiring members of the bar to reside in the judicial district of the court to which their bar was attached breached Article 43 because it prevented members of the bar established in other Member States from maintaining an establishment in Italy. In Fearon[279] the Court said that an exemption from an Irish rule on the compulsory acquisition of land for those who had resided for more than a year within three miles of the land breached Article 43. However, because it benefited local residents who were likely to be Irish the Court said that the exemption could be justified on grounds of preserving the ownership of land to those who worked on it.

Sometimes the Court abandons the equal treatment principle in favour of a formula based on removing obstacles to the exercise of the freedom of establishment. We saw the Court adopt this approach in Gebhard and Vlassopoulou in respect of access to the market and it can be seen again in Konstantinidis[280] concerning exercise of the freedom of establishment. Konstantinidis, a Greek national, worked in Germany as a self-employed masseur and assistant hydrotherapist. Although his name was entered into the marriage register as Konstadinidis, he argued that the correct transcription of his name should have been Konstantinidis. He sought to have the register corrected because, he said, the distortion of his name could cause potential clients to confuse him with other masseurs, and this interfered with his business contrary to Article 43.[281] Having noted that the Treaty did not prevent the transcription of a Greek name into Roman characters,[282] the Court began by using the discrimination framework to determine whether the national rules on transcription were capable of placing Konstantinidis 'at a disadvantage in law or in fact, in comparison with the way in which a national of that Member State would be treated in the same circumstances'.[283] The Court then moved on to examine whether there were any obstacles or impediments to free movement. It said that the German rules breached Article 43 only in so far as their application caused a Greek national 'such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment'.[284] It continued that the interference would be sufficiently substantial if, as a result of the transliteration, the spelling of Konstantinidis' name led to a modification of

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Haim II [2000] ECR I-5123.

272 Case C-238/98 [2000] ECR I-6623.

273 Para. 30.

274 Para. 35.

275 Case C-162/99 [2001] ECR I-541, para. 36.

276 Case C-203/98 Commission v. Belgium [1999] ECR I-4899.

277 Para. 13.

278 Case C-145/99 Commission v. Italy [2002] ECR I-2235, para. 28.

279 Case C-182/83 [1985] ECR I-3677, paras. 10–11.

280 Case C-168/91 Christos Konstantinidis v. Stadt Altensteig [1993] ECR I-1191.

281 For a similar case in the field of citizenship, but without the emphasis on interference with business, see AG Jacobs' opinion in Case C-148/02 Carlos Garcia Avello v. Etat Belge [2003] ECR I-000.

282 Para. 14.

283 Para. 13.

284 Para. 15. Cf. Case 379/87 Groener v. Minister of Education [1990] ECR I-3967.

the pronunciation with the risk that other clients might confuse him with others.[285]

While Advocate General Jacobs reached much the same conclusion, his approach was inspired by fundamental human rights[286] and not market access. He said that a Community national who goes to another Member State as a worker or a self-employed person was entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state but also to assume that

wherever he goes to earn a living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in accordance with the European Convention on Human Rights. In other words, he is entitled to say 'civis europeus sum' [I am a European citizen] and to invoke the status in order to oppose any violation of his fundamental rights.[287]

This Opinion, delivered just as the Treaty on European Union was being concluded, contained an important recognition of the changing attitude towards migrants: they were not only factors of production but were also citizens with fundamental (civil and political) rights. This approach eventually inspired decisions such as in Martínez Sala[288] and Baumbast[289] on the free movement of citizens.[290]

In Skanavi[291] the Court was also encouraged to decide an establishment case under the citizenship provisions but it declined. Mrs Skanavi, a Greek national working in Germany, had failed to exchange her Greek driving licence for a German one within one year of residence, as required by Community law. As a result, she was prosecuted for driving without a licence and fined. The Court said that while Member States were competent to impose penalties for a breach of such rules, they could not impose a penalty so disproportionate to the gravity of the infringement that this became an obstacle to the free movement of persons. For this reason the Court said that it would be disproportionate to treat a person who had failed to exchange her driving licence as if she were driving without a licence[292] because a criminal conviction would damage her ability to exercise certain trades or professions which would constitute a further, lasting restriction on free movement.[293]

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285 Para. 16.
person of his rightful name is the ultimate degradation, as is evidenced by the common practice of repressive penal regimes which consists in substituting a number for a prisoner's name.

287 Para. 46.

288 Case C-85/96 Martínez Sala v. Freistaat Bayern [1998] ECR I-2691.

289 Case C-413/99 Baumbast and R v. Secretary of State for the Home Department [2002] ECR I-7091.

290 These cases are considered in detail in ch. 15.

291 Case C-193/94 Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos [1996] ECR I-929.

292 Para. 37.

293 Para. 38.

Case C-6/01, REFERENCE to the Court under Article 234 EC by the Tribunal Cível da Comarca de Lisboa (Portugal) for a preliminary ruling in the proceedings pending before that court between Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others
and
Estado português,
on the interpretation of Articles 2 EC, 28 EC, 29 EC, 31 EC and 49 EC,

Summary

1. Freedom to provide services — Treaty provisions — Scope — Activity of operating games of chance or gambling machines — Whether included — Monopoly in the operation of those games — Article 31 EC not applicable — (Arts 2 EC, 28 EC, 29 EC, 31 EC and 49 EC)

2. Freedom to provide services — Restrictions — National legislation restricting the right to operate games of chance or gambling to casinos — Justification — Maintenance of order in society and prevention of fraud — Existence of less stringent conditions in other Member States — Not relevant — Methods of organisation and control — Discretion of national authorities — (Art. 49 EC)

Summary

1. Games of chance and gambling constitute economic activities within the meaning of Article 2 EC. ….

2. National legislation which authorises the operation and playing of games of chance or gambling solely in certain places such as casinos and is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, provided that it is based on concerns of social policy and the prevention of fraud.

Furthermore, the fact that there might exist, in other Member States, legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the legislation in question has no bearing on the compatibility of the latter with Community law. It is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

It is also solely for the national authorities to choose, in the context of the discretion which they enjoy, the methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose.

Parties

THE COURT (Third Chamber),

after hearing the Opinion of the Advocate General at the sitting on 11 February 2003,

gives the following Judgment

Grounds

1. By order of 25 May 2000, which was received at the Court on 8 January 2001, the Tribunal Cível da Comarca (Civil Court of First Instance), Lisbon, referred to the Court for a preliminary ruling under Article 234 EC 13 questions on the interpretation of Articles 2 EC, 28 EC, 29 EC, 31 EC and 49 EC.

2. Those questions were raised in the context of proceedings between the Associação Nacional de Operadores de Máquinas Recreativas (hereinafter Anomar), established in Lisbon, and eight Portuguese companies involved in the marketing and operation of gaming machines (hereinafter together referred to as the applicants in the main action) and the Portuguese State. The questions concern Portuguese legislation relating to the operation and playing of games of chance or gambling under Decreto-Lei (Decree-Law) No 422/89 of 2 December 1989 (Diário da República , I , No 2777, of 2 December 1989), as amended by Decreto-Lei No 10/95 of 19 January 1995 (Diário da República , I, Series A, No 16, of 19 January 1995, hereinafter Decree-Law No 422/89), and whether it complies with Community law.

Community law

3. Article 2 EC provides that [t]he Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities.

4. Under Articles 28 EC and 29 EC, quantitative restrictions on imports and exports and all measures having equivalent effect are to be prohibited between Member States.

5. According to Article 31 EC:

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These

provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

6. Article 49 EC provides:

... restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

National law

7. Decree-Law No 422/89 governs, in particular, the operation and playing of games of chance or gambling and combinations of games of chance and other forms of gaming and makes the operation and playing thereof outside duly authorised areas an offence punishable by a period of imprisonment. The general principle underpinning the statutory scheme is laid down in Article 9 of Decree-Law No 422/89, which provides that [t]he right to operate games of chance or gambling is reserved to the State. Although the State alone is entitled to that right, it may be exercised, other than by the State or another public body, subject to authorisation in the form of an administrative licensing agreement.

8. Decree-Law No 422/89, which forms part of a consistent legislative policy concerning the granting of licences in respect of gaming areas which may be traced back to Decree-Law No 14643 of 3 December 1937, provides that the operation and playing of games of chance or gambling are to be restricted to the games rooms of casinos located in permanent or temporary gaming areas created by decree-law.

9. Portuguese law distinguishes between various kinds of game arranged in four categories, according to the criteria laid down in the relevant provisions of Decree-Law No 422/89, governed by different legal rules.

10. The first category contains games of chance or gambling. Under Article 1 of Decree-Law No 422/89, games of chance or gambling are those whose result is uncertain because it depends exclusively or fundamentally on chance.

11. That category makes provision for two types of gaming involving the use of machines. One is play on machines paying out tokens or cash and the other play on machines which do not pay out either tokens or cash but involve matters proper to games of chance or gambling, or display a result in the form of points depending exclusively or essentially on chance (Article 4(1)(f) and (g) of Decree-Law No 422/89).

12. The right to operate games of chance or gambling is reserved to the State and may be exercised only by undertakings incorporated as public limited companies, to which the Government grants the relevant licence by way of an administrative contract (Article 9 of Decree-Law No 422/89). The operating licence is granted on the basis of a tender procedure (Article 10 of Decree-Law No 422/89) which does not discriminate on grounds of nationality.

13. The only places where the operation and playing of games of chance or gambling are authorised are in casinos located in permanent or temporary gaming areas established under decree-law and, exceptionally and subject to ministerial authorisation, ships, aircraft, bingo halls and in halls reserved for major tourist events (Article 3(1), (6), (7) and (8) of Decree-Law No 422/89).

14. The second category covers combinations of games of chance or gambling and other forms of gaming, statutorily defined as transactions offered to the public in which the expectation of winning depends on either a combination of chance and the skill of the player or on chance only and where the winnings are in the form of goods having commercial value (Article 159(1) of Decree-Law No 422/89). It includes, in particular, lotteries, tombolas, prize draws, promotional competitions, quizzes and contests (Article 159(2) Decree-Law No 422/89).

15. Operation of such combinations of games of chance or gambling and other forms of gaming is subject to authorisation of the Minster for Interior Affairs who is to lay down, for each case, the conditions he considers appropriate and establish the relevant monitoring system (Article 160(1) of Decree-Law No 422/89). In principle, such combinations of games of chance or gambling and other forms of gaming may not be operated by profit-making organisations (Article 161(1) of Decree-Law No 422/89). Nor may they concern matters inherent to games of chance or gambling (poker, fruit machines, roulette, dice, bingo, lottery draws, instant lottery, pools (totobola and totoloto)), or replace prizes with cash or tokens (Article 161(3) of Decree-Law No 422/89).

16. The third category includes games of skill offering prizes in cash, tokens or goods with commercial value (Article

162(1) of Decree-Law No 422/89).

17. It is not permitted to operate machines on which play depends exclusively or essentially on the skill of the player and which provide winnings in cash, tokens or goods having commercial of even little value other than free extended play won on points scored (Article 162(2) of Decree-Law No 422/89).

18. The fourth category, amusement machines, is subject to a special set of rules, laid down by Decree-Law No 316/95 of 28 November 1995 (Diário da República , I, Series A, No 275, 28 November 1995, hereinafter Decree-Law No 316/95).

19. Amusement machines are defined as machines which:

− while paying out prizes directly in tokens or goods with a commercial value, run games the result of which depends exclusively or essentially on the player's skill, enabling the latter to extend the time he can play the machine free of charge on the basis of the points he has obtained (Article 16(1)(a) of the annex to Decree-Law No 316/95);

− possess the characteristics described in paragraph (a) above and make it possible to obtain items the commercial value of which is no more than three times the sum the player wagers (Article 16(1)(b) of the annex to Decree-Law No 316/95).

20. The importation, manufacture, assembly and sale of amusement machines entails the categorisation of the kinds of game concerned, which is a matter for the Inspecção-Geral de Jogos (Inspectorate-General for Gaming and Betting) (Article 19 of the annex to Decree-Law No 316/95).

21. The operation of machines in that category - be they automatic, mechanical, electrical or electronic - is subject to a registration and licensing system, irrespective of whether they are imported, manufactured or assembled in the country (Article 17(1) of the annex to Decree-Law No 316/95).

22. The proprietor of the machine must apply to the civil governor of the district in which the machine is located or where it may be operated in order to register it (Article 17(2) of the annex to Decree-Law No 316/95).

23. Before the machine may be operated, an operating licence must also be issued, either annually or biannually, by the civil governor of the district in which the machine is located or where it may be operated in order to register it (Article 20(1) and (2) of the annex to Decree-Law No 316/95).

24. A licence may be refused, by reasoned decision, where such a protective measure is justified on grounds of protection of children and young persons, prevention of crime and the maintenance or restoration of public peace, order and security (Article 20(3) of the annex to Decree-Law No 316/95).

25. Amusement machines may be operated within a zone or an establishment holding a licence for the playing of legal games on amusement machines which may not be located near an educational establishment (Article 21(2) of the annex to Decree-Law No 316/95). If more than three amusement machines are to be operated together, the establishment concerned must hold a licence exclusively for the operation of games (Article 21(1) of the annex to Decree-Law No 316/95).

26. Machines which do not pay out either tokens or cash but involve matters proper to games of chance or gambling or display a result in the form of points depending exclusively or essentially on chance are not deemed to be amusement machines. That type of equipment falls within the category of games of chance or gambling (Article 4(1)(g) of Decree-Law No 422/89) and is governed by Decree-Law No 422/89 (Article 16(2) of the annex to Decree-Law No 316/95).

27. The rules governing the operation and playing of games are legally classified as public-policy rules justified in the public interest under Article 95(2) of Decree-Law No 422/89.

The main proceedings and the questions referred for a preliminary ruling

28. The applicants in the main action brought an action against the Portuguese State under Article 4(1) and (2) of the Portuguese Code of Civil Procedure seeking a declaration that certain provisions of Portuguese law in the field of gaming do not comply with Community law, and claimed that the court should:

− acknowledge the right to operate and manage games of chance or gambling outside the prescribed gaming areas, and extinguish the monopoly held by the casinos and, accordingly, repeal Articles 1, 3(1) and (2) and 4(1)(f) and (g) of Decree-Law No 422/89, in view of the primacy of the rules and principles of Community law referred to in the application initiating proceedings;

− as a result of the repeal of the abovementioned provisions, also repeal the rules deriving from them, namely the criminal provisions defined in Articles 108, 110, 111 and 115 of that decree-law, as well as all provisions, whether substantive or procedural, laid down in any statute, prohibiting and restricting such activities.

29. The applicants in the main action base their claims, first, on the incompatibility of the abovementioned provisions of Portuguese legislation with Community law and, secondly, on the primacy of Community law over ordinary

domestic law in accordance with Article 8(2) of the Portuguese Constitution.

30. The Portuguese State raised a preliminary objection to the admissibility of the application claiming, in particular, that none of the applicants in the main action has standing to bring proceedings in so far as they lack a direct interest linked to their claims, and that Anomar has no standing to bring proceedings in that a finding that the application is well founded can be of no benefit to it.

31. On the merits, the Portuguese State contends that the rules and principles of Community law on which the applicants in the main action rely were inapplicable to the purely internal circumstances in point and that the operation of gaming machines cannot in any event fall within the scope of the rules on the free movement of goods.

32. The preliminary plea of lack of standing of Anomar and the absence of interest in bringing proceedings of all the applicants in the main proceedings was upheld at first instance.

33. However, the Tribunal de Relação de Lisboa overturned the decision of the lower court and found that the applicant Anomar did have standing and that all the applicants in the main action had an interest in bringing proceedings.

34. Taking the view that, in light of the arguments of the parties, the interpretation of Community law was essential to enable it to settle the dispute before it, the Tribunal Cível da Comarca de Lisboa decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Do games of chance or gambling constitute an economic activity within the meaning of Article 2 EC?

.....

5. Does the operation of gaming machines constitute a provision of services and, as such, is it covered by Article 49 EC et seq.?

6. Does a body of legal rules (such as that established in Articles 3(1) and 4(1) of Decree-Law No 422 of 2 December 1989) according to which the operation of and engagement in games of chance or gambling (defined by Article 1 of that instrument as those whose result is uncertain since it depends exclusively or fundamentally on chance) - which include (see Article 4(1)(f) and (g) of Decree-Law No 422/89) games played on machines which pay out prizes directly in tokens or money and games on machines which, while not paying out directly prizes in tokens or money, involve matters proper to games of chance or gambling or display the number of points awarded depending exclusively and fundamentally on chance - is authorised only in casinos in permanent or temporary gaming areas created by decree-law, constitute a barrier to the freedom to provide services, within the meaning of Article 49 EC?

7. Even if the restrictive rules described in question 6 constitute a barrier to freedom to provide services, within the meaning of Article 49 EC, are they compatible with Community law, given that they are applicable without distinction to Portuguese nationals and undertakings and to nationals and undertakings of other Member States and are, moreover, based on overriding reasons relating to the public interest (consumer protection, crime prevention, protection of public morality, restriction of demand for gambling and the financing of public-interest activities)?

8. Is the activity of operation of games of chance or gambling subject to the principles of freedom of access to and pursuit of any economic activity whatever and, consequently, does the possible existence of legislation in other Member States which lays down less restrictive conditions for the operation of gaming machines sufficient of itself to render invalid the Portuguese legal regime described in Question 6?

9. Do the restrictions laid down in the Portuguese legislation on the activity of operation of games of chance or gambling comply with the principle of proportionality?

10. Do the Portuguese rules making authorisation subject to conditions which are legal (conclusion of an administrative contract with the State following a tendering procedure: Article 9 of the abovementioned Decree-Law No 422/89) and logistical (operation and engagement in games of chance or gambling restricted to gaming areas: Article 3 of the abovementioned decree-law) in nature constitute a requirement which is appropriate and necessary for the attainment of the objectives pursued?

11. Does the use by the Portuguese legislation (Articles 1, 4(1)(g) and [162] of the abovementioned Decree-Law No 422/89 and Article 16(1)(a) of Decree-Law No 316/95 of 28 November 1995) of the word fundamentally, in conjunction with the word exclusively, in order to define games of chance or gambling and to draw a legal distinction between gaming machines and amusement machines, affect the possibility of defining the concept in issue according to the rules of legal construction?

12. Do the imprecise legal concepts to which the Portuguese legislation resorts in defining games of chance or gambling (Articles 1 and 162 of Decree-Law No 422/89, cited above) and amusement machines (Article 16 of Decree-Law No 316/95, cited above) require an interpretation, for the purpose of categorising the various types of amusement machines, which must also take account of the margin of discretion which the national authorities enjoy?

13. Even if it were considered that the Portuguese legislation at issue does not lay down objective criteria to

distinguish between gaming machines and amusement machines, does the conferring on the Inspecção-Geral de Jogos of a discretionary power to categorise games infringe any principle or rule of Community law?

The questions referred for a preliminary ruling

.....Question 1

43. By its first question, the national court is asking whether games of chance or gambling constitute an economic activity within the meaning of Article 2 EC.

44. The applicants in the main action, the governments which submitted observations and the Commission agree that games of chance or gambling are to be deemed an economic activity within the meaning of Article 2 EC, that is to say a for-profit activity which gives rise to a specific remuneration and which falls within the framework of the commercial freedoms enshrined in the Treaty.

45. The German Government submits that neither the chance nature of the winnings nor the use to which is put the profit made on games of chance or gambling prevent the latter from constituting an economic activity.

46. As the Portuguese Government in particular points out, the Court has already held that lotteries constitute an economic activity, within the meaning of the Treaty, inasmuch as they consist in the importation of goods or the provision of services for remuneration (Case C-275/92 Schindler [1994] ECR I-1039, paragraph 19). With particular regard to the activities in issue in the main proceedings, the Court has held that games consisting in the use, in return for a money payment, of slot machines must be regarded as gambling which is comparable to the lotteries forming the subject of the Schindler judgment (Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 18).

47. That assessment must be confirmed and all games of chance or gambling must be deemed to be economic activities within the meaning of Article 2 EC, since they fulfil the two criteria laid down by the Court in its case-law, namely provision of a particular service for remuneration and the intention to make a cash profit.

48. The answer to the first question must therefore be that games of chance and gambling constitute economic activities within the meaning of Article 2 EC.

Questions 2, 3 and 5

49. By its second, third and fifth questions, the national court is asking in essence whether games of chance or gambling constitute an activity relating to goods or, on the contrary, provision of services, within the meaning of the Treaty and, if so, whether activities relating to the manufacture, importation and distribution of gaming machines are separable from the operation of such machines in order to determine whether the principle of free movement of goods as defined in Articles 28 EC and 29 EC is to be applied to those activities, which are indivisible, as a whole.

50. In contrast to the applicants in the main action, the governments which submitted observations and the Commission take the view that gaming activities do not come under the rules applicable to goods.

51. They draw a distinction between gaming machines and gaming activities, as the Court itself did at paragraph 20 of Läärä and Others , pointing out expressly that slot machines constitute goods in themselves which may fall within the scope of Article 30 of the EC Treaty (now, after amendment, Article 28 EC). As regards gaming, that is to say the operation of gaming machines, those governments and the Commission, relying on Schindler , cited above, submit that they are not activities relating to goods but must instead be regarded as services.

52. The Court indeed held, in paragraphs 24 and 25 of Schindler , cited above, that lottery activities are not activities relating to goods, falling, as such, under Article 30 of the Treaty, but are however to be regarded as services within the meaning of the Treaty.

53. As regards the difference between activities relating, on the one hand, to the manufacture, importation and distribution of gaming machines which is within the scope of the free movement of goods and, on the other, the activity of operating gaming machines, which is within the scope of the freedom to provide services, the Portuguese, Belgian and German Governments submit that those various activities are not independent of each other. Since the manufacture and distribution of gaming machines cannot be considered independently from the operation of such machines - given that the latter, being manufactured for the purpose of organising games of chance or gambling, cannot serve for any other purpose - all the governments which submitted observations request the application of the maxim accessorium sequitur principale .

54. In connection to the similar activity of lotteries, the Court has held that the importation and distribution of advertisements and application forms, and possibly tickets, which are specific steps in the organisation or operation of a lottery, cannot, under the Treaty, be considered independently of the lottery to which they relate. Such activities are not ends in themselves; rather, their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery (Schindler , cited above, paragraph 22).

55. However, without there being any need, by approximate analogy with that reasoning, to regard the importation of slot machines as ancillary to the operation thereof, it suffices to state, as the Court did in paragraphs 20 to 29 of Läärä

and Others , cited above, that, even though the operation of slot machines is linked to operations to import them, the former activity comes under the provisions of the Treaty relating to the freedom to provide services and the latter under those relating to the free movement of goods.

56. The answer to the second, third and fifth questions must therefore be that the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

.....Questions 6, 7, 9 and 10

62. By its 6th, 7th, 9th and 10th questions, the national court is essentially asking whether, first, national legislation, such as the Portuguese provisions on games of chance or gambling, which restricts the operation and playing of such games to specific areas and applies without distinction to Portuguese nationals and nationals of other Member States, constitutes a barrier to the freedom to provide services and, secondly, whether such legislation may be justified by overriding public-interest reasons relating, in particular, to consumer protection and to concerns over public morality and crime prevention, which justify it.

63. So far as concerns whether national legislation such as the Portuguese provisions in issue in the main proceedings constitutes a barrier to the freedom to provide services, both the applicants in the main action, the governments which submitted observations and the Commission consider that such legislation may constitute a barrier to the freedom to provide services, even where the restrictions it entails apply without discrimination on the grounds of nationality and are thus applicable without distinction to Portuguese nationals and nationals of other Member States.

64. The applicants in the main action submit, in particular, that in Portugal the betting and gaming industry is monopolised by the casinos, which is manifestly contrary to the economic principles and freedoms enshrined in the Treaty. The Finnish Government, for its part, is of the view that the legal provisions at issue in the main proceedings prevent, at least indirectly, operators established in another Member State from offering the services in question in Portugal.

65. It is common ground that national legislation may fall within the ambit of Article 49 EC, even if it is applicable without distinction, 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 (Schindler , cited above, paragraph 43).

66. That is the case of national legislation, such as the Portuguese provisions, which restricts the right to operate games of chance or gambling solely to casinos in permanent or temporary gaming areas created by decree-law.

67. Any justification of the Portuguese legislation relies on two elements. The first is based on the fact that the legal regime which it establishes is applicable without distinction to Portuguese nationals and nationals of other Member States, and the second on the fact that that regime is justified by the overriding reasons relating to the public interest on which it is based.

68. As the national court states in its order for reference, the Portuguese legislation does not discriminate between the nationals of the various Member States. That legislation must therefore be regarded as applying without distinction.

69. It is appropriate to inquire whether Article 49 EC precludes legislation such as that in issue in the main proceedings which, although it does not discriminate on grounds of nationality, restricts the freedom to provide services.

70. All the governments which submitted observations maintain that such legislation is compatible with Article 49 EC. According to them, it must be regarded as being justified by overriding reasons relating to the public interest such as the protection of consumers, prevention of fraud and crime, protection of public morality and the financing of public-interest activities.

71. By contrast, the applicants in the main action take the view that the restrictions referred to in Article 30 EC by way of exception are clearly derogations and cannot be applied in general, without any criteria. They also claim that the Portuguese State, although required to state precisely the sphere and the grounds prompting it to avail itself of Article 30 EC, has not given satisfactory reasons for resorting to a legal regime such as that which it has laid down. The applicants in the main action are of the view that Portugal has not put forward any reservations of a moral or public-order nature such as to justify such a legal regime.

72. According to the information provided by the national court, the provisions of Portuguese law governing games of chance or gambling are legally classified as public-policy rules justified in the public interest. That legal regime has primacy, is highly symbolic and is designed to attain objectives of public interest and legitimate social purposes such as fair play and the possibility of obtaining some benefit for the public sector.

73. The various considerations leading to the adoption of such legislation to govern games of chance or gambling must be taken together, as the Court pointed out in paragraph 58 of the judgment in Schindler , cited above. In the present case, those considerations concern the protection of consumers, who are the recipients of the service, and the

maintenance of order in society. The Court has already held that those objectives may justify restrictions on freedom to provide services (Case 220/83 Commission v France [1986] ECR 3663, paragraph 20; Schindler , cited above, paragraph 58; and Läärä and Others , cited above, paragraph 33).

74. Furthermore, as the Commission points out, the Portuguese legislation in issue in the main proceedings is substantially similar to the Finnish legislation on slot machines, in issue in Läärä and Others , in respect of which the Court found that it was not disproportionate, in view of the objectives which justified it (Läärä and Others , cited above, paragraph 42). Moreover, the Court considered that limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, falls within the ambit of such public-interest objectives (Case C-67/98 Zenatti [1999] ECR I-7289, paragraph 35).

75. Accordingly, the answer to the 6th, 7th, 9th and 10th questions must be that national legislation, such as the Portuguese legislation, which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

Question 8

76. By its eighth question, the national court is asking in essence whether the mere fact that the operation and playing of games of chance or gambling are subject, in other Member States, to legislation which is less restrictive than the Portuguese legislation in issue in the main proceedings is sufficient to render the latter incompatible with the Treaty.

77. The applicants in the main action point out that legislation in other Member States is less restrictive than the Portuguese legislation and submit that there is no social or economic reason nor any reservations from a moral or public-order angle to justify the Portuguese legislation being more restrictive.

78. On the other hand, all the governments which submitted observations point out that the level of protection which a Member State intends providing in its territory in relation to games of chance or gambling falls within the discretion recognised as being enjoyed by the national authorities. It is therefore a matter for each Member State to arrange for the appropriate legislation to govern gaming, in particular in the light of the specific social and cultural features of each Member State, and in accordance with the principles deemed best to suit the society concerned. The Portuguese Government points out that the special nature of gaming calls for and justifies a legal framework in keeping with the scale of fundamental values of each Member State.

79. It is common ground that it is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them (Läärä and Others , cited above, paragraph 35, and Zenatti , cited above, paragraph 33).

80. Accordingly, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure (Läärä and Others , cited above, paragraph 36, and Zenatti , cited above, paragraph 34).

81. The answer to the national court's eighth question must therefore be that the possible existence, in other Member States, of legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law.

Questions 11, 12 and 13

82. By its 11th, 12th and 13th questions, the national court seeks to ascertain in essence whether legislation which makes the operation and playing of games of chance or gambling subject to legal and logistical conditions such as conclusion of an administrative licensing contract with the State following a tendering procedure and restriction of gaming areas solely to casinos, which uses imprecise legal concepts in order to categorise different sorts of games and which confers on the Inspecção-Geral de Jogos a discretionary power to categorise games by theme is compatible with the Treaty, in particular Article 49 EC.

83. The Portuguese, Belgian, Spanish and Finnish Governments agree that the Treaty does not preclude the provisions of Decree-Law No 422/89 governing the operation and playing of games of chance or gambling provided such provisions meet conditions as to proportionality and necessity.

84. The applicants in the main action, for their part, submit that the restrictions on operation of games laid down in the Portuguese legislation do not comply with the principle of proportionality by virtue of the lack of precision regarding the reasons and aims pursued by that legislation, since no justification regarding public order or social protection has been advanced. They also challenge the conferring on the Inspecção-Geral de Jogos of a discretionary

power to categorise types of gaming, gaming machines and games by theme. Such power, when it lacks objective and transparent rules, is arbitrary and thus contrary to the Treaty.

85. The Commission points out that measures restricting the operation and playing of games of chance or gambling must be proportionate and appropriate for ensuring achievement of the intended aim and proposes that the Court should declare those questions inadmissible. It submits that, in the absence of a definition, at Community level, of the various sorts of games and the various types of machines to play them on, it is for the national court to rule on the interpretation of the national provisions in issue in the main proceedings. Moreover, the national court alone is competent to determine whether conferring on the Inspecção-Geral de Jogos the power to characterise and categorise is likely to affect adversely the freedom to provide services.

86. As the Portuguese Government points out, the Court has held that national measures which restrict the freedom to provide services, which are applicable without distinction and are justified by overriding reasons relating to the public interest - as is the case here, as is evident from paragraphs 68 and 72 to 75 of this judgment - must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it (Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraphs 13 to 15, and Läärä and Others , cited above, paragraph 31).

87. None the less, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict (see, to that effect, Schindler , cited above, paragraph 61; Läärä and Others , cited above, paragraph 35, and Zenatti , cited above, paragraph 33) and which have been deemed compatible with the Treaty.

88. The answer to the 11th, 12th and 13th questions should therefore be that, in the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

Costs

89. The costs incurred by the Portuguese, Belgian, German, Spanish, French and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Tribunal Cível da Comarca de Lisboa by order of 25 May 2000, hereby rules:

1) Games of chance and gambling constitute economic activities within the meaning of Article 2 EC.

...4) National legislation such as the Portuguese legislation which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

5) The fact that there might exist, in other Member States, legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law.

6) In the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

In Case C-429/02,

REFERENCE to the Court under Article 234 EC by the Cour de Cassation (France) for a preliminary ruling in the proceedings pending before that court between

Bacardi France SAS, formerly Bacardi-Martini SAS, and Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA,

Girosport SARL,

on the interpretation of Council Directive 89/552/CEE of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) and Article 59 of the EC Treaty (now, after amendment, Article 49 EC),

THE COURT (Grand Chamber),

1. By decision of 19 November 2002, received at the Court on 27 November 2002, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) and Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

2. Those questions were raised in proceedings between Bacardi France SAS, formerly Bacardi-Martini SAS ('Bacardi'), and Télévision française 1 SA ('TF1'), Groupe Jean-Claude Darmon SA ('Darmon') and Girosport SARL ('Girosport'), seeking an order that the latter three undertakings cease to put pressure on foreign clubs to refuse advertising for alcoholic beverages produced by Bacardi on advertising hoardings placed in venues hosting bi-national sporting events taking place in other Member States.

.....

23. As it was in doubt as to the compatibility with Community law of the French rules prohibiting television advertising for alcoholic beverages marketed in France, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States ('the television advertising rules at issue in the main proceedings'), the Court of Cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. [Does] Directive 89/552/EEC of 3 October 1989 ("Television without frontiers"), in the version prior to that of Directive 97/36/EC of 30 June 1997, [preclude] national legislation, such as Articles L.17 to L.21 of the French Code des débits de boissons and Article 8 of Decree No 92-280 of 27 March 1992, which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive [direct advertising] or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive [?]

2. [Are] Article 49 EC and the principle of the free movement of television broadcasts within the Union to be interpreted as precluding a national provision such as that in Articles L.17 to L.21 of the French Code des débits de boissons and Article 8 of Decree No 92-280 of 27 March 1992 which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive [direct advertising] or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive, from having the effect that operators responsible for the broadcasting and distribution of television programmes:

(a) refrain from broadcasting television programmes, such as in particular retransmissions of sporting events, whether held in France or in other countries of the Union, where they show prohibited advertisements within the meaning of the French Code des débits de boissons, or

(b) broadcast them on condition that prohibited advertisements within the meaning of the French Code des débits de boissons do not appear, thereby preventing the conclusion of advertising contracts concerning alcoholic drinks whether of national origin or from other Member States of the Union [?]'

The questions referred

.....Second question: freedom to provide services

30. By its second question, the national court asks, essentially, whether Article 59 of the Treaty (now, after amendment, Article 49 EC) precludes a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, in the case of indirect television advertising resulting from the appearance on screen of

hoardings visible during the retransmission of bi-national sporting events taking place in other Member States.

31. Article 59 of the Treaty requires the elimination of any restriction on the freedom to provide services, even if it applies to national providers of services and to those of other Member States alike, 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 (see to that effect Case C-76/90 Säger [1991] ECR I-4221, paragraph 12, and Case C-58/98 Corsten [2000] ECR I-7919, paragraph 33). Moreover, freedom to provide services is enjoyed by both providers and recipients of services (see to that effect Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, paragraph 16).

32. The freedom to provide services may, however, in the absence of Community harmonisation measures, be limited by national rules justified by the reasons mentioned in Article 56(1) of the EC Treaty (now, after amendment Article 46(1) EC) read together with Article 66 of the EC Treaty (now Article 55 EC), or for overriding requirements of the general interest (see, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I-0000).

33. In that context, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality (see Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivía [1991] ECR I-4151, paragraph 16), which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, in particular, Säger , paragraph 15; Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, paragraph 35; Corsten , paragraph 39; and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 33).

34. In the main proceedings, since there are no Community harmonisation measures on the matter, three points must be examined in turn, namely, whether there is a restriction within the meaning of Article 59 of the Treaty, whether there may be justification for rules on television advertising such as those at issue in the main proceedings under Article 56(1) of the Treaty, read together with Article 66, and whether those rules are proportionate.

35. In the first place, it must be observed that rules on television advertising such as those at issue in the main proceedings constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty. They entail a restriction on freedom to provide advertising services in so far as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also impede the provision of broadcasting services for television programmes. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may be visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events is likely to contain indirect television advertising for those alcoholic beverages.

36. In that context, as is clear from paragraphs 28 and 29 of today's judgment in Case C-262/02 Commission v France [2004] ECR I-0000, the arguments of the French Government concerning, first, the technical possibility of masking images in order selectively to conceal the hoardings showing advertising for alcoholic beverages and, second, the non-discriminatory application of the rules on television advertising to all alcoholic beverages, whether they are produced in France or abroad, cannot be accepted. Although it is true that such technical means exist, they involve substantial additional costs for the French broadcasters. Furthermore, in the context of the freedom to provide services, it is only the origin of the service at issue which may be relevant in the case in these proceedings.

37. Second, rules on television advertising such as those at issue in the main proceedings pursue an objective relating to the protection of public health within the meaning of Article 56(1) of the Treaty, as the Advocate General stated in paragraph 69 of his Opinion. Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns (see Case 152/78 Commission v France [1980] ECR 2299, paragraph 17; Aragonesa de Publicidad Exterior and Publivía , paragraph 15; and Case C-405/98 Gourmet International Products [2001] ECR I-1795, paragraph 27).

38. Third, rules on television advertising such as those at issue in the main proceedings are appropriate to ensure their aim of protecting public health. Furthermore, they do not go beyond what is necessary to achieve such an objective. They limit the situations in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages.

39. In that regard, as is clear from paragraphs 33 to 39 of today's judgment in Commission v France , the arguments set out by the Commission and the United Kingdom Government to establish the disproportionate nature of that regime must be rejected.

40. As far as concerns the one argument raised by Bacardi which was not considered in today's judgment in Commission v France , namely the argument that the rules on television advertising at issue in the main proceedings are not consistent because they do not cover advertising for alcoholic beverages visible in the background on film

sets, that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved (see Aragonesa de Publicidad Exterior and Publivía , paragraph 16).

41. Accordingly, the answer to the second question is that Article 59 of the Treaty does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States.

Operative part

On these grounds,

2. Article 59 of the EC Treaty (now, after amendment, Article 49 EC) does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States.

Case C-108/01.
Opinion of Mr Advocate General Alber delivered on 25April2002.
Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd.
Reference for a preliminary ruling: House of Lords - United Kingdom.

Protected designations of origin - Regulation (EEC) No 2081/92 - Regulation (EC) No *1107/96 - Prosciutto di Parma - Specification - Requirement for ham to be sliced and packaged in the region of production - Articles 29 EC and 30 EC - Justification - Whether requirement may be relied on against third parties - Legal certainty - Publicity.*

I ─ Introduction

1. The present order for reference concerns the question of the extent of the protection afforded by industrial property in the form of protected designations of origin. Specifically, the issue is whether the protected designation of origin "Prosciutto di Parma" ("Parma ham") may be used only if the slicing and packaging of the ham also take place in the region of production. The Italian plaintiffs in the main proceedings wish to prevent the defendants from placing ham on the market under the protected designation of origin "Parma ham" if it is sliced and packaged in the United Kingdom.

II ─ Legal framework

(1) Community provisions

(a) Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (2) ("Regulation No 2081/92")

2. Regulation No 2081/92 introduces Community rules to protect certain agricultural products and foodstuffs for which a link between product or foodstuff characteristics and geographical origin exists.

3. Article 2(2) provides:

"For the purposes of this Regulation:

(a) designation of origin: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

─ originating in that region, specific place or country, and

─ the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area;

(b) geographical indication: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

─ originating in that region, specific place or country, and

─ which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area.

"

4. Under Article 4(1) of Regulation No 2081/92, to be eligible to use a protected designation of origin ("PDO") (3) or a protected geographical indication ("PGI") an agricultural product or foodstuff must comply with a specification . Article 4(2) lists the particulars which must be included in the specification; they include a description of the agricultural product or foodstuff including the raw materials, the definition of the geographical area, a description of the method of obtaining the agricultural product or foodstuff, details bearing out the link with the geographical environment or the geographical origin and any requirements laid down by Community and/or national provisions.

5. Regulation No 2081/92 prescribes a normal procedure and a simplified procedure ─ which is relevant in the present case ─ for the entry of PDOs and PGIs in the "Register of protected designations of origin and protected geographical indications" kept by the Commission. The fundamental difference between them is that the simplified procedure does not provide for the main points of the application and the references to national provisions to be published in the Official Journal of the European Communities . Articles 5, 6 and 7 govern the normal procedure. In brief, Article 5 provides that an application is initially submitted at national level and examined as to its content by the Member State. The Member State forwards the application to the Commission if it considers the application to be justified. Under Article 6, the Commission verifies, by means of a formal investigation, whether the application for registration includes all the particulars provided for in Article 4 and, if it considers that the name qualifies for protection, publishes in the Official Journal of the European Communities the name and address of the applicant, the name of the product, the main points of the application, the references to national provisions governing the preparation, production or manufacture of the product and, if necessary, the grounds for its conclusions. If no

statement of objections is notified to the Commission in accordance with Article 7 by a Member State or a legitimately concerned natural or legal person, the Commission enters the name in the "Register of protected designations of origin and protected geographical indications" and publishes it in the Official Journal of the European Communities .

6. In accordance with Article 8, the indications "PDO" and "PGI" may appear only on agricultural products and foodstuffs which comply with the regulation.

7. Article 13(1) provides:

"Registered names shall be protected against:

(a) any direct or indirect commercial use of a name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as "style" , "type" , "method" , "as produced in" , "imitation" or similar;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the public as to the true origin of the product.

...

8. In accordance with Article 15, the Commission is assisted in the registration procedure by a committee composed of representatives of the Member States.

9. Article 17 governs the simplified procedure for registering a PDO or PGI. It applied to names, such as Parma ham, which already existed and enjoyed national protection before the regulation entered into force. Article 17 states:

"1. Within six months of the entry into force of the Regulation, (4) Member States shall inform the Commission which of their legally protected names or, ... , which of their names established by usage they wish to register pursuant to this Regulation.

2. In accordance with the procedure laid down in Article 15, the Commission shall register the names referred to in paragraph 1 which comply with Articles 2 and 4. Article 7 shall not apply. ...

3. ...

"

10. In contrast to the normal procedure, the simplified procedure therefore makes, or made, no provision for the main points of the application and the references to national provisions to be published in the Official Journal. Comparable information is made available solely to the committee set up under Article 15 of Regulation No 2081/92.

(b) Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation No 2081/92 ("Regulation No 1107/96")(5)

11. After receiving and formally examining the names notified by the Member States pursuant to Article 17 of Regulation No 2081/92, the Commission adopted Regulation No 1107/96. The annex to this regulation contains the list of names registered as PDOs or PGIs, including the PDO "Prosciutto di Parma" .

12. The specification for the PDO "Parma ham" refers, in sections B.4 and C.2, to the requirement that the packaging of sliced Parma ham is to be carried out in the region of production defined in section C.1. In section G it identifies the functions of the Consorzio del Prosciutto di Parma (the Parma Ham Producers' Association; "the Consorzio"), including in relation to packaging. It sets out certain additional requirements as to labelling in Section H.

(2) Italian law

13. The Consorzio was set up on 18 April 1963 by 23 producers of Parma ham and in the very same year — thus long before the Community regulations entered into force in 1992 and 1996 — the trademark "Prosciutto di Parma" was registered by it. The production of Parma ham and protection of the denomination of origin were first regulated in Italian law by Law No 506 of 4 July 1970. (6) By ministerial order of 3 July 1978, the Consorzio was entrusted with the task of supervising the production and marketing of Parma ham pursuant to Article 7 of Law No 506. Law No 26 of 13 February 1990 consolidated in Italian law the rules which are now in force. (7) Ministerial Decree No 253 of 15 February 1993 and a ministerial decree of 12 April 1994 empowered the Consorzio to monitor and supervise observance of the provisions concerning the production and processing of Parma ham. (8)

.....

26. The House of Lords elucidates the question which it has submitted by indicating, in question form, that it is interested above all in clarification of the following issues:

"(1) On a true construction of Council Regulation (EEC) No 2081/92 and Commission Regulation (EC) No 1107/96, and the relevant specification for Parma ham, is it contrary to Articles 4 and/or 8 and/or 13 of Council Regulation (EEC) No 2081/92 to label and sell as "Parma ham" ham from Parma which has not been sliced and packaged in the typical production area and under the supervision of the [Consorzio]?

This issue focuses on two matters. First, whether the regulations are capable of protecting slicing and packaging operations. Secondly, whether (assuming the regulations so permit) the application for registration included a claim for the protection of slicing and packaging operations.

(2) If the answer to issue 1 is Yes, are the relevant provisions of Council Regulation (EEC) No 2081/92 and Commission Regulation (EC) No 1107/96 valid? (The validity issue.)

(3) Are the provisions of Council Regulation (EEC) No 2081/92 enforceable in civil proceedings in England by persons such as the Appellants ...? (The direct effect issue.)

"

V ─ Assessment

(1) Interpretation of the question submitted

60. The House of Lords has referred to the Court of Justice the question whether Regulation No 2081/92 read with Regulation No 1107/96 and the specification for the PDO "Prosciutto di Parma" creates a right which is directly enforceable before the courts of the Member States to restrain the retail sale of ham which has not been sliced and packaged in the region of production in accordance with the specification. It is apparent from the order for reference that the national court would like to ascertain, first, whether slicing and packaging operations in the region of production are capable of being protected at all by Regulations No 2081/92 and No 1107/96 and, secondly, whether the application for registration of the PDO "Prosciutto di Parma" in fact included a claim seeking protection of slicing operations. Should both those questions be answered in the affirmative, the question of the validity of both regulations is raised. Finally, the House of Lords asks whether it is possible to enforce before national courts such protection as is granted under the regulations.

.....

(5) Compatibility of the measure with the principles of transparency and legal certainty

116. In the main proceedings it is in question whether the slicing and packaging requirement contained in the specification can be raised against Asda and Hygrade because it was not published in the Official Journal of the European Communities and, at any rate officially, is available only in Italian.

(a) Publication of the specification

117. Asda and Hygrade complain that the specification is not accessible because it has not been published in the Official Journal of the European Communities and they have no right against the Commission or the Consorzio to access to it.

118. It is a fundamental principle of the Community legal order that a measure adopted by the public authorities cannot be applicable to those concerned before they have had the opportunity to make themselves acquainted with it. (41) Articles 8 and 13 of Regulation No 2081/92 in conjunction with Regulation No 1107/96 establish a Community law prohibition on placing on the market under the PDO "Prosciutto di Parma" ham which has not been sliced, packaged and labelled in the region of production. However, that prohibition has been published in the Official Journal only in so far as it follows from Regulations No 2081/92 and No 1107/96 that there is a PDO "Parma ham" . The detail of the conditions under which the PDO may be used is contained in the specification submitted with the notification, which was not published in the Official Journal.

119. It is true that the transmission of a summary of the specification to the committee under Article 15 of Regulation No 2081/92, a step invoked by the Commission, results in a certain level of publicity for the specification. However, only the Member States are thereby informed. This reflection therefore does not solve the problem of notifying citizens or businesses such as Asda and Hygrade.

120. Nor does the fact, relied on by the Commission, that in the normal procedure under Articles 5, 6 and 7 of Regulation No 2081/92 the specification is equally published in the Official Journal in summary form only appear capable of dispelling the concerns put forward by Asda and Hygrade. Under the normal procedure the national provisions to be observed are none the less indicated. In the case of the PDO "Parma ham" , where the restriction at

issue is also embodied in national provisions, that indisputably did not occur.

121. The principle of legal certainty could be complied with by publishing the whole specification in the Official Journal. However, that approach seems practicable to a limited extent only in view of the very technical nature of that document and its length. Nor does that approach take account of the fact that, where designations of origin are registered under Article 17 of Regulation No 2081/92, names already protected under national law on the entry into force of the regulation are involved. The provisions conferring protection have therefore already been published once, in the case of Parma ham in the Italian Official Gazette. Account has thus been taken of publicity at national level. If fresh publication were now required at Community level, publication would take place twice. This proposition accordingly seems not to take sufficiently into account the particular nature of the registration procedure under Article 17 of Regulation No 2081/92.

122. Registration concludes an administrative procedure which begins with the submission to the relevant Member State of the application, including the specification to be lodged therewith. As the Court found in its judgment in Carl Kühne , under the division of powers laid down by Regulation No 2081/92 it is for the Member States to examine the material preconditions for registration of a PDO or PGI. It is accordingly also for the national courts to decide whether the substantive preconditions for registration are met. (42) As is apparent from the facts set out in that judgment, objections concerning the preconditions were indeed raised at national level. (43) It follows that the problem of the accessibility of the specification, from which the requirements imposed on the use of a PDO arise, is first of all an issue to be raised within the framework of national law. As Carl Kühne (44) also establishes, that also applies to the simplified procedure followed under Article 17 of Regulation No 2081/92.

123. In the light of that case-law, the question can be raised of whether publication at Community level is still necessary at all. The registration procedure under Regulation No 2081/92 is a procedure which requires the participation of both national and Community authorities. Since the Member States are to examine whether the preconditions for registration are met and objections as to legality are to be raised at national level, publication of the specification at Community level does not seem absolutely necessary.

124. It is, however, to be taken into account that entry in the register of protected designations of origin meant that the protection for the PDO "Parma ham" which previously existed only at national level was extended throughout the Community. Registration has the effect of creating the industrial property right established under Community law. The situation appears reconcilable with the principle of legal certainty only with difficulty if that new right is created without some publicity, which is also ensured at Community level, for the rules to be observed.

125. Community law indeed ensures some publicity for the specification. In accordance with the 12th recital in the preamble to Regulation No 2081/92, entry in the register of protected designations of origin and protected geographical indications kept by the Commission serves to provide information to those involved in the trade. Interested businesses such as Asda and Hygrade can see first of all from that entry that there is a PDO "Prosciutto di Parma" .

126. In addition, it is apparent from Article 4 of Regulation No 2081/92 that a specification is to be annexed to the application for registration of a PDO or PGI. It is clear, furthermore, from Article 6 of the regulation that the application is to be sent to the Commission and that the Commission keeps the register of PDOs and PGIs. Businesses therefore know not only that there is a PDO "Parma ham" but also, through that disclosure, that there is a specification for the PDO and that it is held by the Commission.

127. In accordance with case-law, a person who has learnt of the existence of a legal measure which was not notified to him is obliged to obtain the full text of the legal measure affecting him from the relevant institution. (45) This also applies where a summary of the legal measure in question has been published. (46) That case-law clearly proceeds on the basis that there is, alongside the duty to notify under Article 254 EC, in addition an obligation on citizens of the Union to inform themselves where appropriate.

128. An economic operator is informed by publication of Regulation No 1107/96 that the PDO "Parma ham" exists. It knows on the basis of Regulation No 2081/92, which was published, that registration occurs only if there is a corresponding specification. It also knows that applications for registration are to be sent via the Member State to the Commission and that the Commission keeps the register of protected designations of origin. It accordingly knows where it can inform itself about the specification. On the basis of the case-law cited, it may therefore be assumed that where the need arises businesses inform themselves about the specification of interest to them by making an appropriate request to the Commission.

129. The fact that the register is kept by the Commission and serves to provide information to those involved in the trade and that the Commission receives the application for registration together with the specification via the competent Member State provides justification, arguing from the converse, for the assumption that the Commission is obliged to make the specification held by it accessible to interested persons involved in the trade. It performs with regard to the basic elements of the registration the function as it were of a notary or depositary with whom the documents which have led to the registration are deposited. That assumption appears to be necessary not only for reasons of legal certainty but also in particular in the light of Article 255 EC which grants citizens of the Union a right

of access to the Commission's documents. In addition, regard is to be had to the third paragraph of Article 21 EC. It too entitles every citizen to write to the Commission and seek information.

130. The fact that the specification was not drawn up by the Commission should not preclude the right of access to that document. The Commission is the author of the entry in the register of protected designations of origin. Since the protective effect of registration conferred by Articles 8 and 13 of Regulation No 2081/92 also relates to the conditions for use of the PDO or PGI which are contained in the specification, the Commission may be considered to have taken on the provisions in the specification. Finally the Commission is the author of the legal measure, Regulation No 1107/96, by which the PDO "Parma ham" is protected under Community law to the extent defined by the specification. It is therefore either to be regarded as author or at any rate to be equated to the drafter.

131. As for the rest, it is to be noted that, in accordance with Article 2(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (47) which was adopted in implementation of Article 255 EC (see the fourth recital in its preamble), a right of access is granted to all documents held by an institution, that is to say to all documents drawn up or received by it and in its possession, in all areas of activity of the European Union. The specification concerns an entry in the register of PDOs and PGIs and thus an area of activity of the Union. It was received by the Commission and is in its possession. The Commission is therefore required to grant access to that document.

132. It must therefore be stated by way of intermediate conclusion that the absence of publication of the specification in the Official Journal does not infringe the principles of transparency and legal certainty. A business must inform itself about the specification and the conditions contained in it for use of a PDO by making a request to the Commission.

(b) Existence of the specification in only one official language

133. It thus remains to discuss to what extent the rules cannot be raised against Asda and Hygrade because they were submitted to the Commission in Italian only and at any rate no official English translation of the specification for the PDO "Parma ham" is available.

134. The question is thus raised as to whether a prohibition under Community law, as declared here by means of Articles 8 and 13 of Regulation No 2081/92 in respect of use of the PDO "Parma ham" for ham not sliced in the region of production, is effective only if it is published or accessible in all the official languages.

135. The question of the extent to which a citizen's obligations under Community law must be accessible to him in his mother tongue, at least in so far as it is one of the official languages of the Community, is a fundamental question. Article 290 EC does not settle the language question but leaves it to the Council to settle. A right cannot at any rate be derived from that provision whereby all Community law measures must necessarily be available in every official language. (48)

136. Under Articles 4 and 5 of Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community, (49) regulations and other documents of general application are to be drafted in the official languages and published in the Official Journal. As explained above, the specification at issue here forms part of the entry in the register of designations of origin which was effected on the basis of Regulation No 1107/96. It can thus be taken as part of the regulation. By virtue of the prohibitory effect of Articles 8 and 13 of Regulation No 2081/92, it is, however, in any event "another document of general application" because it lays down in detail the conditions to be met for use of the PDO. This could indicate that the specification must be translated into all the official languages.

137. It could be argued to the same effect by referring to the third paragraph of Article 21 EC. Under that provision, every citizen may write to the Commission and expect an answer from it in the official language chosen for the request. If Asda and Hygrade therefore write to the Commission in English in accordance with the solution proposed above and seek information on the specification, the view could be taken, referring to that provision, that the Commission must produce the specification in English.

138. This solution perhaps comes closest to meeting the requirement of legal certainty. However, it fails to take account of the mixed national/Community nature of the registration procedure and imposes a substantial translation burden on the Commission.

139. As already stated, under the case-law judicial protection in respect of a registration is to be sought from the national courts. (50) Within that framework, a business interested in placing on the market a product protected by a PDO is nevertheless obliged to use the official language in which the application for registration was written, therefore Italian in the present case.

140. Against that background, it does not seem unreasonable to expect a person who seeks information from the Commission on a specification to receive the specification in the official language in which it was submitted to the Commission with the application for registration.

141. This outcome also seems justified in particular by the reflection that a business concerned with placing foreign

goods on the market, such as Asda or Hygrade, will generally have the linguistic knowledge necessary for importing the goods or otherwise has available to it appropriate means of overcoming the associated language difficulties. It can therefore also be expected to overcome the obstacles resulting from the fact that the specification is available in the original language only.

142. In addition to those arguments, practice in competition law can be referred to. There the principle applies that, while the person to whom a decision on a cartel is addressed must be sent the statement of objections in his official language, the documents upon which the Commission's assessment is based and which are communicated as annexes or subject to the right of inspection are to be made available only in the original. No translation is required. (51) Here too, documents upon which the Commission bases its decision are involved. It could be argued in a similar fashion that, when the Commission decides on the registration of a designation of origin, it relies on the details in the application for registration and particularly in the specification and that the specification is therefore also to be made available only in the original language.

143. On the basis of those reflections, it must be assumed that the fact that the specification does not exist in English does not prevent Articles 8 and 13 from being directly applicable in relation to the PDO "Parma ham" .

144. It should be added that the problem discussed here concerns only registrations under the simplified procedure. For names registered under the normal procedure, a summary of the notification including the specification and reference to any national provisions to be observed is published in the Official Journal and therefore in all the official languages. The consequences of the interpretation put forward here are thus limited. The interpretation concerns only registrations of names already existing when Regulation No 2081/92 was adopted, and only in so far as the Commission was informed of them within six months of the entry into force of the regulation. In that respect, the interpretation put forward here appears appropriate to the particular features of the procedure under Article 17 of Regulation No 2081/92.

145. It is therefore to be concluded that the registration of the PDO "Parma ham" is also consistent with the principles of legal certainty and transparency.

.....

Judgment of the Court of 20 May 2003.
Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd.
Reference for a preliminary ruling: House of Lords - United Kingdom.
Protected designations of origin - Regulation (EEC) No 2081/92 - Regulation (EC) No 1107/96 - Prosciutto di Parma - Specification - Requirement for ham to be sliced and packaged in the region of production - Articles 29 EC and 30 EC - Justification - Whether requirement may be relied on against third parties - Legal certainty - Publicity.
Case C-108/01.

on the interpretation of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), and of Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation No 2081/92 (OJ 1996 L 148, p. 1),

after hearing the Opinion of the Advocate General at the sitting on 25 April 2002,
gives the following
Judgment

1. By order of 8 February 2001, received at the Court on 7 March 2001, the House of Lords referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ("Regulation No 2081/92"), and of Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation No 2081/92 (OJ 1996 L 148, p. 1).

2. That question was raised in proceedings between Consorzio del Prosciutto di Parma ("the Consorzio"), an association of producers of Parma ham, established in Italy, and Salumificio S. Rita SpA ("Salumificio"), a company also established in Italy, a producer of Parma ham and a member of the Consorzio, of the one part, and Asda Stores Ltd ("Asda"), a company established in the United Kingdom, an operator of supermarkets, and Hygrade Foods Ltd ("Hygrade"), also established in the United Kingdom, an importer of Parma ham, of the other part, concerning the marketing in the United Kingdom under the protected designation of origin "Prosciutto di Parma" ("the PDO "Prosciutto di Parma"

") of Parma ham sliced and packaged in that Member State.

.....

Whether the condition of slicing and packaging in the region of production can be relied on against economic operators

Observations submitted to the Court

82. The Consorzio and Salumificio consider that the condition of slicing and packaging in the region of production laid down by the specification of the PDO "Prosciutto di Parma" may be relied on before national courts. They submit that an operator may plead his ignorance of that condition, derived from measures and provisions to which he does not have access, only if a penalty is sought to be imposed on him. In agreement with the Italian Government, they consider that an operator cannot, on the other hand, rely on his ignorance of the condition where, as in the main proceedings, what he is asked to do is merely in future to cease selling Parma ham sliced and packaged outside the region of production. They add that, in any event, Asda and Hygrade had no difficulty in the main proceedings in freely and lawfully obtaining and using all the necessary information and documents, in particular an English-language version of the specification, available since 1997.

83. The French Government submits that, pursuant to Article 249 EC, any individual may rely directly on a Community regulation in civil proceedings before a national court.

84. The Commission states that the fact that the specification was not published follows from the economy of Regulation No 2081/92 and the specific registration procedure applied. The national court's question touches the very essence of the legislation and calls into question the entire registration procedure laid down by Regulation No 2018/92. The non-publication of the specification results from a deliberate choice on the part of the Community legislature in connection with the simplified procedure. That procedure collects together all the designations already protected by national legislations. The names registered pursuant to that procedure were already well known not only to the public but also, probably, to economic operators, whether they were importers, distributors or retailers. It may also be supposed that those operators marketed the products concerned before registration of the PDO. The intention of the Community legislature was solely to give the names already protected at national level the benefit of

Community protection, after verification by the Commission that they complied with the terms and conditions of Articles 2 and 4 of Regulation No 2081/92.

85. Asda and Hygrade submit that a measure which has not been published in the Official Journal of the European Communities cannot be applied against an individual where, as in the main proceedings, he has no legal right to obtain a copy of the measure, whether in his own or another language. Notwithstanding the principle of the direct effect of regulations under Article 249 EC, a Community measure is capable of creating individual rights only if it is sufficiently clear, precise and unconditional. The scope and effect of a Community provision must be clear and foreseeable to individuals, otherwise the principle of legal certainty and the principle of transparency are breached. The rules laid down must enable the persons concerned to know the precise extent of the obligations imposed on them. Failure to publish a measure prevents the obligations laid down by that measure from being imposed on an individual. Furthermore, an obligation imposed by Community law must be easily accessible in the language of the Member State in which it is to be applied. In the absence of an official translation, a Community measure cannot block the rights of individuals in the context of either civil or criminal proceedings. If the Consorzio were authorised to obtain, before a national court, compliance with an unpublished specification, the principles of legal certainty and transparency would be breached. Consequently, the provisions relating to that specification cannot have direct effect.

86. The United Kingdom Government observes that Regulation No 1107/96 merely mentions that the name "Prosciutto di Parma" is a PDO. Nothing in that PDO indicates that an operator who has purchased Parma ham cannot slice and package it for sale to the consumer. Nothing in the nature of the operations draws the operator's attention to the fact that the PDO "Prosciutto di Parma" may not be used for slices cut outside the region of production from a ham lawfully bearing the PDO. Any prohibition of using the PDO "Prosciutto di Parma" must be transparent and easily accessible. The principles of transparency and accessibility are complied with only if the restriction may be determined easily on the basis of official publications of the Community.

Findings of the Court

87. In accordance with the second paragraph of Article 249 EC, a regulation, which is a measure of general application, is binding in its entirety and directly applicable in all Member States.

88. As such, it creates not only rights but also obligations for individuals, on which they may rely against other individuals before national courts.

89. Nevertheless, the requirement of legal certainty means that Community rules must enable those concerned to know precisely the extent of the obligations which they impose on them (see Case C-209/96 United Kingdom v Commission [1998] ECR I-5655, paragraph 35).

90. Regulation No 2081/92 states, in the 12th recital in its preamble, that to enjoy protection in every Member State designations of origin must be registered at Community level, with entry in a register also providing information to those involved in trade and to consumers.

91. However, where the simplified procedure is adopted, it does not provide for publication of the specification or extracts from the specification.

92. Regulation No 1107/96 merely provides that the name "Prosciutto di Parma" is to be registered as a PDO under Article 17 of Regulation No 2081/92.

93. The effect of that registration is to lay down at Community level the conditions set out or referred to in the specification, in particular the condition that slicing and packaging operations be carried out in the region of production. That condition implies for third parties a negative obligation, breach of which may give rise to civil or even criminal penalties.

94. As all the parties who have expressed a view on this point acknowledged during the procedure, the protection conferred by a PDO does not normally extend to operations such as slicing and packaging the product. Those operations are prohibited to third parties outside the region of production only if a condition to that effect is expressly provided for in the specification.

95. In those circumstances, the principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in Community legislation, which could have been done by mentioning that condition in Regulation No 1107/96.

96. As it was not brought to the knowledge of third parties, that condition cannot be relied on against them before a national court, whether for the purposes of criminal penalties or in civil proceedings.

97. It cannot be argued that publication of the conditions in the specification was not necessary in the context of the simplified procedure under Article 17 of Regulation No 2081/92 since the names registered were already well known to the public and to economic operators and the intention of the Community legislature was solely to extend to Community level a protection which already existed at national level.

98. Prior to Regulation No 2081/92, designations of origin were protected by national provisions which were

published and applied, in principle, only on the territory of the Member State which had adopted them, subject to international conventions extending protection to the territory of other Member States by common agreement of the contracting parties. Subject to that reservation, it cannot be presumed that in consequence of such a situation the conditions relating to those designations of origin were necessarily known to the public and to economic operators throughout the Community, including details of the precise extent of protection defined by specifications and national provisions of a technical nature, drawn up in the national language of the Member State concerned.

99. It must therefore be concluded that the condition that the product must be sliced and packaged in the region of production cannot be relied on against economic operators, as it was not brought to their attention by adequate publicity in Community legislation.

On those grounds,

THE COURT,

in answer to the question referred to it by the House of Lords by order of 8 February 2001, hereby rules:

1. Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, must be interpreted as not precluding the use of a protected designation of origin from being subject to the condition that operations such as the slicing and packaging of the product take place in the region of production, where such a condition is laid down in the specification.

2. Where the use of the protected designation of origin "Prosciutto di Parma" for ham marketed in slices is made subject to the condition that slicing and packaging operations be carried out in the region of production, this constitutes a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 29 EC, but may be regarded as justified, and hence compatible with that provision.

3. However, the condition in question cannot be relied on against economic operators, as it was not brought to their attention by adequate publicity in Community legislation.

Opinion of Mr Advocate General Léger delivered on 10 July 2001.
Council of the European Union v Heidi Hautala.
Appeal - Public right of access to Council documents - Council Decision 93/731/EC - Exceptions to access to documents - Protection of the public interest concerning international relations - Partial access.
Case C-353/99 P.

Opinion of the Advocate-General

1. This appeal was brought by the Council of the European Union against the judgment of the Court of First Instance of the European Communities of 19 July 1999 in Case T-14/98, which annulled the Council Decision of 4 November 1997 refusing Heidi Hautala, a Member of the European Parliament, access to the report of the Working Group on Conventional Arms Exports.

2. This case originated with a written question which Mrs Hautala put to the Council on 14 November 1996, in which she stated that she was concerned by the violations of human rights which were being assisted by arms exports from Member States of the European Union. Mrs Hautala asked the Council what the reasons were for the secrecy surrounding the guidelines which the Working Group on Conventional Arms Exports had proposed to the Council's Political Committee with a view to clarifying the criteria governing arms exports.

3. The Council replied on 10 March 1997 stating that one of the eight criteria taken into account in arms exports decisions concerned respect for human rights in the country of final destination. It added that at its meeting on 14-15 November 1996 the Council's Political Committee approved a report from the Working Group on Conventional Arms Exports, with a view to further enhancing the consistent implementation of the common criteria.

4. By letter of 17 June 1997, addressed to the Secretary-General of the Council, the applicant asked to be sent the report mentioned in the Council's answer.

5. The report was approved by the Political Committee but not by the Council itself. It was drawn up under the COREU special European correspondence system and was therefore not distributed through the normal channels for distributing Council documents. In the Council's practice, the COREU network is reserved for questions falling within the abovementioned Title V. Distribution of documents transmitted via the COREU network is restricted to a limited number of authorised recipients in the Member States, the Commission of the European Communities and the General Secretariat of the Council.

6. By letter of 25 July 1997, the General Secretariat of the Council refused access to the report under Article 4(1) of Decision 93/731/EC, stating that it contained highly sensitive information, disclosure of which would undermine the public interest as regards public security.

7. By letter of 1 September 1997 the applicant made a confirmatory application, in accordance with Article 7(1) of Decision 93/731.

8. The confirmatory application was considered by the Information Working Party of the Committee of Permanent Representatives and by the members of the Council, which considered by a simple majority that a negative reply should be given. Four delegations were in favour of releasing the document.

9. By letter of 4 November 1997, the Council rejected the confirmatory application on the grounds that disclosure of the report could be harmful for the European Union's relations with third countries. It stated that access to the document was refused in order to protect the public interest with regard to international relations.

10. On 13 January 1998 Mrs Hautala brought an action before the Court of First Instance for annulment of the Council's decision refusing access to the report.

11. The terms of the contested judgment are set out below, following the description of the legal background to the present case.

I - Legal background

12. The Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 contains a Declaration (No 17) on the right of access to information, which states:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

13. At the close of the European Council in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled A Community close to its citizens, in which they stressed the need to make the Community more open. That commitment was reaffirmed by the European Council in Edinburgh on 12 December 1992.

14. On 5 May 1993 the Commission addressed to the Council, the Parliament and the Economic and Social Committee Communication 93/C 156/05 on public access to the institutions' documents. It contained the results of a comparative survey on public access to documents in the Member States and some non-member countries, and concluded that there was a case for developing further the access to documents at Community level.

15. On 2 June 1993 the Commission adopted Communication 93/C 166/04 to the Council, the European Parliament and the Economic and Social Committee on openness in the Community, setting out the basic principles governing access to documents.

16. At the European Council in Copenhagen on 22 June 1993, the Council and the Commission were invited to continue their work based on the principle of citizens' having the fullest possible access to information.

17. Within the framework of these preliminary steps towards implementing the principle of transparency, the Council and the Commission approved on 6 December 1993 a Code of Conduct concerning public access to Council and Commission documents, aimed at establishing the principles to govern access to documents held by them.

18. The Code of Conduct sets out the following general principle:

The public will have the widest possible access to documents held by the Commission and the Council.

19. Document is defined as any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.

20. The circumstances which may be relied on by an institution as grounds for rejecting a request for access to documents are listed in the Code of Conduct in the following terms:

The institutions will refuse access to any document whose disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

- ...

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.

21. The Code of Conduct further provides:

The Commission and the Council will severally take steps to implement these principles before 1 January 1994.

22. In order to put that undertaking into effect, the Council adopted Decision 93/731/EC on public access to Council documents.

23. Article 4(1) of Decision 93/731 provides:

Access to a Council document shall not be granted where its disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

....

II - The contested judgment

24. The Court of First Instance sets out the pleas in law put forward by Mrs Hautala as follows:

The applicant puts forward three pleas in law to support her application: first, infringement of Article 4(1) of Decision 93/731; second, infringement of Article 190 of the EC Treaty (now Article 253 EC); third, breach of the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the Community institutions, and of the principle of protection of legitimate expectations.

25. Since the decision to refuse access was annulled on the basis of the first plea the Court did not consider the other two pleas.

26. The Court considered in turn the three arguments put forward by the applicant in support of her first plea. It sought to determine first, whether the confirmatory application was given adequate consideration by the Council; second, whether access to the report could be refused by reference to the public interest concerning international relations; and third, whether the Council was obliged to consider whether it could grant partial access, authorising disclosure of the parts of the document not covered by the exception on grounds of protection of the public interest.

27. The Court rejected the first two arguments put forward by Mrs Hautala. It accepted the third argument, in favour of granting the applicant partial access to the report, and ordered the annulment of the Council's refusal on the following grounds:

75 As regards the third argument, which is supported by the Swedish Government, namely that the Council infringed Article 4(1) of Decision 93/731 by refusing to grant access to the passages in the report which are not covered by the

exception based on protection of the public interest, it should be observed that the Council considers that the principle of access to documents applies only to documents as such, not to the information contained in them.

76 It is thus for the Court to verify whether the Council was obliged to consider whether partial access could be granted. Since this is a question of law, review by the Court is not limited.

77 Decision 93/731 is a measure of internal organisation adopted by the Council on the basis of Article 151(3) of the EC Treaty. In the absence of specific Community legislation, the Council determines the conditions for dealing with requests for access to its documents (see, to that effect, Case C-58/94 Netherlands v Council [1996] ECR I-2169, paragraphs 37 and 38). Consequently, if the Council so wished, it could decide to grant partial access to its documents, under a new policy.

78 Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted. Nor, as the Council accepted at the hearing, does it expressly prohibit such a possibility.

79 In view of the above, the basis on which the Council adopted Decision 93/731 must be borne in mind for the purpose of interpreting Article 4 of that decision.

80 Declaration No 17 recommended that the Commission should submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions. That commitment was restated at the European Council in Copenhagen on 22 June 1993, which invited the Council and the Commission to "continue their work based on the principle of citizens' having the fullest possible access to information".

81 In the preamble to the Code of Conduct, the Council and the Commission refer expressly to Declaration No 17 and the conclusions of the European Council in Copenhagen as the basis for their initiative. The Code of Conduct states the general principle that the public will have the widest possible access to documents.

82 Furthermore, the Court of Justice stressed in Netherlands v Council, paragraph 35, the importance of the public's right of access to documents held by public authorities. The Court of Justice noted that Declaration No 17 links that right with "the democratic nature of the institutions". In his Opinion in that case ([1996] ECR I-2171, point 19), the Advocate General stated, with reference to the individual right to information, as follows:

"Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F [of the Treaty on European Union, now, after amendment, Article 6 EU] of the Common Provisions."

83 The Court of First Instance recently held in Svenska Journalistförbundet, paragraph 66, referring to Netherlands v Council, that:

"The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration."

84 Next, it should be noted that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule (see, to that effect, WWF UK v Commission, paragraph 56, and Interporc v Commission, paragraph 49). In the present case, the provisions to be construed are those of Article 4(1) of Decision 93/731, which lists the exceptions to the above general principle.

85 Furthermore, the principle of proportionality requires that "derogations remain within the limits of what is appropriate and necessary for achieving the aim in view" (Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 38). In the present case, the aim pursued by the Council in refusing access to the report was, according to the reasons stated in the contested decision, to "protect the public interest with regard to international relations". Such an aim may be achieved even if the Council does no more than remove, after examination, the passages in the report which might harm international relations.

86 In that connection, the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.

87 Accordingly, Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions.

88 As appears from paragraph 75 above, the Council did not make such an examination, since it considers that the principle of access to documents applies only to documents as such and not to the information contained in them. Consequently, the contested decision is vitiated by an error of law and must therefore be annulled.

III - Pleas in law and arguments of the parties

28. The Council is seeking to have the judgment of the Court of First Instance set aside and is supported by the Kingdom of Spain, intervener in the appeal. It claims that the Court made an error of law by interpreting Article 4(1) of Decision 93/731 as requiring the Council to consider whether it should grant partial access to information not covered by the exceptions to public access to its documents.

29. The Council and the Kingdom of Spain claim that the Court has misconstrued Decision 93/731, as regards both its wording and its objective, and has wrongly applied the principle of proportionality.

30. The Council considers that the Court has categorised as being a right to information what is merely a right of access to public documents. The text of Decision 93/731 refers only to Council documents in their existing form and not to the items of information which they contain. The Council is therefore required merely to consider whether the document requested, in its existing form and without any alteration, can be released or whether it falls under one of the exceptions laid down in Article 4 of Decision 93/731. The decision does not, however, require it to consider whether partial access may be granted to documents. It does not oblige it to create a new document comprising only items of information which may be disclosed, as the contested judgment appears, wrongly, to require. The Council observes that the approach taken by the Court is likely to create a considerable administrative burden and significant practical difficulties since it would be necessary to determine which parts of each document could be released.

31. In the view of the Council, the objective of Decision 93/731 is not to enshrine a right to information. The judgments of the Court of First Instance relating to the right to information fail to recognise that the Court of Justice in its judgment in Netherlands v Council, cited above, refers to access to documents and that Declaration No 17 on the right of access to information is a political statement and has no binding effect.

32. As regards the principle of proportionality, to which the Court of First Instance refers in the contested judgment, the Council considers that it cannot be applied in order to determine the validity of a restriction on a right protected under Community law. The decision aims not to confer an absolute right of access to Council documents on members of the public, but to arrange for access to be granted on certain conditions. In the absence of a general principle of Community law conferring an absolute right of access to Council documents on members of the public, and in view of the adoption of Article 255 EC as a result of the Treaty of Amsterdam, which confirms the absence of a pre-existing principle in this matter, the principle of proportionality cannot be interpreted as a restriction on a right protected under Community law. In addition, by ensuring by means of the exceptions laid down in Article 4 that disclosure of documents will not harm certain interests in need of protection, Decision 93/731 already applies the principle of proportionality. That principle is thus fully taken into consideration.

33. The Kingdom of Spain shares that view. It contends that it cannot be inferred either from the legislation in force or from the case-law of the Court of Justice and the Court of First Instance that there is a principle of a right to information such as is embodied in the contested judgment. It also contends that the principle of proportionality, when applied to measures adopted by the Council in relation to Article 4(1) of Decision 93/731, can only mean that that institution must act within the confines of what is appropriate and necessary in order to fulfil the requirements of that provision. That involves denying access to its documents if one of the interests listed in that provision would otherwise be undermined.

34. Mrs Hautala claims that the appeal should be dismissed. The United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark, interveners in the appeal, and the Kingdom of Sweden and the Republic of Finland, interveners at first instance and present at the appeal stage, support that claim.

35. In the view of Mrs Hautala and the Member States associated with her defence, the right of partial access is required by both the wording and the context of Decision 93/731. They add that the latter should be interpreted and applied in accordance with the general principles of Community law, which include the right to information. Entitlement to partial access to documents follows directly from the fundamental principle of Community law that European Union citizens should be granted the widest and fullest possible access to documents of the European institutions.

36. Mrs Hautala contends that, like other principles of Community law, the right of access to information was incorporated into the Treaty by Article 255 EC. The principle of proportionality therefore serves in this case to limit that right in order to safeguard other objectives deserving of protection. It requires, however, that exceptions should not exceed the limits of what is appropriate and necessary for achieving the aim in view.

37. Before giving my opinion on the abovementioned pleas and arguments I think it is appropriate to recall the rules of Community law governing the interpretation of Decision 93/731.

IV - The rules of Community law governing the interpretation of Decision 93/731

38. Decision 93/731 is based on Article 151(3) of the EC Treaty (now, after amendment, Article 207(3) EC), under which the Council is to adopt its own rules of procedure. It lays down the principle of public access to Council documents. It does, however, make exercise of that right subject to a number of conditions, which it lists and which include the exceptions contained in Article 4(1) of the decision.

39. In Netherlands v Council the Kingdom of the Netherlands sought annulment of Decision 93/731 on the ground that the Council wrongly relied as its legal basis on Article 151(3) of the Treaty and Article 22 of its Rules of Procedure, both of which are concerned solely with the Council's internal organisation. The Kingdom of the Netherlands argued that Decision 93/731 went far beyond the ambit of the rules on the internal organisation and management of the Council and constituted an act expressly designed to have legal effects vis-à-vis citizens. The Netherlands Government contended that the Council had categorised as a matter of internal organisation something which in fact constituted a fundamental right, namely the public's right of access to information, the rules governing which must be accompanied by the necessary safeguards.

40. The Court of Justice acknowledged that so long as the Community legislature had not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures regarding the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.

41. It thus acknowledged the Council's right to use its power of internal organisation to introduce a measure of transparency into its operation. The absence of Community rules of a general nature governing access to documents undoubtedly justified an institution such as the Council improving its methods of operating, in an effort to achieve transparency, by laying down rules more favourable than those which had so far governed its own practice.

42. Despite its aim, which by reason of the links it has with the very foundations of the European Community, clearly goes beyond the mere internal organisation of one of the Community institutions, Decision 93/731 was held to be based on the appropriate Treaty provision. The Court of Justice was able to regard the Treaty provision enabling the Council to adopt its rules of procedure as constituting an adequate legal basis for improving the transparency of its operation.

43. It would be an exaggeration, however, to claim that even as regards the Council's field of operation the content of that judgment dealt fully with the question of access to documents.

The judgment in Netherlands v Council, which confirms the formal validity of Decision 93/731, does not appear to contribute anything substantive to the interpretation of the provisions of Decision 93/731 at issue. In that case the Court of Justice was clearly bound by the subject-matter of the action, which was confined to the question of the appropriate legal basis of Decision 93/731.

44. The present appeal, however, calls for an interpretation of the contested provisions. That can only be done if all the rules of Community law governing the right of access to documents are taken into consideration. In Netherlands v Council the Court of Justice noted that the trend followed by the Community discloses a progressive affirmation of individuals' right of access to documents held by public authorities.

45. It is clear that the provisions of Decision 93/731 at issue cannot be applied unless their content is interpreted in accordance with that trend and with the foundations of the right of public access to documents which that decision by its very title seeks to achieve.

46. The rules it contains are intended to put into effect, in the limited context of the Council's power of internal organisation, the guidelines laid down since Declaration No 17 in respect of the right of individuals to have access to documents held by the public authorities.

47. Declaration No 17 is the first tangible act in which the Community acknowledged the importance of a general right of access to information within the Community institutions. The Intergovernmental Conference thereby demonstrated its intention to increase the effectiveness of that right. In noting that transparency of the decision-making process enhances the democratic nature of the institutions and the confidence of the public in the administration, it emphasised the importance of a right which is derived from the most essential political foundations of the Member States of the Community.

48. The European Councils held in 1992 in Birmingham and Edinburgh reaffirmed that will to make the Community more open. At the European Council in Copenhagen on 22 June 1993 the Council and the Commission were called upon to continue their work on the basis of the principle that citizens must have the fullest possible access to information.

49. Those various political impetuses were translated into action in particular through the adoption by the Council and the Commission of a code of conduct and subsequently the amendment by the Council of its rules of procedure. Decision 93/731, which reiterates and supplements the provisions of the Code of Conduct, was adopted following that amendment.

50. The process of acknowledging the right of access did not end with the adoption of rules of procedure which the institutions laid down for themselves. A new article, Article 191a (now Article 255 EC), was introduced into the EC Treaty by the Treaty of Amsterdam. Article 255(1) EC provides that [a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European

Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3. In pursuance of those paragraphs, a proposal was submitted for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

51. Article 42 of the Charter of Fundamental Rights of the European Union provides a right of access to European Parliament, Council and Commission documents.

52. It is important to take into account that consistency in the political will of the Member States and in the evolution of the scope of Community legislation in that regard. They demonstrate the emergence of a right closely related to the foundations of the Community. As Advocate General Tesauro observed in his Opinion in Netherlands v Council, the openness of the public authorities' action is closely linked with the democratic nature of the institutions. The fact that citizens are aware of what the administration is doing is a guarantee that it will operate properly. Supervision by those who confer legitimacy on the public authorities encourages them to be effective in adhering to their initial will and can thereby inspire their confidence, which is a guarantee of public content as well as the proper functioning of the democratic system. At the highest level of that system, providing the public with information is also the surest method of involving them in the management of public affairs.

53. Advocate General Tesauro described perfectly the place of the right of access to documents in Community law as follows:

Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice ... . In the light of the changes which have taken place in the legislation of the Member States, the right of access to official documents now constitutes part of that principle ... . Hence it is the democratic principle and the content which it has progressively assumed in the various national systems which requires access to documents no more to be allowed only to the addressee of a measure of the public authority.

54. The finding by the Court of Justice in Netherlands v Council that the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle reflects the strength and relevance of that right. A large number of Member States, moreover, have amended their domestic legislation concerning access to documents since 1996 without there appearing to be any retreat except in a few minor cases. Ireland and the United Kingdom in particular have adopted legislation which goes notably far as regards protection for citizens in this respect.

55. It is important to emphasise this convergence of national laws since to my mind it constitutes a decisive reason for recognising the existence of a fundamental principle of a right of access to information held by Community institutions.

56. According to consistent case-law now enshrined in the Treaties, fundamental rights form an integral part of the general principles of law with which the Court of Justice ensures compliance. To that end it draws on the constitutional traditions common to the Member States and on evidence provided by international instruments concerning protection of human rights in which Member States have cooperated or to which they have acceded.

57. Thirteen of the fifteen Member States have a general rule that the public has a right of access to documents held by the administration. In nine of those thirteen States the right of access is a fundamental right, a principle of a constitutional nature or a right founded in the constitution but of a legislative nature. In the four other Member States the right derives from one or more laws.

58. Those national rules, although the content of their corresponding legal systems are not necessarily the same, demonstrate a common conception in most of the Member States, which Advocate General Tesauro has described as follows: it is no longer true that everything is secret except what is expressly stated to be accessible, but precisely the converse.

59. In the light of that conception of relations between those who govern and those who are governed, on which there is almost unanimous consensus within the European Union, it appears natural to me to accept that there exists a principle of access to information held by the national public authorities and that that principle is such that it would engender an equivalent principle at Community level.

If there is to be any discussion, it would appear to be more about the content of the exceptions to the principle which must be laid down, since the need to define certain limits does not raise any significant objections either. It cannot be ruled out that certain restrictions on access to information should be allowed for reasons of a public or a private nature.

60. If one considers the international instruments concerning protection of human rights which Member States have cooperated in or adhered to, their contribution with regard to access to documents varies.

61. The right to freedom of expression provided for in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms has not so far been interpreted by the European Court of Human Rights as covering the right of access to information. Article 10(1) provides that the right to freedom of expression shall include

freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. .... It is a matter for regret that freedom of expression is not regarded as having a natural link to the right of access to information unlawfully kept secret. However, the letter of the text has always been interpreted strictly.

62. Various resolutions, recommendations and declarations of the Parliamentary Assembly of the Committee of Ministers of the Council of Europe have affirmed the importance for citizens to have adequate information about the operation of the public authorities. A draft recommendation on public access to official information is in the course of preparation by the Council of Europe. In its current version that draft lays down a general principle providing to anyone who makes an application the right to have access to documents held by the public authorities. Exceptions to the general principle are provided for where other legitimate interests prevail. They must be applied restrictively. It should be noted that the draft provides for partial access to information. However, partial access may be refused if the expurgated version of the document is misleading or incomprehensible. The final draft of the recommendation should be adopted before 31 December 2001.

63. These various measures show that even if no legislative step has yet been taken by the Council of Europe numerous unambiguous declarations have been made as a preliminary.

64. Article 19 of the 1966 United Nations Covenant on Civil and Political Rights provides expressly that freedom of expression includes the right to seek information and ideas. The 1966 Covenant is in force in all the Member States. That freedom conferred on citizens to have access to the information required in order for them to exercise their freedom of expression confirms the principle that each Member State has enshrined in its national law.

65. It should not be overlooked, however, that the broad interpretation which may be made of Article 19 of the 1966 Covenant is far from being unanimously accepted. Some authors do not consider that the freedom to seek information provided for in the 1966 Covenant includes the obligation on Member States to supply that information.

66. In any event, the approach traditionally taken by the Court of Justice to the protection of fundamental rights has never led it to take guidance from a provision if it was not certain that that provision laid down the rule corresponding to the principle at issue.

67. The Court of Justice ensures compliance with fundamental rights. It contributes to their recognition and participates in the definition of their content. The general principles of Community law, of which fundamental rights are an integral part, are often derived from international instruments such as the European Human Rights Convention or the 1966 Covenant.

68. Examination of the case-law reveals, however, that the convergence of the constitutional traditions of the Member States may suffice in order to establish the existence of one of those principles without the need to obtain confirmation of its existence or content by referring to international rules.

69. Moreover, a general principle of Community law may be recognised without first establishing the existence of either constitutional rules common to the Member States or rules laid down in international instruments in which the Member States have cooperated or to which they have acceded. It may suffice that Member States have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States.

As regards the powers of investigation available to the administration in respect of legal persons, for example, the Court of Justice has held that 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 and the European Convention on Human Rights did not allow for recognition of a fundamental right to the inviolability of the home of a business. This lacuna in the principal rights under consideration was not enough to deter the Court of Justice from recognising the existence of a general principle that individuals must be protected against harmful intervention by the public authorities. The Court held that in all the legal systems of the Member States, any intervention by the pubic 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 [therefore] be recognised as a general principle of Community law.

70. It is quite clear from the foregoing that the principal sources which traditionally support the enshrinement of general principles of Community law are not essential if other elements are sufficient to define the content of those principles.

71. I consider that that is precisely the case here.

72. As we have seen, as a principle and regardless of the exceptions that may apply to it and the procedure for exercising it, access to documents for citizens is a right widely shared among the Member States. It would be paradoxical to say the least to extend the situation in which the Community institutions, which have legislative powers similar to those of the Member States, are sheltered in the exercise of those powers by a right of access to documents

which is ill-defined and restrictive, when almost all the Member States have elevated that right to the level of a principle. Finally, is it reasonable to accept that the transfer by Member States of their sovereign rights to the Community legal order in certain specified fields should not be accompanied by a similar transfer of the safeguards which they accord their citizens, which embrace the right to have knowledge of information in the possession of the administration?

73. At Community level, the principle of access to documents was confirmed, and its status and content defined, following the entry into force of the Treaty of Amsterdam and the adoption of the Charter of Fundamental Rights.

74. It should be remembered that that principle was constitutionally enshrined by the adoption of Article 255 EC. Its content is to be defined in the regulation to be adopted under Article 255(2) EC, which is currently being negotiated, and by the future decisions of the Court of Justice.

75. The fact remains that that right, which existed before the Council's new Rules of Procedure and Decision 93/731/EC were adopted, has now been expressly integrated at the highest level of Community law.

76. That the principle existed before it was introduced into the Treaty was evident from the case-law of the Court of First Instance, which considers that Declaration No 17 and the Code of Conduct enshrine the general principle of giving the public the widest possible access to documents held by the Commission and the Council. It had clearly stated that the objective of Decision 93/731 was to give effect to the principle of the widest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. One must concur with that.

77. The strength of the principle of access to documents derives from the fact that it is a fundamental right.

78. Advocate General Tesauro termed it a fundamental civil right. Article 42 of the Charter of Fundamental Rights of the European Union provides [a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

79. Classification of the right of access to documents as a fundamental right constitutes a further stage in the process of recognising that principle and establishing its ranking within the Community legal order.

80. Naturally, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States.

81. It is known that the political and moral values of a society are not all to be found in positive law. However, where rights, freedoms and principles are described, as in the Charter, as needing to occupy the highest level of reference values within all the Member States, it would be inexplicable not to take from it the elements which make it possible to distinguish fundamental rights from other rights.

82. The sources of those rights, listed in the preamble to the Charter, are for the most part endowed with binding force within the Member States and the European Union. It is natural for the rules of positive Community law to benefit, for the purposes of their interpretation, from the position of the values with which they correspond in the hierarchy of common values.

83. As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.

84. In this case, the link between Article 42 of the Charter and Article 255 EC is evidenced by the explanatory note to Article 42, which states that [t]he right guaranteed in this Article is the right guaranteed by Article 255 of the EC Treaty. It cannot be made more plain that the right contained in Article 255 EC is now clearly described as corresponding to a fundamental right within the meaning of the Charter.

85. It is true that, according to the same explanatory note, [i]n accordance with Article 52(2) [of that Charter, that right] applies under the conditions defined by the Treaty. The content of the right of access to documents, as set out in the Charter, is thus delimited by the provisions of Article 255 EC. That delimitation is the logical consequence of the difference in legislative value between the Charter and the binding provisions of the Treaty.

86. That should not, however, cause us to overlook the fundamental nature of that right, as affirmed by the Member States of the Union at the time it was introduced into the Charter. Although not enshrining a positive right itself, Article 42 of the Charter confers on that right a quality which should provide guidance for its interpretation. I consider that where it is decided that a right should be classified as a fundamental right the authorities responsible for

applying it are under a strict requirement to give it the wide interpretation demanded by its true nature.

87. This should be the case as regards the right of access to documents as enshrined in Article 255 EC.

88. The Court of Justice will doubtless be required again to interpret the principle of access to documents, Article 255 EC, which introduces it into the Treaty, and the regulation which is to lay down the detailed provisions concerning that principle.

89. It is not required, in the context of this appeal, to give an exhaustive definition of the principle. However, it is necessary in order to be able to give a ruling on it to deal with one aspect of that definition by clarifying the meaning ascribed to the term documents both by Article 42 of the Charter and by Article 255 EC.

90. The other Community texts on this subject do not all use the same terms. Declaration No 17 refers to public access to information. At the European Council in Copenhagen, the Council and the Commission were directed to pursue their work of implementing the principle that citizens should have the fullest possible access to information. However, the measures adopted following those requests to implement the principle of access to information refer to access to documents.

91. Use of the term documents is not enough in my view to justify the interpretation proposed by the Council.

92. The distinction between documents and information seems to me to be purely formal. The right of access to a document concerns the content of the document and not its physical form. No one can claim that when making a request for access to documents he is seeking the document itself and not the information it contains. When applying for the disclosure of a document, the applicant implies that he is seeking all of the information contained in the document, which leaves him free to ascertain the information which is of particular interest to him.

93. The nuance introduced by the Council imposes a somewhat artificial distinction between the container and the content or between the medium and the information. So far as the applicant is concerned, it is only the substance of the document which is relevant. We request access to a document solely because it contains data which is likely to be of interest to us. It is therefore always ultimately a case of a request for information.

94. This understanding of the right of access to documents is, moreover, in accordance with the broad interpretation which should be used in such matters. It is necessary, therefore, to interpret the concept of the right of access to documents as meaning a right of access to the information contained in the documents.

95. It is in the light of that right thus interpreted that I can now give my opinion regarding the present appeal.

V - The appeal

96. The Council challenges the existence of the obligation imposed on it by the Court of First Instance to consider whether it should grant partial access to the information contained in the document at issue.

97. It relies, first, on the wording of Decision 93/731, which uses exclusively the term documents and not information.

98. I have just given the reasons why the right of access to documents should not be interpreted in this way. The Council's concept of access to documents should therefore be understood to mean access to the information contained in that institution's documents.

99. Since what counts is the information itself and not the document, the argument put forward by the Council that partial access would oblige it to create a new document containing solely information which may be released is unfounded.

100. If interpreted in this way, the right of access to Council documents provided for in Article 1(1) of Decision 93/731 authorises partial access to documents. It should therefore be accepted that access is permitted to certain information contained in a document although the document cannot be made public in its entirety for reasons relating to the need to protect one or more of the interests listed in Article 4(1) of Decision 93/731.

101. Second, the Council contends that the objective of Decision 93/731 is not to establish a right of access to information. In its view, that decision has its own specific and limited objective.

102. Decision 93/731 is, in fact, intended to ensure the internal operation of the institution in conformity with the interests of good administration. It is a measure of internal organisation by means of which the Council may deal with requests for access to documents in its possession.

103. Even within the limited scope of its power of internal administration, however, the Council is bound by the general principles of Community law and, even more, by fundamental rights. The purpose assigned to Decision 93/731 cannot therefore be relied on in breach of the fundamental right of access to documents. This applies even more where, as the Court of Justice has observed, there is nothing to prevent rules on the internal organisation of the work of an institution having legal effects vis-à-vis third parties. It would not therefore be permissible for the Council, by means of an internal measure, to avoid a fundamental rule with which the other Community rules are required to

comply.

104. As Advocate General Tesauro stated, a Council decision, albeit adopted in full compliance with its self-imposed rules on public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of the right of information. In other words, the purpose assigned to Decision 93/731 cannot be relied on in support of a reading of its provisions which is contrary to fundamental principles.

105. It is appropriate to consider the Council's third complaint, alleging that the principle of proportionality is not relevant in this case in the absence of an absolute right of access to its documents. In the Council's view, Article 4 of Decision 93/731 already applies that principle.

106. As I said, the right of access to documents must be regarded as one of the fundamental rights protected by the Community legal system. It is accepted that those rights are not framed as absolute rights. Exercise of such rights may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.

107. By prohibiting the Council from authorising access to a document where its disclosure could undermine the protection of the public interest, Article 4(1) of Decision 93/731 is capable of restricting the right of access to Council documents.

108. It is not denied in the present case, however, that the exception contained in Article 4 of Decision 93/731 with regard to protection of the public interest in the field of international relations meets Member States' requirements regarding defence of their prerogatives in international affairs. Among those prerogatives is the right for Member States to consult each other in order to adopt a common position with regard to non-member countries on questions which may be as sensitive from a political viewpoint as arms exports to countries suspected of using such arms for purposes incompatible with human rights.

109. The Council interprets the principle of proportionality as having already been incorporated into the content of Article 4(1) of Decision 93/731.

110. According to that view, merely listing the circumstances which justify restrictions on the right of access to documents is sufficient to ensure that that right is observed, provided the restrictions meet the objectives of the Community.

111. I do not share that view.

112. In order to assess whether or not the principle of proportionality has been infringed, it is not enough to ensure that exceptions like those contained in Article 4(1) of Decision 93/731 are in accordance with the public interest objectives pursued by the Community. It is necessary also to ascertain whether they have been applied in a manner proportionate to those objectives.

113. The Council's refusal to consider whether partial access should be granted to information not covered by the exceptions clearly conflicts with the principle of proportionality.

114. Since it is not covered by the exceptions, the information to which access is refused is presumed not to be confidential. It is hard to see therefore why the objective of protecting the public interest pursued by Decision 93/731 requires that information which has been shown to be harmless should not be accessible to the public although it appears in a document containing other information which could be harmful to the public interest.

115. The all or nothing approach taken by the Council may mean that it classifies an entire document as being confidential, however large it is, solely because it contains a single piece of information justifying refusal of access. The major part of that document would be kept from the public without any justification. By depriving all applicants of the right to have access just to information not covered by the public interest exception, the Council is not merely applying the principle of proportionality improperly, it is also undermining the very substance of the right of access to documents.

116. Refusing partial access, moreover, conflicts with the principle that exceptions to the general principles of Community law must be interpreted and applied strictly.

117. Since the right of access to documents, being a fundamental principle, should be understood in the broad sense, Article 4(1) should be interpreted as requiring the Council to consider granting partial access to information not covered by the exceptions.

118. As to whether the Council can be dispensed from granting partial access where the administrative burden involved in blanking out information which cannot be released would be too great, there is a need for caution.

119. First, it is not in accordance with the nature of the right of access to documents as a fundamental right to accept purely administrative reasons as grounds for restricting partial exercise of that right, regardless of the extent of such constraints. Second, it does not appear that the work involved in marking the confidential part of a document is in

general substantially increased by the work of separating the confidential parts from the others or of removing them.

Moreover, partial access is enshrined, in law or in case-law, in nine of the fifteen Member States of the Community. In three other Member States that right is neither expressly provided for nor expressly prohibited. In my view, this significant convergence between national laws should be taken as a sign that the widespread practice of the right of partial access does not generally pose insurmountable administrative problems.

120. It remains possible, however, that, where there would be a particularly heavy administrative burden for the institution concerned, refusal may be justified on a wholly exceptional basis.

121. It seems legitimate, therefore, to allow a derogation to the right of partial access exclusively where the administrative burden would exceed the limits of what can reasonably be required. Exercise of that right of refusal should even so be open to review by the courts, in accordance with the right to effective judicial review, and the institution concerned should be required to provide evidence of the extent of the workload in question.

122. With reference solely to the complaints raised by the Council concerning the contested judgment, it is necessary to consider that Decision 93/731 as interpreted in the light of the fundamental principle of the right of access to documents does not prohibit the right of partial access. The conclusion must therefore be that the Court of First Instance did not err in law in ruling that the Council was required to consider whether partial access should be granted to information not covered by the exceptions provided for in Article 4(1) of Decision 93/731.

Conclusion

123. In the light of the foregoing I propose that the Court should:

(1) dismiss the appeal;

(2) order the Council to pay the costs, under Article 69(2) of the Rules of Procedure.

after hearing the Opinion of the Advocate General at the sitting on 10 July 2001,
gives the following
Judgment

Grounds

1 By application lodged at the Registry of the Court of Justice on 22 September 1999, the Council of the European Union brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 19 July 1999 in Case T-14/98 Hautala v Council [1999] ECR II-2489 (the contested judgment) annulling the Council's decision of 4 November 1997 refusing Ms Hautala access to the report of the Working Group on Conventional Arms Exports (the contested decision).

2 By order of the President of the Court of 10 February 2000, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Council, while the Kingdom of Denmark and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by Ms Hautala.

Legal background

3 As regards the legal background, the Court of First Instance found:

1 The Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 contains a Declaration (No 17) on the right of access to information (hereinafter "Declaration No 17"), which states:

"The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions."

2 At the close of the European Council in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled "A Community close to its citizens" (Bull. EC 10-1992, p. 9), in which they stressed the need to make the Community more open. That commitment was reaffirmed by the European Council in Edinburgh on 12 December 1992 (Bull. EC 12-1992, p. 7).

3 On 5 May 1993 the Commission addressed to the Council, the Parliament and the Economic and Social Committee Communication 93/C 156/05 on public access to the institutions' documents (OJ 1993 C 156, p. 5). It contained the results of a comparative survey on public access to documents in the Member States and some non-member countries, and concluded that there was a case for developing further the access to documents at Community level.

4 On 2 June 1993 the Commission adopted Communication 93/C 166/04 on openness in the Community (OJ 1993 C 166, p. 4), setting out the basic principles governing access to documents.

5 At the European Council in Copenhagen on 22 June 1993, the Council and the Commission were invited to "continue their work based on the principle of citizens' having the fullest possible access to information" (Bull. EC 6-1993, p. 16, point I.22).

6 Within the framework of these preliminary steps towards implementing the principle of transparency, the Council and the Commission approved on 6 December 1993 a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter "the Code of Conduct"), aimed at establishing the principles to govern access to documents held by them.

7 The Code of Conduct sets out the following general principle:

"The public will have the widest possible access to documents held by the Commission and the Council."

8 "Document" is defined as "any written text, whatever its medium, which contains existing data and is held by the Council or the Commission".

9 The circumstances which may be relied on by an institution as grounds for rejecting a request for access to documents are listed in the Code of Conduct in the following terms:

"The institutions will refuse access to any document whose disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings,

inspections and investigations),

- ...

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings."

10 The Code of Conduct further provides:

"The Commission and the Council will severally take steps to implement these principles before 1 January 1994."

11 In order to put that undertaking into effect, the Council adopted on 20 December 1993 Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43).

12 Article 4(1) of Decision 93/731 provides:

"Access to a Council document shall not be granted where its disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations), ..."

Facts of the case

4 As regards the facts of the case, the Court of First Instance found:

13 [Ms Hautala] is a Member of the European Parliament.

14 On 14 November 1996 she put a written question to the Council (Written Question P-3219/96, OJ 1997 C 186, p. 48) seeking clarification of the eight criteria for arms exports defined by the European Council in Luxembourg in June 1991 and in Lisbon in June 1992. In particular, she asked the following questions:

"What will the Council do to put an end to violations of human rights which are assisted by arms exports from EU Member States? What are the reasons for the secrecy surrounding the guidelines which the Council's Working Group on Conventional Arms Exports has proposed to the political committee with a view to clarifying the criteria?"

15 The Council answered on 10 March 1997, stating in particular:

"One of the eight criteria concerns the respect of human rights in the country of final destination, an issue of concern to all Member States. Exchanges between Member States on this and other aspects of arms export policy take place within the Common Foreign and Security Policy (CFSP) Working Group on Conventional Arms Exports, which has been charged with giving particular attention to the implementation of the eight criteria, with a view to reaching a common interpretation thereof.

At its meeting of 14-15 November 1996, the Political Committee [of the Council] approved a report from the Working Group on Conventional Arms Exports, with a view to further enhancing the consistent implementation of the common criteria. The Political Committee also agreed that the Group should continue to follow this matter closely.

Actual decisions on the granting of export licences remain, however, a matter for national authorities. The Council is therefore not in a position to comment on individual export authorisations or on national public information policies in this area."

16 By letter of 17 June 1997, addressed to the Secretary-General of the Council, [Ms Hautala] asked to be sent the report mentioned in the Council's answer (hereinafter "the contested report").

17 The contested report was approved by the Political Committee but not by the Council. It was drawn up under the COREU special European correspondence system - adopted by the Member States and the Commission in 1995 within the framework of the CFSP in application of Title V of the Treaty on European Union - and was not distributed through the normal channels of distribution of Council documents. In the Council's practice, the COREU network is reserved for questions falling within Title V. Distribution of documents transmitted via the COREU network is restricted to a limited number of authorised recipients in the Member States, the Commission and the General Secretariat of the Council.

18 By letter of 25 July 1997, the General Secretariat of the Council refused access to the contested report under Article 4(1) of Decision 93/731, stating that it contained "highly sensitive information disclosure of which would undermine the public interest, as regards public security".

19 By letter of 1 September 1997, [Ms Hautala] made a confirmatory application, in accordance with Article 7(1) of Decision 93/731.

20 The confirmatory application was considered by the Information Working Party of the Committee of Permanent Representatives at its meeting of 24 October 1997 and by the members of the Council at its meeting of 3 November 1997, following which the necessary simple majority considered that a negative reply should be given. Four delegations were in favour of releasing the document.

21 By letter of 4 November 1997 (hereinafter "the contested decision"), the Council rejected the confirmatory application, in the following terms:

"I refer to your letter of 1 September 1997 in which you make a confirmatory application, pursuant to Article 7(1) of Decision 93/731/EC, for access to [the contested report].

Your application was reviewed by the Council on the basis of an examination of the document in question.

As a result of this consideration, the Council has concluded that disclosure of [the contested report] could be harmful for the EU's relations with third countries.

Access to the document in question is therefore to be refused by virtue of Article 4(1) of Decision 93/731/EC in order to protect the public interest with regard to international relations."

22 The contested report prompted the Council to adopt, on 8 June 1998, a code of conduct for arms exports. That code was published.

The contested judgment

5 By application lodged at the Registry of the Court of First Instance on 13 January 1998, Ms Hautala sought the annulment of the contested decision.

6 Ms Hautala put forward three pleas in law in support of her application: infringement of Article 4(1) of Decision 93/731 (the first plea), infringement of Article 190 of the EC Treaty (now Article 253 EC) (the second plea), and breach of the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the Community institutions, and of the principle of protection of legitimate expectations (the third plea).

7 The Court of First Instance started by finding that it had jurisdiction to hear the application. On this point, it stated as follows:

40 It should be noted, first, that under Article 113 of its Rules of Procedure the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case.

41 The fact that the contested report comes under Title V of the Treaty on European Union has no effect on the jurisdiction of the Court. The Court has already held in [Case T-174/95 Svenska Journalistförbundet v Council [1998] ECR II-2289], paragraphs 81 and 82, that Decision 93/731 applies to all Council documents, irrespective of their content. It also held that, under Article J.11(1) of the Treaty on European Union (Articles J to J.11 of that Treaty have been replaced by Articles 11 to 28 EU), acts adopted pursuant to Article 151(3) of the EC Treaty (now, after amendment, Article 207(3) EC), which is the legal basis for Decision 93/731, are applicable to measures within the scope of Title V of the EU Treaty.

42 Thus, in accordance with the conclusion reached in Svenska Journalistförbundet (paragraph 85), documents relating to Title V of the Treaty on European Union are covered by Decision 93/731 in the absence of provisions to the contrary. The fact that under Article L of that Treaty [(now, after amendment, Article 46 EU)] the Court of First Instance does not have jurisdiction to assess the lawfulness of acts falling within Title V thus does not exclude its jurisdiction to rule on public access to those acts.

8 The Court of First Instance went on to annul the contested decision, upholding Ms Hautala's first plea in so far as it criticised the Council for taking the view that it was not obliged to consider whether it could grant partial access authorising disclosure of the parts of the contested report which were not covered by the exception based on protection of the public interest. In this respect, it stated:

75 As regards the third argument [of the first plea], which is supported by the Swedish Government, namely that the Council infringed Article 4(1) of Decision 93/731 by refusing to grant access to the passages in the contested report which are not covered by the exception based on protection of the public interest, it should be observed that the Council considers that the principle of access to documents applies only to documents as such, not to the information contained in them.

76 It is thus for the Court to verify whether the Council was obliged to consider whether partial access could be granted. Since this is a question of law, review by the Court is not limited.

77 Decision 93/731 is a measure of internal organisation adopted by the Council on the basis of Article 151(3) of the EC Treaty. In the absence of specific Community legislation, the Council determines the conditions for dealing with requests for access to its documents (see, to that effect, Case C-58/94 Netherlands v Council [1996] ECR I-2169, paragraphs 37 and 38). Consequently, if the Council so wished, it could decide to grant partial access to its documents, under a new policy.

78 Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted. Nor, as the Council accepted at the hearing, does it expressly prohibit such a possibility.

79 In view of the above, the basis on which the Council adopted Decision 93/731 must be borne in mind for the purpose of interpreting Article 4 of that decision.

80 Declaration No 17 recommended that the Commission should submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions. That commitment was restated at the European Council in Copenhagen on 22 June 1993, which invited the Council and the Commission to "continue their work based on the principle of citizens' having the fullest possible access to information".

81 In the preamble to the Code of Conduct, the Council and the Commission refer expressly to Declaration No 17 and the conclusions of the European Council in Copenhagen as the basis for their initiative. The Code of Conduct states the general principle that the public will have the widest possible access to documents.

82 Furthermore, the Court of Justice stressed in Netherlands v Council, paragraph 35, the importance of the public's right of access to documents held by public authorities. The Court of Justice noted that Declaration No 17 links that right with "the democratic nature of the institutions". In his Opinion in that case ([1996] ECR I-2171, point 19), the Advocate General stated, with reference to the individual right to information, as follows:

"Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F [of the Treaty on European Union, now, after amendment, Article 6 EU] of the Common Provisions."

83 The Court of First Instance recently held in Svenska Journalistförbundet, paragraph 66, referring to Netherlands v Council, that:

"The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration."

84 Next, it should be noted that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule (see, to that effect, [Case T-105/95 WWF UK v Commission [1997] ECR II-313], paragraph 56, and [Case T-124/96 Interporc v Commission [1998] ECR II-231], paragraph 49). In the present case, the provisions to be construed are those of Article 4(1) of Decision 93/731, which lists the exceptions to the above general principle.

85 Furthermore, the principle of proportionality requires that "derogations remain within the limits of what is appropriate and necessary for achieving the aim in view" (Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 38). In the present case, the aim pursued by the Council in refusing access to the contested report was, according to the reasons stated in the contested decision, to "protect the public interest with regard to international relations". Such an aim may be achieved even if the Council does no more than remove, after examination, the passages in the contested report which might harm international relations.

86 In that connection, the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.

87 Accordingly, Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions.

88 As appears from paragraph 75 above, the Council did not make such an examination, since it considers that the principle of access to documents applies only to documents as such and not to the information contained in them. Consequently, the contested decision is vitiated by an error of law and must therefore be annulled.

89 It follows that there is no need for the Court to rule on the two other pleas in law put forward by [Ms Hautala] in support of her application.

The appeal

Pleas in law and arguments of the parties

9 The Council, supported by the Kingdom of Spain, asks the Court to set the contested judgment aside, dismiss the application made at first instance as unfounded, order Ms Hautala to pay the costs of the proceedings at first instance, and make an appropriate decision on the costs of the appeal.

10 According to the Council and the Spanish Government, the Court of First Instance erred in law by interpreting Decision 93/731 as obliging the Council to consider whether access should be granted to the items of information contained in a document which are not covered by the exceptions set out in Article 4 of that decision.

11 The Council begins by submitting that according to the actual wording of Decision 93/731, which provides for access to documents, not to information, it is only Council documents as such which are concerned by the decision,

not the information in them. The Council must only examine whether the document asked for, in its existing form without any alteration, can be disclosed or not. In those circumstances, the Court of First Instance erred in law by deducing from Decision 93/731 an obligation on the Council not to grant a request for access to a document, but to edit the document and thus create a new document containing only the information capable of being disclosed, solely in order to supply information to the public. Moreover, such an obligation would be difficult to put into practice and would involve a considerable administrative burden for the Council.

12 The Council submits, next, that, contrary to what the Court of First Instance stated, the aim pursued by Directive 93/731 is not to lay down a right to information but a specific right of access to the Council's existing documents only, the same documents that were available to the members of the institution and on the basis of which it took its decision. The Court of First Instance was therefore wrong to interpret Decision 93/731 in the light of the principle of the right to information.

13 Finally, according to the Council, in the absence of a general principle of Community law conferring on citizens an absolute right of access to its documents, the Court of First Instance misapplied the principle of proportionality. The principle of proportionality finds expression in the list in Article 4 of Decision 93/731 of the circumstances which justify exceptions to the right of access to documents. That list, interpreted restrictively and in the light of the objective pursued by the decision, namely to provide for access to documents of the Council, makes it possible to ensure that that principle is fully complied with. On the other hand, no right of partial access to Council documents may be derived from that principle.

14 The Spanish Government considers, similarly, that, as Community law now stands, no principle of the right to information exists as stated in the contested judgment. Moreover, the principle of proportionality cannot require the Council to consider partial access to a document whose disclosure would endanger one of the interests protected by Article 4(1) of Decision 93/731, a provision which, in such a case, clearly obliges the Council to refuse access to the document in question.

15 Ms Hautala contends, on the other hand, that the Court should dismiss the appeal and order the Council to pay the costs. The Kingdom of Denmark, the United Kingdom, the Republic of Finland and the Kingdom of Sweden make similar claims.

16 According to Ms Hautala and those Governments, the contested judgment correctly interpreted Decision 93/731 by requiring the Council to consider granting partial access to documents which contain information covered by the exceptions laid down in Article 4(1) of that decision.

17 Such an obligation on the Council follows both from the wording of Decision 93/731 and from the aim it pursues, namely to ensure that citizens have the widest possible access to information, with a view to strengthening the democratic nature of the Community institutions and the public's confidence in the administration.

18 According to Ms Hautala, the same conclusion follows from the obligation to interpret Community law in the light of the general principles of Community law, which include the principle of the right to information. The Council should thus, in order to ensure the widest possible access of citizens to information, grant partial access to documents where they cannot be disclosed in full.

19 Ms Hautala and the Danish, United Kingdom, Finnish and Swedish Governments contend that the obligation to grant partial access to Council documents also derives from the principle that exceptions to a general rule must be interpreted strictly, and from the principle of proportionality.

20 Finally, according to Ms Hautala, even if Decision 93/731 does not require the Council to consider partial access, that requirement follows directly from the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the institutions of the Union. Article 255(1) EC, inserted by the Treaty of Amsterdam, confirms the citizen's fundamental right of access to the documents of the institutions.

Findings of the Court

21 As the Court of First Instance observed in paragraph 78 of the contested judgment, while Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted, it does not expressly prohibit such a possibility either.

22 In the context of its interpretation of Decision 93/731, the Court of First Instance first correctly pointed out the origin of that decision, in paragraphs 80 and 81 of the contested judgment. Thus in Declaration No 17, Declaration on the right of access to information, the conference of the representatives of the Governments of the Member States considered that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration and recommended that the Commission should submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions. That commitment was reaffirmed at the European Council in Copenhagen on 22 June 1993, which invited the Council and the Commission to continue their work based on the principle of citizens' having the fullest

possible access to information. Moreover, in the preamble to the Code of Conduct, the Council and the Commission referred expressly to Declaration No 17 and the conclusions of the European Council in Copenhagen as the basis for their initiative. Finally, the Code of Conduct states the general principle that the public will have the widest possible access to documents held by the Commission and the Council.

23 It is therefore apparent even from the context in which Decision 93/731 was adopted that the Council and the Spanish Government are wrong in submitting that that decision concerns only access to documents as such rather than to the information contained in them.

24 Next, as the Court of First Instance observed in paragraph 82 of the contested judgment, the Court of Justice stressed in paragraph 35 of its judgment in Netherlands v Council the importance of the public's right of access to documents held by public authorities and noted that Declaration No 17 links that right with the democratic nature of the institutions.

25 The aim pursued by Decision 93/731, as well as being to ensure the internal operation of the Council in conformity with the interests of good administration (Netherlands v Council, paragraph 37), is to provide the public with the widest possible access to documents held by the Council, so that any exception to that right of access must be interpreted and applied strictly (see, to that effect, with reference to Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ L 46, p. 58), Joined Cases C-174/98 P et C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1, paragraph 27).

26 The interpretation put forward by the Council and the Spanish Government would have the effect of frustrating, without the slightest justification, the public's right of access to the items of information contained in a document which are not covered by one of the exceptions listed in Article 4(1) of Decision 93/731. The effectiveness of that right would thereby be substantially reduced.

27 Finally, contrary to the submissions of the Council and the Spanish Government, the Court of First Instance did not err in law by holding that the principle of proportionality also requires the Council to consider partial access to a document which includes items of information whose disclosure would endanger one of the interests protected by Article 4(1) of Decision 93/731.

28 On this point, the Court of First Instance correctly referred, in paragraph 85 of the contested judgment, to the case-law of this Court holding that the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view.

29 Beside the fact that no reason has been put forward to show why an institution should be able to keep secret the items of information in a document which are not covered by the exceptions laid down in Article 4(1) of Decision 93/731, a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions. As the Court of First Instance observed in paragraph 85 of the contested judgment, the aim pursued by the Council in refusing access to the contested report could be achieved even if the Council did no more than remove, after examination, the passages in the report which might harm international relations.

30 The Court of First Instance also applied the principle of proportionality correctly when, in paragraph 86 of the contested judgment, in response to the Council's argument based on the excessive administrative burden which would be entailed by an obligation to ensure partial access to the documents it holds, it reserved the possibility of safeguarding the interests of good administration in particular cases.

31 Accordingly, without its being necessary to consider whether, as the Council and the Spanish Government submit, the Court of First Instance was wrong in basing itself on the existence of a principle of the right to information, that Court was right to hold in paragraph 87 of the contested judgment that Article 4(1) of Decision 93/731 must be interpreted as meaning that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions, and to annul the contested decision on finding that the Council had not made such an examination since, in its opinion, the principle of access to documents applied only to documents as such and not to the information contained in them.

32 The appeal must therefore be dismissed.

Decision on costs

Costs

33 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ms Hautala has applied for the Council to pay the costs and the Council has been unsuccessful, it must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Spain, the Kingdom of Denmark, the United Kingdom, the Republic of Finland and the Kingdom of Sweden must bear their own costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the Council of the European Union to pay the costs;

3. Orders the Kingdom of Spain, the Kingdom of Denmark, the United Kingdom of Great Britain and Northern Ireland, the Republic of Finland and the Kingdom of Sweden to bear their own costs.

In Case C-368/95,
REFERENCE to the Court under Article 177 of the EC Treaty by the Handelsgericht Wien, for a preliminary ruling in the proceedings pending before that court between
Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH
and
Heinrich Bauer Verlag
on the interpretation of Article 30 of the EC Treaty,
THE COURT,
after hearing the Opinion of the Advocate General at the sitting on 13 March 1997,
gives the following
Judgment
Grounds

1 By order of 15 September 1995, received at the Court on 29 November 1995, the Handelsgericht Wien (Commercial Court, Vienna), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 30 of that Treaty.

2 That question was raised in proceedings brought by Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH (`Familiapress'), an Austrian newspaper publisher, against Heinrich Bauer Verlag, a newspaper publisher established in Germany, for an order that the latter should cease to sell in Austria publications offering readers the chance to take part in games for prizes, in breach of the Gesetz über unlauteren Wettbewerb 1992 (Austrian Law on Unfair Competition; `the UWG').

3 Heinrich Bauer Verlag publishes the weekly magazine `Laura' in Germany, which it also distributes in Austria. The 22 February 1995 issue contained a crossword puzzle. Readers sending in the correct solution were entitled to be entered in a draw for two prizes of DM 500. There were two other puzzles in the same issue, for prizes of DM 1 000 and DM 5 000 respectively, which were also to be awarded by drawing lots among the persons sending in the correct answers. The following issues invited readers to play similar games. Each issue indicated that there would be more puzzles the following week.

4 According to the order for reference, that practice is contrary to Austrian law. Paragraph 9a(1)(1) of the UWG contains a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. Paragraph 9a(2)(8) of the UWG authorizes prize competitions and draws for which `the value of the potential individual entries, obtained by dividing the total number of prizes at stake by the number of entry vouchers (lots) distributed, does not exceed 5 schillings and the total value of the prizes competed for does not exceed 300 000 schillings', this, however, was declared inapplicable to the press by an amending law of 1993. Consequently, there has, since then, no longer been any exception to the prohibition on publishers of periodicals inviting consumers to take part in draws.

.....

20 Admittedly, in Case C-275/92 Schindler [1994] ECR I-1039, paragraph 61, concerning freedom to provide services, the Court held that the special features of lotteries justify allowing national authorities a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. The Court therefore considered that it was for the national authorities to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

21 Games such as those at issue in the main proceedings are not, however, comparable to the lotteries the features of which were considered in Schindler.

22 The facts on which that judgment was based were concerned exclusively, as the Court expressly pointed out, with large-scale lotteries in respect of which the discretion enjoyed by national authorities was justified because of the high risk of crime or fraud, given the amounts which could be staked and the winnings which could be held out to players (paragraphs 50, 51 and 60).

23 By contrast, such concerns for the maintenance of order in society are not present in this case. The draws in question are organized on a small scale and less is at stake; they do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine; and under Austrian legislation, draws are prohibited only in the press.

Opinion of Mr Advocate General Alber delivered on 13March2003.

Criminal proceedings against Piergiorgio Gambelli and Others.
Reference for a preliminary ruling: Tribunale di Ascoli Piceno - Italy.
Right of establishment - Freedom to provide services - Collection of bets on sporting events in one Member State and transmission by internet to another Member State - Prohibition enforced by criminal penalties - Legislation in a Member State which reserves the right to collect bets to certain bodies.
Case C-243/01

Opinion of the Advocate-General
Opinion of the Advocate-General
I — Introduction
1. This case was brought before the Court of Justice by way of a reference for a preliminary ruling from the Tribunale di Ascoli Piceno (District Court, Ascoli Piceno (Italy)). It arises from criminal proceedings instituted against Mr Piergiorgio Gambelli and over 100 others (2) for the infringement, inter alia , of Article 4 of Italian Law No 401/89, which makes it a criminal offence to collect and forward bets reserved to the State or to undertakings operating under concession from the State. Bets placed in Italy are forwarded to a British bookmaker. The case therefore raises questions as to the compatibility of the national provisions concerned with the Community law on the freedom of establishment and the freedom to provide services. The relevant Italian provisions were examined by the Court to some extent in Zenatti . (3) This case, however, has to do with a different aspect of the issue addressed in Zenatti , since it relates to measures of criminal law and is primarily concerned with whether those measures are proportionate. Furthermore, the Italian provisions are to be considered from the point of view of the freedom of establishment, whereas the Court has hitherto examined issues involving lotteries, (4) gambling, (5) and betting on sporting events (6) only from the point of view of the freedom to provide services. Lastly, a law adopted in 2000 (7) and effective from 2001 reinforced the Italian provisions in a manner which may in its own right be problematic in terms of Community law.
(The judgments in Zenatti, Schindler and Läärä , cited in footnotes 3 to 5, are referred to repeatedly below. The source references are given only occasionally.)

II — Relevant legislation
A — Provisions of Community law
2. Article 43 EC provides:

" Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

" Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

" Companies or firms" means companies or firms constituted under civil or commercial law ...

4. Article 46(1) EC provides:

" 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."

5. The first paragraph of Article 49 EC provides:

" Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

Under Article 55 [EC], the provisions of Articles 45 to 48 applicable to freedom of establishment are also to apply to the freedom to provide services.

B — Provisions of national law

6. Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773

approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931, hereinafter " the Royal Decree"), (8) no licence is to be granted for the taking of bets, with the exception of bets on races, regattas, ball games or similar contests where the taking of the bets is essential for the proper conduct of the competitive event. Authorisation to organise betting is granted exclusively to concession holders or to those entitled to do so by a ministry or another entity to which the law reserves the organisation or management of betting. Bets can relate to the outcome or the result of sporting events taking place under the supervision of the Italian National Olympic Committee (Comitato olimpico nazionale italiano, hereinafter " CONI"), or to the results of horse races organised through the National Union for the Betterment of Horse Breeds (Unione italiana per l ' incremento delle razze equine, hereinafter " UNIRE").

7. Article 4 of Law No 401/89 (9) on gaming, clandestine betting and ensuring the proper conduct of sporting contests,

1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

4. Paragraphs 1 and 2 shall also be applicable to gaming on machines prohibited under Article 110 of Royal Decree No 773 of 18 June 1931, as amended by Law No 507 of 20 May 1965 and as most recently amended by Article 1 of Law No 904 of 17 December 1986.

4(a) (10) The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.

4(b) Without prejudice to the powers conferred on the Finance Minister by Article 11 of Decree Law No 557 of 30 December 1993, now, after amendment, Law No 133 of 26 February 1994, and pursuant to Article 3(228) of Law No 549 of 28 December 1995, the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.

III — Facts and procedure

8. According to the order for reference, the Public Prosecutor and the investigating judge attached to the Tribunale di Fermo (District Court, Fermo) (Italy) have identified " the operation of a widespread and complex organisation of Italian agencies" , linked via the internet to the British bookmaker Stanley International Betting Ltd of Liverpool (hereinafter " Stanley") and including Mr Gambelli and over 100 others among its members, which is involved in " the collection in Italy of bets reserved by law to the State" . It does this as follows: the bettor notifies the person in charge of the agency of the games on which he wishes to bet and how much he intends to bet. The person in charge of the agency forwards a request for acceptance of the bet via the internet to the British bookmaker and indicates the football matches in question and the bets placed. The bookmaker forwards confirmation of the acceptance of the bet via the internet immediately (literally: " in real time"). That confirmation is forwarded to the bettor, whereupon he pays the amount owed which is then forwarded to the British bookmaker and paid into a special foreign account. That means of collecting and forwarding bets was considered to be in breach of the monopoly held by CONI in respect of sports betting and therefore deemed to infringe Article 4 of Law No 401/89.

9. The Public Prosecutor ' s Office attached to the Tribunale di Fermo began an investigation into the handling and acceptance by Mr Gambelli and the other defendants of prohibited bets within the meaning of Article 4(1) of Law No 401/89. The investigating judge attached to the Tribunale di Fermo also made an order for preventive sequestration and instructed that Mr Giovanni Garrisi, a director of Stanley in Italy, be taken into police custody. The agencies and the defendants ' homes and vehicles were also searched. An application for review of the orders for preventive sequestration was submitted to the referring court.

10. Stanley is a British company limited by shares which is registered in the United Kingdom and which acts as a bookmaker. It is authorised to exercise that activity under a licence granted, pursuant to the Betting, Gaming and Lotteries Act, by the City of Liverpool for the purposes of gaming in the United Kingdom and abroad. The bookmaker organises betting under that British licence and advertises in daily and weekly newspapers and magazines.

The British undertaking organises and manages bets, identifies events and sets the betting prices, takes the economic risk and collects bets, inter alia , by telephone and data transfer. The company pays the taxes due in the United Kingdom (betting duty, VAT and corporation tax), as well as the taxes on and deductions from salaries, and pays out any winnings. The company is subject to strict scrutiny from both internal and private sector auditors and from the tax authorities.

11. The British undertaking trades on the Italian market by concluding with operators established there contracts for the setting-up of data transfer centres under which those Italian undertakings become agents for sports betting. According to the order for reference, these centres " give users an electronic means of contacting the bookmaker, collect and register the intentions to bet and forward them to Liverpool" . The British bookmaker offers an extensive range of sports bets, that is to say not only on events managed by CONI or its subsidiary organisations, but also on other foreign and international sporting events. Italian nationals can also place sports bets from home, which the bookmaker organises and markets by various means such as the internet, fax, telephone and the like.

12. The defendants are registered with the Italian Chamber of Commerce as corporate owners of data transfer centres and have duly received authorisation from the Minister for Post and Telecommunications to transmit data (within the meaning of Decision 467/2000/Cons of 19 July 2000 and Presidential Decree No 318 of 19 September 1997).

13. The referring court takes the view that Community law confers on Stanley the right to set up principal places of business or branches in the Member States of the European Community. Those principal places of business or branches make it possible for users to transmit data to the bookmaker. It is also of the opinion that the defendants not only assisted the bookmaker in collecting bets but also carried out an economic activity and performed a service for the foreign undertaking. It states that the application for review before it raises preliminary issues regarding the compatibility of national provisions with Community law. In its view, it is noteworthy that many Italian courts have reached conflicting and opposing decisions on this issue.

14. The referring court further points out that the provisions of Article 4(1) of Law No 401/89 do not exclude criminal liability where the agent is a foreign Community undertaking licensed to transmit data by the competent authorities of its own country. Consequently, it submits, there could conceivably be unacceptable discrimination against national operators which, on the basis of concessions or authorisations granted to them, perform identical tasks in collecting and accepting sports bets on behalf of CONI. The referring court takes the view that this may be in conflict with the principles of freedom of establishment and freedom to provide cross-border services.

15. In the light of the judgment of the Corte di Cassazione (Italian Court of Cassation) in Case No 1680/2000, the referring court considers that, with regard to the potential risk to public order that could result from the unrestricted exercise of activities connected with gambling, such requirements can be adequately taken into account where the operator is an undertaking already subject in its own country to supervision which guarantees the propriety of its operations.

16. With regard to the risk feared by the Corte di Cassazione of a further incitement to wager, the referring court pointed out that gambling and betting opportunities are progressively increasing in Italy. However, the " phenomenon" of placing bets with foreign operators is " marginal" in comparison with the national gambling market. An " analysis of taxation revenues deriving from authorised national gambling" , it states, confuses the issue even further. Under the new rules contained in subparagraphs 4a and 4b [of Article 4] of Law No 401/89, the collection of bets on international sporting events, world events or events of other kinds, in which the State has no fiscal interest, is also penalised.

17. According to the referring court, it is clear from the parliamentary papers relating to the amendment of the 2000 Finance Law that the subsequent restrictions were dictated mainly by the need to protect " Totoricevitori" (a category of private undertakings [engaged in the taking of sports bets]), whilst there is no evidence of any public policy concerns that could justify a restriction of rights under Community law or constitutional law.

18. The lawfulness of collecting and forwarding bets on foreign sporting events which can be inferred from the original wording of Article 4 has, the referring court goes on to state, " led to the development of a network of operators which have invested capital and resources in this sector" . Those operators have been deprived of the legitimacy and lawfulness of their position by a change in the law which they could not have anticipated. In its view, there is a clear conflict between Article 4 and the protection of the Community law principles of freedom of establishment and freedom to provide services where private sector economic initiatives are pursued in the context of activities that do not generate revenue for the Italian State, such as betting on foreign sporting or non-sporting events.

19. The referring court is unsure on two points. First, it considers it necessary to raise the question whether the principle of proportionality can be said to have been observed when " the extreme nature of the prohibition (it is enforced by a criminal penalty)" chosen by the national legislature is compared with the " importance of the national interest that is protected by sacrificing the freedoms attributed to individuals by the EC Treaty" . Secondly, it considers it necessary to examine the extent of the apparent imbalance between domestic legislation that rigorously restricts the activity of accepting sports bets by foreign Community undertakings and an opposing policy of considerably expanding gambling and betting pursued by the Italian State at national level for the purpose of

generating State revenue.

20. The referring court has therefore referred the following question to the Court for a preliminary ruling:

" Is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorisations prescribed by domestic law have been complied with?"

IV ─ Observations of the parties to the proceedings

21. The defendants Mr Gambelli and Others and the defendant Mr Garrisi ─ who is a member of the board of directors of Stanley in Italy ─ contend that this case differs fundamentally from previous cases before the Court, and, in particular, from Zenatti. The Governments of the Member States which are parties to the proceedings, and the Commission, on the other hand, are unanimously of the view that the solution to the dispute is to be found in the existing case-law of the Court as defined in the judgments in Schindler , Läärä and, in particular, Zenatti .

A ─ Mr Gambelli

22. Mr Gambelli points out that the betting activity carried on by CONI and UNIRE exhibits a typical monopolistic structure. An undertaking such as the foreign company Stanley offers those who enter into contracts with it a guarantee of quality and reliability. The undertaking, which trades through centres which it organises itself, holds a certificate and a licence, is subject to supervision, operates on the basis of the latest technology and in accordance with United Kingdom legislation and Community law, and does not infringe the Italian rules.

23. It contends that the Italian authorities ' concerns regarding the protection of gamblers against the risks of fraud are unfounded. By contrast, legislation enacted by Italy in recent years, which has made possible an ever-growing number o f games of chance (" Lotto" , " Totocalcio" , " Totip" , betting on horse racing, " Totogol" , " Corsa tris" , " Totosei" , " Superenalotto" , bingo, " Totobingol" , " Gratta e vinci" , etc.), cannot be regarded as limiting gambling opportunities in order to avert any damaging effects gambling may have on individuals and society and inhibit the incitement to wager, or to protect public security and public policy.

24. In Mr Gambelli ' s view, a criminal penalty is essentially the last resort and should be relied on only where adequate protection of the interests to be protected cannot be guaranteed otherwise. The threat of imprisonment for the mere act of collecting bets blatantly infringes the principle of proportionality.

25. With regard to the freedom of establishment, Mr Gambelli submits that the data transfer centres are dependent agencies or branches which are contractually bound to Stanley. A Member State may not refuse a national of another Member State the right to establish himself in such a way. He contends that, by requiring authorisation in the context of a system of concessions, the Italian legislature confuses the activity of the data transfer centres with the overseas management and organisation of betting. Moreover, companies limited by shares are automatically excluded from the system of concessions.

26. With regard to the freedom to provide services, Mr Gambelli argues that the material transferred by Stanley to the centres, the betting prices, the calendar of events, the confirmations of receipt, and everything else necessary for the confirmation, identification and acceptance of bets organised and managed abroad, as well as the transfer by the centres of the intentions to bet and the stakes collected, constitutes cross-border services for the purposes of the fundamental freedoms of the EC Treaty. In his view, the Italian legislation disregards that Community principle by prohibiting Italian nationals from using a foreign company to choose the games or most interesting combinations thereof they wish to play or to place bets by telephone or data transfer. According to Mr Gambelli, it also infringes the Community principle of the protection of legitimate expectations inasmuch as the legitimate expectation of the owners of the data transfer centres that their activities are lawful, in relation to gambling on international events at any rate, is frustrated.

27. Next, in the light of the judgments in Schindler , Läärä and Zenatti , Mr Gambelli examines what grounds would be capable of justifying a restriction of the fundamental freedoms. He submits that, although the political objective of Member States to regulate gambling activities is not necessarily an overriding reason in the general interest, the restrictive measure must nevertheless be the expression of a coherent policy of the Member State concerned to limit or prevent gambling activities. Moreover, the restrictive measure may not either directly or indirectly be intended to discriminate or give rise to discrimination against nationals or undertakings of other Member States. In any event, it must be proportionate.

28. However, Mr Gambelli submits, the Italian State is undoubtedly stimulating and supporting its fiscal policy. The monopoly that it grants to the system comprising CONI and its bookmakers does not serve overriding reasons in the general interest. By refusing to give any recognition to the legislative measures of other Member States ─ in this case

the United Kingdom, whose legislation is regarded as strict and is widely respected — the Italian legislation is discriminatory and infringes the principles fundamental to the establishment of the common market.

29. In addition to the doubts raised by the referring court — with regard to the proportionality of the penalty and the contradiction between the legal restriction on betting outside Italy and the encouragement of gambling within Italy — Mr Gambelli contends that this case raises issues hitherto unresolved by the Court. For example, the Court has not yet examined the compatibility with Community law of the Italian provisions laying down penalties in respect of betting. Moreover, the 2000 Finance Law, which the Court has not yet had occasion to examine, significantly reinforced the Italian legislation, even as regards international events, in which the Italian State cannot claim a fiscal interest. Similarly, the Court has not previously examined either the compatibility of the Italian legislation with the freedom of establishment or the issue of discrimination against Italian citizens, who are prevented from using foreign operators to gamble or bet online.

30. With regard to possible risks to public policy, Mr Gambelli contends that other suitable and effective means of monitoring foreign service providers can be found to ensure that the European market is opened up in a forward-looking and natural fashion. In the light of developments in technology, changes in legislation and the objectives of the Community in the field of online communications and trade, Mr Gambelli contends that a fresh examination of this issue by the Court is essential.

31. Mr Gambelli proposes that the question referred for a preliminary ruling be answered as follows:

(1) The legislation enacted by the Italian Republic in Article 88 of Royal Decree No 773 of 18 June 1931 (Teste Unico delle Leggi di Pubblica Sicurezza), as amended on several occasions, and Article 4 of Law No 401 of 13 December 1989, as amended on several occasions (most recently by Article 37(4) and (5) of Law No 388 of 23 December 2000), is incompatible with Article 43 et seq. of the EC Treaty concerning freedom of establishment and/or Article 49 et seq. of the EC Treaty concerning freedom to provide services; discriminates against Community operators; infringes the principles of proportionality, mutual recognition, legal certainty and the protection of legitimate expectations; infringes Community directives on the freedom to offer online and telecommunications services; infringes the principle of reasonable cooperation and the obligation under Article 10 of the EC Treaty; conflicts with the general interest; is not justified by the principles of public security and public policy; must not pursue fiscal objectives; limits the freedom of Community citizens and undertakings; and discriminates against Italian nationals.

(2) In the alternative, national legislation such as that at issue is incompatible with Article 43 et seq. or Article 49 et seq. of the Treaty and with the principles of Community directives in so far as it is not disapplied by the authorities or national courts or in so far as it is not applied in a manner which is compatible with the principles, directives and abovementioned Community measures.

B — Mr Garrisi

32. Mr Garrisi is a member of Stanley ' s board of directors and is responsible for the group ' s activities in the field of sports betting. He adds to Mr Gambelli ' s submissions that the amendments made to the Italian legislation in 2000 made the Italian market for services in the collection and taking of sports bets absolutely impenetrable to operators from other Member States.

33. Mr Garrisi points out in this regard that the conditions for participating in the invitations to tender issued by CONI in connection with 1 000 new concessions for the organisation of betting on sporting events other than horse racing could in practice be met only by those bookmakers which already belonged to the UNIRE or CONI system, since only natural persons or partnerships who were able to exhibit the different structures required and who already had business premises in Italian territory could be awarded concessions. Moreover, he contends, both before and after that process, many Italian bookmakers received concessions for betting on horse racing and on sporting events other than horse racing without having to take part in public invitations to tender. They thus received firm concessions for new betting, while other Community operators were unable to acquire that " status" , which bookmakers operating under concession from UNIRE were assumed to have.

34. With regard to the possible justification for the restrictions of the fundamental freedoms laid down by the EC Treaty, Mr Garrisi refers to the principle confirmed by recent case-law that economic grounds cannot constitute reasons relating to the general interest which justify a restriction of the fundamental freedoms. In that regard, Mr Garrisi refers to the judgments in SETTG , (11) Bond van Adverteerders and Others (12) and Gouda and Others . (13)

35. According to Mr Garrisi, a study carried out by the London-based, independent economic consulting firm, NERA (National Economic Research Associates), entitled " Expansion of the Italian betting industry" , which was updated in 2001, shows that the Italian State is resolutely pursuing a policy of large-scale expansion with the aim of increased revenue for the public purse. He submits that, far from actually reducing gambling opportunities, the Italian State intends to develop them further. The extensive restrictions which the Italian legislation imposes on the fundamental freedoms relating to the provision of services and establishment, he contends, were adopted on fiscal rather than social policy grounds.

36. Mr Garrisi criticises the Italian legislation for having failed to examine fully whether service providers are subject

in their State of origin to similar rules and prohibitions which both aim to protect the same interests — that is to say public policy and public morality — and provide for preventive and punitive measures under criminal law. As a result, he contends, operators who want to penetrate the Italian market are exposed to the same charges, checks and penalties twice. This constitutes serious discrimination in favour of national operators. The legislation at issue therefore infringes the principle of mutual recognition.

37. Mr Garrisi takes the view that the legislative amendments introduced in 2000 also infringe the legitimate expectations and legal certainty of persons who, like the defendants in the main proceedings, were, at the time when Law No 388/00 entered into force, operating in Italy as agents responsible for transferring data in connection with sports betting other than that reserved to CONI and UNIRE. In addition, he contends, Directive 1999/42/EC (14) is also infringed.

38. In his submission, the Italian legislation contains elements which are incompatible with Directives 90/388/EEC, (15) 97/13/EC (16) and 97/66/EC (17) and therefore conflicts not only with the fundamental freedoms relating to the provision of services and establishment, but also with the freedom to offer telecommunications services.

39. Mr Garrisi proposes that the question referred for a preliminary ruling be answered as follows:

The Italian legislation on sports betting is incompatible with Articles 43 et seq. EC and 49 et seq. EC:

(A) It constitutes positive discrimination to the detriment of Community operators who are not Italian nationals and/or, although applicable without distinction in theory, gives rise, in fact or in law, to obstacles which make it impossible or disproportionately difficult for operators from other Member States to provide the relevant services either directly or through the intermediary of an agency, branch or subsidiary; and/or infringes the principles of proportionality, mutual recognition and non-conflict with other domestic policies; and/or infringes the principles of legal certainty and the protection of legitimate expectations.

(B) It conflicts with Directive 1999/42 in the field of mutual recognition of qualifications.

(C) It conflicts with the directives on the freedom to offer liberalised telecommunications services other than voice telephony.

In the alternative, the Italian legislation on sports betting is incompatible with Articles 43 et seq. EC and 49 et seq. EC and/or with the provisions of Directive 1999/42 and/or the provisions of Directive 90/388, Directive 97/13 and Directive 97/66, in so far as it is not applied by the national authorities and courts in a manner consistent with the principles of non-discrimination, proportionality, mutual recognition, consistency with other national policies, legal certainty and the protection of legitimate expectations.

C — The Italian Government

40. The Italian Government takes the view that, in the light of the principles developed in the judgment in Zenatti , the Italian legislation is compatible with the provisions of Community law on freedom to provide services and freedom of establishment. The judgment in Zenatti concerns the provisions relating to a licence issued under administrative law for the activity of collecting and managing bets in Italy (Article 88 of the Royal Decree). This case concerns the enforcement in criminal law of the prohibition on the collection and management of bets. Both rules, it contends, pursue the same aim, that is to say to prohibit the activity in question in circumstances other than those expressly permitted by law.

41. The Italian Government points out that, in judgment No 1680 of 28 April 2000, the Corte di Cassazione examined the legislation in the light of the principles established in Zenatti and came to the conclusion that it was lawful in so far as it is intended to restrict gambling opportunities and to protect public policy.

D — The Belgian Government

42. The Belgian Government points out that, for the purposes of the case-law of the Court, the activity carried on by the centres is to be regarded as an economic activity within the meaning of the EC Treaty. It submits, however, that a common market for gambling can only incite consumers to waste more money and give rise to the damaging social consequences which that entails; it refers in particular in that connection to paragraphs 60 and 61 of the judgment in Schindler . With reference to the judgments in Kraus (18) and Gebhard , (19) the Belgian Government points out that the Italian legislation falls outside the prohibition contained in Article 49 EC if the four conditions laid down in those judgments as having to be fulfilled in order for a restriction on the freedom to provide services to be permissible are met. The Belgian Government submits that the attempt to curb gambling and its damaging consequences can be regarded as an objective in the general interest within the meaning of the judgments in Schindler , Läärä and Zenatti . Moreover, the fact that gambling is not completely prohibited does not mean that that objective is not being pursued. In its view, the Italian legislation is not discriminatory either. Only operators who hold an authorisation from the Italian Ministry of Finance may organise gambling. This, it says, applies to both Italian and foreign operators. It states that the Italian legislation is also proportionate. Even if it proves ultimately to be a restriction on the freedom of establishment, it is justified on the same grounds as the restriction on the freedom to provide services.

E — The Greek Government

43. The Greek Government draws a parallel between the Italian legislation at issue and the relevant Greek legislation. It considers both to be compatible with Community law. In its view, the liberalisation of gambling activities brings with it new risks for society. It submits that there is therefore good reason for gambling and, in particular, sports betting to be subject to State control in the form of a monopoly.

F — The Spanish Government

44. The Spanish Government also considers that, in the light of existing case-law, the Italian legislation is justified on grounds relating to the general interest. Both the granting of special or exclusive rights by means of a strict system of authorisations or concessions and the prohibition on the operation of branches belonging to foreign operators are compatible with Community law if those measures were adopted with the aim of reducing gambling opportunities. It submits that gambling opportunities must be regulated in order to prevent the risks associated with that activity. Member States have latitude in determining how they organise lotteries and gambling and how they allocate the profits they yield.

G — The Luxembourg Government

45. The Luxembourg Government takes the view that, although the Italian legislation at issue appears to constitute a restriction on the freedom to provide services and the freedom of establishment, it is justified in so far as it meets the four conditions laid down by case-law as having to be fulfilled in order for a restriction to be permissible. In its view, that is true of the Italian legislation in so far as it can be assumed that it was adopted for the sole purpose of confining gambling opportunities within controlled channels.

H — The Portuguese Government

46. The Portuguese Government points out that there is evidence in all Member States of conduct that infringes the relevant laws restricting gambling, be it the sale of tickets for foreign lotteries or the collection of bets on horse racing. That conduct pursues a strategy of liberalising and privatising the gambling market which was expressly rejected at the Edinburgh European Council in 1992. The Portuguese Government submits that the significance of this case lies in the fact that, in Italy, as in other Member States, the organisation of lotteries is kept under the control of a State monopoly in order to ensure for Member States an important source of income which takes the place of other taxes and which serves to finance social, cultural and sports policies in all Member States and to secure a high level of prosperity for the citizens of the Union.

47. The Portuguese Government points out that the principle of subsidiarity, by virtue of which the Community has not taken action to harmonise legislation in this field up to now, must be the guideline for interpreting the relevant Community law. It submits that, when it comes to examining the proportionality of national measures restricting gambling, it must be borne in mind that it is for the national legislature to define the objectives and the legal interests which it intends to protect. Similarly, it can choose the means which it deems appropriate, provided that they are not discriminatory. The Portuguese Government too relies in this respect on the judgments in Schindler , Läärä and Zenatti .

48. In the Portuguese Government ' s view, lenient gambling legislation could lead to serious social problems caused by loss of individual or family wealth. In general terms, gambling harbours risks of fraud and other criminal activities, such as money laundering. The unproductive nature of gambling precludes arguments based on entrepreneurial freedom and free competition. Since gambling is not a productive activity, the freedoms which operate for the good of the Community cannot apply here.

49. The Portuguese Government relies on the case-law of the Court (20) to demonstrate that imperative requirements in the general interest are in each case a response to a specific situation. It refers to its written observations in Anomar and Others (21) where it stated that public policy encompasses moral, ethical and political values and these are dependent on a national system which cannot be assessed either at supranational level or in a uniform manner.

50. According to the Portuguese Government, it is apparent from paragraph 30 of the judgment in Zenatti that the Italian legislation is capable of combating the risks of fraud and the damaging social consequences of gambling, and of allowing it only where it is useful in connection with the conduct of sporting events.

51. The Portuguese Government further submits that the effect of open competition on the market in gambling would be to shift income from the poorer to the richer countries. Gamblers would play wherever there were higher winnings to be had. As a result, gamblers from the smaller States would co-finance the social, cultural and sports budgets of the larger States. This would cause revenue in the smaller States to fall and force those States to make further tax increases. Moreover, it submits, dividing up the lottery and betting market in each State between three or four large operators in Europe could bring about structural changes which would lead to job losses and a greater social divide between States.

52. The Portuguese Government takes the view that the Italian legislation, like the Portuguese legislation, is compatible with the principle of proportionality since it is necessary to protect the general interest. In its view, the only alternative is either to ban gambling activities altogether or to liberalise them. The grounds on which the Court based its judgment in Zenatti remain valid. Restricting the freedom of establishment of a British undertaking is

therefore not disproportionate. It contends that putting an end to the State monopoly on gambling would have serious economic effects and damaging individual and social consequences.

I — The Finnish Government

53. Relying on the judgments in Schindler , Läärä and Zenatti , the Finnish Government submits that the prohibition in question, which is laid down by law and enforced by criminal penalties, protects a monopoly compatible with Community law, subject to certain conditions, which prevents operators from other Member States from establishing themselves or offering services in Italy. It points out that the Court accords Member States extensive discretion as regards the free movement of goods, the freedom to provide services and the freedom of establishment. In its view, the legislation at issue is justified provided that it is not discriminatory and is applied without distinction to national and foreign operators.

54. The Finnish Government submits that, from the point of view of Community law, it is immaterial that the penalty in question is a criminal one and that it also applies to the collection of bets, in which the Italian State has no fiscal interest, on behalf of an operator authorised to pursue the activity in question in another Member State. It points out that, in accordance with paragraph 36 of the judgment in Läärä ,the proportionality of a measure may be assessed only by reference to the objectives pursued by the national authorities and the level of protection they are intended to provide, which is ultimately a matter for the referring court to examine.

J — The Swedish Government

55. The Swedish Government takes the view that the Court should follow the approach it prescribed in the judgments in Schindler , Läärä and Zenatti . Although the Italian legislation does constitute an obstacle to the freedom to provide services, it is neither discriminatory nor applied in a discriminatory manner. The fact that the measures serve fiscal interests does not therefore pose any problems in Community law, provided that those measures are proportionate and not discriminatory, which is a matter for the referring court to examine. The Swedish Government is of the opinion that the interests protected by the Italian legislation cannot be safeguarded by the checks to which the betting offices are subject in their State of origin. In its view, the amended Italian legislation makes it possible to prevent an undertaking which has not been granted authorisation in Italy from circumventing the law. It follows from the judgments in Läärä (paragraph 36) and Zenatti (paragraph 34) that the fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end, which must be assessed solely by reference to the objectives pursued and the level of protection which they are intended to provide. The Swedish Government submits that the restrictions on the freedom of establishment are also justified.

K — The Commission

56. The Commission submits that the issue in this case was disposed of by the judgment in Zenatti . In its view, the legislative amendments introduced in 2000 merely supplement the existing prohibition without introducing new grounds for criminal prosecution. It also contends that Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (" Directive on electronic commerce") (22) does not apply to betting. With regard to the expansion of the betting market, which does not serve the fiscal interests of the Italian State, the Commission states that the betting in question relates to national football matches, not foreign sports events as in Zenatti . However, it submits, that difference is not such as to lead to a different assessment of the protective objectives pursued by the legislation at issue. On the basis of paragraph 33 of the judgment in Zenatti , the Commission adds that the level of protection pursued by a Member State falls within its margin of appreciation. It is therefore a matter for the Member State in question to decide whether to prohibit the activity in full or in part or merely to subject it to specific restrictions.

57. With regard to the freedom of establishment, the Commission points out that the agencies managed by Mr Gambelli are technically independent and are not subordinate to Stanley. The Commission contends that it is appropriate, therefore, to consider the issue henceforth from the point of view of the freedom to provide services, particularly as, according to the case-law of the Court, (23) that freedom includes the freedom of the person for whom a service is provided to go to the Member State where the service is provided or to contact a service provider in another Member State by electronic means. Even if the provisions on the freedom of establishment were applicable, the Commission submits that the Italian legislation would be justified on the same grounds as those applicable in the context of the freedom to provide services.

58. The Commission proposes that the question referred for a preliminary ruling be answered as follows:

(a) The provisions of the EC Treaty on the freedom of establishment and the freedom to provide services do not preclude domestic legislation such as the Italian legislation which reserves to specific entities the right to collect bets on sporting events, inter alia by electronic means, provided that that legislation is justified by social policy objectives aimed at restricting the damaging effects of such activities, and the restrictions adopted to that end are not disproportionate to the objective pursued.

(b) It is a matter for the national court to examine, in the light of those conditions of application, whether the national legislation pursues the objectives which justify it, and whether the restrictions which it imposes are disproportionate

to the objective pursued.

V — Assessment

59. Although the governments of the Member States which are parties to the proceedings and the Commission take the view that the solution of this case is to be found in the judgments in Schindler , Läärä and Zenatti , the referring court and the defendants in the main proceedings have profound doubts as to the compatibility of the national legislation with Community law. The Italian courts too seem highly uncertain about the correct interpretation to be given to the Community law applicable in this field, given the dire consequences this has for legal certainty. The economic freedom of individuals is seriously impaired as a result. A business practice which is classified as lawful in some countries is liable to criminal prosecution and penalties as severe as imprisonment in others.

60. Even the judgment in Zenatti , which has been said to offer a solution to this dispute, was unable to provide definitive clarity in the Italian legal system, particularly since the action in the main proceedings in Zenatti was withdrawn after the Court delivered its judgment. A declarative judgment by the Court, based on previous case-law but taking into account the particular features of the dispute at issue, is of fundamental importance in each case. It should therefore make clear the approach to be taken both to the referring court and to all other national courts dealing with the same issue.

61. In fact, this case goes beyond the issue addressed in Zenatti in many respects. For example, the subject of cross-border gambling has not previously been discussed by the Court from the point of view of the freedom of establishment. The only — vague — indications as to the applicability of the provisions on the freedom of establishment are to be found in the Opinions of Advocates General Gulmann, (24) La Pergola (25) and Fennelly (26) in Schindler , Läärä and Zenatti ,and in the judgment in Zenatti . (27) In any event, the question whether the freedom of establishment is applicable to cross-border gambling depends on the specific circumstances of each case. That is what must be examined here.

Nor has the criminal law aspect of the issue been assessed by the Court before. The fact that a prohibition is enforced by criminal penalties cannot be disregarded when considering whether the provision is in principle permissible or potentially incompatible with Community law. Consequently, what must be clarified first of all, in any event, is the fundamental question of the permissibility of national prohibitions under Community law. Then comes the further and separate question of the proportionality of the provision imposing penalties.

Lastly, the recent reinforcement of the national provisions will also necessitate a separate assessment. Even though the Court has held that certain restrictions of the fundamental freedoms are in theory compatible with Community law, nevertheless, measures to reinforce legislation which run counter to the spirit of the fundamental freedoms cannot be justified under any circumstances.

62. However, before I examine the questions raised themselves, I must first summarise the principal findings contained in the judgments in Schindler , Läärä and Zenatti for the purposes of my subsequent assessment of the case at issue.

A — The Schindler, Läärä and Zenatti judgments

1. The Schindler judgment

63. At the time of the events at issue in Schindler , lotteries were the subject of a total prohibition on the gambling market in the United Kingdom. All activities relating to the organisation and operation of lotteries, including the advertising of participation in them, were prohibited. That is not called into question by the fact that smaller lotteries were permissible within very strict material and regional limits, or by the fact that legislation was subsequently introduced which made possible a large-scale national lottery in the United Kingdom. Those details were immaterial to the judgment of the Court in Schindler . The Court therefore had to proceed on the assumption that lotteries were totally prohibited on the market concerned.

64. The Schindler brothers, who wished to have large quantities of advertising material relating to the Süddeutsche Klassenlotterie imported by post from the Netherlands to the United Kingdom, were prevented from doing so by the United Kingdom customs authorities. The Court considered the prohibition on the import of the material in question to be lawful and held in that respect in paragraph 62 of its judgment that:

" When a Member State prohibits in its territory the operation of large-scale lotteries and in particular the advertising and distribution of tickets for that type of lottery, the prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organised in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services. Such a prohibition on import is a necessary part of the protection which that Member State seeks to secure in its territory in relation to lotteries."

65. The Court first, in paragraphs 33 and 35, started from the premiss that lottery activities were economic in nature, and then, in paragraph 37, classified those activities as a service. The United Kingdom legislation on lotteries, although applicable without distinction (paragraphs 43 and 47), was nevertheless an obstacle to the freedom to provide services

(paragraph 45). As regards the considerations raised by way of justification for that restriction (paragraph 57), the Court held, on the basis of the " peculiar nature of lotteries" (paragraph 59), that restrictions as extreme as the prohibition of lotteries could be justified.

66. The parties to the proceedings have at several points relied upon these findings by the Court in paragraphs 60 and 61 of its judgment in Schindler , and the Court has itself made reference to them in its case-law. (28) They should therefore be cited verbatim here:

" First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

"

2. The Läärä judgment

67. The case at issue in the judgment in Läärä was different in many respects. It concerned Finnish legislation on gambling by means of slot machines ─ the organisation of which was reserved to undertakings by way of a monopoly ─ which was also capable of being regarded as a game of skill. The Court ' s ruling in that case too was based on the provisions on the freedom to provide services and not, for instance, on the free movement of goods, even though the case concerned the import of slot machines and an examination of the free movement of goods would have been appropriate. (29)

68. The considerations raised by the Finnish Government by way of justification for the national legislation were similar to those raised in Schindler . In the context of those considerations, which it was necessary to take together (paragraph 33), the Court expressly took into account the crucial fact that the activity in question was not totally prohibited but was in certain circumstances to be regarded as authorised (paragraph 34). It therefore granted the national authorities extensive powers of assessment, which it did in the following terms in paragraph 35 of its judgment in Läärä :

" However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities ' power of assessment ... . It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict."

The Court continued in paragraphs 36 and 37:

" In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.

Contrary to the arguments advanced by the appellants in the main proceedings, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.

"

69. As regards the grant of a monopoly for the authorised exploitation of gambling, the Court held in paragraph 39 of its judgment in Läärä that:

" The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice

made in that regard must not be disproportionate to the aim pursued."

The Court then held in paragraph 42 that the provisions did " not appear to be disproportionate ... to the objectives they pursue[d]" .

3. The Zenatti judgment

70. It is in fact Zenatti which bears the closest resemblance to this case. It concerned the original prohibition on the taking of sports bets in Italy under Article 88 of the Royal Decree, which is also of relevance here. The reference for a preliminary ruling in Zenatti arose from administrative proceedings and concerned the question whether it was permissible for a company established in the United Kingdom and specialising in the taking of bets on sporting events to act as an intermediary in Italy. The Italian legislation ─ like the Finnish legislation in Läärä ─ imposed a prohibition qualified by a reservation of authorisation for a sales organisation with a monopoly on sports betting.

71. Sports bets are not dependent on chance in the same way as lotteries. A bettor ' s chances of winning may also be affected by his skill and, above all, his knowledge. There is therefore some debate among legal commentators as to whether betting is to be classified as a game of skill or a game of chance. The fact that the events involved are largely dependent on chance, particularly in the case of bets placed on entire blocks of games, would suggest that it is a game of chance. The question of classification can ultimately remain unresolved for the purposes of the examination to be carried out here, however, since the Court adopted the same approach when assessing the national legislation at issue in Läärä ─which concerned games of skill ─ as it did in Schindler , which concerned a lottery, and therefore clearly a game of chance.

72. In paragraph 18 of its judgment in Zenatti , the Court held as follows with regard to that issue:

" In this case ... bets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences."

73. The Court nevertheless pointed out some essential differences between Zenatti and Schindler . Firstly, as indicated above, Zenatti concerned only a partial rather than a total prohibition and, secondly, the freedom of establishment was conceivably applicable in the latter case (paragraphs 21 and 22 of the judgment in Zenatti).

74. Notwithstanding the fact, as provided for by the Treaty, (30) that the freedom to provide services is subordinate to the freedom of establishment, the Court was unable to consider the freedom of establishment since the question referred by the national court was expressly limited to the freedom to provide services (paragraph 23). As regards the prohibition, which was partial and did not therefore apply to everybody (paragraph 32), the Court held as follows in paragraph 33:

" However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler , recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them."

75. In examining whether the national legislation deemed to restrict the freedom to provide services was justified, the arguments raised by the Italian Government to support its justification having been based on pursuit of largely the same objectives as those pursued by the legislation at issue in Schindler (paragraph 30), the Court further held in paragraphs 34 to 37 of its judgment in Zenatti :

" In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.

As the Court pointed out in paragraph 37 of its judgment ... in Läärä ..., the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.

However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in

paragraph 60 of Schindler , even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

It is for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.

"

B — Freedom of establishment

76. It must now be examined whether and how the principal findings contained in those three judgments can be applied to this case. As the question referred by the national court relates expressly to the application of the freedom of establishment and to how t he application of that freedom affects the national legislation at issue in these proceedings, and since, under the hierarchy of provisions established by the Treaty, the freedom of establishment takes precedence over the freedom to provide services, (31) it is necessary first of all to examine the compatibility of the national legislation with the freedom of establishment.

1. Conditions for establishment

77. It may be inferred from the uncontested submissions of the parties to the proceedings that the centres which were the subject of the searches and seizures in the main proceedings are contractually bound to Stanley, and that Stanley has thus built up an entire network of operators offering and accepting sports bets on Italian territory. It must therefore be examined whether, by so doing, Stanley has established itself in Italy.

78. According to the judgment of the Court in Factortame and Others , (32) establishment consists in " the actual pursuit of an economic activity through a fixed establishment in [a] Member State for an indefinite period" . Under Article 43 EC, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited within the framework of the provisions subsequent to that article. Under Article 48 EC, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community must, for the purposes of the chapter on the freedom of establishment, be treated in the same way as natural persons who are nationals of Member States.

79. Stanley is a company limited by shares and incorporated under English law which, as a profit-making legal person, is capable of enjoying the freedom of establishment under the second paragraph of Article 48 EC. The second sentence of the first paragraph of Article 43 EC prohibits restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

80. Under the broad definition which the Court gave to the scope of freedom of establishment in Commission v Germany , (33) an undertaking (34) which maintains a permanent presence in another Member State is covered by the provisions of the Treaty on the right of establishment, " even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking ' s own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency" .

81. There is, therefore, no doubt at all that a dependent body acting on behalf of the central organisation may be regarded as that undertaking ' s " secondary establishment" . In so far as it is to be regarded as an establishment within the meaning of the Treaty, that body can rely on the freedoms associated with its status as such.

82. It must be positively established whether the economic activity pursued in this case constitutes establishment within the meaning of the Treaty, since, as the Court held in Commission v Germany , an undertaking that acts within the scope of the freedom of establishment may not rely on the freedom to provide services. (35)

83. In some circumstances, reliance on one or other of the freedoms may therefore also make a difference to the conditions applicable to the pursuit of an economic activity in the market of the country of destination, in so far as any special conditions governing authorisation to pursue the activity in question in the State of establishment cannot as such be imposed on a provider of services and the checks carried out and guarantees given in respect of a provider of services in the State of origin must be recognised. It is generally sufficient for a provider of services from another Member State to fulfil the conditions governing authorisation to pursue an activity applicable in the State of origin. In those circumstances, restrictions on the freedom to provide services are permissible only in so far as they meet the four conditions governing justification set out below in point 91.

84. The determination as to whether the freedom being relied on is the freedom of establishment or the freedom to provide services must always be effected in the light of the particular circumstances of the case in question, since there is no definition covering all the different forms of cross-border economic activity that can be used for the purposes of distinguishing between the freedoms in question. On the basis of the definition of establishment laid down by the Court and cited above in point 78, the economic activity pursued in this case constitutes a fixed establishment set up for an indefinite period.

2. The data transfer centres as establishments of the undertaking Stanley

85. The data transfer centres are very likely to be fixed establishments. Whether they are intended to represent Stanley on the Italian market on a permanent basis (36) depends on the nature of the contracts concluded between Stanley and the centres. It is, however, questionable whether the centres participate on a permanent basis in the business activities of the central organisation, that is to say whether they act on a permanent basis as outposts of the central organisation, since they merely pass on information relating to transactions managed in the United Kingdom. It follows from the submissions of the parties to the proceedings that the server offering, accepting and processing the bets is in Liverpool and that the centres merely act as intermediaries. Where dependent auxiliary services are provided in this way, an undertaking ' s presence in the territory of another State is permissible only where the establishment is dependent on the undertaking, " as would be the case with an agency" . (37) Where the establishment acts purely as an intermediary, that is to say as a mere receiving outlet, it should therefore be exclusively bound, or at least predominantly linked, to the managing undertaking.

86. However, an undertaking whose activity as an intermediary for the managing undertaking is just one of many activities it pursues can hardly be regarded as having been charged with the task of acting on behalf of the undertaking on a permanent basis in the manner of an agency, since, in such circumstances, the intermediary is at liberty, depending on its contract with the undertaking, to opt out of the cooperative relationship, in which case there is no dependence upon the central organisation. It is apparent from the documents before the Court that the data transfer centres offer a wide range of services in the data transfer sector, only one of which is to act as an intermediary for Stanley.

87. In those circumstances, I am inclined towards the view that the data transfer centres are not secondary establishments of the firm Stanley, but operate by providing services. Ultimately, however, this is a matter for the national court to decide. In reaching that decision, the national court should not fail to take account of the national authorities ' perception of the centres in the preliminary investigation pending.

88. If, because of the strength of their link to the British undertaking, the centres are nevertheless to be regarded as establishments of Stanley, the question arises to what extent their activities on Italian territory may be restricted by the national legislation.

3. Restrictions on the pursuit of an economic activity

89. The Court has already held that the gambling sector in principle constitutes an economic activity falling within the scope of the Treaty. (38)

90. It must further be observed, first of all, that the restrictions at issue do not constitute special treatment on grounds of public policy or public security within the meaning of Article 46(1) EC. In its judgment in Zenatti , the Court held that, by virtue of Article 55 EC, Article 46 EC is also applicable in the context of the provisions on the freedom to provide services. However, it drew no conclusions from that with regard to the assessment of the provisions at issue in that case, but addressed itself directly to an examination of the overriding reasons in the general interest. Consequently, in accordance with the approach adopted by the Court in that case, it must be assumed here too that the national provisions are not justified under Article 46 EC.

91. It can also be inferred from the case-law of the Court that, where an economic activity is taken up and pursued in another Member State within the framework of the freedom of establishment in an area which is subject to certain conditions in the host Member State, those conditions must in principle be complied with. (39) However, " national measures" — in the sense of imperative requirements, that is to say where the exceptions under Article 46(1) EC do not apply — " liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it" . (40) Furthermore, any equivalence on the part of the knowledge acquired (41) and guarantees given (42) in the State of origin must be taken into account. Consequently, the fact that a Member State regulates its gambling sector by means of a system of concessions is not objectionable per se . However, a foreign economic operator must be able to apply for a concession in the same way as a national of that Member State, (43) and the system of concessions itself must meet the four conditions applicable to national legislation restricting the pursuit of an economic activity.

(a) Discrimination

92. Consequently, it is necessary first of all to assess whether the national legislation is discriminatory in nature or in effect.

93. It has been submitted that the Italian legislation on the regulation of sports betting has a " monopolistic structure" . I take this to mean that it exhibits traits associated with a monopoly but is nevertheless not to be regarded as a monopoly in the narrower sense of the term. The discriminatory effects of a monopoly can be viewed in two ways. On the one hand, it can be said that a monopoly does not have a discriminatory effect for the purposes of the second paragraph of Article 43 EC, since both national and foreign economic operators are excluded from the activity in question in the same way. On the other hand, however, it is also argued that discrimination on grounds of nationality exists where foreign economic operators are automatically excluded from the activity in the Member State concerned.

The question is whether the same is true of a " monopolistic structure" .

94. It must be assumed that other economic operators at least have the possibility of participating in the " monopolistic structure" at issue here in that they can apply for a concession. The decisive factor, therefore, is the nature of the conditions governing the award of the concession. Even if the invitation to tender for a concession contains no conditions that discriminate directly on grounds of nationality, some of its conditions — for instance the requirement of existing business premises on Italian territory — may nevertheless have the effect of favouring national economic operators, thus placing foreign economic operators at a disadvantage. This must be regarded as indirect discrimination, which is likewise prohibited under Community law.

95. There are several factors which support the claim that the conditions governing the award of concessions for accepting sports bets in Italy are discriminatory in nature. The very condition mentioned above (which has been criticised in these proceedings), to the effect that the potential concession holder must already have business premises in Italian territory, has a discriminatory effect. That is all the more so because it is illegal to take up and pursue the activity in question without a concession and because previous experience of it in a relevant context — in Italian business premises — is impossible in any event.

96. The fact that certain types of company are automatically excluded from being concession holders also has a discriminatory effect. Furthermore, the Commission has already identified this as being contrary to Community law and, as indicated in its press release of 17 October 2002, has instituted proceedings for failure to fulfil obligations and addressed a reasoned opinion to the Italian Republic. That press release reads as follows:

The European Commission has decided to make a formal request to Italy to comply with Community law when awarding concessions for sports betting operations. At present, share-capital companies listed on EU regulated markets are excluded from obtaining such concessions, and the Commission does not consider such an exclusion to be a necessary part of the effort to combat fraud and other crimes. What is more, Italy has renewed around 300 horse-race betting concessions without issuing a call for competition. When a major public concession is awarded without the contract being opened up to all potential European tenderers (as required by the EC Treaty and the public procurement directives), European enterprises are unfairly deprived of their right to submit a bid. Moreover, the public authorities awarding the concession — and in this case the punters too — run the risk of receiving a service of a lower quality than might have been provided by a tenderer who has been improperly excluded from the award procedure ... ."

97. If the award procedure at issue were regarded as discriminatory for the purposes of the second paragraph of Article 43 EC, it would in itself be considered an obstacle to the freedom of establishment under the Treaty, in breach of Community law. In that event, the fact that an obstacle to establishment is also enforced by a prohibition under criminal law would all the more conclusively have to be regarded as an infringement of Community law.

(b) Overriding reasons in the general interest — objectives, suitability of the measures and proportionality

98. If, on the other hand, the conditions in question are not considered to be discriminatory, the legislation at issue still constitutes a restriction which can be justified only if it fulfils the four stringent conditions laid down by the Court and set out in point 91 above. The Court has already recognised the protection of consumers and the maintenance of order in society as being overriding reasons in the general interest which are capable of justifying very extensive national rules governing the gambling sector. (44) Consequently, even if the legislation at issue is exclusively concerned with the pursuit of legitimate objectives aimed at ensuring that concession holders are not involved in criminal or fraudulent practices, the question nevertheless arises whether the specific exclusion of companies limited by sharesis capable of serving that objective in the first place.

99. The integrity of a company limited by shares can be established by means of checks such as obtaining information on the integrity of the undertaking ' s representatives and major shareholders. The complete refusal of access seems in any event to be disproportionate. However, if complete exclusion is contrary to Community law, its enforcement by criminal penalties will to that extent be all the more conclusively so.

100. Moreover, in that event, checks already carried out and guarantees already given in another Member State would have to be taken into consideration in the concession award procedure. (45) Mr Garrisi ' s submission that lottery activities are also covered by Directive 1999/42 is of interest in this context. (46) Article 1 of that directive requires the Member States to adopt certain measures in respect of establishment and the provision of services. The directive applies to the activities listed in Annex A, Part 1, list VI, point 3 of which contains, inter alia , the following entry:

" ex 84. Recreation services

843. Recreation services not elsewhere classified:

— sporting activities (sports grounds, organising sporting fixtures, etc.), except for the activities of sports instructors

— games (racing stables, areas for games, racecourses, etc.)

— other recreational activities (circuses, amusement parks and other entertainments).

"

101. It is true that that provision does not contain the express references to " bookmakers" and " betting offices" which Mr Garrisi claims it does. As can be seen, the activities most closely resembling such activities are classified not under " ex 859" of the ISIC nomenclature, as stated by Mr Garrisi, but under 843.

102. A broad interpretation of the group in question would support the view held by Mr Garrisi. However, the fourth recital in the preamble to the directive reads:

" Whereas the main provisions of the said directives should be replaced in line with the conclusions of the European Council held in Edinburgh on 11 and 12 December 1992 regarding subsidiarity, simplification of Community legislation and, in particular, the reconsideration by the Commission of the relatively old directives dealing with professional qualifications ... ;"

The aforementioned European Council conclusions expressly state in Part A, Annex 2 that:

" [The Commission] will not, for instance, be going ahead with ... the regulation of gambling." (47)

103. It is not unlikely that that decision, to which reference has been made on a number of occasions in these proceedings, will have an impact on the interpretation of the directive adopted in 1999 on the recognition of qualifications. The Member States are in any event required, whether pursuant to the procedures provided for in Directive 1999/42 or directly under primary law, to take account of " knowledge and qualifications" acquired in another Member State, (48) that is to say " checks and guarantees" , (49) professional qualifications, authorisations to practise and supervision.

104. It can therefore be stated, by way of a preliminary conclusion, that, in the event that pursuit of the activity at issue constitutes establishment, a question which the national court must determine, the prohibition contained in the Italian provisions at issue on the pursuit of that activity by sports bookmakers duly authorised in other Member States infringes the principle of the freedom of establishment within the meaning of the EC Treaty.

C ─ Freedom to provide services

105. If, however, on purely factual grounds, the data transfer centres are not to be regarded as establishments of the undertaking Stanley, they are in any event involved in providing the services offered by Stanley. Assuming that Stanley has no representation in Italian territory which can be regarded as the maintenance of an establishment on its part, the business activities it pursues are a classic example of a service provided by correspondence. The provider of the service and the recipient of the service are established in two different Member States, and the service alone is cross-border in character.

1. Obstacles to the freedom to provide services and their justification

106. The Court has already recognised that enabling people to participate in gambling (deemed by the Court to include sports betting) in return for remuneration constitutes a service, and this should no longer be called into question for the purposes of these proceedings. (50) The Court also took it as read that legislation preventing operators in other Member States from taking bets in Italian territory constituted an obstacle to the freedom to provide services. (51)

107. Obstacles to the freedom to provide services are acceptable as such only where they are permissible under the exceptions expressly provided for by the EC Treaty ─ in which case even discriminatory legislation is possible ─ or are justified, in accordance with the case-law of the Court, by imperative requirements. (52) As indicated above in point 90, the Court made reference in Zenatti to Articles 45 EC, 46 EC and 55 EC, which permit restrictions where the activity is connected, even only occasionally, with the exercise of official authority or in so far as those restrictions are justified on grounds of public policy, public security or public health. However, it did not examine those articles but proceeded directly to an assessment of the overriding reasons in the general interest. It may be c oncluded from this that, in the view of the Court, betting activities, irrespective of how they are regulated by the State, are not connected with the exercise of official authority and do not jeopardise public policy, public security or public health in such a way as is capable of justifying such regulation.

108. However, the idea in particular that public security and public order are capable of justifying the kind of strict rules which reserve for the State very extensive powers of organisation in the gambling sector does not seem misplaced. Part of the rationale for the legislation applicable in Italy, and for the equivalent legislation in almost all the Member States, (53) is the prevention of crime. (54) The fact that, in Italy and in other Member States, the provisions establishing the State control of gambling are enforced by criminal penalties is likewise indicative of the legislatures ' assessment of the dangers of that activity. Nevertheless, the Court has not deemed the Italian legislation, which formed the subject-matter of the judgment in Zenatti , to be justified on grounds of public security and public policy; nor has this been seriously contended by the parties to the present proceedings.

109. It is therefore necessary, following the example of the Court, (55) to proceed directly to an examination of whether national legislation which is applicable without distinction ─ and is therefore non-discriminatory ─ but which restricts the freedom to provide services is justified. That question accordingly hangs on the existence or otherwise of overriding reasons in the general interest which are capable of justifying the national measures. In previous cases before the Court concerning the gambling sector, a whole range of arguments has always been put forward by way of

justification for the national legislation at issue.

110. In paragraph 57 of its judgment in Schindler , the Court summarised those arguments as follows: " to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes."

111. The objective of the legislation at issue in Läärä was, according to paragraph 32 of the judgment in that case, " to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes" .

112. According to the order for reference and the observations of the Italian Government, the Court held in relation to the original legislation, which is also at issue in these proceedings, that it pursued objectives similar to those pursued by the United Kingdom legislation on lotteries. " The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports." (56)

113. No new or different grounds for the legislation have been put forward in these proceedings. The Court has to date refrained from examining each ground individually. It has instead expressly considered them together. (57) It considers that they " concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society" , (58) which can be regarded as constituting overriding reasons relating to the public interest.

114.

In Schindler (paragraph 61), those grounds were capable of justifying a total prohibition on lotteries. As regards legislation such as that at issue in Zenatti , which, crucially, did not impose a total prohibition on the trade in question, the Court afforded Member States the discretion to decide whether they wanted to prohibit activities of that kind totally or partially, or only to restrict them. To that end, they could lay down procedures for controlling them the rigour of which was for them to decide (paragraph 33 of the judgment in Zenatti). To that extent ─ according to paragraph 34 ─ it falls to the Member State to determine the objectives and level of protection.

115. Limited authorisation of gambling, which has the aim of " confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes" , also serves public-interest objectives. The Court nevertheless held that " such a limitation is acceptable only if, from the outset , it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence ..." . (59)

116. It therefore seems entirely consistent with the case-law of the Court to subject the objectives pursued and the means employed to attain them to closer inspection, even though the Court has hitherto left that task to the national courts. (60) As indicated above, it is a task which they clearly find difficult.

2. Suitability of the means employed to attain the objective pursued

117. The objectives cited can be divided into different groups. On the one hand, there are the potential dangers posed by operators, such as fraudulent practices and criminal activities. On the other hand, there is the protection of players from themselves. This includes the efforts to restrict gambling opportunities, the purpose of which is to prevent the wagering of excessive stakes and the practice of habitual or even compulsive gambling, together with the damaging financial and social consequences that follow from this. The feared negative effects on society can be classified under that objective, since the limitation of gambling opportunities is intended to counter such effects. Finally, consideration must be given to the not insignificant economic dimension of gambling as represented by the generation of substantial funds for the public purse or in any event for public-interest purposes.

(a) Dangers posed by operators

118. Potential dangers posed by operators can be countered by means of checks at the time of authorisation and, where appropriate, by monitoring their activities. To that extent, an authorisation procedure is not objectionable per se . However, in the context of the freedom to provide services, it becomes problematic when it is implemented in such a way that an operator which is authorised in another Member State and complies with the rules applicable there is effectively prevented from pursuing its activity. It is safe to assume that gambling is regulated in most if not all Member States, (61) and that the grounds given for such regulation are largely the same. (62) The fact that an operator from another Member State meets the requirements applicable in that State should therefore satisfy the national authorities of the Member State in which the service is provided and should be accepted by them as a sufficient guarantee of the integrity of the operator.

(b) Prevention of the passion for gambling

119. As regards the dangers feared to be posed by the diversification and extension of gaming opportunities, it must be examined whether the Member State has a coherent policy on the subject, particularly where the prohibition in question is not absolute but is qualified by a reservation of authorisation. A total prohibition on a particular branch of the gambling sector clearly has the effect of limiting those gambling opportunities. However, where gambling — in this case sports betting — is permitted, albeit within clear limits laid down by law, the stated objective of producing a limiting effect must be examined much more closely. Limited authorisation cannot, as the Court held in paragraph 35 of its judgment in Zenatti , serve to show that national legislation is not in reality intended to achieve public-interest objectives. Nor can regulation alone serve to show that the stated objective is being pursued, for, as the Court again held (in paragraph 36 of its judgment in Zenatti), such regulation is acceptable " only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities" .

120. However, whether that is the case can be determined only by an overall assessment taking into account the image and conduct of gambling operators in the Member State. This is borne out by the fact that, in Zenatti ,the Court left that assessment to the national court. Where, however, the Court has sufficient facts at its disposal to enable it to make an assessment, it is not prevented from doing so.

121. It has been submitted in these proceedings that sports betting operators trading under a concession make themselves known by means of aggressive advertising. Such conduct is intended to instil and foster a desire to gamble. That is not all, however. The Italian State itself has made it possible, through the legislation it has adopted, for the range of gambling opportunities on the Italian market to be substantially extended. (63) It has further been submitted, without contradiction, that the Italian State has also made it easier to collect bets. Reference was made earlier to the fact that the infrastructure has been expanded through the award of 1 000 new concessions.

122. Against that background, there can no longer be any talk of a coherent policy to limit gambling opportunities. Moreover, the objectives stated but not in reality pursued (any more) are not therefore capable of justifying the restriction of the freedom to provide services enjoyed by service providers established and duly authorised in other Member States.

123. As regards the amendments made to the Italian legislation in 2000 by the Finance Law, and the circumstances surrounding the adoption of that law, which reinforced the provisions previously applicable (as examined by the Court in Zenatti), it should be pointed out that, according to the legislation cited in the written observations, those amendments were made at least partly in order to protect Italian concession holders. These are clearly protectionist motives which are not capable of justifying the legislative amendments in question and, what is more, cast doubt on the legislation as a whole. In so far as the original legislation must in any event be regarded as no longer being underpinned by the objectives which the legislature may or may not have had in mind at the time of its adoption, because the legal and factual situation has changed, those provisions should not under any circumstances have been reinforced as they were.

(c) Relevance of State revenue

124. The fact that the legislation was introduced in a finance law also indicates that the Member State has a not inconsiderable interest in gambling for economic reasons.

125. In paragraph 60 of its judgment in Schindler , the Court held it to be " not without relevance" — although incapable of being regarded as justification — " that lotteries may make a significant contribution to the financing of benevolent or public-interest activities such as social works, charitable works, sport or culture" . Although that finding might support the assumption in certain circumstances that economic grounds — at least when combined with other grounds — are recognised as reasons in the general interest, the Court dispelled such speculation in its judgment in Zenatti , which was consistent with its previous case-law to the effect that economic grounds are incapable of justifying restrictive measures. (64) The Court held in paragraph 36 of that judgment that " the financing of social activities through a levy on the proceeds of authorised games [may constitute] only an incidental beneficial consequence and not the real justification for the restrictive policy adopted" .

126. The favourable financial consequences of gambling for the public purse cannot, therefore, be regarded as overriding reasons in the general interest which are capable of justifying the exclusion from the gambling market of operators from other Member States. Nevertheless, the fact remains that the favourable economic effects of gambling on the revenue of Member States are highly significant. This emerges with varying degrees of clarity from the observations of the Member States, and was most clearly expressed by the Portuguese Government, which vividly describes the almost dramatic consequences which it is feared the liberalisation of gambling at European level would have for the smaller Member States. Such concerns certainly cannot be dismissed out of hand.

127. However, it is clear from the submissions of the Member States that what they fear most is the economic consequences of changes within the gambling sector. Little reference is made in this context to any dangerous effects that gambling might have on gamblers and their social environment . Consequently, such fears likewise cannot be regarded as an interest in the protection of consumers that would constitute an overriding reason in the general interest.

128. If fears of a shift in the sources of State revenue were realised as a result of a partial opening-up of national

gambling markets, other suitable measures would, if necessary, have to be taken in order to counter this. Economic considerations alone, however, cannot serve to prevent outright the exercise of the freedom to provide services by operators authorised in another Member State.

129. Consequently, the restriction of the freedom to provide services cannot, on the grounds given and in the circumstances obtaining, be regarded as justified by overriding reasons in the general interest.

3. Gambling and electronic media

130. The legislative amendments introduced in 2000, which were apparently intended only to enforce the existing prohibitions, must also be viewed, at the very least, in the context of technological advances. It is common ground that such advances are making it increasingly difficult to monitor whether legitimate systems of regulation are being complied with. Even without the intervention of an intermediary, a person who wishes to gamble can place a bet with a European service provider of his choice by phone, fax, or internet. Those media, which mean that a change of location is no longer a prerequisite for participating in foreign gambling activities, have prompted a variety of reactions from national legislatures. For example, the United Kingdom passed the Lotteries Act 1993, referred to in Schindler but not directly relevant to that case, which introduced a national lottery in order to make available in the United Kingdom a facility similar to those offered by foreign service providers. In other Member States, such as Italy and Germany, (65) existing legislation was reinforced, primarily by means of enforcement under criminal law.

4. Consequences

131. However, the acceptability of those criminal penalties stands or falls by the lawfulness of the restrictions and prohibitions on which they are based, their assessment under Community law being dictated entirely by the objectives pursued. Where, as in this case, the alleged objectives of the relevant legislation are called into question by the inconsistent conduct of the national authorities themselves, that is to say, where those objectives cannot be regarded as imperative requirements in the public interest, legislation which reinforces such measures by means of criminal penalties must be considered disproportionate.

132. It must therefore be concluded that national legislation like the Italian legislation at issue in these proceedings, which imposes prohibitions enforced by criminal penalties on the pursuit, by any person and at any place, of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, is, in the circumstances obtaining in this case, inconsistent with the freedom to provide services under Article 49 et seq. EC.

133. Finally, for the sake of completeness, it is necessary to examine the defendants ' submission that the Italian legislation in question infringes secondary Community law concerning electronic commerce and the directives listed in point 39. In that connection, it is sufficient to refer first of all to Directive 2000/31 on electronic commerce, (66) the third indent of Article 1(5)(d) of which provides that the directive must not apply to " gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions" . Furthermore, as regards Directive 96/19 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets, Directive 97/13 on a common framework for general authorisations and individual licences in the field of telecommunications services and Directive 97/66 concerning the processing of personal data and the protection of privacy in the telecommunications sector, it should be noted that these directives have no bearing, either explicitly or implicitly, on the organisation of gambling. Consequently, it cannot be assumed that the field at issue is governed by secondary law. The assumption must therefore be that no specific Community legislation is applicable, and that the field at issue is governed by primary law, in the light of which, moreover, secondary law too must be interpreted.

VI — Conclusion

134. In the light of the foregoing considerations, I propose that the question referred for a preliminary ruling be answered as follows:

The provisions of Article 49 et seq. EC concerning the freedom to provide services are to be interpreted as precluding national legislation like the Italian legislation contained in Article 4(1) to (4), 4a and 4b of Law No 401 of 13 December 1989 (as most recently amended by Article 37(5) of Law No 388 of 23 December 2000), which provides for prohibitions enforced by criminal penalties on the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, where such activities are effected by, on the premises of, or on behalf of, a bookmaker which is established in another Member State and which duly carries out those activities in accordance with the legislation applicable in that State.

Case C-243/01 (Extract only**)**
Judgment of the Court of 6 November 2003.

Criminal proceedings against Piergiorgio Gambelli and Others.
Reference for a preliminary ruling: Tribunale di Ascoli Piceno - Italy.
Right of establishment - Freedom to provide services - Collection of bets on sporting events in one Member State and transmission by internet to another Member State - Prohibition enforced by criminal penalties - Legislation in a Member State which reserves the right to collect bets to certain bodies.

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,
gives the following
Judgment

1. By order of 30 March 2001, received at the Court on 22 June 2001, the Tribunale di Ascoli Peceno referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 43 and 49 EC.

2. The question was raised in criminal proceedings brought against Mr Gambelli and 137 other defendants (hereinafter " Gambelli and others"), who are accused of having unlawfully organised clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State.

Legal background

Community legislation

3. Article 43 EC provides as follows:-

" Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

"

4. The first paragraph of Article 48 EC provides that " companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall ... be treated in the same way as natural persons who are nationals of Member States" .

5. Article 46(1) EC provides that " 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" .

6. The first paragraph of Article 49 EC provides that " within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended" .

.....

The Court ' s reply

44. The first point to consider is whether legislation such as that at issue in the main proceedings (Law No 401/89) constitutes a restriction on the freedom of establishment.

45. It must be remembered that restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries, are prohibited by Article 43 EC.

46. Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.

47. Furthermore, in reply to the questions put to it by the Court at the hearing, the Italian Government acknowledged that the Italian legislation on invitations to tender for betting activities in Italy contains restrictions. According to that

Government, the fact that no entity has been licensed for such activities apart from the monopoly-holder is explained by the fact that the way in which the Italian legislation is conceived means that the licence can only be awarded to certain persons.

48. In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.

49. It is therefore possible that the conditions imposed by the legislation for submitting invitations to tender for the award of these licences also constitute an obstacle to the freedom of establishment.

50. The second point to consider is whether the Italian legislation in that respect constitutes a restriction on the freedom to provide services.

51. Article 49 EC prohibits restrictions on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Article 50 EC defines " services" as services which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.

52. The Court has already held that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a " service" (Schindler , paragraph 37). By analogy, the activity of enabling nationals of one Member State to engage in betting activities organised in another Member State, even if they concern sporting events taking place in the first Member State, relates to a " service" within the meaning of Article 50 EC.

53. The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established (Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 22).

54. Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet — and so without moving — to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

55. In addition, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, paragraph 16, and Case C-294/97 Eurowings Luftverkehr [1999] ECR I-7447, paragraphs 33 and 34).

56. In reply to the questions put by the Court at the hearing, the Italian Government confirmed that an individual in Italy who from his home connects by internet to a bookmaker established in another Member State using his credit card to pay is committing an offence under Article 4 of Law No 401/89.

57. Such a prohibition, enforced by criminal penalties, on participating in betting games organised in Member States other than in the country where the bettor is established constitutes a restriction on the freedom to provide services.

58. The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.

59. It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.

60. In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.

61. With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services (see, to that effect, Case C-264/96 ICI [1998] ECR I-4695, paragraph 28, and Case C-136/00 Danner [2002] ECR I-8147, paragraph 56).

62. As stated in paragraph 36 of the judgment in Zenatti , the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.

63. On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler , Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

64. In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37).

65. According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

66. It is for the national court to decide whether in the main proceedings the restriction on the freedom of establishment and on the freedom to provide services instituted by Law No 401/89 satisfy those conditions. To that end, it will be for that court to take account of the issues set out in the following paragraphs.

67. First of all, whilst in Schindler , Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.

69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

70. Next, the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike.

71. It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination.

72. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court ' s case-law (see Case C-193/94 Skanavi and Chryssanthakopoulos [1996] ECR I-929, paragraphs 34 to 39, and Case C-459/99 MRAX [2002] ECR I-6591, paragraphs 89 to 91), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.

73. The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year ' s imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.

74. As to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.

75. It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

.....

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunale di Ascoli Piceno by an order of 30 March 2001, hereby rules:

National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.

In Case C-55/94,
REFERENCE to the Court under Article 177 of the EC Treaty by the Consiglio Nazionale Forense (Italy) for a preliminary ruling in the proceedings pending before that court between
Reinhard Gebhard
and
Consiglio dell' Ordine degli Avvocati e Procuratori di Milano,
on the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17),
THE COURT,
after hearing the Opinion of the Advocate General at the sitting on 20 June 1995,
gives the following
Judgment

1 By order of 16 December 1993, received at the Court on 8 February 1994, the Consiglio Nazionale Forense (National Council of the Bar) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

2 The questions have been raised in the course of disciplinary proceedings opened by the Consiglio dell' Ordine degli Avvocati e Procuratori di Milano (Council of the Order of Advocates and Procurators of Milan, hereinafter "the Milan Bar Council") against Mr Gebhard, who is accused of contravening his obligations under Law No 31 of 9 February 1982 on freedom for lawyers who are nationals of a Member State of the European Community to provide services (GURI No 42 of 12 February 1982) on the ground that he pursued a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title avvocato.

.....

31 The provisions relating to the right of establishment cover the taking-up and pursuit of activities (see, in particular, the judgment in Reyners, paragraphs 46 and 47). Membership of a professional body may be a condition of taking up and pursuit of particular activities. It cannot itself be constitutive of establishment.

32 It follows that the question whether it is possible for a national of a Member State to exercise his right of establishment and the conditions for exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

33 Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is effected.

34 In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.

35 However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability (see Case C-71/76 Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris [1977] ECR 765, paragraph 12). Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as avvocato.

36 Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

37 It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993] ECR I-1663, paragraph 32).

38 Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89 Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg [1991] ECR I-2357, paragraph 15). Consequently, they must take account of the equivalence of diplomas (see the judgment in Thieffry, paragraphs 19

and 27) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned (see the judgment in Vlassopoulou, paragraph 16).

……

On those grounds,

THE COURT

in answer to the questions referred to it by the Consiglio Nazionale Forense, by order of 16 December 1993, hereby rules:

1. The temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity.

2. The provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.

3. A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.

4. The possibility for a national of a Member State to exercise his right of establishment, and the conditions for the exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

5. Where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them.

6. National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

7. Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.

Case C-159/90.
Opinion of Mr Advocate General Van Gerven delivered on 11 June 1991.
The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others.
Reference for a preliminary ruling: High Court - Ireland.
Freedom to provide services - Prohibition on the distribution of information on clinics carrying out voluntary terminations of pregnancy in other Member States.

Mr President,
Members of the Court,
1. The questions submitted for a preliminary ruling by the High Court, Dublin, ("the national court") arose in proceedings brought by The Society for the Protection of Unborn Children Ireland Ltd (hereinafter referred to as "the SPUC" or "the plaintiff in the main proceedings") against a number of persons in their capacity as representatives of one of three students associations, namely the Union of Students of Ireland (hereinafter "the USI"), the University College Dublin Students Union (hereinafter "the UCDSU") and the Trinity College Dublin Students Union (hereinafter "the TCDSU").

Factual and legal background

2. The SPUC is a company incorporated under Irish law whose purpose is to prevent the decriminalization of abortion and, more generally, to protect the rights of unborn life from the moment of conception.

The UCDSU and the TCDSU each publish an annual guidebook for students. In common with the previous edition the 1989/90 edition of each of the two guidebooks includes a section containing information for pregnant students. Abortion is mentioned as one possible option in the event of an unwanted pregnancy. In that connection, the guidebooks provide the names, addresses and telephone numbers of a number of clinics in the United Kingdom where medical termination of pregnancy is available.

The USI publishes a monthly publication for students entitled "USI News". Information is provided in particular in the February 1989 issue on the possibility of having an abortion in the United Kingdom and on the way of contacting the agencies concerned.

3. The dispute between the SPUC and the representatives of the students associations must be seen in the context of the Irish legislation relating to abortion. Section 58 of the Offences against the Person Act 1861, makes it a criminal offence for the pregnant woman herself or another unlawfully to attempt to procure her miscarriage. Section 59 of that Act also makes it a criminal offence to provide unlawful assistance to that end. On the basis of, inter alia, those provisions the Irish courts have recognized the right to life of the unborn as from the moment of conception.

Following a referendum in 1983 an express acknowledgment of the right to life of the unborn was inserted in the Irish Constitution. The new third subsection of Article 40, Section 3, of the Constitution reads as follows:

"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."

In a judgment of 16 March 1988 in The Attorney General at the relation of The Society for the Protection of Unborn Children Ireland Ltd v Open Door Counselling Limited and Dublin Wellwoman Centre Limited, (1) the Supreme Court ruled inter alia as follows:

"The Court doth declare that the activities of the defendants, their servants or agents in assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic; by the making of their travel arrangements, or by informing them of the identity and location of and method of communication with a specified clinic or clinics are unlawful, having regard to the provisions of Article 40, s. 3, sub-s. 3 of the Constitution" (emphasis added).

4. In September 1989 the SPUC drew the attention of the students associations mentioned above to that judgment of the Supreme Court and requested them to undertake not to include in their publications during the 1989/90 academic year information as to the identity and location of and method of communication with abortion clinics. The students associations gave no such undertaking.

On 25 September 1989 the SPUC brought proceedings in the High Court against the representatives of the three students associations (to whom I shall refer as "the defendants in the main proceedings") for a declaration that any publication of the aforementioned information is contrary to Article 40, s. 3, sub-s. 3 of the Constitution. At the same time, the SPUC sought from the same court an interlocutory injunction until the full hearing of the action, restraining

the publication of such information.

During the proceedings for the interlocutory injunction, the defendants in the main proceedings argued that pregnant women residing in Ireland might, by virtue of Community law, travel to another Member State where abortion was permitted in order to have their pregnancies terminated using the medical facilities provided in that country. They further argued that as a corollary to that right derived from Community law there was a right for interested women in Ireland to obtain information as to the identity and location of abortion clinics in other Member States and the manner of contacting them. Lastly, they stated that that right of information on the part of pregnant women resident in Ireland also gave rise to a right under Community law for the defendants to distribute the relevant information in Ireland.

On 11 October 1989 the High Court decided in the proceedings on the motion for an interlocutory injunction to refer a number of questions (which were not then specified) to the Court of Justice for a preliminary ruling. The High Court, however, did not rule on the SPUC' s request for an injunction restraining publication. The SPUC appealed against that judgment to the Supreme Court, which, on 19 December 1989, granted the injunction sought until the trial of the action. The Supreme Court did not interfere with the High Court' s decision to refer a number of questions to the Court of Justice for a preliminary ruling. However, it gave the parties leave to apply to the High Court in order to vary the injunction restraining publication in the light of the preliminary ruling to be given by the Court of Justice.

5. It was not until after the Supreme Court gave that judgment that the High Court, following on from its judgment of 11 October 1989, decided on 5 March 1990 to refer the following three questions to the Court of Justice for a preliminary ruling:

"1. Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of 'services' provided for in Article 60 of the Treaty establishing the European Economic Community?

2. In the absence of any measures providing for the approximation of the laws of the Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?

3. Is there a right at Community law in a person in Member State 'A' to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State 'B' where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State 'A' but is lawful under certain conditions in Member State 'B' ?"

Jurisdiction of the Court

6. The Commission observes in its observations that it is not clear whether the High Court' s preliminary questions are referred in the context of the interlocutory proceedings or in that of the main proceedings.

I agree with the Commission' s view that that uncertainty is not of such a nature as to cast doubt on the Court' s jurisdiction to entertain the request for a preliminary ruling, having regard to the judgment in Pardini. (2) If the questions have been referred in connection with the main proceedings they are certainly relevant to the decision to be taken by the referring court. However, they are relevant equally if they are referred in connection with the interlocutory proceedings. It is true that the interim measure sought in the interlocutory proceedings has since been granted by the Supreme Court. But since the Supreme Court gave the parties leave to apply to the High Court, once the preliminary ruling has been given, to vary the injunction granted, the reference for a preliminary ruling is relevant in that case too.

7. The plaintiff in the main proceedings and the Irish Government take the view that no question of Community law arises in these proceedings. The issue is whether the defendants, that is to say the representatives of the students associations, are entitled to distribute the information in question to pregnant women. Since the information is distributed free of charge and the defendants do not operate as agents for the abortion clinics named by them, no economic activity can be involved within the meaning of Article 2 of the EEC Treaty. They add that, in any event, the provision of information by the defendants took place entirely within Ireland and therefore lacks any cross-border element, as a result of which the Treaty provisions on the freedom to supply services cannot apply.

The defendants in the main proceedings disagree. As has already been mentioned (in section 4) they consider that they can derive from Community law a right to provide information which is a corollary to the right to information of pregnant women resident in Ireland which ensues from their freedom guaranteed by the Treaty to go to another

Member State to receive medical services. The information provided by the defendants can therefore not be seen in isolation from the economic services provided in another Member State.

8. The defendants' view seems to me to be correct. The questions raised by the national court seek to establish whether the activities of abortion clinics constitute services within the meaning of Article 60 of the EEC Treaty and, if so, whether the Treaty provisions on the freedom to supply services preclude a national rule prohibiting the provision of information concerning abortion services carried out in another Member State. The second part of the question therefore relates to the provision of information to pregnant women residing in one Member State who may wish to go to another Member State in order to receive certain services. Construed thus, the questions do not relate to activities "whose relevant elements are confined within a single Member State". (3) The prohibition on the provision of information in Ireland may result in a smaller number of women being acquainted with the services performed in the other Member State and therefore making less use of them. This may have an adverse effect on intra-Community trade in services. (4) Consequently, the questions do have a Community-law dimension.

Services within the meaning of Article 60 of the EEC Treaty

9. By its first question the national court wishes to know whether the "organized activity or process of carrying out an abortion or the medical termination of pregnancy" is to be regarded as a service within the meaning of Article 60 of the EEC Treaty.

There can in my view be no doubt that "the medical termination of pregnancy" covers a cluster of services which, if - as none of the parties in this case dispute - they are "normally provided for remuneration", constitute services within the meaning of Article 60 of the EEC Treaty. That the term "services" includes such services is already clear from the wording of the second paragraph of Article 60, which mentions as being services "activities of the professions". In any event, in the judgment in Luisi and Carbone (5) the Court expressly mentioned (in paragraph 16) "persons receiving medical treatment" as being recipients of a service within the meaning of Article 60. Furthermore, Article 57(3) of the EEC Treaty (on establishment), to which Article 66 (on services) refers, expressly mentions the medical and allied professions.

10. The SPUC takes the view that the medical termination of pregnancy should nevertheless fall outside the scope of Article 60 on the ground that as a result the life of a third party, the unborn child, is destroyed, which is unlawful in Ireland as a result of the constitutional protection of the life of the unborn (6) and the prohibition of intentional abortion. Abortion is also prohibited in principle in other Member States but permitted, more specifically during the initial period of pregnancy, under particular conditions and circumstances which vary from one Member State to another. Moreover, it appears from the national court' s third question that the court has in mind a situation in which the relevant service about which information is provided in Ireland is performed in the other Member State (in this case, the United Kingdom) in accordance with the legal conditions in force there.

In those circumstances I do not have to consider the question which has been raised on several occasions in connection with trade in goods in previous cases which have come before the Court, (7) namely whether unlawful services fall outwith the scope of the Treaty provisions on the provision of services. In the light of the questions referred by the national court, the services involved in this case are services for the medical termination of pregnancy which are lawfully provided in the country where they are performed (see also section 14 below) and which, as has already been shown (in section 8), are also of a cross-border nature.

Consequently, I propose that the first question should be answered as follows:

"The medical operation, normally performed for remuneration, by which the pregnancy of a woman coming from another Member State is terminated in compliance with the law of the Member State in which the operation is carried out is a (cross-border) service within the meaning of Article 60 of the EEC Treaty."

Scope and context of the second and third questions

11. By its second question the national court wishes to establish whether, in the present state of Community law, a Member State may prohibit the distribution of specific information about the identity and location of clinics in another Member State where pregnancies are medically terminated and about means of communicating with such clinics. It appears from its connection with the first question that the national court has the provisions on the supply of services in mind. It is therefore a matter of establishing whether a Member State may, consistently with the Treaty provisions on the freedom to supply services, impede access to medical abortion services lawfully carried out in another Member State by prohibiting the provision of information about those services.

12. In its third question the national court asks whether a person in Member State A has a right at Community law to

distribute such information about abortion clinics in Member State B when the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B. It appears from the documents of the main proceedings that the information in question is provided in Member State A by persons who are not paid for providing it and who have no connections with the clinics in Member State B. Do those persons - the national court asks itself - have a right under Community law, that is to say the Treaty provisions on the freedom to provide services, to distribute the information in question?

In addition, it seeks to establish - hence the emphasis on the difference between the law in Member State A (Ireland) and in Member State B (United Kingdom) (8) - whether, in the event that a prohibition on the provision of information of the type described is contrary to the Treaty provisions on the freedom to supply services, the situation is different if the prohibition ensues from fundamental provisions in the Constitution and the criminal law of the first Member State. In other words, can such a national rule nevertheless be justified on grounds of considerations of a mandatory nature or of public policy enshrined in national constitutional or criminal-law provisions?

13. It may appear from the above and from what follows that the national court' s questions do not have to do directly with the compatibility with Community law of the actual prohibition of the provision of abortions to pregnant women but with the compatibility with Community law of the prohibition on third parties giving assistance, more specifically, information, to pregnant women wishing to undergo an abortion in another Member State. Yet the prohibition of abortion is indirectly relevant, that is to say as the ground justifying the ban on the distribution of information (on this point see sections 26 and 33).

The national court' s questions refer to the prohibition of the distribution of "specific information about the identity, location and means of communication with" British clinics in which abortions are carried out. That definition closely tallies with the words used by the Irish Supreme Court in the Open Door Counselling case to which I have already referred (see section 3 above) and in which the distribution of information and referral and making travel arrangements to foreign clinics were held to be unlawful means of assisting pregnant women in Ireland to obtain abortions. In its written observations, the Commission rightly emphasizes that the prohibition of the provision of assistance is a general one which applies in Ireland to every provider of services and/or person providing information irrespective of his nationality or his place of establishment and that pregnant women in Ireland, regardless of their nationality, are impeded from making use of the services concerned both in Ireland and in other Member States alike.

The national court' s questions do not extend beyond the legality of the relevant prohibition on the provision of assistance and information. More specifically, they are not concerned with any penalty which may be imposed in Ireland on pregnant women who undergo an abortion abroad. For that matter it is not sufficiently clear from the information before the Court or from the statements of the parties whether or not Irish law provides for the imposition of any penalty in those circumstances. However, it is stated in the written observations of the defendants in the main proceedings that Ireland does not prohibit or seek to prevent a pregnant woman from exercising her right to travel and receive services of termination of pregnancy abroad.

14. I would refer to a further point. As I have already observed, the questions are concerned with medical termination of pregnancy carried out in another Member State in compliance with the laws of that State. I assume that this likewise signifies - as does not appear to be contested in this case - that the information distributed in Ireland by the defendants in the main proceedings complies with the rules which apply in the United Kingdom with regard to the cases in which pregnancies may lawfully be terminated in that country. Indeed, in those Member States where abortion is permitted under certain conditions, there are frequently requirements laid down with regard to advice and counselling, which are designed to prevent abortion becoming routine and commercialized (9) or to ensure that the information is provided only by authorized persons (10) and that the decision to carry out an abortion is taken with knowledge of the facts, that is to say with the necessary advice and counselling. (11)

I assume therefore that the distribution of information in Ireland remains within the limits of what is allowed in the Member State in which the service originates. This detail is important, because the right to provide information which the defendants in the main proceedings claim may in no case extend beyond the freedom to provide services on the part of the actual provider of services established in another Member State, of which, the defendants in the main proceedings argue, that right is the corollary. This is in fact related to the general rule that only goods or services which are duly "produced" or "brought into circulation" in the Member State of origin may be freely traded in the context of intra-Community trade in goods or services.

15. It appears from the foregoing that the second and third questions are closely related to each other and, in conjunction, must read as follows:

"Do the Treaty provisions on the freedom to provide services preclude a Member State where abortion is prohibited both by the Constitution and by criminal law from prohibiting anyone, whether he be the provider of the service or a

person completely independent of the provider of the service and irrespective of his nationality or place of establishment, from providing women residing in that State, regardless of their nationality, with assistance with a view to the termination of pregnancy, more specifically through the distribution of information about the identity and location of and the manner of communication with clinics established in another Member State where abortions are performed, even though the services of medical termination of pregnancy and the provision of information relating thereto comply with the law in force in that other Member State?"

In answering this question I shall deal with three distinct points. I shall first consider, in the light of the Court' s case-law on the freedom to supply services, whether the prohibition on the provision of information which is at issue falls within the scope of the Treaty provisions on the freedom to supply services (sections 16 to 21). Secondly, I shall examine whether, in the event that the first question is answered in the affirmative, the prohibition can nevertheless be justified under Community law on the ground of imperative requirements of public interest in theory (sections 22 to 24) and in practice (sections 25 to 29). Lastly, I shall consider whether the Court is entitled to examine the prohibition on the provision of information which is at issue in the light of the general principles of Community law with regard to fundamental rights and freedoms (sections 30 and 31) and, if it is so entitled, the result of such examination (sections 32 to 38).

Does the prohibition of the distribution of information fall within the scope of Articles 59 and 60 of the EEC Treaty?

16. Articles 59 and 60 of the EEC Treaty have been directly applicable since the expiry of the transitional period. (12) The fact that the Member States' legislation on the medical termination of pregnancy has not been approximated, as is mentioned by the national court in the second question, does not stand in the way of the direct applicability of the Treaty provisions.

17. As the Court has consistently held, (13) Article 59 of the EEC Treaty requires the abolition of any restriction which has the aim or effect of treating a provider of services established in a Member State other than the Member State where the service is provided less favourably on account of his nationality or of his place of establishment than a provider of services who is established in that Member State.

But even where the provider of the service is established in the same Member State where the service is provided and it is the recipient of the service who goes to that country from another Member State, Article 59 of the EEC Treaty requires the abolition of any restrictions which that recipient of services might encounter on account of his nationality or of the fact that he is established in a Member State other than that to which he goes in order to receive the service. The Court gave this answer in paragraph 10 of the judgment in Luisi and Carbone (cited above):

"In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital."

In paragraph 16, the Court drew the following conclusion from this:

"the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments".

In paragraph 15 of the judgment in Cowan (14) the Court expressly confirmed that conclusion.

It follows from this case-law that not only providers of services who do so by way of trade or profession derive rights from the Treaty provisions on freedom to provide services, but also Community citizens who wish to receive services derive rights therefrom, and more specifically the right to go to another Member State in order to receive a service provided there.

18. The question now is whether that right of Community citizens to receive services in another Member State encompasses the right to receive, unimpeded, information in one' s own Member State about providers of services in the other Member State and about how to communicate with them. I consider that that question must be answered in the affirmative.

In the judgment in GB-Inno-BM (15) the Court emphasized, in connection with offering goods for sale, the interest of consumer information. It stated (in paragraph 8) that consumers' freedom to shop in another Member State is compromised if they are deprived of access in their own country to advertising available in the country where

purchases are made. I can see no reason why the position should be otherwise with regard to information provided about a service: individuals' freedom to go to another country in order to receive a service supplied there may also be compromised if they are denied access in their own country to information concerning, in particular, the identity and location of the provider of the services and/or the services which he provides.

19. In my view, the answer given also holds good where the information comes from a person who is not himself the provider of the services and does not act on his behalf. The freedom recognized by the Court of a recipient of services to go to another Member State and the right comprised therein to access to (lawfully provided) information relating to the services and the provider of those services ensue from fundamental rules of the Treaty to which the most extensive possible effectiveness must be given. As a fundamental principle of the Treaty, the freedom to supply services must - subject to limitations arising out of imperative requirements or other justifying grounds, which I shall discuss later - be respected by all, just as it may be promoted by all, inter alia by means of the provision of information, whether or not for consideration, concerning services which the provider of information supplies himself or which are supplied by another person.

Moreover, such an interpretation of Community law is consistent with Article 10 of the European Convention on Human Rights ("the European Convention"), the underlying principles of which the Court accepts as forming part of the Community legal order, and with Article 5 of the European Parliament' s Declaration of Fundamental Rights and Freedoms. (16) According to those provisions, everyone has the right, subject to restrictions prescribed by law, "to receive and to impart information and ideas without interference by public authority and regardless of frontiers" (European Convention on Human Rights, Article 10(1)). The protection afforded by that provision is aimed in particular at information intended to influence public opinion but also applies to "information of a commercial nature". (17) These provisions will be dealt with more extensively later (section 34 below).

20. As has already been mentioned (in section 13), the prohibition on the provision of information on abortions carried out abroad is a measure derived from the Constitution which applies generally in Ireland and affects domestic and foreign providers of services and information or recipients of services alike and in a non-discriminatory manner. The Commission argued before the Court that that non-discriminatory rule fell outside Articles 59 and 60 of the EEC Treaty. It sought support for that view in the Court' s judgments in Koestler (18) and in Debauve. (19)

It is true that the Court has not yet expressly ruled that Article 59 of the EEC Treaty is applicable to non-discriminatory measures which impede (actually or potentially) intra-Community trade in services. But neither has it restricted the scope of Article 59 to (overt or covert) discriminatory measures. One explanation for the emphasis on discrimination in the cases doubtless lies, according to Mr Advocate General Jacobs in his recent Opinion in Saeger, (20) in the fact that most of the cases are concerned with a situation in which the provider of services has moved to another Member State where he is confronted with national rules which affect the provider of services from another Member State more severely than the domestic provider and, as a result, they have a "discriminatory" (that is to say, adverse) effect on the foreign provider as compared with the domestic provider of services.

In his Opinion, Mr Advocate General Jacobs expresses the view that non-discriminatory restrictions on the provision of services should be treated in the same way as non-discriminatory restrictions on the free movement of goods under the Cassis de Dijon line of case-law. According to the Advocate General, that analogy is particularly appropriate where the provider of the service does not move physically between Member States. (21) To require the provider of services in such a situation to comply with the often detailed legislation of each Member State where the service "moves" by post or telecommunications (or, a fortiori, with the legislation of the Member State from which the recipient of the services originates) would severely impede the attainment of a single market in services in the Community. (22) In this Opinion Mr Advocate General Jacobs associated himself with the view already adopted by a number of advocates general. (23)

I entirely agree with this view. To allow measures which are non-discriminatory but detrimental to intra-Community trade in services to fall a priori outside the scope of Article 59 of the EEC Treaty would detract substantially from the effectiveness of the principle of the free movement of services, which in an economy in which the tertiary sector is continuing to expand will increase in importance. It would also give rise to an undesirable divergence between the Court' s case-law on trade in goods and that on trade in services in situations in which only the service or the recipient of the service crosses the internal frontiers of the Community and which do not genuinely differ from situations in which goods or purchasers cross frontiers, and in situations in which services, for instance in the financial sector, are frequently presented as "products".

In addition, now the prohibition of discrimination has already been so broadly stretched in the case-law of the Court that it covers a situation in which providers of services from one Member State are placed, as a result of a disparity between the legislation of the Member States concerned, in a less favourable position in so far as they are subjected as a result of that disparity to a heavier burden if they should wish to exercise their trade or profession in another

Member State. (24) If the broad interpretation of Article 59 which is advocated herein is accepted, a more heavy burden of that kind will naturally be regarded as a barrier, without its being necessary to place undue emphasis on the prohibition of discrimination. (25)

21. My conclusion is, therefore, that national rules which, albeit not discriminatory, may, overtly or covertly, actually or potentially, impede intra-Community trade in services fall in principle within the scope of Articles 59 and 60 of the EEC Treaty. I say "in principle" advisedly, because such national rules may nevertheless be compatible with the said Treaty provisions where they are justified by imperative requirements of public interest (see section 22 et seq., below). In addition, I conclude that in principle Community citizens derive from Articles 59 and 60, where they are applicable, the right to obtain information regarding services lawfully provided in another Member State just as they derive the right therefrom to distribute such information, whether or not for remuneration.

Imperative requirements of public interest which may justify limitations on the freedom to supply services

22. The Court has consistently held, in particular in its judgment in Webb (26) (in paragraph 17, which refers to the judgment in Van Wesemael (27)), that

"regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered incompatible with the Treaty where they have as their purpose the application of rules governing such activities. However, the freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good [intérêt général] and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment".

In the judgment in Commission v Germany (28) the Court made it clear that specific requirements imposed on the provider of services on account of the particular nature of the (insurance) services concerned

"must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected" (paragraph 27),

to which it added the further proviso that

"the same result cannot be obtained by less restrictive rules" (paragraph 29).

Recently in the "tourist guide" judgments (29) the Court restated the case-law as follows:

"The requirements are therefore to be regarded as compatible with Articles 59 and 60 of the Treaty only if, in the sphere of the activity in question, there appear to be grounds of public interest justifying the restrictions on the freedom to provide services, that interest is not already safeguarded by the rules of the State of establishment and the same result cannot be achieved by less restrictive rules."

As appears from the paragraph from the judgment in Webb which is quoted above, the national rules referred to in this case-law are rules which are applicable without distinction, that is to say "which are imposed on all persons or undertakings operating in the said State" (including those which, as a result of a disparity in legislation, may constitute a heavier burden for providers of services from other Member States and are in that sense "discriminatory": see section 20 above). National rules which are per se (overtly or covertly) discriminatory as regards providers of services from other Member States may also, under Article 56(1) in conjunction with Article 66 of the EEC Treaty, be justified "on grounds of public policy, public security or public health". (30)

23. There is a great temptation to draw a parallel between the case-law which has been cited on the supply of services and the case-law relating to imperative requirements (Article 30 of the EEC Treaty) or grounds of public interest (Article 36 of the EEC Treaty).

In view of the complexity of the subject-matter I shall have no difficulty in resisting this temptation and shall confine myself to a few observations designed to place the concept of imperative requirements of public interest in the general context of Community law.

In both areas (supply of goods and supply of services) the reasons or grounds which may justify (as the case may be, discriminatory or non-discriminatory) national rules must be justified under Community law. In the case of the free movement of goods, the Court will adhere, as regards the "Article 36" justifications, to the exhaustive list set out in the Treaty, while, as regards the "Article 30" imperative requirements, the Court accepts in its case-law a limited set of unvarying reasons (namely consumer protection, fair trading practices and market transparency, environment protection, protection of working conditions, effectiveness of fiscal supervision). In contrast, in the

sphere of the freedom to supply services, the Court appears - leaving aside the grounds mentioned in Article 56 in conjunction with Article 66 - to have delimited the cluster of imperative requirements of public interest less precisely. Nevertheless, here too the grounds in question are similar to those set out in Article 36 (protection of intellectual property (31) and of artistic and archaeological treasures (32)) and/or to the grounds coming under Article 30 (protection of workers (33) and consumers, in particular policy-holders (34)).

In both areas, the Court also appears to be prepared, according to recent case-law, to subsume under the "Article 30" imperative requirements or under the "Article 59" public interest grounds also grounds which "reflect certain political and economic choices" and are connected with "national or regional socio-cultural characteristics, [which], in the present state of Community law, is a matter for the Member States". (35) In the field of trade in goods, this found expression in the Cinéthèque judgment (36) (where an objective of a cultural nature, namely promotion of the film industry, was involved) and in the various "Sunday-trading" judgments (37) (which were concerned with the distribution of working and rest days and hence with a socio-recreational objective). As far as the provision of services is concerned, an indication was therefore already apparent earlier in judgments such as Koestler (38) (in which a non-discriminatory national measure which precluded the recovery by legal action of debts arising out of a wagering contract for reasons founded on the "social order", and therefore on grounds of an ethical/political nature, was held to be acceptable) and Debauve (in which a national ban which was applicable "without distinction" to cable television advertising on grounds of the general interest - the ban was intended essentially to ensure the survival of a pluralistic written press (39) - was held to be justified).

It is inevitable that the Court should have been moved to do this in a context of contemporary society in which the authorities have responsibility for the public interest in all kinds of policy areas, many of which are not covered, or only covered indirectly, by Community law. The important point is that attention is paid to ensuring that such public interest aims and the practical effects of the general national rules prompted by those aims are compatible with Community law. Hence the Court' s emphasis on the need for the national rule to pursue aims which are justified under Community law, which means that where the rule relates to objectives within the scope of Treaty provisions, it should be in keeping with the objectives pursued by those provisions or, where it relates to objectives outside the scope of the Treaty, it may not be directed against objectives pursued by Treaty objectives, in particular the establishment of a single market. Hence, too, the emphasis placed by the Court on the requirement, in order to check that the national rule does not conflict with the Community aim of free trade, that it should go no further than is objectively necessary in order to attain the interest which it pursues, which presupposes that that interest is not already safeguarded by a rule having the same objective in the Member State of origin (of the product or of the provider of the service) and that the same result could not be achieved as well using means which restrict the Community interest less.

24. It is in the light of this frame of reference (which is similar for trade in goods and trade in services) that the national rule at issue must, in my opinion, be considered. The questions arising in this connection are whether the rule pursues an objective which is justified under Community law, that is to say whether it can rely on imperative requirements of public interest which are consistent with or not incompatible with the aims laid down in the Treaty provisions, and whether that rule has no effects beyond those which are necessary and, in particular, is not disproportionate, that is to say whether it satisfies the test of the principle of proportionality.

Assessment of a national rule prohibiting the distribution of information concerning medical abortion services

25. As I pointed out earlier, the national rule at issue sets out a general prohibition, which in no respect discriminates on grounds of nationality or place of establishment, on distributing in the Member State concerned information affording assistance to potential recipients residing in that Member State about services of medical termination of pregnancy lawfully performed in another Member State, services which I have accepted as falling in principle within the scope of Articles 59 and 60 of the EEC Treaty.

I would further recall that that prohibition on the provision of information is, according to the Irish Supreme Court, the result of a provision incorporated into the Irish Constitution in 1983 after a referendum with a view to protecting the life of the unborn, with due regard to the equal right to life of the mother, an aim which, according to the provision, is to be defended "as far as is practicable". In other words, two rules which stem from fundamental rights come into conflict in this case: the freedom of the defendants in the main proceedings to distribute information, which I have accepted as being the corollary of the Community freedom to provide services vested in the actual providers of the services (see section 19 above), and the prohibition to assist pregnant women, by providing information, which, according to the Irish Supreme Court, results from the constitutional protection of unborn life.

26. It is undeniable that the prohibition of the provision of assistance - in this case in the form of information - is promoted by an objective which is regarded in the Member State concerned as an imperative requirement of public interest. The protection of the unborn enshrined in the national Constitution (and the prohibition of abortion

inherent therein) and likewise the resultant need to prevent abortions - naturally only within the jurisdiction of the Member State concerned - by prohibiting the distribution of information thereon in its territory are regarded in that Member State as forming part of the basic principles of society.

Without prejudice to the question which I shall be considering later with regard to fundamental rights and freedoms (section 32 below), such an objective is justified under Community law, since it relates to a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States and in respect of which they are entitled to invoke the ground of public policy referred to in Article 56 read together with Article 66 (and also in Article 36) of the EEC Treaty (a ground which can even justify discriminatory measures), in other words, according to the definition which has been adopted by the Court, "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society". (40) Although the scope of the concept of public policy "cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community", nevertheless, as "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another", it is necessary "to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation". (41) There can, in my estimation, be no doubt that values which, in view of their incorporation in the Constitution, number among "the fundamental values to which a nation solemnly declares that it adheres" (42) fall within the sphere in which each Member State possesses an area of discretion "in accordance with its own scale of values and in the form selected by it". (43)

27. However, it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality.

That principle has two aspects. First, in order for a national rule to be justified under Community law it must be objectively necessary in order to help achieve the aim sought by the rule: that means that it must be useful (or relevant) and indispensable, in other words, it must not be capable of being replaced by an alternative rule which is equally useful but less restrictive of the freedom to supply services. (44) Secondly, even if the national rule is useful and indispensable in order to achieve the aim sought, the Member State must nevertheless drop the rule, or replace it by a less onerous one, if the restrictions caused to intra-Community trade by the rule are disproportionate, that is to say if the restrictions caused are out of proportion to the aim sought by or the result brought about by the national rule. (45)

28. Although it is not for the Court of Justice but the national court to rule on the compatibility of a national rule with Community law, the Court of Justice must provide the national court with all the information so as to make sure that the assessment which it carries out remains within the limits of Community law which are the same for all Member States. Relevant aspects of Community law include the principle of proportionality, which, in order to be of use to the national court, should be related by the Court as specifically as possible to the relevant national rule and to the facts of the case; on the understanding, however, that the Court must adhere strictly to the description of the national rule and to the facts held in the national proceedings to be relevant and proven, as they appear in the order for reference and in the documents enclosed therewith.

29. Can a national rule prohibiting the provision of information to pregnant women satisfy the test of the principle of proportionality? In this respect, it appears to me that a Member State is entitled, within its area of discretion, to regard such a prohibition, in so far as it concerns only information which assists pregnant women (46) to terminate unborn life (which I shall refer to as "information by way of assistance"), as being useful and indispensable and not disproportionate to the aim sought, since that aim is intended to effectuate a value-judgment, enshrined in its Constitution, attaching high priority to the protection of unborn life. Admittedly, such a prohibition does entail a potential restriction of intra-Community trade in services, in so far as the prohibition might possibly decrease the number of pregnant women who might otherwise have gone abroad. As against this, however, the prohibition does not ban all information but only information which is provided by way of assistance and the aim sought is based on a value-judgment as to the necessity to protect unborn human life which is regarded as fundamental in the Member State concerned. Measures which would be disproportionate - in as much as they would excessively impede the freedom to supply services - would include for example a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad. However, nothing of this nature is raised in the preliminary questions.

It could be objected that it appears from the limited scope of the prohibition that the national authorities in question have not taken every possible measure in order to prevent abortions and hence have not themselves given maximum effect to the high priority attached to the protection of unborn life, but such an objection would not hold good: the national authorities cannot be reproached for keeping the measures which they have taken to protect unborn life within certain proportions, since Community law itself imposes a requirement of proportionality upon them. The

authorities' decision to concentrate the prohibition on practices - namely in this case the distribution of information by way of assistance - which they consider transgress most plainly that high priority value-judgment seems therefore to me to satisfy the test of proportionality.

Appraisal of national rules under Community law in the light of fundamental rights and freedoms

30. As has already been mentioned (in section 15) it remains to be considered whether the prohibition on the provision of information which is at issue in this case is compatible with the general principles of Community law with regard to fundamental rights and freedoms, assuming, as will be examined hereinafter (in section 31), that the Court has jurisdiction to appraise a national rule in this way.

The Court has consistently held that

"fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures.

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 recognized 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". (47)

Among the "international treaties" mentioned towards the end of that passage, special importance attaches to the European Convention on Human Rights, as has been expressly recognized in the preamble to the European Single Act. (48) That case-law of the Court and the principles which it derived from the constitutional traditions of the Member States and from the said international treaties also lie behind the Declaration of Fundamental Rights and Freedoms which was adopted by the European Parliament on 12 April 1989. (49)

A feature of this case-law is that it does not confer direct effect in the Community legal order on the provisions of the abovementioned international treaties but regards those treaties, together with the constitutional traditions common to the Member States, as helping to determine the content of the general principles of Community law. This stance enables the Court, in establishing general principles in the particular (socio-economic) context of Community law, also to take into account the imperatives of the fundamental freedoms and of the Community market organizations, which are intended to bring about the integration of the market. (50) However, it does not prevent the Court from enforcing these fundamental rights and freedoms introduced into Community law in the form of general principles in the same way as it enforces specific provisions where it is a question of assessing acts of the Community institutions in the light of those principles and declaring those acts void or invalid if the Court finds that they are incompatible therewith.

31. One question which has so far not been settled is to what extent it is competent to the Court to appraise national rules in the light of the aforementioned general principles of Community law with regard to fundamental rights and freedoms. (51)

In the judgment in Cinéthèque (52) the Court stated as follows with regard to Article 10 of the European Convention on Human Rights, which is concerned with freedom of expression:

"Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator" (paragraph 26).

In the later judgment in Demirel (53) the Court reformulated the last phrase quoted above as follows:

"[... the Court] has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law" (paragraph 28).

In the still more recent case of Wachauf, (54) the Court examined whether a Community rule was compatible with the requirements of the protection of fundamental rights and added that

"those requirements are also binding on the Member States when they implement Community rules" (paragraph 19).

It appears from this case-law that a national rule adopted to implement a Community legal provision will be reviewed by the Court from the point of view of its compatibility with fundamental rights and freedoms. In the present case it

cannot be said that the ban on the provision of information which is derived from a national constitutional provision implements Community law. However, the Demirel judgment provides a broader formulation, since in that judgment it is regarded as being sufficient for the national rule to lie inside the scope of Community law. The question now is: must it not be assumed that a national rule which in order to show that it is compatible with Community law has to rely on legal concepts, such as imperative requirements of public interest or public policy - which the Court considers may not be determined unilaterally by the Member States (see section 26 above) - falls "within the scope" of Community law? Admittedly, those concepts may be defined to a considerable degree by the Member States. Yet that does not mean that they should not be justified and delimited in a uniform manner for the whole Community under Community law and therefore taking into account the general principles in regard to fundamental rights and freedoms which form an integral part of Community law and the observance of which the Court is to ensure.

On a strict view, that interpretation does not conflict with the view expressed by the Court in Cinéthèque. In that case, it was stated that the Court' s power of review did not extend to "an area which falls within the jurisdiction of the national legislator", a statement which, generally speaking, is true. Yet once a national rule is involved which has effects in an area covered by Community law (in this case Article 59 of the EEC Treaty) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislature. (55)

Compatibility of the prohibition of the distribution of information with the general principles of Community law with regard to fundamental rights and freedoms

32. If the above reasoning is accepted, it must now be considered once again - this time in the light of the general principles of Community law with regard to fundamental rights and freedoms - whether the fact that a general prohibition is in force in the territory of a Member State on the provision of information by way of assistance to pregnant women regarding abortions lawfully carried out abroad can be justified under Community law. Under this new approach two aspects now have to be covered by the inquiry: first, is the aim pursued by the national rule, that is to say the promotion of an ethical value-judgment relating to the protection of unborn life which is enshrined in the Constitution of the State concerned, compatible with the said general principles; secondly, is the freedom of expression, which forms part of Community law and exists in parallel to the freedom under Community law to supply services on an intra-Community basis (which covers receiving such services and providing information about them), restricted impermissibly by the national rule at issue.

33. The national court did not ask the Court (see section 13 above) - and there has been no exchange of arguments before the Court between the parties on the matter - whether a national rule which protects the life of the unborn by means of a far-reaching ban on abortion is compatible with the general principles of Community law with regard to fundamental rights and freedoms. Moreover, no legal or factual particulars have been submitted to the Court relating to the scope and application of the rules on abortion which are applicable in the Member State concerned (more specifically concerning the way in which the equal right to life of the mother, expressly referred to in Article 40, s. 3, sub-s.3 of the Irish Constitution, is taken into account). I therefore assume that, as far as the prohibition on the provision of information which is at issue in this case - which aims to preclude the provision of assistance in procuring an abortion - is concerned, it cannot be maintained that that prohibition is in furtherance of an objective which, itself, is incompatible with the said general principles of Community law.

For completeness' sake, I would also point out that the European Court of Human Rights has not yet had occasion to rule on the compatibility of rules on abortion with the European Convention but the European Commission of Human Rights has made some pronouncements on this question. In its rulings the European Commission of Human Rights has refrained from making a general pronouncement on whether or not Article 2 of the Human Rights Convention protects the right to life of the foetus and, if so, to what extent. (56) It has indicated only that, having regard to the protection of the mother' s life which is obviously guaranteed by the Convention, the foetus cannot be entitled to an absolute right to life (as was claimed by a man who complained that national legislation did not prevent his wife from having an abortion). (57) On an earlier occasion the European Commission of Human Rights dismissed a complaint brought by two women on the basis of Article 8 of the European Convention to the effect that national legislation under which abortion was permissible only within a specified period and/or subject to specified conditions, was to be regarded as an infringement of the right to respect for family life. (58)

It appears therefore that so far the European Commission for Human Rights has refrained from - and the European Court of Human Rights has not yet had any occasion for - instructing the individual States to adopt a particular degree of protection for unborn life, in so far as the mother' s right to life is guaranteed by the relevant national rules.

34. The question remains whether it is consonant with the general principles of Community law with regard to fundamental rights and freedoms for a Member State to prohibit the provision and receipt of information by way of

assistance about abortions lawfully carried out in other Member States, thereby infringing individuals' freedom of expression. It is a question here of balancing two fundamental rights, on the one hand the right to life as defined and declared to be applicable to unborn life by a Member State, and on the other the freedom of expression, which is one of the general principles of Community law on the basis of the constitutional traditions of the Member States and the European and international treaties and declarations on fundamental rights, in particular Article 10 of the European Convention on Human Rights.

It is clear that such a prohibition infringes the freedom of expression, as set out inter alia in Article 10 of the European Convention, from paragraph 1 thereof, which guarantees everyone the right "to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". As has already been mentioned (in section 19) it appears from the case-law of the European Court and the European Commission of Human Rights on Article 10 of the European Convention that commercial information qualifies for protection under Article 10 and a fortiori information intended to influence public opinion. The information at issue in this case is not distributed by the providers of services established in Great Britain themselves but by Irish students associations, which distribute the information in Ireland without remuneration, because of their conviction that a pregnant woman is entitled to be given useful information about clinics where she can have an abortion.

It appears, however, from the wording of Article 10(2) and from the case-law of the European Court and the European Commission of Human Rights that such restrictions may be imposed on freedom of expression by individual States "as are prescribed by law" (which covers unwritten law, provided that it is adequately accessible to citizens, who must be able to regulate their conduct accordingly, and formulated with sufficient precision; see also section 36 below) (59) provided that the restrictions are "necessary in a democratic society [...] for the prevention of disorder or crime, for the protection of health or morals, for the protection of the [...] rights of others [...]". In this connection, the individual States have a margin of appreciation, which they exercise, however, under the supervision of the courts; (60) in the course of that supervision the European Court of Human Rights checks whether the national measures pursue a legitimate aim and whether they are necessary in a democratic society to achieve that aim, that is to say they must correspond to a "pressing social need" and be proportionate to the legitimate aim pursued. (61)

In parallel to Article 10(1) of the European Convention, Article 5 of the European Parliament' s Declaration of Fundamental Rights and Freedoms provides that everyone has the right to freedom of expression, which includes "freedom of opinion and the freedom to receive and impart information and ideas, particularly philosophical, political and religious [, regardless of frontiers] (*)". By virtue of the general limits set out in Article 26, this freedom may be "restricted within reasonable limits necessary in a democratic society only by a law which must at all events respect the substance of such rights and freedoms".

35. It appears from the above that in a case such as the present in which fundamental rights conflict with each other a criterion is employed in the case-law on the European Convention which is analogous to the principle of proportionality used in Community law. This is also reflected in the judgment of the Court of Justice in Hauer, (62) where there was a conflict between a Community objective of general interest (implementation of structural policy measures in the context of a market organization) and the right to property guaranteed by the general principles of Community law. In assessing the (in that case, Community) rule, the Court examined whether the restrictions introduced thereby could be regarded as lawful (paragraph 22 of the judgment) and whether they corresponded

"to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property" (paragraph 23).

I assume that the Court, in accordance with its general approach with regard to questions arising in connection with fundamental rights (see section 30 above), as regards the application of the principle of proportionality, will take into account in particular the way in which that principle is employed in the European Convention and in the case-law of the European Court of Human Rights and of the European Commission of Human Rights. However, that will not be difficult, since, leaving aside subtle differences, (63) the main elements of the principle of proportionality as it is used in the European Convention and in Community law appear to be the same. In the context of the issues under discussion here and having regard to these main elements, I consider that the following points should be considered on the basis of the principle of proportionality. First, does the prohibition on the provision of information which is at issue pursue a legitimate aim of public interest which fulfils a imperative social need? Secondly, is that aim being realized using means which are necessary (and acceptable) in a democratic society in order to achieve that aim? Thirdly, are the means employed in proportion to the aim pursued and is the fundamental right concerned, in this case freedom of expression, impinged upon as a result?

36. At this point in my Opinion I must turn my attention to the case which, following the judgment of the Irish Supreme Court of 16 March 1988 referred to in section 3 above in Open Door Counselling, was brought before the

European Commission of Human Rights in connection with the compatibility with (inter alia) Article 10 of the European Convention of the Irish prohibition on the provision of information which is at issue in this case.

After declaring the applications to be admissible by decision of 15 May 1990, the European Commission of Human Rights adopted a report on 7 March 1991 on the substance. However, the report provides little guidance concerning the application of the principle of proportionality. It is true that the European Commission did hold that there was a restriction of the freedom of expression guaranteed by Article 10(1) of the European Convention and that Article 10(2) was inapplicable, but it based its decision (paragraph 52 of its report) on the consideration that the restriction in question was not "prescribed by law" "at the material time", that is to say "prior to the Supreme Court judgment" (of 16 March 1988). This is true both of those paragraphs (44 to 53) of the report which relate to the applications of two counselling centres and of two employees of one of those centres and of those paragraphs (54 to 57) which relate to the applications of two individual (but not pregnant) women. As far as the first two applications are concerned, the Irish Government conceded that there was a restriction within the meaning of Article 10(1) of the European Convention; however, it denied that there was any such restriction as regards the second category of applications. As regards both categories of application, the European Commission of Human Rights accepts that freedom of expression (including the freedom to receive information) was indeed restricted and that the restriction was not permissible under Article 10(2), because at the material time it was not "prescribed by law" (which includes an unwritten rule of law) in a sufficiently accessible and precise manner. As a result, the European Commission did not proceed to an assessment of the necessity and/or the proportionality of the contested measure or to an appraisal of the legitimacy of the aim pursued by the measure (see paragraph 52 in fine in conjunction with paragraph 43 of the report).

However, it appears from the report of the European Commission that - since in its judgment of 16 March 1988 in the Open Door Counselling case the Irish Supreme Court has laid down in a sufficiently accessible and precise manner the consequences of Article 40, s. 3, sub-s.3 of the Irish Constitution - the national prohibition in question now (64) is sufficiently "prescribed by law" (namely by a now established unwritten rule of common law). As a result, it is not necessary to go into that point here.

37. Whereas no special difficulties arise in connection with the formulation of the principle of proportionality (see section 35 above), its application raises quite another question: that of the extent of the Member States' discretion in assessing what is a necessary and proportional - and therefore permissible - restriction of one of the fundamental rights, such as those protected by Articles 8 to 11 of the European Convention. In the case-law of the European Commission and Court of Human Rights the answer given to this question depends very much on the subject-matter at issue. (65)

The question is all the more delicate when it is a matter, as in this case, of assessing two fundamental rights which are as sensitive as, on the one hand, freedom of expression, whose fundamental nature in a democratic society is stressed by the European Court of Human Rights, and, on the other, the right to life, as it is applied to unborn life in the Member State in question on the basis of a fundamental ethical value-judgment enshrined in Constitution. As far as ethical value-judgments are concerned, however, the European Court of Human Rights has consistently held that, in the absence of a uniform European conception of morals,

"[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of the protection of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them". (66)

As far as the protection of unborn life is concerned, such a uniform moral conception is lacking (except as regards respect for the mother' s right to life), as between the Member States and within each Member State, as regards the conditions under which abortion is or should be permitted and likewise there is no case-law of the European Commission or (subject to the reservation concerning the mother' s right to life) of the European Court of Human Rights to serve as a guide (see section 33 above). This is also clear from the numerous individual opinions of members of the European Commission appended to the report discussed in section 36 above, which express conflicting views on this point. (67)

In those circumstances, I consider that with respect to the case at issue the individual States must be allowed a fairly considerable margin of discretion. This follows too from the case-law of this Court as regards the area of discretion allowed to each Member State in determining, within the limits set by Community law, what is to be understood by public policy and public morality. It is for each Member State to define those concepts in accordance with its "own scale of values" (see section 26 above).

38. It remains for me to examine, in relation to the actual national rule at issue, whether a Member State is entitled to

take the view, within the limits of its fairly considerable margin of discretion, that a general prohibition (which at the material time was sufficiently accessible and precise) on the provision within its territory of information by way of assistance on abortion in other Member States is a necessary and not disproportionate restriction of the freedom of expression, having regard to the ethical value-judgment as to the high degree of worth to be attached to protecting unborn life which that restriction pursues and which is regarded in the Member State concerned as fundamental. I consider that a Member State is entitled to take that view on the basis of the application of the principle of proportionality, of which I shall now examine the three main elements (described in section 35).

The legitimacy of the aim pursued by the prohibition on the provision of information which is at issue is not in question in these proceedings (see section 33 above). Moreover, that is disputed in none of the opinions appended to the report of the European Commission of Human Rights discussed above (in section 36), since even those members of the European Commission who considered that the national rule was incompatible with Article 10(2) of the European Convention as a result of the application of the principle of proportionality (68) regarded the protection of morality as a permissible justification. In my estimation, the correct justification under general principles of Community law is public policy and/or public morality, because the rule at issue here is justified by an ethical value-judgment which is regarded in the Member State concerned as forming part of the bases of the legal system (69) and was incorporated in the Constitution after the views of the population were canvassed in a referendum in 1983. It also appears from this that the aim in question is an aim of public interest which satisfies an imperative requirement.

As far as the requirement is concerned that the restriction imposed must be necessary in a democratic society in order to achieve the aim pursued, I take the view, having regard to what has been said in the previous section and to the description given of the national rule and of the factual background in the request for a preliminary ruling, (70) that the relevant national authorities are entitled to consider that a prohibition on the provision of information by way of assistance is necessary in order to effectuate the value-judgment contained in the Constitution with regard to the need to protect unborn life. In view of the limited nature of the prohibition (see below) and of its basis, that is to say, a constitutional provision on unborn life which was adopted after a referendum, it appears to me that the national authorities are entitled to take the view that the prohibition is acceptable in a democratic society.

Also as regards the requirement for the relevant national rule not to be disproportionate to the aim pursued, the national authorities were, in my view, entitled to assume that that is the case with a prohibition such as that at issue here, which, according to the information brought to the Court' s notice, is confined to prohibiting the provision of information by way of assistance and does not prevent the provision of other information, which does not impede the freedom to express opinions about the permissibility of abortion and does not extend to measures restricting the freedom of movement of pregnant women or subjecting them to unsolicited examinations.

Decision and discussion of Article 62 of the EEC Treaty

39. In view of the foregoing, I consider that the Treaty provisions with regard to the freedom to provide services do not prevent a Member State where the protection of unborn life is recognized in the Constitution and in its legislation as a fundamental principle from imposing a general prohibition, applying to everyone regardless of their nationality or place of establishment, on the provision of assistance to pregnant women, regardless of their nationality, with a view to the termination of their pregnancy, more specifically through the distribution of information as to the identity and location of and method of communication with clinics located in another Member State where abortions are carried out, even though the services of medical termination of pregnancy and the information relating thereto are provided in accordance with the law in force in that second Member State. It appears from the above examination that this conclusion is not incompatible with the general principles of Community law with regard to fundamental rights and freedoms.

40. In the light of that conclusion I can deal quite briefly with the argument that the defendants in the main proceedings seek to derive from Article 62 of the EEC Treaty. Article 62 provides as follows: "Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of entry into force of [the EEC] Treaty". The defendants in the main proceedings consider that that provision of the Treaty has a bearing on the interpretation of the provision introduced into the Irish Constitution in 1983 on which the Irish Supreme Court based the prohibition on the distribution of information which is at issue in this case. In their view, that constitutional provision may not be interpreted so as to give rise to a new restriction on the provision of services relative to the position when Ireland acceded to the Community.

It is sufficient to observe in this connection that Article 62 cannot apply to national rules containing a restriction on the provision of services, such as the prohibition on the provision of information at issue in this case, which fall outside the scope of Articles 59 and 60 of the EEC Treaty for the imperative reasons of public interest mentioned earlier. The position would be otherwise only if the newly introduced national rule nevertheless brought the national

rule within the scope of those articles, but, according to the investigation carried out above, this is not the case.

For the sake of completeness. I would point out that Article 62 of the EEC Treaty, like for that matter Article 53 of the EEC Treaty on the right of establishment, must be interpreted in the same way as the first paragraph of Article 32 of the EEC Treaty. Under that provision Member States are to refrain from making more restrictive quotas and measures having equivalent effect which were in existence at the date when the Treaty entered into force. In its judgment in Motte (71) the Court held as follows in that regard:

"The sole purpose of that provision was to prevent the Member States from making more restrictive during the transitional period measures which had to be abolished by the end of that period at the latest. Since the expiry of the transitional period the abovementioned provision adds nothing to Articles 30 and 36 of the Treaty."

In my view Article 62 of the EEC Treaty has the same aim as Article 32, that is to say to prevent Member States from making measures which had to be abolished at the very latest by the end of the transitional period more restrictive in the course of that period. Since the end of the transitional period, Article 59 of the EEC Treaty, which requires the abolition of restrictions on the freedom to supply services, has had direct effect. (72) Since then, Article 62 adds nothing more to the Treaty provisions on services. For those reasons too, the argument of the defendants in the main proceedings based on Article 62 cannot succeed.

Proposed answers

41. I therefore propose that the Court should answer the questions put by the national court in the following terms:

"1. The medical operation, normally performed for remuneration, by which the pregnancy of a woman coming from another Member State is terminated in compliance with the law of the Member State in which the operation is carried out is a (cross-border) service within the meaning of Article 60 of the EEC Treaty.

2. The Treaty provisions with regard to the freedom to provide services do not prevent a Member State where the protection of unborn life is recognized in the Constitution and in its legislation as a fundamental principle from imposing a general prohibition, applying to everyone regardless of their nationality or place of establishment, on the provision of assistance to pregnant women, regardless of their nationality, with a view to the termination of their pregnancy, more specifically through the distribution of information as to the identity and location of and method of communication with clinics located in another Member State where abortions are carried out, even though the services of medical termination of pregnancy and the information relating thereto are provided in accordance with the law in force in that second Member State."

In Case C-159/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Ireland for a preliminary ruling in the action pending before that Court between
The Society for the Protection of Unborn Children Ireland Ltd
and
Stephen Grogan and Others
on the interpretation of Articles 59 to 66 of the EEC Treaty,
…….Judgment …….
Second and third questions

22 Having regard to the facts of the case, it must be considered that, in its second and third questions, the national court seeks essentially to establish whether it is contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where medical termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

23 Although the national court' s questions refer to Community law in general, the Court takes the view that its attention should be focused on the provisions of Article 59 et seq. of the EEC Treaty, which deal with the freedom to provide services, and the argument concerning human rights, which has been treated extensively in the observations submitted to the Court.

24 As regards, first, the provisions of Article 59 of the Treaty, which prohibit any restriction on the freedom to supply services, it is apparent from the facts of the case that the link between the activity of the students associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty.

25 The situation in which students associations distributing the information at issue in the main proceedings are not in cooperation with the clinics whose addresses they publish can be distinguished from the situation which gave rise to the judgment in GB-INNO-BM (Case C-362/88 GB-INNO-BM v Confédération du Commerce Luxembourgeois [1990] I-667), in which the Court held that a prohibition on the distribution of advertising was capable of constituting a barrier to the free movement of goods and therefore had to be examined in the light of Articles 30, 31 and 36 of the EEC Treaty.

26 The information to which the national court' s questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information constitutes 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 established in another Member State.

27 It follows that, in any event, a prohibition on the distribution of information in circumstances such as those which are the subject of the main proceedings cannot be regarded as a restriction within the meaning of Article 59 of the Treaty.

.....

On those grounds,

THE COURT,

in reply to the questions submitted to it by the High Court of Ireland, by order of 5 March 1990, hereby rules:
……..

2. It is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

Case C-41/00 P.
Opinion of Mr Advocate General Léger delivered on 12 March 2002.
Interporc Im- und Export GmbH v Commission of the European Communities.
Appeals - Decision 94/90/ECSC, EC, Euratom - Access to documents - Documents held by the Commission and emanating from the Member States or third countries - Authorship rule.

1. This appeal has been brought by a company incorporated under German law, Interporc Im- und Export GmbH, (2) against a judgment of the Court of First Instance of the European Communities of 7 December 1999 partially annulling the Commission's decision of 23 April 1998 (3) refusing the appellant access to documents. (4)

The appellant invites this Court, in its principal claim, to set aside the judgment of the Court of First Instance in so far as it held that the Commission was right to apply the rule that it has a duty not to disclose documents held by it but which emanate from Member States or from the authorities of third countries (in the present case, from the Argentine authorities), even though application of that rule, according to the appellant, infringes a fundamental Community right of access to documents.

2. The case relates to a specific legal framework with the following main features:

I ─ Legal framework

3. Central to this case are Commission Decision 94/90/EC of 8 February 1994 (5) and the annexed Code of Conduct concerning public access to Council and Commission documents. (6)

4. The Code of Conduct sets out a "general principle" (7) of access to documents, accompanied by legal provisions the most salient aspects of which need presenting here.

General principle of access to documents within the meaning of the Code of Conduct

5. The general principle is defined as follows:

"The public will have the widest possible access to documents held (8) by the Commission ...

" . (9)

Limits of the general principle of access to documents within the meaning of the Code of Conduct

6. The Code of Conduct makes provision for the situation where the request for access relates to a document not written by the Commission. In that connection, the fifth paragraph of the Code of Conduct sets out the authorship rule:

"Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author" .

7. As regards the provisions establishing exceptions in the true sense, they are worded as follows:

"The institutions will refuse access to any document whose disclosure could undermine:

─ the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

─ the protection of the individual and of privacy,

─ the protection of commercial and industrial secrecy,

─ the protection of the Community's financial interests,

─ the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings

" . (10)

8. To ensure implementation of the Code of Conduct, Article 2(2) of Decision 94/90 provides:

"The relevant Director-General or Head of Department, the Director designated for the purpose in the Secretariat-General or an official acting on their behalf shall inform the applicant in writing, within one month, whether the application is granted or whether he intends to refuse access. In the latter case the applicant shall also be notified that he has one month in which to apply to the Secretary-General of the Commission for review of the intention to refuse access, failing which he shall be deemed to have withdrawn his initial application" .

9. Subsequently, the Commission also adopted Communication 94/C 67/03 on improved access to documents, specifying the criteria for implementation of Decision 94/90. (11) The communication states that "anyone may ... ask

for access to any unpublished Commission document, including preparatory documents and other explanatory material" . (12) As regards the exceptions laid down by the Code of Conduct, the 1994 communication states that "[t]he Commission make take the view that access to a document should be refused because its disclosure could undermine public and private interests and the good functioning of the institution" . (13) In that regard the 1994 communication states that "[t]here is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits" . (14)

.....

Assessment

75. In order to respond to the opposing arguments set out by the parties, it is appropriate to set out the most recent case-law of this Court on the right of access to documents held by a Community institution.

76.

In Netherlands v Council , cited above, in which this Court considered the lawfulness of the legal basis for Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, (45) the Court stated that "the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle" . (46)

77. It went on to say that "[s]o long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the [Community] institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration" . (47)

78. It is therefore not possible, as the appellant contends, to interpret the Netherlands v Council judgment as authority for the existence of a fundamental right of access to documents. (48)

79. Nor can one infer the existence of such a right from the judgment in Council v Hautala. (49) In that case, the appeal concerned primarily the right of partial access to Council documents, laid down in Decision 93/731.

The appellant, a Member of the European Parliament, requested disclosure of a report written by the Working Group on Conventional Arms Exports, in order to learn in more detail about the criteria for arms exports from Member States of the European Union. The Council refused her request, on the ground that the report contained sensitive information disclosure of which could damage public security. (50)

The Court held that "Article 4(1) of Decision 93/731 must be interpreted as meaning that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions" . (51) The Court did not see fit, however, to rule as to "the existence of a "principle of the right to information"

" . (52)

80. Accordingly, I take the view that, as the case-law of this Court currently stands, there is in Community law no fundamental right of access to documents among the general principles of law flowing from the constitutional traditions common to the Member States.

81. The right of access to Commission documents is recognised and guaranteed by the Code of Conduct, implemented by Decision 94/90. It therefore falls to the Court of Justice, in this appeal, to interpret the authorship rule in relation to the general principle of access to documents within the meaning of the Code of Conduct.

82. In that respect, the Code of Conduct enshrines a general principle of access to documents but excludes certain categories of documents from its scope. Thus, where the Commission holds a document of which it is not the author, the Code of Conduct provides that the request should be lodged directly with the person or institution in question.

83. The Code of Conduct therefore expressly provides that the authorship rule is a derogation from the general principle of the right of access.

84. In those circumstances, I take the view that the Court of First Instance did not err in law by finding that the authorship rule could apply, in the absence of any general principle of a right of transparency preventing the Commission from excluding documents of which it is not the author from the ambit of the Code of Conduct.

85. Consequently, the first part of the second plea should be rejected.

(ii) The second part: misinterpretation in law and misapplication in law of the authorship rule

Arguments of the parties

86. Interporc alleges, in the event that the Court of Justice does not find the authorship rule to be invalid, that the Court of First Instance's interpretation and application of that rule were wrong in law. In the appellant's submission, the Court of First Instance did not construe the authorship rule strictly, in keeping with the general principle of

transparency.

87. In its defence to the appeal, the Commission acknowledges that the authorship rule is a limitation on the principle established by Decision 94/90. It contends that the terms of the Code of Conduct are authority for a restrictive interpretation of that rule only in so far as there is a doubt as to the author of the document.

Assessment

88. As explained above, the authorship rule is a clear derogation from the general principle of the right of access to documents within the meaning of the Code of Conduct.

89. In practice, operation of the authorship rule indicates to the party concerned the procedure to follow in filing its request for access to documents. One can easily understand the purpose and the rationale of the derogation. The authorship rule provides assurance to a Member State, third country or any natural or legal person which agrees to entrust documents to the Commission that those documents will not be disclosed against its wishes. By virtue of such relationships of trust, the Commission is able to obtain important information (national statistics, survey reports and the like) enabling it to make reasoned decisions. Similarly, in the context of complaints against anti-competitive practices, undertakings have to be confident that certain written documents which could subsequently be the basis for proceedings will not be disclosed. (53)

90. Application of the authorship rule can, none the less, lead to abuses. The Commission could, for example, rely on that derogation despite the existence of doubt as to the author of the document requested.

91. One should therefore adopt an application and interpretation of the authorship rule in line with the case-law of this Court.

92. In that regard, as the Court has been at pains to state recently, the aim pursued by Decision 94/90, besides that of ensuring the smooth operation of the Commission in the interests of good administration, is to provide the public with the widest possible access to documents held by the Commission, so that any exception to that right of access must be interpreted and applied strictly . (54)

93. Accordingly, where the Commission holds documents of which it is not the author, it must indicate who the author is. That is, the interested party must be in a position to know who is the author of the document so that it has the opportunity to lodge a request for access with the latter.

94. In the contested decision of 23 April 1998, the Commission informed the appellant that the documents to which it requested access emanated either from Member States or from the Argentine authorities. The Member States provided two types of document. These were, on the one hand, declarations of the quantities of Hilton Beef imported from Argentina between 1985 and 1992 and, on the other, a number of statements of position by the States in question in similar cases. As for the Argentine authorities, they supplied declarations of the quantities of Hilton Beef exported to the Community between 1985 and 1992, documents relating to the designation of the bodies responsible for issuing certificates of authenticity and documents relating to the agreement on the opening of the "Hilton" quota. The Commission concluded from the foregoing that the appellant should request access to those documents from the Member States or the Argentine authorities.

95. In the present case, therefore, the Commission correctly applied the authorship rule by indicating the authors of the documents requested.

96. I must point out, however, that there has been a recent modification of the right of access to documents held by Community institutions. Article 4(4) of the (new) Regulation (EC) No 1049/2001 of 30 May 2001 (55) states that:

"As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed."

97. In other words, according to the new Community provisions, (56) the authorship rule is no longer an absolute derogation from the right of access to documents, but has become a "classic" exception subject to the Commission's freedom of interpretation.

98. Under those circumstances, I propose that the Court hold that the Court of First Instance did not err in law in deciding that the Commission had correctly applied the authorship rule when it held that it did not have to grant access to documents of which it was not the author.

99. The second part of the second plea should therefore be dismissed as unfounded.

100. Lastly, the appellant contends that the Commission failed to discharge its duty to give reasons under Article 190 of the Treaty.

(b) Compliance with the duty to give reasons (third limb)

Arguments of the parties

101. The appellant maintains that the Court of First Instance erred in law when it found that the Commission had

correctly discharged its duty to give reasons under Article 190 of the Treaty. It claims that the Court of First Instance was not, on the basis of the statement of reasons for the decision to refuse access, in a position to review whether the Commission had also exercised its power to assess, in particular, whether it was effectively possible to assert the right of access to documents in relation to the Member States and the Argentine authorities.

102. The Commission contends that it did comply with the duty to state reasons under Article 190 of the Treaty.

Assessment

103. It should be borne in mind that the duty to state reasons imposed by Article 190 of the Treaty is founded on principles arising from settled case-law.

104. In that respect, the Court has held that the statement of reasons must be appropriate to the nature of the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to be aware of the reasons for the measure taken and the competent court to exercise its power of review. The requirement to give reasons must be assessed with regard to the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. The statement of reasons does not have to set out all the relevant elements of fact or law, to the extent that assessment of whether or not the statement of reasons for a measure satisfies the requirements of Article 190 of the Treaty must relate not only to its wording but also to its context and to all the legal rules governing the matter in question. (57)

105. Since we are dealing, specifically, with a request for public access to Commission documents, the latter has a duty to ascertain, for each document to which access is requested, whether, in the light of the information available to it, disclosure is in fact likely to undermine an interest protected by one of the exceptions laid down by the Code of Conduct. (58)

106. In the present case, in the contested decision of 23 April 1998, the Commission gives a detailed list of the documents it holds of which it is not the author. (59) It informs the appellant that in order to obtain access to the information contained in those documents, it should contact their authors directly. The Commission explicitly bases the refusal to allow access to those documents on the need to comply with the authorship rule, as enshrined in the Code of Conduct. (60)

107. Consequently, the contested decision of 23 April 1998 does in my view contain a sufficient statement of reasons.

108. The Court of First Instance did not, therefore, err in law by finding that the statement of reasons for the contested decision satisfied the requirements of Article 190 of the Treaty. The third part of the second plea, in so far as it alleges there was such an error in law, must therefore be held to be unfounded.

Conclusion

109. In the light of the foregoing considerations, I propose, accordingly, that the Court should:(1) dismiss the appeal;

In Case C-124/97,
REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Vaasan Hovioikeus, Finland, for a preliminary ruling in the proceedings pending before that court between
Markku Juhani Läärä, Others and Kihlakunnansyyttäjä (Jyväskylä),
Suomen Valtio (Finnish State),

on the interpretation of the judgment of the Court of Justice of 24 March 1994 in Case C-275/92 Schindler [1994] ECR I-1039 and of Articles 30, 36, 56 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC) and Article 60 of the EC Treaty (now Article 50 EC),
THE COURT,
after hearing the Opinion of the Advocate General at the sitting on 4 March 1999,
gives the following Judgment

.....

30 It is therefore necessary to examine whether that obstacle to freedom to provide services can be permitted pursuant to the derogations expressly provided for by the Treaty, or whether it may be justified, in accordance with the Court's case-law, by overriding reasons relating to the public interest.

31 In that regard, Articles 55 (now Article 45 EC) and 56 of the EC Treaty, which are applicable pursuant to Article 66 of the EC Treaty (now Article 55 EC), permit restrictions which are justified by virtue of a connection, even on an occasional basis, with the exercise of official authority or on grounds of public policy, public security or public health. Furthermore, it is clear from the Court's case-law (see, to that effect, Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraphs 13 to 15) that obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it.

32 According to the information contained in the order for reference and in the observations of the Finnish Government, the legislation at issue in the main proceedings responds to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.

33 As the Court acknowledged in paragraph 58 of the Schindler judgment, those considerations must be taken together. They concern the protection of the recipients of the service and, more generally, of consumers, as well as the maintenance of order in society. The Court has already held that those objectives are amongst those which may be regarded as overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, paragraph 28; Case 220/83 Commission v France [1986] ECR 3663, paragraph 20; and Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, paragraph 5). However, it is still necessary, as stated in paragraph 31 of this judgment, that measures based on such grounds guarantee the achievement of the intended aims and do not go beyond that which is necessary in order to achieve them.

34 As noted in paragraph 21 of this judgment, the Finnish legislation differs in particular from the legislation at issue in Schindler in that it does not prohibit the use of slot machines but reserves the running of them to a licensed public body.

35 However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment, recognised by the Court in paragraph 61 of the Schindler judgment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.

36 In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.

37 Contrary to the arguments advanced by the appellants in the main proceedings, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.

38 The position is not affected by the fact that the various establishments in which the slot machines are installed receive from the licensed public body a proportion of the takings.

39 The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.

40 On that point, it is apparent, particularly from the rules on slot machines, that the RAY, which is the sole body holding a licence to run the operation of those machines, is a public-law association the activities of which are carried on under the control of the State and which is required, as noted in paragraph 5 of this judgment, to pay over to the State the amount of the net distributable proceeds received from the operation of the slot machines.

41 It is true that the sums thus received by the State for public interest purposes could equally be obtained by other means, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.

42 In those circumstances, in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the operation of slot machines do not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue.

.....On those grounds,

THE COURT,

in answer to the questions referred to it by the Vaasan Hovioikeus by order of 21 March 1997, hereby rules:

The Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants to a single public body exclusive rights to operate slot machines, in view of the public interest objectives which justify it.

Opinion of Mr Advocate General Poiares Maduro delivered on 13 July 2006

Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik.
Reference for a preliminary ruling: Korkein oikeus - Finland.
Free movement of goods - Articles 28 EC and 30 EC - National legislation prohibiting, without prior authorisation, the importation of undenatured ethyl alcohol of an alcoholic strength of more than 80% - Measure having equivalent effect to a quantitative restriction - Justification on the grounds of protection of public health and public order.
Case C-434/04.

1. Good wine is a good familiar creature if it be well used. (2) It is astonishing, however, 'that men should put an enemy in their mouths to steal away their brains', (3) when the enemy in question, unlike good wine, is as ferocious as virtually pure ethyl alcohol. Yet, it turns out from information submitted by the Finnish Government in the course of the present proceedings that consumer demand for spirits with an extremely high alcohol percentage is by no means theoretical. Finnish law forbids the retail sale of substances containing more than 80% of undenatured ethyl alcohol ('spirits'). Their commercial use for industrial purposes or as a raw material is subject to a licensing scheme. The Korkein oikeus (Supreme Court) of Finland has requested a preliminary ruling from this Court on the question whether the requirement of a licence for the importation, from another Member State, of substances containing more than 80% of undenatured ethyl alcohol, is compatible with Articles 28 and 30 EC. The issue arose in the context of criminal proceedings against Mr Ahokainen and Mr Leppik, who are charged with smuggling undenatured ethyl alcohol from Germany into Finland.

I – National legal framework

2. The purpose of the alkoholilaki No 1143/1994 ('the Alcohol Act'), according to Article 1 thereof, is to control the consumption of alcohol so as to prevent harmful effects to health and to society caused by alcoholic substances.

3. The Alcohol Act distinguishes between 'alcoholic drinks' and 'spirits'. According to Article 3(2), as amended by Law No 1/2001, 'alcoholic drink' means a drink intended for consumption which contains up to 80% by volume of ethyl alcohol; 'spirits' means ethyl alcohol or an aqueous solution of ethyl alcohol which contains more than 80% by volume of ethyl alcohol and which is not denatured.

4. Article 8 regulates the commercial importation of alcoholic drinks and spirits. Pursuant to Article 8(1), alcoholic drinks may be imported without an import licence for personal use and for commercial or other economic purposes. By contrast, the import of spirits requires a licence. Pursuant to Article 8(2), a trader may import spirits if he has obtained an import licence from the product supervision agency (tuotevalvontakeskus). Article 8(3) says that the product supervision agency may grant an import licence 'to a person who is considered to have the qualifications and the reliability necessary for the [import] activity'.

5. In addition, Article 8(2) provides that a person may import spirits for his own use if he has obtained a special licence to use spirits from the product supervision agency pursuant to Article 17, after having notified that agency of his activity as importer. Article 17 essentially limits the persons eligible for such a licence to those who need spirits for professional use or as a raw material. Article 17(3) provides that, in order to obtain the licence, the applicant, who must be qualified and reliable, must specify a justifiable use.

6. Under Article 82 of Law No 459/1968 – which the Alcohol Act replaced, except in matters of sanctions – anyone who unlawfully imports or exports an alcoholic drink or spirits, or attempts to do so, is criminally liable for smuggling an alcoholic substance.

II – Facts and reference for a preliminary ruling

7. On 1 August 2002, customs authorities in Finland discovered 9 492 litres of a clear liquid, packaged in litre bottles, in a lorry arriving from Germany. According to the consignment documents, the load was 32 pallets of sesame oil. An analysis performed by the customs laboratory revealed that the clear liquid was pure spirits (96.4%-96.5% of undenatured ethyl alcohol).

8. The Raaseporin käräjäoikeus (Raasepori District Court) found Ahokainen and Leppik guilty of unlawfully importing the 9 492 litres of spirits. By judgment of 21 November 2001, the court sentenced both Ahokainen and Leppik to imprisonment for the organised smuggling of an alcoholic substance. It ordered that the spirits be forfeited to the State. By judgment of 30 May 2003, the Helsingin hovioikeus (Helsinki Court of Appeal) confirmed the judgment of the Raasepori District Court.

9. Ahokainen and Leppik lodged an appeal before the Korkein oikeus (Supreme Court), which, by decision of 6 October 2004, referred the following questions to the Court of Justice:

'(1) Is Article 28 EC to be interpreted as precluding legislation of a Member State under which undenatured ethyl alcohol of over 80% (spirits) may be imported only by a person who has obtained a licence to do so?

(2) If the above question is answered in the affirmative, is the licence system to be regarded as permitted under Article

30 EC?'

10. The Virallinen Syyttäjä (public prosecutor) and the Governments of Finland, Sweden and Portugal, as well as the Commission, have submitted written observations to the Court. On 17 May 2006 he Court heard oral argument from the Finnish Government and the Commission.

III – Appraisal .....

B – The second question

16. The referring court asks if the system of prior authorisation for the import of spirits could, however, be justified under Article 30 EC.

17. The Governments of Finland and Sweden both argue that the requirement of an import licence is justified on grounds of public health and public policy.

18. The Swedish Government submits that in Finland, as in Sweden, a tradition exists of consuming strong alcoholic drinks. In order to prevent the consumption of substances containing more than 80% alcohol, it is necessary to regulate the trade in spirits. Whether a system of import licences is necessary and proportionate in order to protect public health is for the national court to assess, in light of the social practices and consumer habits in the Member State concerned.

19. For the most part, the submissions of the Finnish Government proceed along the same lines. The system of prior authorisation for the import of spirits forms an integral part of the general policy in Finland concerning alcohol. The Finnish Government submits that the consumption of alcohol poses a major risk to public health; it is related to violence and criminality, and to a high number of deaths among people of working age in Finland. Moreover, in Finland, many are prone to drinking only minimally diluted spirits in their search to become inebriated. In fact, before the Alcohol Act defined 'spirits' by expressly referring to an ethanol content of 80%, the product supervision agency received queries from restaurant owners about the possibility of serving customers substances with an ethanol content of 96% as drinks. The Finnish Government emphasises that the consumption of spirits is particularly dangerous to human health. Even when consumed in relatively small quantities, spirits can lead to serious, and possibly lethal, intoxication. The risks are especially high for young people, who tend to consider spirits a cheap alternative to strong alcoholic drinks. In light of this, the Finnish Government contends that the system of prior import authorisation is an appropriate and necessary means of avoiding the use of spirits for private consumption.

20. I have no hesitation in accepting the general hypothesis that the consumption of immoderate amounts of alcohol has a multitude of adverse effects on human health and public order. Indeed, this has been common knowledge since at least as far back as the time of the Old Testament. (8) More recently, the Court acknowledged it in its judgment in Heinonen . (9) Article 30 EC expressly mentions public policy and the protection of human health as grounds of interest which may allow a restriction on the free movement of goods to escape the prohibition laid down in Article 28 EC. (10) In principle, therefore, in the absence of harmonisation, Member States are free to adopt national measures aimed at preventing people from drinking alcohol, even where these measures have a negative impact on the free movement of goods within the internal market. (11) This is especially true in the present case, where the legislation at issue distinguishes between alcoholic drinks for consumption and spirits for industrial purposes, and aims to prevent people from drinking the latter.

21. However, the exceptions to the fundamental principle of the free movement of goods must be construed strictly. (12) The Member State concerned must demonstrate that the measure at issue is appropriate to the aim pursued (13) and that it does not go beyond what is necessary to achieve that aim. (14)

22. The Commission argues that Finland has failed to demonstrate why the import licensing scheme for spirits is necessary. Referring to Commission v Belgium , the Commission maintains that, as a rule, a system of prior import authorisation is a disproportionate measure, since less restrictive measures, such as the requirement of an import declaration, should suffice in order to protect the Member State's legitimate interests. (15) The Commission notes that, in Franzén , the Court rejected the argument of the Swedish Government that the system of prior import authorisation for alcoholic beverages under consideration in that case was proportionate in relation to the objective of protecting public health. (16) Moreover, given the fact that Finnish law completely excludes spirits from the market for private consumption, the Commission doubts whether a system of prior import authorisation for spirits intended for commercial use can contribute directly to the protection of human health and public policy. Finally, the Commission points out that trade in alcohol between Member States is already strictly monitored in the framework of Directive 92/12, which provides for Community checks regarding the collection of excise duties. The Finnish system of prior import authorisation, though imposing an extra burden on traders, does not appear to produce any additional advantages for combating traffic in undenatured ethyl alcohol.

23. Before examining these arguments, it is worth expanding on the workings of the principle of proportionality in the context of Article 30 EC. Essentially, the principle of proportionality entails a consideration of the costs and benefits of a measure enacted by a Member State in the light of the different interests which Community rules deem worthy of protection. (17) Once a national measure is in principle prohibited by Article 28 EC it is for the Member State to

demonstrate that the benefit of that measure for the public interest recognised by Community law outweighs the costs arising from the restriction imposed on free movement. Thus, in order for the system of prior import authorisation to be compatible with the Treaty, Finland must demonstrate that the benefits of that system to public policy and the protection of human health justify the costs it imposes on the free movement of goods in the internal market. However, instead of immediately verifying the Member State's overall assessment of the relevant costs and benefits, the Court, when reviewing the proportionality of a measure enacted by a Member State, in practice applies one or more of three sub-tests. (18)

24. The first is a test of suitability: the measure at issue must indeed contribute to achieving the aim pursued. For instance, in Aragonesa the Court held that legislation restricting the advertising of alcoholic beverages is apt to protect public health. (19) By contrast, in Commission v United Kingdom (UHT milk) , the Court found that a regulation which required a second heat treatment in the United Kingdom for imported UHT milk was not an appropriate means of protecting public health. (20) The Court noted that the United Kingdom had accepted some imports without requiring a second heat treatment and observed that 'it ha[d] not been shown that public health in the United Kingdom ha[d] been affected in the slightest by such imports'. (21) The question to be determined in applying the suitability test is whether the measure has any benefits at all for the legitimate interests on which the Member State relies. When this is not the case, the measure infringes by definition the principle of proportionality.

25. The second test concerns the necessity of the measure. To put it more precisely: it concerns the question whether an alternative measure is realistically available that would protect the Member State's legitimate interests just as effectively, but would be less restrictive of the free movement of goods. In other words: could the Member State, by directing a similar amount of its resources into an alternative measure, achieve the same result at a lower cost to intra-Community trade? Again, the judgment in UHT milk provides an illustration. The United Kingdom sought to justify a system of specific import licences for UHT milk on grounds of safeguarding animal health. However, the Court held that the licensing system resulted 'in an impediment to intra-community trade which … could be eliminated without prejudice to the effectiveness of the protection of animal health and without increasing the administrative or financial burden imposed by the pursuit of that objective'. (22) Of course, if a Member State can demonstrate that adopting the alternative measure would have a detrimental effect on other legitimate interests (for instance, on fundamental rights), then this would have to be taken into consideration. (23) Yet, typically, failure to opt for the less restrictive alternative amounts to an infringement of the principle of proportionality. (24)

26. Academic writings frequently refer to the third test as 'proportionality stricto sensu '. (25) This aspect of the assessment of proportionality can be expressed as the following rule: the greater the degree of detriment to the principle of free movement of goods, the greater must be the importance of satisfying the public interest on which the Member State relies. (26) Thus, the Member State must demonstrate that the level of protection it decides to afford to its legitimate interests is commensurate with the degree of interference this causes in intra-Community trade. (27) The difference with the second test is that, as a result of the third test, a Member State may be required to adopt a measure that is less restrictive of intra-Community trade, even if this would lead to a lower level of protection of its legitimate interests. Under this test, the Court usually allows the Member State a certain amount of discretion in choosing the desired level of protection to be afforded to the public interest at issue. (28) Hence, different Member States may attribute different values to the legitimate interests they consider worth protecting. It is only in areas where Community law already clearly identifies a common level of protection of the legitimate interest under consideration, that the Court applies the test more strictly. In such cases, Member States have a higher burden to overcome when seeking to justify measures restrictive of free movement. For instance, in a series of cases concerning consumer protection, the Court, in effect, found an infringement of the principle of proportionality stricto sensu . (29) Notably in its ruling in Estée Lauder , the Court held that Member States, when they adopt measures affecting intra-Community trade for the purpose of consumer protection, should adjust the level of protection to 'the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect'. (30) The majority of the Court's decisions on proportionality, however, concentrate on the first and second tests.

27. A measure which does not satisfy the overall proportionality review constitutes, in the words of Article 30 EC, 'a disguised restriction on trade between Member States'. Such restrictions are plainly forbidden.

28. However, the review under Article 30 EC does not stop here. In addition to the assessment of proportionality described above, a measure enacted by a Member State which falls within the scope of Article 28 EC must satisfy a final requirement. The measure is not to 'constitute a means of arbitrary discrimination'. (31) This, again, requires an assessment of proportionality, but seen from a different perspective.

29. The ruling in Conegate provides a clear illustration. (32) The Opinion of the Advocate General informs us that the case concerned 'Love Love Dolls', 'Miss World Specials', 'Rubber Ladies' and 'Sexy Vacuum Flasks'. One might wonder exactly what those are. However, leaving unwarranted curiosity aside, for the purposes of my present analysis it suffices to know that the United Kingdom authorities regarded the products as indecent or obscene and hence banned their importation. The Court accepted that grounds of public morality could justify such a ban, but it held that the United Kingdom could not rely on those grounds 'in order to prohibit the importation of goods from other

Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory'. (33) By only banning the importation of obscene products, the United Kingdom's prohibition amounted to discrimination. This discrimination was arbitrary, and therefore impermissible, because there was no objective justification for it – or if there was, the United Kingdom was not able to show that the differential treatment of imported goods and domestic goods was proportionate. (34)

30. Discrimination is not 'arbitrary' when it is justified and proportionate. (35) In Deutscher Apothekerverband , the Court found that German legislation prohibiting the direct sales of medicine by pharmacies over the internet had a greater impact on pharmacies established in other Member States, because 'for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market'. (36) Nevertheless, the Court held that the prohibition, despite its differential impact, could be saved by Article 30 EC, in so far as it applied to prescription medicines:

'Given that there may be risks attaching to the use of these medicinal products, the need to be able to check effectively and responsibly the authenticity of doctors' prescriptions and to ensure that the medicine is handed over either to the customer himself, or to a person to whom its collection has been entrusted by the customer, is such as to justify a prohibition on mail-order sales. … Furthermore, the real possibility of the labelling of a medicinal product bought in a Member State other than the one in which the buyer resides being in a language other than the buyer's may have more harmful consequences in the case of prescription medicines.' (37)

In other words, some degree of differential treatment or disparate impact on imported products may be accepted if it is proportionate to the objective differences between domestic and imported products. Here, the proportionality test serves the purpose of distinguishing between acceptable discrimination and arbitrary discrimination.

31. Consequently, the review under Article 30 EC of a measure enacted by a Member State requires the application of one or a combination of the following methods of assessment: the suitability test; the necessity test; a review of proportionality stricto sensu ; and an examination of whether the measure constitutes a means of arbitrary discrimination, which, in turn, entails an assessment of the proportionality of the discriminatory impact of the measure.

32. In the framework of the preliminary reference procedure, the final assessment of proportionality is often left to the referring court. (38) It is the responsibility of the Court of Justice, however, to furnish the referring court with the normative criteria it should employ. In this regard, it is important for the Court of Justice to draw attention to particular enquiries the referring court might need to make in order properly to exercise the review of proportionality with which it is entrusted.

33. In the present case, the referring court must verify whether, in the light of the existence of other relevant legislation on alcohol trade and consumption, the import licensing scheme for spirits for commercial use is of added value as regards the aim of avoiding the private consumption of spirits. This will help it verify whether the measure is indeed necessary or if its aim can also be achieved by alternative measures less restrictive of intra-Community trade.

34. In addition, the referring court should make sure that the import licensing scheme does not give rise to arbitrary discrimination within the meaning of Article 30 EC. At the hearing, the Finnish Government pointed out that traders or manufacturers who want to purchase spirits for commercial use from domestic producers, must also obtain a licence. It is for the referring court to verify, on 'a comprehensive view' (39) of the relevant national rules and administrative practice, if the licensing scheme for imported spirits is equivalent to the licensing scheme for domestically produced spirits. In so far as there are any differences – for example as to the costs or conditions of obtaining a licence – those differences must be objectively justified and proportionate.

IV – Conclusion

35. In light of the foregoing considerations, I suggest that the Court give the following answers to the questions referred by the Korkein oikeus:

(1) Article 28 EC precludes national legislation which requires a licence for the import of substances containing more than 80% by volume of undenatured ethyl alcohol ('spirits') from another Member State.

(2) It is for the referring court to establish whether the legislation in question complies with the principle of proportionality. In particular, it is incumbent upon the referring court to verify that the legislation in question is appropriate to the aim of avoiding the private consumption of spirits and necessary to achieve that aim, and that it does not give rise to arbitrary discrimination within the meaning of Article 30 EC.

Case C-42/02.
Judgment of the Court (Fifth Chamber) of 13 November 2003.

Diana Elisabeth Lindman.
Reference for a preliminary ruling: Ålands förvaltningsdomstol - Finland.
Freedom to provide services - Lottery tickets - Amount won in a game of chance held in another Member State - Income tax - Tax on games of chance - Special regime in the Åland Islands.
after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,
gives the following

Judgment
1. By order of 5 February 2002, received at the Court on 15 February 2002, the Ålands förvaltningsdomstolen (Administrative Court, Åland) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 49 EC.

2. That question was raised in the course of a dispute between Ms Lindman and the skatterättelsenämnden (Taxation Verification Committee) concerning its rejection of her appeal against her assessment to tax on an amount of money which she had won in a lottery held in Sweden.

Legal background

A ─ Community legislation

3. Under the first paragraph of Article 49 EC:

" Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

B ─ National legislation

4. Under Article 1 of the lotteriskattelagen (552/1992) (Law on tax on games of chance), tax on games of chance is payable to the State in respect of games conducted in Finland. Under Article 2 of that law lotteries are games of chance. Article 3 provides that it is the lottery ' s organiser who is chargeable to the tax.

5. By virtue of Article 85 of the inkomstskattelagen (1535/1992) (Income Tax Law), " winnings from games of chance covered by Article 2 of the lotteriskattelagen shall not constitute income chargeable to tax ..." . It is clear from the file that the exemption applies only to games of chance covered by Article 2 of the lotteriskattelagen, which include only those organised in Finland.

C ─ The special regime in the Åland Islands

6. By virtue of the Självstyrelselagen för Åland (1144/1991) (Åland Self-Government Law), the regulation of lotteries and other gambling falls within the legislative competence of the region of Åland. The holding of lotteries is subject to licence from the regional government the detailed rules of which are prescribed by the landskapslagen om lotterier (Regional law on games of chance, Ålands författningssamling 10/1966). The organisation of games of chance is governed by that law. Licences to organise lotteries and gambling covered by Article 3 of the landskapslagen om lotterier may be granted by a public law association established by regional legislation. The receipts from the association ' s activities must be entered in the budget of the Åland region and used to promote and support projects of public utility or in the public interest, as well as those which can be regarded as benefiting the association ' s activities and objectives.

The dispute in the main proceedings and the question referred

7. Ms Lindman, a Finnish national, resides in the commune of Saltvik, in the Åland Islands (Finland). On 7 January 1998, she won SEK 1 000 000 as a result of a lottery draw by the company AB Svenska Spel, which took place in Stockholm (Sweden). She had bought her winning ticket during a stay in Sweden.

8. That lottery win was regarded as earned income chargeable to income tax for the year 1998 and was assessed to national tax payable to the Finnish State, to local tax payable to the municipality of Saltvik, to church tax for the benefit of the parish and to an additional sickness insurance premium levied under the sjukförsäkringslagen (Sickness insurance law).

9. Ms Lindman appealed to the skatterättelsenämnden of Åland, to obtain rectification of the assessment against her. That appeal was rejected on 22 May 2000 on the ground that Article 85 of the inkomstskattelagen does not preclude the taxation in Finland of winnings from foreign lotteries.

10. Ms Lindman then appealed to the Ålands förvaltningsdomstolen seeking reversal of the rejection by the skatterättelsenämnden, arguing that the assessment on the winnings in Sweden should be quashed, or, in the alternative, that the winnings should be taxed not as earned income, but as income from capital, which entails a lower

tax rate.

11. The Ålands förvaltningsdomstolen considers that the taxation, either as earned income or as income from capital, of winnings from games organised abroad may possibly be regarded as a special rule based on the place where the services were provided.

12. Since it considered that an interpretation of Community law was needed before a decision could be given in the dispute before it, the Ålands förvaltningsdomstolen decided to stay proceedings and to refer to the Court for a preliminary ruling the following question:

" Does Article 49 EC preclude a Member State from applying rules under which winnings from lotteries held in other Member States are regarded as taxable income of the winner chargeable to income tax, whereas winnings from lotteries held in the Member State in question are exempt from tax?"

Substance

Observations submitted to the Court

13. Ms Lindman asserts that the Finnish legislation is discriminatory, since, if she had resided in Sweden or if the amount at issue in the main proceedings had been won in a Finnish lottery, she would not have been charged income tax.

14. The Finnish, Belgian, Danish and Norwegian Governments submit that the Finnish legislation is compatible with Article 49 EC. In that regard, they rely on the Court ' s case-law (Case C-275/92 Schindler [1994] ECR I-1039; Case C-124/97 Läärä and Others [1999] ECR I-6067, and Case C-67/98 Zenatti [1999] ECR I-7289) to argue that the taxation of games of chance is only a specific aspect of the general regime governing games of chance, a field in which the Member States have a wide discretion. According to those governments, any restrictions are justified by overriding reasons in the public interest relating to combating the pernicious consequences of games of chance, since if winnings from foreign lotteries were exempt, the public would be encouraged to participate in them.

15. More particularly, the Finnish Government contends that the reason for the taxation of winnings from games of chance organised outside Finland is the impossibility of taxing, in that Member State, foreign undertakings who offer gambling activities from abroad. Were it otherwise, taxpayers in Finland and the organisers of games of chance would share a tax advantage, regardless of whether the receipts were intended to fulfil objectives in the public interest in the State of origin or whether that State ' s legislation sought to take account of the objectives of consumer protection and prevention of social damage.

16. The Commission and the EFTA Surveillance Authority submit that the taxation in a Member State of winnings from lotteries solely where they are organised in other Member States is contrary to Article 49 EC and cannot be justified on grounds of public interest.

17. The Commission relies on the judgment in Case C-283/95 Fischer [1998] ECR I-3369 to argue that, in accordance with the principle of fiscal neutrality, a Member State may not treat a winner of a game of chance lawfully organised in another Member State less favourably than a winner who participated in a game organised in the first State.

The Court ' s reply

18. As a preliminary point, it must be noted that, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law (Case C-80/94 Wielockx [1995] ECR I-2493, paragraph 16; Case C-264/96 ICI [1998] ECR I-4695, paragraph 19; Case C-311/97 Royal Bank of Scotland [1999] ECR I-2651, paragraph 19; Case C-35/98 Verkooijen [2000] ECR I-4071, paragraph 32, and Case C-136/00 Danner [2002] ECR I-8147, paragraph 28).

19. With regard to the provisions of the EC Treaty relating to freedom to provide services, they apply, as the Court has already held concerning the organisation of lotteries, to an activity which consists in enabling users to participate, for a payment, in gambling (see Schindler , cited above, paragraph 19). Therefore, such an activity falls within the scope of Article 49 EC, provided that at least one of the providers is established in a Member State other than that in which the service is offered. It is therefore necessary to examine the case from the viewpoint of freedom to provide services.

20. According to settled case-law, Article 49 EC prohibits not only any discrimination, on grounds of nationality, against a provider of services established in another Member State, but also any restriction on or obstacle to freedom to provide services, even if they apply to national providers of services and to those established in other Member States alike (see Case C-131/01 Commission v Italy [2003] ECR I-1659, paragraph 26).

21. It is clear, in the main proceedings, that foreign lotteries are treated differently for tax purposes from, and are in a disadvantageous position compared to, Finnish lotteries. Under the lotteriskattelagen, only winnings from games of chance which are not licensed in Finland are regarded as taxable income, whereas winnings from games of chance organised in that Member State are not taxable income. The Finnish Government has also admitted that the existence of such legislation means that Finnish taxpayers prefer to participate in a lottery organised in Finland rather than a

lottery taking place in another Member State.

22. Contrary to that Government ' s submission, the fact that gaming providers established in Finland are subject to tax as organisers of gambling does not rid the Finnish legislation of its manifestly discriminatory character, since that tax is not analogous to the income tax charged on winnings from taxpayers ' participation in lotteries held in other Member States.

23. The Finnish Government, whilst admitting that the national legislation is discriminatory, contends that it is justified by overriding reasons in the public interest such as the prevention of wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest and ensuring legal certainty.

24. The Norwegian Government cites also as justification the need to combat the damaging consequences of gambling addiction, which is a matter of public health. Thus, there are rehabilitation centres and other infrastructures for treating gamblers; gambling creates social problems, such as depriving of resources the families of gambling addicts, divorce, and suicide.

25. In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State (see, to that effect, Case C-55/94 Gebhard [1995] ECR I-4165, and Case C-100/01 Oteiza Olazabal [2002] ECR I-10981).

26. In the main proceedings, the file transmitted to the Court by the referring court discloses 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 of the Member State concerned in lotteries organised in other Member States.

……On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Ålands förvaltningsdomstolen by order of 5 February 2002, hereby rules:

Article 49 EC prohibits a Member State ' s legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.

In Case C-459/99,

REFERENCE to the Court under Article 234 EC by the Conseil d'État (Belgium) for a preliminary ruling in the proceedings pending before that court between

Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)

And

État belge,

on the interpretation of Articles 1(2), 3(3) and 9(2) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), Articles 3 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), Articles 3 and 6 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14) and Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1), after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

Judgment

1. By judgment of 23 November 1999, received at the Court on 2 December 1999, the Belgian Conseil d'État (Council of State) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 1(2), 3(3) and 9(2) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), Articles 3 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), Articles 3 and 6 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14) and Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1).

2. Those questions were raised in proceedings between Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (Movement to combat racism, anti-Semitism and xenophobia; MRAX) and the Belgian State for annulment of the Circular of the Ministers for the Interior and for Justice of 28 August 1997 concerning the procedure for publication of banns of marriage and the documents which must be produced in order to obtain a visa for the purpose of contracting a marriage in the Kingdom of Belgium or to obtain a visa for the purpose of reuniting a family on the basis of a marriage contracted abroad (*Moniteur belge* of 1 October 1997, p. 25905; the Circular of 28 August 1997).

...

The main proceedings and the questions referred for a preliminary ruling

35. By application of 28 November 1997 to the Conseil d'État, MRAX sought annulment of the Circular of 28 August 1997.

36. It submitted in support of its action that the circular, in particular paragraph 4, was incompatible with the Community directives on movement and residence within the Community.

37. Since the Conseil d'État found that an interpretation of Community law was required in order to dispose of the case before it, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Must Article 3 of Directive 68/360 of 15 October 1968, Article 3 of Directive 73/148 of 21 May 1973 and Regulation No 2317/95 of 25 September 1995, read in the light of the principles of proportionality and non-discrimination and the right to respect for family life, be interpreted as meaning that the Member States may, at the border, send back foreign nationals subject to a visa requirement and married to a Community national who attempt to enter the territory of a Member State without being in possession of an identity document or visa?

2. Must Article 4 of Directive 68/360 and Article 6 of Directive 73/148, read in the light of Article 3 of each of those directives and of the principles of proportionality and non-discrimination and the right to respect for family life, be interpreted as meaning that Member States may refuse to issue a residence permit to the spouse of a Community national who has entered their territory unlawfully and issue an expulsion order against him?

3. Do Articles 3 and 4(3) of Directive 68/360, Article 3 of Directive 73/148 and Article 3(3) of Directive 64/221 of 25 February 1964 mean that the Member States may neither withhold a residence permit nor expel a foreign spouse of

a Community national who has entered national territory lawfully but whose visa has expired when application is made for the issue of that permit?

4. Must Articles 1 and 9(2) of Directive 64/221 of 25 February 1964 be interpreted as meaning that foreign spouses of Community nationals who are not in possession of identity documents or a visa or whose visa has expired have the right to refer the matter to the competent authority mentioned in Article 9(1) when applying for the issue of a first residence permit or when they have an expulsion order made against them before the issue thereof?

Preliminary point

38. The Belgian State contends that the national legislature has placed spouses of Belgian nationals on the same footing as nationals of the Member States so that they are not treated less favourably than a spouse or family member of a national of another Member State. However, according to the Belgian State the Court of Justice has no jurisdiction where the situation of a third country national married to a Belgian national is at issue.

39. As to that submission, Community legislation concerning freedom of movement for workers, freedom to provide services and freedom of establishment is not applicable to situations not presenting any link to any of the situations envisaged by Community law. Consequently, that legislation cannot be applied to the situation of persons who have never exercised those freedoms (see, in particular, Case C-206/91 *Koua Poirrez* [1992] ECR I-6685, paragraphs 10, 11 and 12, and Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 28).

40. It is in that light that the Court will answer the questions inviting it to rule on the effect of a number of provisions of Directives 64/221, 68/360 and 73/148 and Regulation No 2317/95 with regard to third country nationals married to a Member State national.

.....

The Court's answer

100. The purpose of Article 9(2) of Directive 64/221 is to provide minimum procedural guarantees for persons refused a first residence permit, or whose expulsion is ordered before the issue of the permit, in any of the three cases defined in Article 9(1). Where the right of appeal against administrative measures is restricted to the legality of the decision, the purpose of the intervention of the competent authority is to enable an examination of the facts and circumstances, including factors demonstrating the appropriateness of the proposed measure, to be carried out before the decision is finally taken (see, to that effect, Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraphs 34 and 37).

101. The provisions of Article 9 of Directive 64/221, which are complementary to those relating to the system of appeals to a court of law referred to in Article 8 and are intended to mitigate the effect of deficiencies in those remedies (see, in particular, Case 98/79 *Pecastaing* [1980] ECR 691, paragraphs 15 and 20), call for a broad interpretation as regards the persons to whom they apply. In the field of Community law, the requirement for judicial review of any decision of a national authority reflects a general principle stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the Convention (Case 222/86 *Unectef* v *Heylens and Others* [1987] ECR 4097, paragraph 14, Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 14, and Case C-226/99 *Siples* [2001] ECR I-277, paragraph 17).

102. Accordingly, contrary to the argument put forward by the Belgian State, any foreign national married to a Member State national claiming to meet the conditions necessary to qualify for the protection afforded by Directive 64/221 benefits from the minimum procedural guarantees laid down in Article 9 of the directive, even if he is not in possession of an identity document or, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

103. Moreover, those procedural guarantees would be rendered largely ineffective if entitlement to them were excluded in the absence of an identity document or visa or where one of those documents has expired.

104. The answer to the fourth question referred for a preliminary ruling must therefore be that, on a proper construction of Articles 1(2) and 9(2) of Directive 64/221, a foreign national married to a national of a Member State has the right to refer to the competent authority envisaged in Article 9(1) of that directive a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

.....

On those grounds,

THE COURT,

in answer to the questions referred to it by the Conseil d'État by judgment of 23 November 1999, hereby rules:

1. On a proper construction of Article 3 of Council Directive 68/360/EEC of 15 October 1968 on the abolition

of restrictions on movement and residence within the Community for workers of Member States and their families, Article 3 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services and Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.

2. On a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.

3. On a proper construction of Articles 3 and 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, a Member State may neither refuse to issue a residence permit to a third country national who is married to a national of a Member State and entered the territory of that Member State lawfully, nor issue an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit.

4. On a proper construction of Articles 1(2) and 9(2) of Directive 64/221, a foreign national married to a national of a Member State has the right to refer to the competent authority envisaged in Article 9(1) of that directive a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

Oryzomyli agiou konstantinou , g . Raptis - l . Triandafyllidis kai sia oe , a partnership governed by greek law , whose registered office is in pernis , kavala , represented by panagiotis marinos bernitsas , of the athens bar , with an address for service in luxembourg at the chambers of aloyse may , 27 place de paris , l-2341 luxembourg ,
Applicants ,
v
Commission of the european communities , rue de la loi 200 , b-1049 brussels , represented by xenophon yataganas , a member of its legal department , with an address for service in luxembourg at the office of g . Kremlis , jean monnet building , kirchberg ,
Defendant

Application for a declaration that commission decision no e(84) 557 of 25 april 1984 finding that remission of import duties is not justified in the applicants ' case , is void ,
The court (third chamber)
Composed of : u . Everling , president of chamber , y . Galmot and j . C . Moitinho de almeida , judges ,
Advocate general : j . Mischo
Registrar : k . Riechenberg , administrator
Grounds

5 The applicants immediately applied to the ministry of agriculture for the issue a posteriori of advance fixing certificates at a rate of dr 381 per tonne and the rectification of the import licences originally issued . In support of that application , they claim that at the time when the application form for the import licences was presented to them on 27 august 1981 , they were unaware of the meaning of the expression ' advance fixing requested ' and could obtain no enlightenment on that point from the competent official . It was ultimately the latter who filled in in their place the relevant part of the form and thus determined that the import licences issued did not provide for advance fixing . A considerable exchange of correspondence resulted between the administration and the applicant companies , who were unable to obtain satisfaction , however .

6. On the expiry of the time-limit beyond which the goods could no longer be kept in the customs warehouse , that is to say , on 27 september 1983 , two years after they had been placed there , the applicants cleard the rice in question through customs . On that date , the rate of levy on importation was dr 11 487.54 per tonne , that is to say , 30 times what it had been in august 1981 . The applicants therefore applied for remission of that part of the levy exceeding the amount resulting from the application of a rate of dr 381 per tonne , which was the rate which had been in force on 26 august 1981 (that is to say , dr 11 452 296 minus dr 379 832 = dr 11 072 464), arguing that they had been unaware of the community provisions applicable in greece since 1 january 1981 and complaining of the conduct of the competent administrative services .

7. On 30 november 1983 , the greek ministry of finance , in an application submitted to the commission under article 13 of council regulation no 1430/79 of 2 july 1979 on the repayment or remission of import or export duties (official journal l 175 , p . 1) as amended by council regulation no 1672/82 of 24 june 1982 (official journal l 186 , p . 1) for the remission of an amount of dr 11 072 464 and for a decision of the commission authorizing such a remission . In its application , the ministry of finance stated that the conduct of the undertakings involved revealed no negligence or deception and that it was clear that the competent section of the ministry of agriculture had not noticed the difference between an ordinary import licence and an advance fixing certificate .

8. The commission rejected that application in a decision of 25 april 1984 , against which the applicant companies brought the present action , along with an application for suspension of the decision . By order of 16 july 1984 , the president of the court granted the application to suspend the decision , and by order of 24 october 1984 that suspension was extended until the court had delivered judgment .

9. Article 13 of council regulation no 1430/79 of 2 july 1979 , as amended by council regulation no 1672/82 of 24 june 1982 , provides that ' import duties may be repaid or remitted in situations other than those referred to in sections a to d which result from special circumstances in which no negligence or deception may be attributed to the person concerned . . . ' .

10. The applicants draw the court ' s attention generally to its judgment of 15 december 1983 (case 283/82 papierfabrik schoellershammer h . A . Schoeller v commission (1983) ecr 4219) in which the court held that article 13 constituted a ' general equitable provision ' , and argue that it should be applied in the present case . They claim that the conditions for establishing the existence of special circumstances and the absence of negligence or deception have been fulfilled . Without indicating that there was any deception on the part of the applicants , the commission considers that there were no special circumstances in this case and that the applicants were negligent to a degree which made any remission of duty impossible .

The existence of special circumstances

11. The applicants rely in particular on the circumstances that the application for import licences was submitted in the very first months of greek membership of the european economic community , that , at that time , the regulations governing agricultural imports were not yet available in greek , that , in order to apply those regulations , officials were obliged to work on the basis of provisional and uncertain translations intended for purely internal use , that the terms used in the form filled in by the applicants did not make it possible to determine the exact meaning of advance fixing and that the competent section of the ministry of agriculture was unable to provide them with useful information on that point .

12. The commission , on the other hand , denies the existence of special circumstances and contends that all the necessary community regulations had been translated into greek and were available from the very first days of greek membership , both to government departments and to individuals who might wish to consult them . It adds that the meaning of the regulations establishing a levy on agricultural imports is perfectly clear and could not give rise to any confusion . The same is true for the terms in which the application form for import licences is drafted . The commission considers that the argument to the effect that the affair took place during the first months of greek membership is unacceptable , particularly in regard to the implementation of the machinery of the common agricultural policy .

13. It must be observed that from the time at which a new member state joins the european economic community , traders in that state are immediately subject to community rules under the conditions laid down in the act of accession . The fact that the contested importation took place during the first months following the accession of greece and was the first transaction of this type carried out by the applicants under community law may not , of itself , be relied upon in support of an application for remission of duties submitted under article 13 of regulation no 1430/79 .

14. In order to verify the facts relied upon by the applicants , the court (third chamber), by order of 14 february 1985 , issued letters rogatory for the hearing by the competent greek judicial authority of four witnesses , officials in the various greek administrative services which dealt with the affair . The evidence obtained pursuant to that order was received at the court registry on 19 november 1985 .

15. It can be seen from the evidence heard in the context of the letters rogatory that when the undertakings submitted their application for import licences they encountered serious difficulties by reason of the following circumstances :

(i) they did not have available to them the greek language text of the applicable regulations ;

(ii) even the competent section of the ministry of agriculture had not received the greek language edition of the official journal of the european communities and used texts in other language versions or translations made by greek officials and intended for internal use ;

(iii) no instructions or circulars had been issued explaining to the officials in those sections the basic principles of the community rules ;

(iv) the applicants , by virtue of the absence of the head of the licensing section of the foreign trade section , who understood the difference between a simple import licence and an advance fixing certificate , were received by a newly-appointed official who did not have the experience to explain that difference .

16. It must therefore be considered that those highly exceptional factors , taken together , constitute ' special circumstances ' within the meaning of article 13 of regulation no 1430/79 .

The absence of negligence

17. The applicants claim that they were led into error by the official of the ministry of agriculture , who himself filled in the relevant part of the form , even though he was unaware of the difference between a simple licence and an advance fixing certificate . Even if the applicants made a mistake of law in confusing a simple import licence with an advance fixing certificate , that mistake is wholly excusable having regard to the special circumstances considered above . Moreover , once they became aware that the import levy had increased tenfold , the applicants placed the rice in a customs warehouse with a view to reaching an agreement with the ministry of agriculture . The remission of duty which they seek is intended merely to compensate them for the damage which they have suffered by virtue of the lack of knowledge of the officials of the ministry .

18. On the other hand , the commission considers that the applicants ' ignorance of the provisions of community law undoubtedly constitutes negligence because it is hard to imagine that commercial companies engaging in international trade could be unaware of the legislation governing their activities . The commission considers that in this case the greek authorities are not guilty of any error . It also contends that by failing to re-export the rice immediately or to put it into free circulation the applicants aggravated the damage they suffered . If they did not wish to assume the commercial risk resulting from changes in the rate of the import levy , they should have cleared the rice through customs not later than the date of arrival of the ship (september 1981), rather than placing it in a customs warehouse for such a long period .

19. It must be pointed out that relatively small companies , whose registered office is situated several hundred kilometres from athens , where the import formalities in question had to be carried out , and which were unable to

obtain the greek language version of the applicable community regulations and were , moreover , faced with the series of special circumstances set out above , cannot reasonably be expected to take any steps other than those which they actually did take in order to obtain information as to the exact meaning of the expression ' advance fixing ' .

20. Moreover , the applicant companies also cannot be criticized for not having placed the imported rice in free circulation as soon as it arrived in order to limit the extent of the damage suffered . It can be seen from the documents in the case that the explanation for their conduct is to be found in the hope , which they entertained in all good faith , that they would be able to reach an agreement with the greek administration which would permit them to pay only the rate of levy in force on the day on which they submitted their application for a licence and not in any speculative intention , which , moreover , the state of the world market did not encourage them to hold .

21. It must therefore be decided that in this case the conduct of the applicants , faced with the special circumstances set out above , did not in any way constitute negligence . The conditions required for the application of article 13 of regulation no 1430/79 were therefore fulfilled , and consequently the contested decision should be declared void .

Costs

22. Under article 69 (2) of the rules of procedure , the unsuccessful party is to be ordered to pay the costs . Since the commission has failed in its submissions , it must be ordered to pay the costs .

On those grounds ,

The court (third chamber)

Decision on costs

Hereby :

(1) declares that the commission decision of 25 april 1984 addressed to the hellenic republic and finding that the remission of import duties in the applicants ' case is not justified , is void ;

Operative part

(2) orders the commission to pay the costs .

Everling galmot moitinho de almeida delivered in open court in luxembourg on 15 may 1986 .

P . Heim u . Everling

Registrar president of the third chamber

* translated from the french .

Case C-327/02.
Opinion of Mr Advocate General Poiares Maduro delivered on 19 February 2004.
Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie.
Reference for a preliminary ruling: Rechtbank te 's-Gravenhage - Netherlands.
Association Agreements between the Communities and, respectively, Bulgaria, Poland and Slovakia - Right of establishment - National legislation under which applications for full residence permits with a view to establishment are rejected without examination where the applicant lacks a temporary residence permit.

1. The reference for a preliminary ruling in the present case concerns the scope of the provisions on establishment of the Europe Agreements establishing an association between the European Community and the Slovak Republic, the Republic of Poland and the Republic of Bulgaria ('the Association Agreements'). (2) The Court is faced with the issue of whether those provisions preclude a Member State from establishing a system according to which applications submitted in its territory for a full residence permit with a view to establishment pursuant to one of those Agreements are rejected without examination if the applicant does not have a valid temporary residence permit which is to be obtained in the alien's country of origin or of permanent residence. [.....]

– Conditions to be met by restrictions on the right of establishment under the Association Agreements

35. It is in the light of those two concerns that we must define the limits and conditions that national rules on the entry and stay of nationals of Associated States must respect. This will allow us to take a position on the lawfulness of the Netherlands requirement of a temporary residence permit and its application in different sets of circumstances. In my view, national rules that restrict the right of establishment granted by the Association Agreements are subject to three sets of conditions.

36. In the first place, it must be recalled that the recognition of direct effect is inextricably linked to the conferment of rights on individuals that they are supposed to be able to enforce. Inherent in the recognition of direct effect is an idea of effectiveness and judicial protection of the individual rights granted to individuals. The recognition of the direct effect of these provisions of the Association Agreements means, as a result, that the exercise of discretion by Member States in applying their rules on the entry and stay of nationals of Associated States must take place in a manner that is susceptible to review by the courts and does not impair the effectiveness of those rights.

37. In this respect, it is important to note that in a different line of case-law where the Court assessed the permissibility of systems of prior administrative authorisation, it made clear that they cannot legitimise discretionary conduct that is liable to negate the effectiveness of provisions of Community law. (22) In order to guarantee that this is not the case and that such systems and the exercise of the discretion they involve are not used arbitrarily, the Court requires them to be based on objective and non-discriminatory criteria that are known in advance to those concerned. (23) Moreover, those affected must have a legal remedy available to them. (24)

38. In my view, similar criteria should be applied in determining the validity of national systems which require nationals of Associated States intending to exercise their right of establishment to obtain in their home State prior authorisation for temporary residence. Such systems must be based on objective criteria known in advance and justified by the need to ascertain that those persons genuinely want to pursue an activity as self-employed persons. They must also provide adequate procedural guarantees and legal remedies to the persons claiming the right of establishment.

39. A further criterion for assessing national measures regarding the entry, stay and residence of natural persons derives from the condition, enshrined in the Agreements, that such measures must not be such as to nullify or impair the benefits accruing to one of the parties to the Agreements. (25) The Court has interpreted this concept in relation to the rights granted to nationals of the Associated States to mean that the measures must be appropriate to achieve the objective in view and must not affect the very substance of those rights by making their exercise impossible or excessively difficult. (26)

40. It is clear that we are not dealing with a proportionality test. This is a consequence of the fact that, as the Court made clear in the same cases, the right of establishment under the Association Agreements is not to be interpreted in the same manner as the right of establishment under the EC Treaty. The mere similarity or even identity in the wording of the provisions is not sufficient to warrant the same interpretation. The more limited objectives of the Association Agreements and the broader restrictions expressly provided for therein justify a more restrictive approach towards the interpretation of the right of establishment granted to nationals of Associated States. (27) The test to be applied requires, instead, that the national measures capable of hindering the exercise of the right of establishment provided for in the Association Agreements should not affect the very substance of the right.

41. This impact on the substance of the right is, however, also assessed in the light of the objectives pursued by the

national measures. A requirement of appropriateness or adequacy of ends and means can also be deduced from the decisions in Barkoci and Malik , Kondova and Gloszczuk . In Barkoci and Malik , for example, the Court stated that 'it is necessary in this regard to determine whether the immigration rules applied by the competent national authorities, under which a Czech national is required, prior to his departure to the host Member State, to obtain entry clearance, grant of which is subject to verification of substantive requirements such as those laid down in paragraph 212 of the Immigration Rules, are appropriate for achieving the objective in view or whether they constitute, in regard to that objective, measures which would affect the very substance of the rights granted to Czech nationals by Article 45(3) of the Association Agreement, by making exercise of those rights impossible or excessively difficult.' (28) In other words, whether the measures strike at the very substance of the rights also depends on whether they are appropriate for achieving the objective in view.

42. In this regard, it may be important to recall two well-known lines of cases where the Court has applied a similar test based on the degree to which the measures at issue affect the substance of a right.

43. In the cases concerning the limits to the procedural autonomy of the Member States, the Court has stated that, '[i]n the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding r ights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law'. (29) This case-law may be relevant because the rule at issue in the present case is a procedural rule, not a substantive rule. It may also be relevant because it shows that, although the Court has been quite deferential towards the procedural rules of the Member States, it has always examined whether the measures in hand were appropriate for achieving a legitimate objective. The other relevant line of case-law is that on fundamental rights, in particular the fundamental right to property or the freedom to pursue a trade or profession (which is of some relevance for our case), which can be restricted in the general interest, 'provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.' (30)

44. What can be deduced from these cases is that the test of interference with the substance of the right is not simply dependent on an analysis of the impact of the restrictive measure on the right itself. It also depends on the objective pursued by the measure and the appropriateness of the measure to attain it. Although the test does not impose a judgment on the proportionality or even the existence of a less restrictive alternative (necessity) of the measure, it still requires an assessment of the appropriateness or adequacy of means and ends.

45. There is a final set of conditions that should be taken into account when assessing national measures restrictive of the right of establishment granted by the Association Agreements. They arise out of the requirement imposed on Member States to observe general principles of law, including fundamental rights, when acting within the scope of Community law. (31)

46. When applying or derogating from the rules provided for in agreements between the Community and third countries, Member States are acting within the scope of Community law. When nationals of third countries benefit from rights arising out of agreements concluded between their country and the Community, restrictions to those rights arising out of measures of the Member States must also be consistent with the fundamental rights and general principles of law the observance of which the Court ensures. (32) In these circumstances, the authorities of the Member State concerned and its national courts are also bound to observe — not simply to 'take into account' — the fundamental rights applicable in the Community legal order which are, by their very nature, also applicable to third country nationals, such as the right to respect for family life or the right to effective judicial protection. (33)

47. In this respect, it is important to note that the judicial protection of fundamental rights is particularly important with regard to the treatment accorded to third country nationals, since the latter constitute 'discrete and insular minorities'. (34) These are often particularly vulnerable groups that are deprived of other means, in particular political means to influence legislation and the political process, for the protection of their rights. Aliens, by the very nature of a political community, cannot benefit from all the rights granted to the citizens of that political community, but it is precisely for the same reason that they deserve added judicial protection where rights granted to them are affected by decisions of the same political community.

48. In the light of the above, I believe it is possible to conclude that domestic rules on the entry and stay of nationals of Associated States who wish to reside in a Member State of the Union for purposes of establishment are acceptable so long as they satisfy the following general conditions: (1) they must be based on objective criteria that can be known in advance by applicants and are susceptible to review by the courts; (2) they must not affect the very substance of the right of establishment (they are acceptable so long as they are appropriate to pursue the objective of controlling

immigration for purposes other than establishment and so long as they do not make the exercise of the right of establishment impossible or excessively difficult); and (3) they must be consistent with the fundamental rights and general principles of law to which Member States are subject when acting within the scope of Community law.

49. It is in the light of these general conditions that I will now assess the application of the Netherlands rules in the two sets of circumstances set out by the national court. In this regard, it results from the case-law that it is important to draw a distinction between those persons who are lawfully in the Netherlands at the time of application for permanent residence and those who are unlawfully present in the Netherlands. .....

Case T-187/03.
Judgment of the Court of First Instance (Third Chamber) of 17 March 2005.

Isabella Scippacercola v Commission of the European Communities.
Access to documents of the institutions - Article 4(5) of Regulation (EC) No 1049/2001.
Case T-187/03.
Judgment of the Court of First Instance (Third Chamber) of 17 March 2005.
Isabella Scippacercola v Commission of the European Communities.
Access to documents of the institutions - Article 4(5) of Regulation (EC) No 1049/2001.

APPLICATION for annulment of the Commission's decision of 19 March 2003 rejecting the application made by the applicant for access to a document relating to the project for the new Athens International Airport at Spata (Greece), Judgment

The legal background
1. Article 255 EC provides:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

...'.

2. Declaration No 35 annexed to the Final Act of the Treaty of Amsterdam (Declaration No 35') states:

The Conference agrees that the principles and conditions referred to in Article [255](1) of the Treaty establishing the European Community will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.'

3. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) defines the principles, conditions and limits governing the right of access to documents of those institutions provided for in Article 255 EC (Article 1(a) of Regulation No 1049/2001). That regulation entered into force on 3 December 2001.

4. Article 2 of Regulation No 1049/2001 provides:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

...'.

5. Article 3 of Regulation No 1049/2001, relating to definitions, provides

For the purpose of this Regulation:

(a) document shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) third party shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'

6. Article 4 of Regulation No 1049/2001, which defines the exceptions to the abovementioned right of access, is worded as follows:

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,

- defence and military matters,

- international relations,

- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

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

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

...'.

7. Article 5 of Regulation No 1049/2001, entitled Documents in the Member States', lays down:

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.'

8. Article 9 of Regulation No 1049/2001, relating to the treatment of sensitive documents, provides:

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as TRÈS SECRET/TOP SECRET, SECRET or CONFIDENTIEL in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

...'.

9. Article 5 (headed Consultations') of the detailed rules for the application of Regulation No 1049/2001, the text of which is to be found in the Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), provides:

1. Where the Commission receives an application for access to a document which it holds but which originates from a third party, the Directorate-General or department holding the document shall check whether one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001 applies. If the document requested is classified under the Commission's security rules, Article 6 of these Rules shall apply.

2. If, after that examination, the Directorate-General or department holding the document considers that access to it must be refused under one of the exceptions provided for by Article 4 of Regulation ... No 1049/2001, the negative answer shall be sent to the applicant without consultation of the third-party author.

3. The Directorate-General or department holding the document shall grant the application without consulting the third-party author where:

(a) the document requested has already been disclosed either by its author or under the Regulation or similar provisions;

(b) the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in

Article 4 of Regulation ... No 1049/2001.

4. In all the other cases, the third-party author shall be consulted. In particular, if the application for access concerns a document originating from a Member State, the Directorate-General or department holding the document shall consult the originating authority where:

(a) the document was forwarded to the Commission before the date from which Regulation ... No 1049/2001 applies;

(b) the Member State has asked the Commission not to disclose the document without its prior agreement, in accordance with Article 4(5) of Regulation ... No 1049/2001.

5. The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation ... No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal.

6. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.

...'.

Facts

10. By letter of 29 January 2003, Ms Isabella Scippacercola applied to the Commission for access to, inter alia, a cost-benefit analysis relating to the project for the new Athens International Airport at Spata. That project had been co-financed by the Cohesion Fund.

11. By letter of 21 February 2003, the DirectorateGeneral (DG) for Regional Policy of the Commission refused to grant the applicant access to the cost-benefit analysis, stating as follows:

... With reference to your request for a copy of the cost-benefit analysis, since this is a document which predates the entry into force of Regulation ... No 1049/2001, the national authorities have been consulted in accordance with the provisions of Article 5 of ... Decision 2001/937 ... . By fax of 10 February 2002, the national authorities informed the DG [for Regional Policy] that access to that document should not be permitted.

The reason for the refusal relates to protection of intellectual property rights. The document is a study drafted by private consultants on behalf of a bank. The latter assisted Greece during the preparation of the project file, under a confidentiality clause.

In those circumstances, the DG [for Regional Policy] considers that, in accordance with Article 4(5) of Regulation ... No 1049/2001, the analysis in question cannot be released ...'.

12. In the same letter, the defendant sent to the applicant part of the application for Cohesion Fund assistance which, under the heading Description of the main conclusions', contained a short description of the main topics of the cost-benefit analysis.

13. By letters of 24 February 2003 and 28 March 2003, the applicant repeated her request.

14. By letter of 19 March 2003, notified to the applicant on 31 March 2003, the SecretaryGeneral of the Commission confirmed the refusal to grant access to the document requested (the contested decision'). That letter reads as follows:

Thank you for your letter of 24 February 2003, registered on 26 February, by which you request re-examination of your application for access to the complete text of the cost-benefit analysis concerning the construction of the new Athens International Airport.

That analysis was carried out by a bank on behalf of the Greek national authorities (Ministry of National Economic Affairs).

In accordance with Article 5(4)(a) of the detailed rules for the application of Regulation No 1049/2001, adopted by ... Decision 2001/937, the Commission's services have consulted the Greek authorities regarding access to that document which was sent to the Commission before the entry into force of the regulation (3 December 2001). In response, the Greek authorities indicated that they did not agree to the release of that document by the Commission.

On the basis of Article 4(5) of Regulation No 1049/2001, I am therefore unable to give you access to that document and must consequently confirm the refusal of the Regional Policy [DG] to your request.

...

.....

Findings of the Court

31. It is important to point out, first of all, that the right of access to documents of the institutions, provided for in Article 2 of Regulation No 1049/2001, covers, in accordance with paragraph 3 of that article, all documents held by the European Parliament, the Council and the Commission, whether drawn up or received by them. Accordingly, the institutions may be required, in appropriate cases, to communicate documents originating from third parties, including, in particular, the Member States, in accordance with the definition of third party' in Article 3(b) of Regulation No 1049/2001.

32. Secondly, it should be recalled that, before Regulation No 1049/2001 entered into force, public access to Commission documents was governed by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58). Article 1 of that decision formally adopted the code of conduct approved by the Council and the Commission on 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41), which was annexed to the decision. That code of conduct provided, in the third paragraph of the section headed Processing of initial applications', that, [w]here the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author'. Consequently, under that rule, known as the authorship rule', an institution was not entitled to disclose documents originating from a wide category of third parties, including from a Member State, and the applicant for access to documents was obliged, where appropriate, to send his application direct to the third party in question.

33. The authorship rule was not referred to in Regulation No 1049/2001, which states that, in principle, all documents of the institutions must be accessible to the public.

34. It follows, however, from Article 4(5) of Regulation No 1049/2001 that, among third parties, the Member States are subject to special treatment. That provision confers on the Member State the power to request the institution not to disclose documents originating from that State without its prior agreement. It should be recalled that Article 4(5) of Regulation No 1049/2001 transposes Declaration No 35, by which the Conference of the High Contracting Parties to the Treaty agreed that the principles and conditions set out in Article 255 EC will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. That power conferred on Member States by Article 4(5) of Regulation No 1049/2001 is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents (recital 15 in the preamble to Regulation No 1049/2001 and judgment in Case T76/02 Messina v Commission [2003] ECR II3203, paragraphs 40 and 41).

35. In this case, it is important to note that the document at issue was received by the defendant in connection with an application for financing from the Cohesion Fund. In that regard, it must be pointed out that, under Article 10(3) of Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (OJ 1994 L 130, p. 1), as amended by Council Regulation (EC) No 1264/1999 of 21 June 1999 (OJ 1999 L 161, p. 57) and by Council Regulation (EC) No 1265/1999 of 21 June 1999 (OJ 1999 L 161, p. 62), applications for assistance for projects from that Fund are to be submitted by the beneficiary Member State. In accordance with Article 10(4), applications for assistance must contain, inter alia, a cost-benefit analysis.

36. It follows that, in the context of the Cohesion Fund, firstly, applications for assistance are to be submitted only by the beneficiary Member State and, secondly, a costbenefit analysis report necessarily forms part of the information which such an application must contain.

37. In this case, the costbenefit analysis was carried out by a bank on behalf of the Greek national authorities. That document forms part of the information which an application submitted for assistance from the Cohesion Fund must contain.

38. Consequently, without there being any need to determine whether documents simply forwarded (and not drafted) by Member States are covered by Article 4(5) of Regulation No 1049/2001, it is sufficient to note that the document in question, which was created by a bank on behalf of the Greek national authorities, was drawn up on behalf of a Member State.

39. In those circumstances, it must be concluded that the defendant did not err by considering that the document originated from a Member State.

40. Moreover, the applicant's argument that any third party could circumvent its obligations under Regulation No 1049/2001 simply by asking a Member State to forward the document to the defendant is completely irrelevant in this case. It has already been pointed out that the document in question was received by the defendant in connection with an application for assistance from the Cohesion Fund. In the context of the Cohesion Fund, the beneficiary Member State is the sole interlocutor of the Commission. Applications for assistance for projects are submitted only by the beneficiary Member State and, consequently, the document received by the defendant would not have been received by it if the Greek authorities had not submitted their application for financial assistance from the Cohesion Fund.

41. It follows from those considerations that the first plea in law must be rejected.

.....Findings of the Court

52. The question raised in this plea in law is whether, in providing that a Member State may request an institution not to disclose a document originating from it without its prior agreement, Article 4(5) of Regulation No 1049/2001 confers a right of veto on that State or whether it leaves the institution with an element of discretion.

53. It should be recalled that Regulation No 1049/2001 provides that, in principle, all documents of the institutions should be accessible to the public (recital 11 in the preamble).

54. As regards thirdparty documents, Article 4(4) of the regulation requires the institution to consult the third party concerned with a view to assessing whether an exception in Article 4(1) or (2) of the regulation is applicable, unless it is clear that the document must or must not be disclosed. It follows that the institutions are not required to consult the third party concerned if it is clearly apparent that the document must be disclosed or that it must not be disclosed. In all other cases, the institutions must consult the third party in question. Consequently, consultation of the third party concerned constitutes, as a general rule, a prerequisite for determining whether the exceptions to access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of thirdparty documents.

55. Moreover, the defendant's obligation under Article 4(4) of Regulation No 1049/2001 to consult third parties does not affect its power to decide whether one of the exceptions provided for by Article 4(1) and (2) of the regulation is applicable.

56. On the other hand, it is clear from Article 4(5) of Regulation No 1049/2001 that Member States are the subject of special treatment. That provision confers on a Member State the right to request the institution not to disclose a document originating from that Member State without its prior agreement. It should be recalled, as stated in paragraph 34 above, that that provision transposes Declaration No 35.

57. Article 4(5) of Regulation No 1049/2001 thus places Member States in a different position from that of other third parties by laying down, in that regard, a lex specialis . It follows from that provision that the Member State has the right, either at the time of submitting a document or subsequently, to request an institution not to disclose a document originating from that Member State without its prior agreement. Where the Member State has made such a request, the institution must seek the prior agreement of the Member State before disclosing the document. That obligation on the institution to seek the prior agreement of the Member State, as clearly imposed by that provision, would be rendered meaningless if the institution could decide to disclose that document despite an express request to the contrary from the Member State concerned. If the institution were entitled to disclose the document notwithstanding the request of the Member State not to give access to that document, the position of the Member State would be no different from that of ordinary third parties. Therefore, contrary to what the applicant submits, such a request from the Member State obliges the institution not to disclose the document in question. If, as in this case, the Member State did not make such a request when submitting the document to the institution, the latter is nevertheless entitled to seek the agreement of the Member State before disclosing the document to third parties. In such a case, the institution is also bound to comply with any request for nondisclosure made by the Member State.

58. In that regard, it must be pointed out that the Member State is not obliged to state reasons for its request under Article 4(5) of Regulation No 1049/2001 and that it is not for the institution to examine, when such a request has been made to it, whether nondisclosure of the document in question is justified, inter alia, in the public interest.

59. In order to ensure that Article 4(5) of Regulation No 1049/2001 is applied in conformity with Declaration No 35 and to facilitate access to the document in question by allowing the Member State from which it originates to give its consent, where appropriate, to its disclosure, it is for the institution to consult that Member State. If that Member State, after being consulted, does not make a request pursuant to Article 4(5) of Regulation No 1049/2001, it is still incumbent on the institution to assess, pursuant to Article 4(4) of that regulation, whether the document must be disclosed or not.

60. Where a Member State has made a request under Article 4(5) of Regulation No 1049/2001, the relevant national provisions of that Member State defining the right of access to documents and the legal framework of any appeal are applicable. Consequently, it is for the national administrative and judicial authorities to assess, on the basis of their national legislation, whether access to the documents originating from the Member State must be granted and to determine whether, and to what extent, there is a right of appeal for the parties concerned.

61. Finally, as regards the argument put forward by the applicant at the hearing, that, if the Community legislature had intended, in Article 4(5) of Regulation No 1049/2001, to grant a right of veto to Member States, it would have adopted a form of words similar to that of Article 9(3) of that regulation, it must be stated that the latter provision lays down specific rules in order to ensure effective protection for secret or confidential documents originating from, inter alia, institutions, Member States, third countries or international organisations in the areas covered by Article 4(1)(a) of Regulation No 1049/2001, notably public security, defence and military matters. That article specifies, inter alia, the persons who are entitled to handle those documents and provides that sensitive documents are to be recorded in the register or released only with the consent of the originator. In view of the specific character of those rules, it must be held that that article is not connected with Article 4(5) of Regulation No 1049/2001 and therefore cannot properly be

relied on for the purpose of interpreting the latter. A classification as TRÈS SECRET/TOP SECRET', SECRET' or CONFIDENTIEL' by a Member State amounts to a statement that the document cannot, in principle, be disclosed. In the case of other documents originating from a Member State, such impossibility can be acknowledged only at the express request of that Member State.

62. In the light of the foregoing considerations, it must be concluded that, under Article 4(5) of Regulation No 1049/2001, where a Member State requests an institution not to disclose a document originating from that Member State without its prior agreement, the institution is bound by that request. Accordingly, the second plea in law put forward by the applicant, alleging that the defendant failed to assess the reasons given by the Greek State for its negative opinion concerning the communication of the document requested, is unfounded.

.....

The fourth plea in law, alleging that the Commission failed to examine whether partial access to the information contained in the document requested should be granted

Arguments of the parties

72. The applicant submits that the defendant committed a manifest error in law consisting of a breach of Article 4(6) of Regulation No 1049/2001 by failing to examine whether partial access to the information contained in the document requested and not covered by the exceptions should be granted.

73. She points out that the defendant provided her with the part of the application for Cohesion Fund assistance that contained a description of the main topics of the cost-benefit analysis rather than the full text of the study as she had requested. That disclosure does not satisfy the requirements of Article 4(6) of Regulation No 1049/2001, since that description does not constitute part of the requested document for the purposes of that provision.

74. The applicant submits that, despite a request from a Member State for access to be refused, the defendant is required to grant the widest possible access to documents and should therefore have assessed whether partial access could be granted. As the defendant did not even attempt to assess whether partial access could be granted, it committed an error in law (Council v Hautala , cited in paragraph 29 above, paragraphs 29 and 30, and Hautala v Council , cited in paragraph 29 above, paragraphs 85 to 88).

75. The defendant takes issue with those arguments and contends that the plea in law should be rejected.

Findings of the Court

76. Under Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

77. It is true that, in the contested decision, there is no mention of whether the defendant considered the possibility of granting partial access to the document. However, it must be pointed out that, as the applicant was informed, the Member State totally opposed disclosure of the whole document. Since the defendant was bound by that request, partial access to that document was not possible. In those circumstances, it must be concluded that the reasons for the refusal of partial access to the document are implicitly but necessarily contained in the Member State's request.

78. It follows that the plea in law must be rejected.

79. In the light of all the foregoing, the application must be dismissed in its entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

after hearing the Opinion of the Advocate General at the sitting on 17 October 1995, gives the following Judgment

1 By order of 20 May 1994, received at the Court on 4 July 1994 and rectified by order of 26 July 1994, received at the Court on 8 August 1994, the Amtsgericht (Local Court) Tiergarten, Berlin, submitted a question under Article 177 of the EC Treaty for a preliminary ruling on the interpretation of Articles 6, 8a and 52 of the EC Treaty.

2. That question has arisen in criminal proceedings brought by the Public Prosecutor against Mrs Skanavi and her husband, Mr Chryssanthakopoulos.

3. Under the combined provisions of Paragraph 4 of the Verordnung ueber internationalen Kraftfahrzeugverkehr (Regulation on international vehicle traffic) (hereinafter the "IntVO") and Paragraph 21(1)(1) of the Strassenverkehrsgesetz (Law on Road Traffic) (hereinafter the "StVG"), Mrs Skanavi has been charged with driving without a licence, an offence punishable by up to one year' s imprisonment or by a fine, or, if the offence was committed as a result of carelessness, by up to six months' imprisonment or a fine. Mr Chryssanthakopoulos faces the same penalties under the combined provisions of Paragraph 4 of the IntVO and Paragraph 21(1)(2) of the StVG on the ground that, as the person regularly in charge of a motor vehicle, he directed or allowed a person to drive that vehicle without a licence.

The directives on driving licences

4. Driving licences were first made the subject of harmonization through the adoption of the First Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence (OJ 1980 L 375, p. 1), which, as the first recital in its preamble indicates, sought in particular to contribute to improving road traffic safety as well as to assist the movement of persons settling in a Member State other than that in which they have passed a driving test or moving within the Community.

5. To that end, Directive 80/1263 harmonized the relevant national rules, in particular those governing national systems of issuing driving licences, categories of vehicles and the conditions of validity of those licences. It also established a Community model licence and introduced a system for the mutual recognition of driving licences by Member States as well as for the exchange of those licences when the holders transferred their residence or place of work from one Member State to another.

6. Article 8(1) of that directive provides that, if the holder of a valid national driving licence or valid Community model licence issued by a Member State takes up normal residence in another Member State, his licence shall remain valid there for up to a maximum of a year following the taking up of residence. At the request of the holder within that period, and against surrender of his licence, the host Member State is to issue him with a Community model driving licence for the corresponding category or categories without requiring him, inter alia, to pass a practical and theoretical test or to meet medical standards. That State may, however, refuse to exchange the licence if its national regulations, including medical standards, preclude the issue of the licence.

7. Council Directive 91/439/EEC of 29 July 1991 on driving licences (OJ 1991 L 237, p. 1) marked a new stage in the harmonization of national provisions, particularly with regard to conditions governing the issue of licences and vehicle categories. It also removed the obligation to exchange driving licences in the event of a change in the normal State of residence, which, according to the ninth recital in its preamble, constitutes an obstacle to the free movement of persons and is inadmissible in the light of the progress made towards European integration.

8. Article 1(2) of Directive 91/439 provides that driving licences issued by Member States are to be mutually recognized. Article 8(1) of the same directive states that the holder of a valid national driving licence issued by a Member State who has taken up normal residence in another Member State may request that his driving licence be exchanged for an equivalent licence, but is not obliged to do so.

9. Under Article 12 of Directive 91/439, Member States were required, after consulting the Commission, to adopt, before 1 July 1994, the laws, regulations or administrative provisions necessary to comply with the Directive as of 1 July 1996. Article 13 repeals Directive 80/1263 as of 1 July 1996.

The facts

10. Mrs Skanavi and Mr Chryssanthakopoulos, who are Greek nationals, took up residence in Germany in order to take over the undertaking Guestrower Moebel GmbH (hereinafter "Guestrower") from the Treuhand. At the material time, Mr Chryssanthakopoulos was the managing director of Guestrower.

11. Mrs Skanavi, who had been resident in Germany since 15 October 1992, was stopped by police on 28 October

1993 while driving a car belonging to Guestrower. She was in possession of a driving licence issued by the Greek authorities but did not have a German driving licence.

12. In the light of those facts, the Public Prosecutor at the Landgericht (Regional Court) Berlin asked for fines of 15 per diem amounts of DM 200, making a total of DM 3 000, to be imposed on each accused.

13. The national court took the view that the accused had committed the offences with which they were charged as a result of carelessness, Mrs Skanavi having neglected to exchange her licence within one year of taking up normal residence in Germany. However, it considered that the German legislation in question might be at variance with Articles 6, 8a and 52 of the Treaty.

14. In this regard, the national court noted, inter alia, that authorization to drive a motor vehicle is under present circumstances an essential condition for the exercise of a trade or profession and that excessive requirements are for that reason liable to impair free movement. In that context, the obligation to exchange discriminates against nationals of other Member States who take up residence in Germany. Even though exchange of a licence is not subject to any special conditions, the holder of a driving licence issued by another Member State who drives a vehicle after the period set for exchanging licences has expired is treated in the same way as a person who has never held a driving licence or whose licence has been withdrawn. That person will thereby incur a custodial sentence or a fine and consequently acquire a criminal record, which might also have consequences for the exercise of his trade or profession, such as withdrawal of a concession on grounds of unreliability. Even if the obligation to exchange were justified on objective grounds, such as the need to check the authenticity of the driving licence or to make additional entries which may be required under German law, the penalties which may be imposed for the breach of such an obligation are, in the national court' s view, disproportionate to its gravity.

15. In view of the foregoing, the Amtsgericht Tiergarten, Berlin, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

"Are Articles 6, 8a and 52 of the EC Treaty to be interpreted as being incompatible with a provision of national law which requires a national driving licence issued by an EC Member State to be exchanged for a German driving licence within one year of the holder' s taking up normal residence in the Federal Republic of Germany, failure to do which will mean that driving a motor vehicle constitutes the offence of driving without a licence, punishable by up to one year' s imprisonment or a fine?" [.....]

22. Article 8a of the Treaty, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 52 of the Treaty. Since the facts with which the main proceedings are concerned fall within the scope of the latter provision, it is not necessary to rule on the interpretation of Article 8a.

23. So far as Article 52 is concerned, the Court has already held, at point 4 of its judgment in Case 16/78 Choquet [1978] ECR 2293, that national rules relating to the issue and mutual recognition of driving licences by the Member States exert an influence, both direct and indirect, on the exercise of the rights guaranteed by the provisions of the Treaty relating to freedom of movement for workers, to freedom of establishment and to the freedom to provide services. In view of the importance of individual means of transport, possession of a driving licence duly recognized by the host State may affect the actual pursuit by persons subject to Community law of a large number of occupations for employed or self-employed persons and, more generally, freedom of movement.

24. At point 7 of the same judgment, however, the Court also stated that, in view of the requirements of road safety, mere recognition of driving licences for the benefit of persons who elected to reside permanently within the territory of a Member State other than the State which issued a driving licence to them could not be contemplated unless the requirements for the issue of those driving licences were harmonized to a sufficient extent.

25. In those circumstances, it was for the Council to achieve that harmonization and to provide that driving licences issued by the Member States should be mutually recognized in order to remove the obstacles to the free movement of persons resulting from the obligation to obtain a driving licence issued by the host Member State.

26. Those obstacles will be totally removed only upon the application, as from 1 July 1996, of Directive 91/439, Article 1(2) of which provides for mutual recognition, without any formality, of driving licences issued by Member States. Furthermore, the obligation imposed on persons taking up residence in a Member State to exchange the licence issued by another Member State for a licence of the host State constitutes in itself an obstacle to the free movement of persons, as the Council points out in the preamble to Directive 91/439.

27. However, in view of the complexity of the matter and the differences between the legislation of the Member States, the Council was empowered to achieve the necessary harmonization progressively. It was therefore quite open to the Council to allow Member States temporarily to impose an obligation to exchange licences.

28. The answer to the first part of the question submitted must therefore be that, as Community law stands at present and prior to the implementation of Directive 91/439, Article 52 of the Treaty does not preclude a Member State from requiring the holder of a driving licence issued by another Member State to exchange that licence for a licence of the

host Member State within one year of taking up normal residence in that State in order to remain entitled to drive a motor vehicle there.

The penalties provided for in the event of breach of the obligation to exchange

29. Secondly, the national court asks whether Articles 6, 8a and 52 of the Treaty preclude the driving of a motor vehicle by a person who could have obtained a licence from the host State in exchange for the licence issued by another Member State but who did not make the exchange within the prescribed period from being treated as driving without a licence and thus rendered punishable by imprisonment or a fine.

30. For the reasons set out in paragraphs 20 to 22, it is necessary to rule only on the interpretation of Article 52.

31. Under the provisions of Directive 80/1263, a driving licence issued by a Member State is recognized by the other Member States in which the holder is not normally resident and, for one year, also in the State in which he takes up normal residence.

32. Although the holder may be required to have his licence exchanged in order to remain entitled to drive motor vehicles within the territory of the host Member State after the expiry of the one-year period, his original licence remains valid in the Member State which issued it and continues to be recognized by the other Member States.

33. Member States may indeed refuse to exchange licences in certain circumstances expressly set out in the Directive, but that possibility cannot affect the entitlement of licence holders to have their licences exchanged if there are no such exceptional circumstances.

34. It follows that the issue of a driving licence by a Member State in exchange for a licence issued by another Member State does not constitute the basis of the right to drive a motor vehicle in the territory of the host State, which is directly conferred by Community law, but evidence of the existence of such a right.

35. In those circumstances, the obligation to exchange driving licences which Member States may impose under the Directive is essentially a way of meeting administrative requirements.

36. In the absence of Community rules governing the matter, the Member States remain competent to impose penalties for breach of such an obligation. However, it follows from settled case-law concerning non-compliance with formalities for establishing the right of residence of an individual enjoying the protection of Community law that Member States may not impose a penalty so disproportionate to the gravity of the infringement that this becomes an obstacle to the free movement of persons; this would be especially so if the penalty consisted of imprisonment (see, in particular, Case C-265/88 Messner [1989] ECR 4209, paragraph 14). In view of the effect which the right to drive a motor vehicle has on the actual exercise of the rights relating to the free movement of persons, the same considerations must apply with regard to breach of the obligation to exchange driving licences.

37. Treating a person who has failed to have a licence exchanged as if he were a person driving without a licence, thereby causing criminal penalties, even if only financial in nature, such as those provided for in the national legislation in question in this case, to be applied, would also be disproportionate to the gravity of that infringement in view of the ensuing consequences.

38. As the national court has pointed out, a criminal conviction may have consequences for the exercise of a trade or profession by an employed or self-employed person, particularly with regard to access to certain activities or certain offices, which would constitute a further, lasting restriction on freedom of movement.

39. The answer to the second part of the question submitted by the national court must therefore be that, in view of the resultant consequences, such as may arise under the national legal system in question, Article 52 of the Treaty precludes the driving of a motor vehicle by a person who could have obtained a licence from the host State in exchange for the licence issued by another Member State but who did not make that exchange within the prescribed period from being treated as driving without a licence and thus rendered punishable by imprisonment or a fine.

On those grounds,
THE COURT,
in answer to the question referred to it by the Amtsgericht Tiergarten, Berlin, by order of 20 May 1994, rectified by order of 26 July 1994, hereby rules:
1. As Community law stands at present and prior to the implementation of Council Directive 91/439/EEC of 29 July 1991 on driving licences, Article 52 of the EC Treaty does not preclude a Member State from requiring the holder of a driving licence issued by another Member State to exchange that licence for a licence of the host Member State within one year of taking up normal residence in that State in order to remain entitled to drive a motor vehicle there.

2. In view of the resultant consequences, such as may arise in the national legal system in question, Article 52 of the Treaty precludes the driving of a motor vehicle by a person who could have obtained a licence from the host State in exchange for the licence issued by another Member State but who did not make that exchange within the prescribed period from being treated as driving without a licence and thus rendered punishable by imprisonment or a fine.

Case T-105/95.
Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 5 March 1997.
WWF UK (World Wide Fund for Nature) v Commission of the European Communities.
Transparency - Access to information - Commission Decision 94/90 on public access to Commission documents - Decision refusing access to documents on the grounds that they relate to the examination by the Commission of a possible infringement of Community law by a Member State - Exceptions relating to the public interest and to the institution's interest in the confidentiality of its proceedings - Extent of the obligation to give reasons.

Judgment
APPLICATION for the annulment of the Commission Decision of 2 February 1995 refusing the applicant access to Commission documents relating to the examination of a project to build an interpretative centre at Mullaghmore (Ireland) and, in particular, to those documents relating to the question as to whether structural funds could be used for that project,
THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
having regard to the written procedure and further to the hearing on 18 September 1997 gives the following Judgment

Legislative context

1 In the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 the Member States incorporated a Declaration (No 17) on the right of access to information in these terms:

`The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

2 At the close of the European Council held in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled `A Community close to its citizens' (Bull. EC 10-1992, p. 9), in which they stressed the necessity to make the Community more open. That commitment was reaffirmed by the European Council at Edinburgh on 12 December 1992 and the Commission was again invited to continue to work on improving access to the information available to Community institutions (Bull. EC 12-1992, p. 7).

3 In response to the Maastricht Declaration the Commission undertook a comparative survey on public access to documents in the Member States and in some non-member countries and the results of its survey were summarized in a communication addressed to the Council, the Parliament and the Economic and Social Committee on 5 May 1993 (93/C 156/05, OJ 1993 C 156, p. 5). In that communication the Commission concluded that there was a case for developing further the access to documents at Community level.

4 In furtherance of the above measures the Council and the Commission formulated and agreed a `Code of Conduct on public access to Commission and Council documents' (hereinafter the `Code of Conduct') and undertook severally to take steps to implement the principles thereby laid down before 1 January 1994.

5 Accordingly, in implementation of that agreement the Commission adopted, on 8 February 1994, on the basis of Article 162 of the EC Treaty, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (hereinafter `Decision 94/90') under Article 1 of which the Code of Conduct was formally adopted (OJ 1994 L 46, p. 58). The text of this Code is set out in an Annex to Decision 94/90.

6 The Code of Conduct as thus adopted by the Commission sets out a general principle in these terms:

`The public will have the widest possible access to documents held by the Commission and the Council.'

7 For those purposes the term `document' is defined in the Code of Conduct as meaning `any written text, whatever its medium, which contains existing data and is held by the Commission or the Council.'

8 After briefly setting out the rules governing the lodging and processing of requests for documents, the Code of Conduct describes the procedure to be followed, where it is proposed to reject a request, in these terms:

`Where the relevant departments of the institution concerned intend to advise the institution to reject an application, they will inform the applicant thereof and tell him that he has one month to make a confirmatory application to the institution for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

If a confirmatory application is submitted, and if the institution concerned decides to refuse to release the document, that decision, which must be made within a month of submission of the confirmatory application, will be notified in writing to the applicant as soon as possible. The grounds of the decision must be given, and the decision must indicate the means of redress that are available, i.e. judicial proceedings and complaints to the ombudsman under the

conditions specified in, respectively, Articles 173 and 138e of the Treaty establishing the European Community.'

9 The Code of Conduct describes the factors which may be invoked by an institution to ground the rejection of a request for access to documents in these terms:

`The institutions will refuse access to any document where disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

- the protection of the individual and of privacy,

- the protection of commercial and industrial secrecy,

- the protection of the Community's financial interests,

- the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.'

.....

Findings of the Court

53 It seems necessary to consider, in the first place, the legal force to be attributed to Decision 94/90, Article 1 of which adopted the Code of Conduct, and, secondly, the scope of the exceptions provided for in the Code.

54 It is clear, first of all, that Decision 94/90 constitutes the Commission's response to the calls made by the European Council to reflect at Community level the right of citizens to have access to documents held by public authorities, a right which is recognized in the domestic legislation of most of the Member States. So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, it falls to those institutions themselves to take measures within their powers of internal organization to enable them to respond to and to process such requests for access in a manner commensurate with the interests of good administration (see Case C-58/94 Netherlands v Council [1996] ECR I-2169, paragraphs 34 to 37) in respect of the corresponding decision adopted by the Council on 20 December 1993 (Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43), hereinafter `Decision 93/731').

55 By adopting Decision 94/90, the Commission has indicated to citizens who wish to gain access to documents which it holds that their requests will be dealt with according to the procedures, conditions and exceptions laid down for the purpose. Although Decision 94/90 is, in effect, a series of obligations which the Commission has voluntarily assumed for itself as a measure of internal organization, it is nevertheless capable of conferring on third parties legal rights which the Commission is obliged to respect.

56 Next, it is necessary to consider the scope to be given to the exceptions contained in the Code of Conduct. In that regard, it is important to note that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. In particular, the grounds for refusing a request for access to Commission documents, set out in the Code of Conduct as exceptions, should be construed in a manner which will not render it impossible to attain the objective of transparency expressed in the response of the Commission to the calls of the European Council (see paragraphs 2 and 54 above).

57 The Court considers that the Code of Conduct contains two categories of exception to the general principle of citizens' access to Commission documents and these correspond to the provisions of Article 4 of Decision 93/731.

58 According to the wording of the first category, drafted in mandatory terms, `the institutions will refuse access to any document where disclosure could undermine ... [in particular] the protection of the public interest (public security, international relations, monetary stability, court proceedings and investigations) ...' (see paragraph 9 above). It follows that the Commission is obliged to refuse access to documents falling under any one of the exceptions contained in this category once the relevant circumstances are shown to exist (see, in relation to the corresponding provisions of Decision 93/731, Case T-194/94 John Carvel and Guardian Newspapers v Council [1995] ECR II-2765, paragraph 64).

59 By way of contrast, the wording of the second category, drafted in discretionary terms, provides that the Commission `may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings' (see paragraph 9 above). It follows, accordingly, that the Commission enjoys a margin of discretion which enables it, if need be, to refuse a request for access to documents which touch upon its deliberations. The Commission must nevertheless exercise this discretion by striking a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations (see, in relation to the corresponding provisions of Decision 93/731, the judgment

in Carvel and Guardian Newspapers v Council, cited above, paragraphs 64 and 65).

60 The Court considers that the distinction between these two categories of exception in the Code of Conduct is explained by the nature of the interest which the categories seek respectively to protect. The first category, comprising the `mandatory exceptions', effectively protects the interest of third parties or of the general public in cases where disclosure of particular documents by the institution concerned would risk causing harm to persons who could legitimately refuse access to the documents if held in their own possession. On the other hand, in the second category, relating to the internal deliberations of the institution, it is the interest of the institution alone which is at stake.

61 The Commission is, however, entitled to invoke jointly an exception within the first category and one within the second in order to refuse access to documents which it holds, since no provision of Decision 94/90 precludes it from doing so. In effect, the possibility cannot be ruled out that the disclosure of particular documents by the Commission could cause damage both to interests protected by the exceptions of the first category and to the Commission's interest in maintaining the confidentiality of its deliberations.

62 Having regard to these factors, it is necessary to consider, secondly, whether the documents relating to an investigation into a possible breach of Community law, leading potentially to the opening of a procedure under Article 169 of the Treaty, satisfy the conditions which must be met for the Commission to be able to rely upon the public interest exception, which is one of the exceptions within the first category provided for in the Code of Conduct.

63 In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.

64 It is important, nevertheless, to point out that the Commission cannot confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court considers, in effect, that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure. It should indicate to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law.

65 The duty identified in the preceding paragraph does not, however, mean that the Commission is obliged in all cases to furnish, in respect of each document, `imperative reasons' in order to justify the application of the public interest exception and thereby risk jeopardizing the essential function of the exception in question, which follows from the very nature of the public interest to be protected and the mandatory character of the exception. It would be impossible, in practical terms, to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.

.....On those grounds,

THE COURT OF FIRST INSTANCE

(Fourth Chamber, Extended Composition)

hereby:

1. Annuls the decision of the Commission of 2 February 1995 refusing the applicant access to Commission documents relating to the examination of a project to build an interpretative centre at Mullaghmore (Ireland);

2. Orders the Commission to pay the costs of the applicant;

3. Orders the Kingdom of Sweden, the French Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

Judgment of the Court (First Chamber) of 8 September 2005.
Criminal proceedings against Syuichi Yonemoto.
Reference for a preliminary ruling: Korkein oikeus - Finland.
Approximation of laws - Machines - Directive 98/37/EC - Compatibility of national law requiring the importer to verify that machinery accompanied by an EC declaration of conformity is safe.
Case C-40/04.
after hearing the Opinion of the Advocate General at the sitting on 10 March 2005,
gives the following

Judgment
1. This request for a preliminary ruling concerns the interpretation of Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1), and of Articles 28 EC and 30 EC.

2. The reference has been made in the criminal proceedings brought against Mr Yonemoto, in his capacity as representative of the importer of a machine which caused an accident at work resulting in serious injuries to a user of that machine.

The legal framework

Community law

3. Directive 98/37 lays down the essential health and safety requirements that machines must satisfy. It replaces and codifies Council Directive 89/392/EEC of 14 June 1989 on the approximation of the laws of the Member States relating to machinery (OJ 1989 L 183, p. 9), frequently amended.

4. Article 2(1) and (2) of Directive 98/37 provides:

1. Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on the market and put into service only if they do not endanger the health or safety of persons ... when properly installed and maintained and used for their intended purpose.

2. This Directive shall not affect Member States' entitlement to lay down, in due observance of the Treaty, such requirements as they may deem necessary to ensure that persons and in particular workers are protected when using the machinery or safety components in question, provided that this does not mean that the machinery or safety components are modified in a way not specified in the Directive.'

.....

National legislation

14. Article 40 of the Law on safety at work (työturvallisuuslaki), in the version in force at the material time, reads as follows:

The manufacturer, importer or seller of a machine, tool or other technical device or the person who places such an object on the market or brings it into use must each ensure that:

(1) when the object is placed on the market or delivered for use in the country, it does not give rise to a risk of accident or sickness when used for the intended purpose;

(2) the object is designed, manufactured and if need be checked in accordance with separate provisions of laws or regulations; and

(3) the object is accompanied by the safety devices necessary for its ordinary use and the necessary markings and other declarations of its conformity with requirements.

Appropriate instructions for its installation, use and maintenance must be sent with the object. They must also include if need be instructions on cleaning, usual repairs and the rules and actions in usual breakdown situations. Those tasks must also be taken into account in assessing the need for safety devices.'

15. Pursuant to the Finnish Penal Code, a breach of those provisions, whether committed intentionally or negligently, is punishable under criminal law as a breach of safety at work, death caused by negligence, injury caused by negligence, death caused by gross negligence or injury caused by gross negligence.

16. Besides those criminal penalties, failure to comply with the obligations laid down in Article 40 of the Law on safety at work entails a liability to compensate for the damage caused, pursuant to the Law on compensation for damage (vahingonkorvauslaki).

The main proceedings and the questions referred for a preliminary ruling

17. The company Ama-Prom Oy, whose managing director is Mr Yonemoto, imports machinery, including hydraulic

press brakes. In 1995 Ama-Prom Oy imported into Finland a hydraulic press brake manufactured in France by the French company Amada Europe and sold it to the Finnish company Peltitarvike Oy.

.....

20. On 17 November 1998 Mr Raine Pöyry, an employee of Peltitarvike Oy, suffered a serious accident at his workplace while he was helping the foreman, Mr Urpo Pursiainen, to change the blades of the hydraulic press brake in question in the main proceedings. To change the blades, Mr Pursiainen had used the emergency stop button to cut off the current to the press brake. During that operation Mr Pöyry had accidentally touched the machine's foot pedal with his foot. Although the machine's current supply had been cut off by the emergency stop button, when its foot pedal was touched the machine made a rapid compressing movement, severing Mr Pöyry's eight fingers which were caught between the blades.

21. The käräjäoikeus, before which the matter was brought, sentenced Mr Yonemoto to a fine of 30 daily units for infringement of Article 40 of the Law on safety at work and negligently causing injury and ordered him to pay Mr Pöyry compensation, the total amount of which was EUR 26 953.80. That court also sentenced the representative of Peltitarvike Oy and Mr Pursiainen for being in breach of that law and for negligently causing injury, and also ordered them to pay Mr Pöyry compensation.

22. On appeal, Mr Yonemoto's sentence was upheld by the Helsingin hovioikeus (Court of Appeal of Helsinki). That court sentenced Mr Yonemoto to a fine of 50 daily units and ordered him to pay a total amount of EUR 21 908.16 by way of compensation.

23. The käräjäoikeus and the hovioikeus considered that Mr Yonemoto as representative of the importer of the machine was partly liable for the defects which contributed to Mr Pöyry's accident. According to those courts, an importer must ensure that machines supplied and used are designed and manufactured in accordance with the rules in force. To fulfil that obligation entirely, it was not enough that the CE marking was on the imported machine and that the manufacturer of the machine had given a written guarantee of the machine's conformity with the requirements in force.

24. Mr Yonemoto lodged an appeal on a point of law before the Korkein oikeus (Supreme Court) in which he claims that the criminal charges should be dismissed and that he should be released from the liability to pay compensation. In the alternative, he submits that the penalty and the amount of compensation which he was ordered to pay should be reduced.

……..

The questions referred for a preliminary ruling

Preliminary observations

27. As a preliminary point, it should be borne in mind that, in the context of a reference for a preliminary ruling, it is not for the Court to determine whether provisions of national law are compatible with Community law.

28. The national court is essentially asking the Court to specify, first, the obligations imposed by Directive 98/37 and Articles 28 EC and 30 EC on importers of machinery manufactured in one Member State and imported into another Member State and, second, the penalties which a Member State may impose on account of failure to comply with those obligations. It is appropriate first to examine the obligations of importers.

……..

The system of penalties

56. Second, it is appropriate to examine the question of civil and criminal penalties that national law may enact, pursuant to Community law, in the event that the obligations arising from Directive 98/37 are infringed.

57. Directive 98/37 does not impose any specific obligations on the Member States as regards the system of penalties. That does not mean, however, that national provisions which impose criminal penalties for infringements of legislation implementing that directive are incompatible with the latter (see, to that effect Joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 Gallotti and others [1996] ECR I-1435, paragraph 14 and case-law cited).

58. The Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 249 EC, to choose the most appropriate forms and methods to ensure the effectiveness of directives (Gallotti , paragraph 14).

59. Moreover, where a directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take

all measures necessary to guarantee the application and effectiveness of Community law. While the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and deterrent (Gallotti , paragraph 14).

60. It follows that a Member State is entitled to impose criminal penalties for failure to comply with legislation intended to implement Directive 98/37 if it considers that to be the most appropriate way of ensuring its effectiveness, provided that the penalties laid down are analogous to those applicable to infringements of national law of a similar nature and importance and are effective, proportionate and deterrent (see, to that effect, Gallotti , paragraph 15).

.....

On those grounds, the Court (First Chamber) hereby rules:

1. Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery precludes the application of national provisions which require the importer in a Member State of a machine manufactured in another Member State, bearing the CE marking and accompanied by an EC declaration of conformity, to ensure that that machinery meets the essential health and safety requirements laid down by that directive.

2. That directive does not preclude the application of national provisions which require the importer in a Member State of a machine manufactured in another Member State to:

- ensure, before the machinery is delivered to the user, that it bears the CE marking and is accompanied by the EC declaration of conformity translated into the language or one of the languages of the Member State into which the machinery is imported, and instructions translated into the language or languages of that State;

- provide, after the machinery has been delivered to the user, all appropriate information and cooperation to the national inspection authorities if it transpires that that machinery poses risks to safety or health, provided that such requirements do not amount to making the importer subject to the obligation to verify himself that the machinery complies with the essential health and safety requirements laid down by that directive.

3. Article 10 EC and the third paragraph of Article 249 EC must be interpreted as not precluding a Member State from imposing criminal penalties to ensure compliance with the obligations laid down by Directive 98/37, provided that those penalties are analogous to those applicable to infringements of national law of a similar nature and importance and are, in any event, effective, proportionate and deterrent.

In Case C-67/98,
REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between
Questore di Verona and Diego Zenatti
on the interpretation of the provisions of the EC Treaty concerning the freedom to provide services,
THE COURT,
after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,
gives the following
Judgment

1 By order of 20 January 1998, received at the Court on 13 March 1998, the Consiglio di Stato (Council of State) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of the provisions of the EC Treaty concerning the freedom to provide services to enable it to determine the compatibility of those provisions with national legislation which, subject to exceptions, prohibits the taking of bets and reserves to certain bodies the right to organise the taking of such bets as are authorised.

2. That question was raised in proceedings between the Questore di Verona (the police prosecuting authority of Verona) and Mr Zenatti concerning the prohibition imposed on the latter from acting as an intermediary in Italy for a company established in the United Kingdom specialising in the taking of bets on sporting events.

Legal background

3. In Italy, under Article 88 of Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (GURI No 146 of 26 June 1931, `the Royal Decree'), `[n]o licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is essential for the proper conduct of the competitive event'.

4. It is clear from the Italian Government's reply to the question put to it by the Court concerning the arrangements for applying the exception so provided for that bets may be placed on the outcome of sporting events taking place under the supervision of the Comitato Olimpico Nazionale Italiano (National Olympic Committee, `CONI') or on the results of horse races organised though the Unione Nazionale Incremento Razze Equine (National Union for the Betterment of Horse Breeds, `UNIRE'). The use of the funds collected in the form of bets and allocated to those two bodies is regulated and must in particular serve to promote sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities, and support equine sports and the breeding of horses. Under various legislative provisions adopted between 1995 and 1997, arrangements for and the taking of bets reserved to CONI and UNIRE may be entrusted, following tendering procedures and on condition of payment of the prescribed fees, to persons or bodies offering appropriate safeguards.

5. Article 718 of the Italian Penal Code makes it a criminal offence to conduct or organise games of chance and Article 4 of Law No 401 of 13 December 1989 (GURI No 401 of 18 December 1989) prohibits the unlawful participation in the organisation of games or betting reserved to the State or to organisations holding a State concession. Moreover, unauthorised gaming and betting are covered by Article 1933 of the Civil Code, according to which no action lies for the recovery of a gaming or betting debt. Nor, except in the event of fraud, can any sum paid voluntarily be reclaimed.

The main proceedings

6. Since 29 March 1997, Mr Zenatti has acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd (`SSP'), a licensed bookmaker. Mr Zenatti runs an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sends to London by fax or Internet forms which have been filled in by customers, together with bank transfer forms, and receives faxes from SSP for transmission to the same customers.

7. By decision of 16 April 1997 the Questore di Verona ordered Mr Zenatti to cease that activity on the ground that it was not one that could be licensed under Article 88 of the Royal Decree, since that provision allows betting to be licensed only where it is essential for the proper conduct of competitive events.

8. Mr Zenatti initiated proceedings for judicial review of that decision before the Tribunale Amministrativo Regionale (Regional Administrative Court), Veneto and applied for an interim order suspending its enforcement. On 9 July 1997 the Tribunale Amministrativo Regionale granted an interim order to that effect.

9. The Questore di Verona appealed to the Consiglio di Stato for that order to be set aside.

10. The Consiglio di Stato considers that the decision to be given calls for an interpretation of the Treaty provisions on the freedom to provide services. In its view, the principles expounded in the judgment of the Court of Justice in Case C-275/92 Schindler [1994] ECR I-1039 to the effect that those provisions do not preclude legislation like the United Kingdom legislation on lotteries, in view of the concerns of social policy and the prevention of fraud which

justify it, appear to be applicable by analogy to the Italian legislation on betting.

11. However, since the Community judicature has not given any judgment on legislation of that kind, the Consiglio di Stato, whose decisions are not open to appeal, considers that Article 177 of the Treaty requires it to seek a ruling from the Court of Justice. It therefore stayed proceedings pending a preliminary ruling from the Court on the following question:

`Do the Treaty provisions on the provision of services preclude rules such as the Italian betting legislation in view of the social-policy concerns and of the concern to prevent fraud that justify it?'

The question

12. The Italian Government and all the other Governments that have submitted observations, and also the Commission, contend that the Schindler judgment provides all that is needed for that question to be answered in the negative.

13. Mr Zenatti, on the other hand, contends that the taking of bets on sporting events cannot be equated with the running of lotteries, with which Schindler was concerned, in particular because bets do not amount to games of pure chance but require the person laying the bet to use his skill in predicting results. He also considers that the social-policy concerns and the concern to prevent fraud referred to by the national court are not sufficient to justify the legislation at issue in the main proceedings.

14. It must be borne in mind that, in paragraph 60 of Schindler, the Court laid emphasis on the moral, religious and cultural aspects of lotteries and other types of gambling in all the Member States. The general tendency of national legislation is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. The Court also observed that lotteries involve a high risk of crime and fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to players, particularly when they are operated on a large scale. They also constitute an incitement to spend which may have damaging individual and social consequences. A final consideration which, although it cannot in itself be regarded as an objective justification, the Court held to be relevant is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

15. In paragraph 61 of the judgment in Schindler the Court held that the special features of lotteries justify allowing national authorities a sufficient margin of appreciation to determine what is required to protect participants and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, taking into account the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. In such circumstances, it is for the national authorities to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

16. Even though the Schindler judgment concerns the organisation of lotteries, those considerations also apply, as is clear also from the very terms of paragraph 60 of that judgment, to other comparable forms of gambling.

17. It is true that in its judgment in Case C-368/95 Familiapress v Bauer Verlag [1997] ECR I-3689, the Court declined to treat certain games in the same way as the lotteries considered in Schindler. However, that case was concerned with magazine competitions involving crosswords or other puzzles in which a number of readers who had given correct answers received a prize following a draw. As the Court held in particular, in paragraph 23 of that judgment, such draws, which are organised on a small scale and in which the stakes are small, do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.

18. In this case, on the other hand, bets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences.

19. In those circumstances, the betting at issue in the main proceedings must be regarded as gambling of a kind comparable to the lotteries at issue in Schindler.

20. However, the present case differs from Schindler in at least two respects.

21. First, although the laws at issue in the two cases both impose a prohibition, subject to exceptions, upon the transactions involved, their scope is not the same. As the Advocate General observes in paragraph 24 of his Opinion, whilst the national legislation considered in Schindler involved a total prohibition on the type of gambling at issue, namely large lotteries, the legislation at issue in this case does not totally prohibit the taking of bets but reserves to certain bodies the right to organise betting in certain circumstances.

22. Second, as pointed out in some of the observations submitted to the Court, the Treaty provisions on the right of establishment may fall to be applied in a situation such as that at issue in the main proceedings in view of the nature of the relationship between Mr Zenatti and SSP, the company for which he acts.

23. On the latter point, however, since the question raised by the national court is limited to the provisions on the freedom to provide services, it is not appropriate to consider the possible applicability of other provisions of the Treaty.

24. As the Court held in Schindler, the Treaty provisions on the freedom to provide services apply, in the context of running lotteries, to an activity which enables people to participate in gambling in return for remuneration. Such an activity therefore falls within the scope of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) if at least one of the providers is established in a Member State other than that in which the service is offered.

25. In this case, the services at issue are provided by the organiser of the betting and his agents by enabling those placing bets to participate in a game of chance which holds out prospects of winnings. Those services are normally provided for remuneration consisting in payment of the stake and they are cross-frontier in character.

26. It is not disputed by the parties to the main proceedings, the various Governments which have submitted observations or the Commission that the Italian legislation, inasmuch as it prohibits the taking of bets by any person or body other than those which may be licensed to do so, applies without distinction to all operators who might be interested in such an activity, whether established in Italy or in another Member State.

27. However, such legislation, preventing as it does operators in other Member States from taking bets, directly or indirectly, in Italian territory, constitutes an obstacle to the freedom to provide services.

28. It is therefore necessary to consider whether that restriction on the freedom to provide services is permissible under the exceptions expressly provided for by the Treaty or is justified, in accordance with the case-law of the Court, by overriding reasons relating to the public interest.

29. Articles 55 of the EC Treaty (now Article 45 EC) and 56 of the EC Treaty (now, after amendment, Article 46 EC), which are applicable in this area by virtue of Article 66 of the EC Treaty (now Article 55 EC), allow restrictions justified by a connection, even if occasional, with the exercise of official authority or for reasons of public policy, public security or public health. Moreover, according to the case-law of the Court (see, to that effect, Case C-288/89 Collectieve Antennevoorziening Gouda and Others [1991] ECR I-4007, paragraphs 13 to 15), 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, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.

30. According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in Schindler. The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.

31. As the Court acknowledged in paragraph 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, paragraph 28, Case 220/83 Commission v France [1986] ECR 3663, paragraph 20, and Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.

32. As noted in paragraph 21 of this judgment, the Italian betting legislation differs from the legislation at issue in Schindler, in particular in that it does not totally prohibit the transactions at issue but reserves them for certain bodies under certain circumstances.

33. However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

34. In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.

35. As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 Läärä and Others [1999] ECR I-0000 in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which

it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.

36. However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

37. It is for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.

38. Accordingly, the answer to the question put by the national court must be that the Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

Decision on costs

On those grounds,

THE COURT,

in answer to the question referred to it by the Consiglio de Stato by order of 20 January 1998, hereby rules:

The EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.