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Centre for European Legal Studies (CELS) of the Faculty of Law, University of Cambridge; the Supreme Court (Curia) and Constitutional Court of Hungary, and Pázmány Péter Catholic University.

MOOT BUNDLE

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D. OTHER MATERIALS

Although the rules prevent competitors from citing authorities other than those in this bundle, should further background information be sought to prepare the case the following websites may be useful:
http://curia.europa.eu
http://www.amicuria.org

Equally, competitors may find it helpful to look at the following documents concerning the CJEU's rules and procedures:
CJEU Rules of procedure: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf
CJEU Statute: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf

Notes for the guidance of Counsel in written and oral proceedings before the CJEU:
http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf

PART A. PRELIMINARIA

European Mega League Company s.l. (Applicant)

v.

World Football Association and European Football Association (Respondent)

Facts

1. The World Football Association (WFA) is the governing body of world football. It was created in 1904 and is headquartered in Steinland, an EU country. WFA organises various international club and national team competitions, including the Global Club Cup (an annual football competition among the winners of club competitions organised by the Confederations) and the Global Cup (a quadrennial football competition among the qualified national teams worldwide). WFA's primary members are national federations of football associations and confederations of football associations (*e.g.*, European Football Association). WFA's objectives are stipulated in Article 2 of the WFA Statutes.

2. The European Football Association (EFA) is the governing body of European football. It was created in 1954 and is headquartered in Steinland. EFA organises various international club and national team competitions, including the Winners League (an annual football competition held among the winners of European national leagues and other qualified clubs[1]) and the Euro Nations Cup (quadrennial football competition among the qualified European national teams). EFA is a member of the WFA. EFA's objectives are stipulated in Article 2 of the EFA Statutes.

3. National federations (*e.g.*, Football Association of Iberland, Football Association of Burlandy, Football Association of Esland) are the governing bodies for football in their respective EU countries. They are responsible for administering and organising officially sanctioned football leagues, tournaments, clubs, and national teams.

4. Professional football clubs are indirect members of WFA and EFA.

5. The National federations, confederations, and clubs are bound by the WFA's statutes and regulations, and must comply with the regulations and decisions of the WFA. Article 20 of the WFA Statutes provides as follows:

   "*Clubs, leagues, or other entities affiliated to a member federation shall be subordinate to that federation and may only exist with the consent of that federation. The statutes of the member federation shall establish the scope of competence and the rights and duties of these entities. The member federation shall approve the statutes and bylaws of these entities.*"

6. Article 22(3) of the WFA Statutes provides as follows:

   "*Each confederation shall have the following rights and obligations:*

   a) to comply with and enforce compliance with the Statutes, regulations and decisions of WFA;

   b) to work closely with WFA in every domain so as to achieve the objectives stipulated in

[1] The number of qualified football clubs is based on the quality of a national football league. For instance, the top 4 clubs of the premier league of Esland qualify for the following year's edition of the Winners League.

article 2 and to organise international competitions;

[…]

e) to ensure that international leagues or any other such groups of clubs or leagues shall not be formed without its consent and the approval of WFA;

[…]

k) with the mutual cooperation of WFA, to take any action considered necessary to develop the game of football on the continent concerned, such as arranging development programmes, courses, conferences, etc.;

[…]."

l) with the mutual cooperation of WFA, to take all actions necessary to ensure that WFA stays neutral, politically and religiously, and that no kind of demonstration or political, religious or racial propaganda is permitted in any venues or other areas.

7. Additional provisions of the WFA Statutes relevant for the issues at hand include Articles 67 to 73.

8. The national leagues and clubs are bound by EFA's statutes and regulations, and must comply with regulations and decisions of EFA. Article 50 of the EFA Statutes provides as follows:

"*Club Licensing System*

1 The Executive Committee shall define a club licensing system and in particular:

a) the minimum criteria to be fulfilled by clubs in order to be admitted to EFA competitions;

b) the licensing process (including the minimum requirements for the licensing bodies);

c) the minimum requirements to be observed by the licensors.

2 It shall be a condition of entry into competition that each Member Association and/or club affiliated to a Member Association agrees to comply with the Statutes, and regulations and decisions of competent Organs made under them."

9. Additional provisions of the EFA Statutes relevant for the issues at hand include Articles 49 and 51.

10. Football competitions can only be organised within the European Economic Area (EEA) with the authorisation of the WFA and EFA. The WFA and EFA have been organising, regulating, and commercialising football competitions for decades. No entity currently competes with the WFA and EFA in this respect.

11. Sussudio Dirdam and Abacab Etnacila are well established football clubs in Iberland. Dinamo Emor is a football club established in Burlandy. Over the past few years, all three clubs were regularly subject to penalties for non-compliance with Article 22(3)(l) of the WFA Statutes during EFA Winners League matches by allowing their football players to wear religious symbols and make religious gestures when on the pitch. For the same reason, individual players of the three clubs were also penalised by being disqualified from playing in 2 subsequent matches. According to the EFA, which imposed the sanctions, such acts contravened the obligation, arising from the WFA Statutes (which the EFA must observe), to remain neutral, politically and religiously.

12. Since 2010, rumours have circulated about certain elite European football clubs wishing to establish a new European football competition, to be organised separately and in addition to those already organised by EFA. This idea was dubbed the European Mega League (EML). The idea

was formally abandoned by the clubs in 2014, when EFA announced that it would impose fines on any European football club seeking to become involved in the EML. However, since then, rumours about the creation of the EML have continued. Whenever such plans were reported in the media, EFA consistently rejected the idea of another competing football league in Europe. Indeed, at the annual general meeting of the WFA in December 2019, a spokesman for the WFA stated that the WFA would never contemplate giving permission for a new pan-European football league, in light of the experience seen in other sports, such as European basketball, where competing regional projects largely "monopolised" the attention of the fans which affected the financing available from sponsorship and broadcasting, leaving national leagues and national/local clubs fighting for survival.

13. In the course of 2020, media speculation intensified to the effect that leading European clubs were seeking to form the EML to compete with the EFA's Winners League. On January 21, 2021, the WFA and EFA issued the following joint statement in response:

"*In light of recent media speculation about the creation of a closed European 'Mega League' by some European clubs, WFA and EFA (and the other five confederations) once again would like to reiterate and strongly emphasise that such a competition would not be recognised by either WFA or the respective confederation. Any club or player involved in such a competition would as a consequence not be allowed to participate in any competition organised by WFA or their respective confederation.*

As per the WFA and confederations' statutes, all competitions should be organised or recognised by the relevant body at their respective level, by WFA at the global level and by the confederations at the continental level. In this respect, the confederations recognise the WFA Club Global Cup, in its current and new format, as the only worldwide club competition while WFA recognises the club competitions organised by the confederations as the only club continental competitions.

The universal principles of sporting merit, solidarity, promotion and relegation, and subsidiarity are the foundation of the football pyramid[2] *that ensures football's global success and are, as such, enshrined in the WFA and confederation statutes. Football has a long and successful history thanks to these principles. Participation in global and continental competitions should always be won on the pitch.*"

14. The European Mega League Company s.l. ("EML-Co") is a limited liability company registered in Iberland. It was incorporated on April 18, 2021 with twelve Founding Clubs as members from three EU Member States, 3 clubs from Iberland, 3 clubs from Burlandy, and 6 clubs from Esland.

15. The EML has three main objectives:

- To organise a European Mega League which will become the first European football competition outside EFA, to be held on an annual basis and with the objective of maximising the possibilities for players and clubs of the highest sporting level to compete. EML asserts that such competition would not prevent participating clubs from participating in their respective national competitions and domestic leagues.
- To become a "green" football competition which supports long-term environmental and sustainability initiatives that will facilitate the future progress and sustainability of European football.
- To become an "open" football competition which not only permits the demonstration of

[2] The system consists of a pyramid of football leagues, bound together by the principle of promotion and relegation. A certain number of the most successful clubs in each league can be promoted to a higher league, whilst those that finish the season at the bottom of their league can be relegated to a lower league. This is combined with organised solidarity mechanisms between the different levels, whereby leading clubs financially support lower clubs.

political, religious or racial viewpoints but also acts on behalf of football players - as a collective group - to ensure that they are not unlawfully discriminated against in any way.

16. The EML model includes a semi-open participation system defined in the Shareholders and Investment Agreement: (i) 12 to 15 European clubs will be permanent members of the EML (i.e., without a risk of being relegated from the EML); and (ii) a definite number of additional clubs will be considered "qualified clubs" selected through a selection process with fair and transparent criteria.

17. On April 18, 2021, the EML project was publicly announced though the following press release:

"*LEADING EUROPEAN FOOTBALL CLUBS ANNOUNCE NEW EUROPEAN MEGA LEAGUE COMPETITION*

Twelve of Europe's leading football clubs have today come together to announce they have agreed to establish a new mid-week competition, the European Mega League, governed by its Founding Clubs.

Going forward, the Founding Clubs look forward to holding discussions with EFA and WFA to work together in partnership to deliver the best outcomes for the new European Mega League and for football as a whole.

The formation of the European Mega League comes at a time when the global pandemic has accelerated the instability in the existing European football economic model. Further, for a number of years, the Founding Clubs have had the objective of improving the quality and intensity of existing European competitions throughout each season, and of creating a format for top clubs and players to compete on a regular basis. European Mega League is dedicated to equality, non-discrimination, freedom of expression and religion. It will not follow the WFA model of political neutrality but allow football players to wear religious symbols and to make religious gestures during matches.

The pandemic has shown that both a strategic vision and a sustainable commercial approach are required to enhance value and support for the benefit of the entire European football pyramid. In recent months, extensive dialogue has taken place with football stakeholders regarding the future format of European competitions. The Founding Clubs believe the solutions proposed following these talks do not solve fundamental issues, including the need to provide higher-quality matches and additional financial resources for the overall football pyramid, as well as need to invest in research as to potential technological or environmental benefits that will assist the future progress and sustainability of European football.

Competition Format

20 participating clubs with 15 Founding Clubs and a qualifying mechanism, based on achievements in the prior season, allowing for a further five teams to qualify annually.

As soon as practicable after the start of the men's competition, a corresponding women's league will also be launched, helping to advance and develop the women's game.

The new annual tournament will provide significantly greater economic growth and support for European football via a long-term commitment to uncapped solidarity payments which will grow in line with the league's revenues. These solidarity payments (i.e., from leading clubs to lower clubs) will be substantially higher than those generated by the current European competition and are expected to be in excess of €10 billion during the course of the initial commitment period of the Clubs. Moreover, 10% of the solidarity payments fund will be allocated to an R&D fund to promote and implement long-term environmental and sustainability initiatives that will facilitate the future progress and sustainability of European football. In addition, the competition will be built on a sustainable financial foundation with all

Founding Clubs signing up to a spending framework. In exchange for their commitment, Founding Clubs will receive an amount of €3.5 billion solely to support their infrastructure investment plans and to offset the impact of the COVID pandemic."

18. The EML project obtained initial investment and financing from a syndicate of banks in the amount of €4 billion. The investment, and broader implementation of the EML project, is subject to the following two alternative conditions precedent: (i) recognition of the EML by WFA and/or EFA as a new competition compatible with WFA statutes and/or EFA statutes; or (ii) obtaining legal protection from judicial courts and/or administrative bodies to allow the participation of the Founding Clubs in the EML in order to maintain participation in their respective leagues, competitions, and national tournaments.

19. On April 18, 2021, EFA, and the national football federations of Iberland, Burlandy, and Esland issued the following joint statement:

"*The clubs concerned will be excluded from any further competition at domestic, European or world level and their players may be deprived of the opportunity to represent their national teams.*"

20. On April 20, 2021, the European federation of professional football leagues (i.e., the sole, independent body representing football clubs at European level) announced its members' unanimous support for the WFA and EFA to undertake any and all appropriate measures to prevent the entry into operation of the EML competition and/or to adopt the disciplinary measures announced by WFA and EFA with respect to those clubs and/or players who participate in the new competition.

21. On April 22, 2021, nine of the twelve Founding Clubs withdrew as members of EML-Co. Two clubs from Iberland (Sussudio Dirdam and Abacab Etnacila) and one club from Burlandy (Dinamo Emor) remained as members of EML-Co.

22. On April 25, 2021, EML-Co sent a letter to the WFA, EFA, and national football federations in Iberland, Burlandy, and Esland requesting the recognition of the EML by WFA and/or EFA as a new competition compatible with WFA statutes and/or EFA statutes. The letter further noted that refusing to grant the request would infringe EU law for the following reasons:

- The WFA and EFA statutes imply the existence of a decision of associations of undertakings within the meaning of Article 101 TFEU (*see e.g.*, Case T-93/18 *ISU*; Case C-49/07 *MOTOE*; COMP 37.398 *UEFA Champions League*).
- The application of the WFA and EFA statutory regulations against the EML-Co have an anti-competitive object or effect *ex* Article 101 TFEU, as they prevent or restrict competition in the relevant market for the organisation of international football club competitions and the commercialisation of the rights associated with such competitions on the European continent. They subject the creation of alternative sports competitions to authorisation without any limit or objective and transparent procedure (see also Case T-93/18 *ISU;* Case C-49/07 *MOTOE*; C-202/88 *France v Commission*; Case C-18/88 *GB-Inno-BM*).
- WFA and EFA hold a dominant position in the relevant market for the organisation of international football club competitions and the commercialisation of the rights associated with such competitions on the European continent within the meaning of Article 102 TFEU (*see e.g.*, Case T-93/18 *ISU;* Case C-49/07 *MOTOE*).
- WFA and EFA abused their dominant position by threatening the clubs and players with sanctions (*see also* Case T-93/18 *ISU;* Case C-49/07 *MOTOE*; C-202/88 *France v Commission*; Case C-18/88 *GB-Inno-BM*).

- The measures announced by WFA and EFA and the application of their statutes may entail, de facto, the imposition of unjustified and disproportionate restrictions of competition in the EU internal market. The statutory rules of WFA and EFA do not contain provisions to ensure general interest objectives in the granting of prior authorisation regarding the organisation of football competitions. Nor do they contain objective and transparent criteria that avoid the existence of discriminatory effects or conflicts of interest with WFA and EFA in the refusal to authorise the organisation of alternative sports competitions (see also Case C-390/99 *Canal Satélite Digital Case*; Cases C-358/93 and C-416/93 *Bordessa and Others*; Case C-205/99 *Analir and Others*; and Case C-157/99 *Smits and Peerbooms*).

23. The letter also stated that, although Article 22(3)(l) of the WFA Statutes (which EFA must observe) guarantees neutrality, in practice EFA applies its rules selectively. While Sussudio Dirdam, Abacab Etnacila, Dinamo Emor, and their players were penalised, many other football clubs, whose players wore religious symbols and made religious gestures, escaped any sanctions. EML argued that EFA targets selected religions, and, by the same token, it discriminates against players on the ground of religion. This amounts to a breach of Article 2, read in conjunction with Article 3(1)(c), of Directive 2000/78 and Articles 10(1) and 21(1) of the Charter of Fundamental Rights. EML-Co referred in this regard to a BBC Panorama television programme, broadcasted on May 3, 2021, which included an interview with a former EFA official, who claimed that there is a well-established hidden leniency agenda towards selected religions and beliefs.[3] EML-Co added that its Statutes do not contain prohibitions similar to Article 22(3)(l) of the WFA Statutes. It permits the players to wear and display religious symbols or religious outfits. It also permits them to take the knee or wear armbands of their choice to signify their support for political causes or movements.

24. On May 1, 2021, WFA and EFA sent a letter to the EML-Co, denying any violation of EU law for the following reasons:

- WFA and EFA accept and do not challenge that they are subject to Articles 101 and 102 TFEU in so far as they constitute an association of undertakings within the meaning of Article 101 TFEU and possess, individually or jointly, a dominant position within the meaning of Article 102 TFEU. However, sporting associations may avoid competition law scrutiny where their actions relate to the organisation of their sport through rules, and in particular where such rules pursue a legitimate objective (as further explained below), the restrictive effects of such rules are inherent in the pursuit of that objective, and the rules are proportionate to achieving that objective (*Wouters, Meca-Medina*).

- WFA's and EFA's statutes and regulations, and sanctions on footballers for participation in non-authorised competitions organised by third parties are compatible with the CJEU case law in *MOTOE*, *Wouters*, and *Gøttrup- Klim* and are essential in order to maintain the pyramid structure of football competitions that ensure solidarity and support within

[3] The BBC panorama programme investigated the manner in which certain players and teams had been sanctioned for allegedly infringing the EFA's neutrality rules. In particular it produced statistics indicating that between 2010-2021 the EFA had received 1000 complaints alleging a breach of the neutrality rule:
a) Of the complaints made:
- 80% alleged that players had displayed religious symbols,
- 10% alleged that players had worn armbands supporting an specific political cause or movement,
- 10% alleged that clubs had publicly displayed a logo or other advertisement that might indicate support of a political cause or movement.

b) Of the complaints made:
- 10% had been made against clubs/ players in Iberland and Burlandy, of which some 90% had been upheld.
- In contrast 90% of complaints were made against teams from the remaining EU countries within EFA, of which only 10% had been upheld.

all levels of football (i.e., collected funds will be distributed amongst all clubs (irrespective of wealth status) as well as to junior football, women's football, amateurs, etc.) (see also Article 165 TFEU and Article 4 of the European Commission's White Paper on Sport).

- The Court of Justice's recent judgment in the *ISU* case is not relevant to these proceedings due to fundamental factual and legal differences in the status and the rules of the ISU and WFA/EFA.
- WFA and EFA may pursue legitimate objectives, including the promotion of financial solidarity and equality between clubs (see also COMP 37.398 *UEFA Champions League*).
    - The EML would have restricted or distorted the degree of competition that currently exists in European football and limited the top levels of success on an ongoing basis (and therefore revenue) to a select few clubs.
    - This distortion would have also had an impact on national leagues. The EML format would have made it much more difficult for other clubs to compete with the EML-Co Founding Clubs for players, giving those EML clubs an advantage in their national leagues, where they intend to continue to play. This would in turn lead the EML clubs to securing a greater share of the available revenues (from national leagues as well as the EML) to the detriment of non-EML clubs.
    - The stated rationale for establishing the EML is unconvincing given the impending reform of the EFA Winners League, which will enter into force in the 2024/2025 football season. The reform will increase the total number of teams participating in the Winners League from 32 to 36 and transform the traditional group stage (i.e., where the total number of teams are divided into sub-groups (Group A, B, C, etc.) and play against other members of that Group) to a single league stage, involving all participating teams. Every team which qualifies for the EFA Winners League would be guaranteed a minimum of 10 league stage games against 10 different opponents (5 home games, 5 away games) rather than the previous 6 matches (i.e., playing home and away against 3 teams), which is how the traditional group stage is currently organised. From the 2024/25 season, the top 8 sides in the single league will qualify automatically for the knockout stage, while the teams finishing 9th to 24th in that single league will compete in a two leg play-off (i.e. playing the same team both home and away) to secure their path to the last 16 of the competition.
- EFA takes its neutrality policy very seriously and follows Article 22(3)(l) of the WFA Statutes (which it must observe) in scrupulous fashion. The aforementioned BBC Panorama programme broadcasted on May 3, 2021, included an interview with a disgruntled former EFA official, who had been dismissed for corruption and dissemination of inaccurate information, in the hope of discrediting EFA.
- Even if there were grounds to claim discrimination on grounds of religion (which EFA denies), EML lacks the necessary locus standi to initiate a claim under Article 9(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. According to Article 2 of Iberland *Equality Act 2010*:

  "Victims of discrimination have the locus standi to submit actions to courts in Iberland."

  Iberland Equality Act does not provide for locus standi of persons who are not victims

or other institutions, bodies, and organisations. Even if the law of Iberland were to be in breach of Directive 2000/78/EC, the latter is not capable of producing horizontal direct effect. Additionally, given that the EML-Co's primary concern is to organise a football competition as a commercial venture, it would lack the necessary legitimate interest in challenging alleged discrimination against football players, whether individually or collectively.

25. On May 2, 2021, six clubs from Esland, that had previously withdrawn as EML-Co members submitted to a settlement with the Esland League, paying a combined financial penalty of EUR 22 million. The Esland League also informed these clubs that each of them remained liable to a EUR 25 million penalty and a 30-point deduction from their position in the Esland League should they agree to rejoin the EML project in the future.

26. In light of these facts, the EML-Co decided that it needed to take a firm stand on behalf of its remaining member teams and their players against the discrimination they suffered when EFA disciplined them for displaying religious symbols during a football match. Accordingly, on May 4, 2021 EML-Co sought to initiate an action against WFA and EFA before the EFA Tribunal, on behalf of (and with the consent of) those players; and their respective football clubs,who felt they had been the victims of religious discrimination.

27. The EFA Tribunal ("EFAT") is located in Iberland and was set up by EFA as its arbitration tribunal with exclusive and compulsory jurisdiction in any and all disputes between (i) EFA and any European professional football clubs; (ii) European football clubs; and (iii) any European football club and its professional staff (including football players), provided that the dispute concerns the application of rules laid down by or resulting from the application of the EFA Statutes. It also has discretion to hear disputes involving other parties, provided that they consent to the EFAT's jurisdiction. The EFA Tribunal comprises a closed list of arbitrators appointed by EFA Members. Every EFA member is entitled to nominate one person to be appointed as an EFA Tribunal arbitrator. Such appointment is conditional upon the candidate first being approved by the common accord of all EFA members.

28. The EFAT is financed from the EFA's budget (which, in turn, is partly financed by the national football federations). Organisationally, the EFAT's Secretariat is a separate unit within the Legal Department of EFA's General Secretariat.

29. Based on Iberland's *Courts Act 2005*, the Minister of Justice adopted a regulation listing all courts and tribunals of Iberland. It includes the EFA Tribunal among other domestic courts, though the legal order of Iberland is silent on its regulation, leaving the details for EFA to decide. Pursuant to the EFA Tribunal's Statutes, the Tribunal shall decide any dispute according to the law applicable in the place of its seat, which would include EU law.

30. When the EFA Tribunal received the request for arbitration from EML-Co, it refused to accept that EML-Co had the necessary *locus standi* to directly initiate a claim against the WFA and EFA. It also refused to allow EML-Co to participate in any way in the proceedings on the basis that it had no legitimate interest in the outcome of proceedings alleging religious discrimination of individual players of various football clubs.

31. Following the EFA Tribunal's refusal to allow ENL-Co to participate in the proceedings, the players who alleged that they had been the victims of religious discrimination, joined by their respective clubs, initiated the claim against the EFA directly. They sought a declaration that Iberland's *Equality Act 2010* is incompatible with Article 9(2) of Directive 2000/78 as it limits the *locus standi* to bring cases to national courts only to victims of discrimination. Furthermore, they claimed that EML-Co should be recognised as having locus standi and a legitimate interest to bring a claim based on the direct effect of Article 2, read in the light of Article 3(1)(c), of Directive 2000/78 and Articles 21(1) and 47 of the Charter of Fundamental Rights (as per cases

NH, *Vera Egenberger*). Furthermore, they sought a declaration that the manner in which Article 22(3)(l) of the WFA Statutes has been enforced is incompatible with Article 2 read in conjunction with Article 3(1)(c) of Council Directive 2000/78/EC of 27 November 2000 and Article 10(1) and Article 21(1) of the EU Charter of Fundamental Rights.

32. Having heard the parties, the EFA Tribunal decided to proceed with a reference for a preliminary ruling to the Court of Justice. The following questions were submitted to the Court of Justice by the EFA Tribunal:

    (1) Is the EFA Tribunal a court or tribunal within the meaning of Article 267 TFEU, so that it is entitled, or obliged, to request preliminary references on EU law from the CJEU?

    (2) If question 1 above is answered in the affirmative, is Article 9(2) of Council Directive 2000/78/EC of 27 November, read in conjunction with Article 21(1) and Article 47 of the EU Charter of Fundamental Rights, directly effective, so that a body such as EML-Co should be entitled to represent a group of complainants in order to bring an action before the EFA Tribunal?

    (3) Is the manner in which Article 22(3)(l) of the WFA Statutes has been enforced (as described in the above summary of the main proceedings) incompatible with Article 2, of Council Directive 2000/78/EC of 27 November 2000, read in conjunction with Article 3(1)(c) of that Directive, and Article 10(1) and Article 21(1) of the EU Charter of Fundamental Rights and is Article 2 capable of horizontal direct effect?

33. EFA strongly rejected the EFA Tribunal's conclusion that it had jurisdiction to refer a request for a preliminary reference to the CJEU.

34. On May 5, 2021, on the advice of its lawyers, EML-Co decided to initiate a separate action against WFA and EFA before the District Court in Millsad, Iberland, seeking declaratory and injunctive remedies, in particular:

    - A declaration that articles 22, 67, 68, 79, 71, 72 and 73 of the WFA Statutes, and articles 49 and 51 of the EFA Statutes are incompatible with Article 101 TFEU insofar as they require prior authorisation for any third-party entity to establish a pan-European club competition.
    - A declaration that the WFA and EFA have abused their dominant position in breach of Article 102 TFEU insofar as they threaten with sanctions the clubs participating in the EML and/or those clubs' players.
    - An order that the WFA and EFA cease and desist their anticompetitive conduct and any measures that directly or indirectly impede or hinder the establishment and development of the EML and the participation of clubs and players in it.

35. On June 11, 2021, the district court in Millsad, Iberland, decided to stay the proceedings and submit a request for a preliminary ruling to the CJEU.

36. The District Court in Millsad, Iberland submitted the following questions to the Court of Justice:

    (1) Is Article 101(1) TFEU to be interpreted as prohibiting the WFA and EFA from including provisions in their statutes which require their prior authorisation for any third-party entity to establish a pan-European club competition, such as that at issue in the main proceedings?

(2) If question 1 above is answered in the affirmative, is Article 101 TFEU to be interpreted as meaning that those restrictions on competition benefit from the exception provided for in Article 101(3) TFEU?

(3) Is Article 102 TFEU to be interpreted as meaning that it prohibits the WFA and/or EFA from threatening with sanctions any clubs and/or players which participate in the EML?

(4) If question 3 above is answered in the affirmative, is Article 102 TFEU to be interpreted as meaning that such conduct is objectively justified?

37. At the Registry of the Court of Justice it was noted that two separate references had been submitted to the Court. In view of the fact that the cases involved identical parties and arose from the same set of facts, the Court decided, of its own motion, to join the two actions.

38. Having joined the two cases, the Article 267 reference pending before the CJEU will consider the following questions (and the numbering of these questions is the numbering referred to in the CEEMC instructions provided to teams about which questions shall be mooted on which day):

(1) Is the EFA Tribunal a court or tribunal within the meaning of Article 267 TFEU, so that it is entitled, or obliged, in circumstances such as those in the main proceedings, to request a preliminary reference from the CJEU?

(2) If question 1 above is answered in the affirmative, is Article 9(2) of Council Directive 2000/78/EC of 27 November, read in conjunction with Article 21(1) and Article 47 of the EU Charter of Fundamental Rights, directly effective, so that a body such as EML-Co should be entitled to represent a group of complainants in order to bring an action before the EFA Tribunal?

(3) If question 1 above is answered in the affirmative, is Article 2 capable of horizontal direct effect and, if so, is the manner in which Article 22(3)(l) of the WFA Statutes has been enforced (as described in the above summary of the main proceedings) incompatible with Article 2, of Council Directive 2000/78/EC of 27 November 2000, read in conjunction with Article 3(1)(c) of that Directive, and Article 10(1) and Article 21(1) of the EU Charter of Fundamental Rights?

(4) Is Article 101(1) TFEU to be interpreted as prohibiting the WFA and EFA from including provisions in their statutes which require their prior authorisation for any third-party entity to establish a pan-European club competition, such as that at issue in the main proceedings?

(5) If question 4 above is answered in the affirmative, is Article 101 TFEU to be interpreted as meaning that those restrictions on competition benefit from the exception provided for in Article 101(3) TFEU?

(6) Is Article 102 TFEU to be interpreted as meaning that it prohibits the WFA and/or EFA from threatening with sanctions any clubs and/or players which participate in the EML?

(7) If question 6 above is answered in the affirmative, is Article 102 TFEU to be interpreted as meaning that such conduct is objectively justified?

Central & Eastern European Moot Competition

COMPETITION RULES

1. Competition and important dates:

This twenty-seventh edition of the competition takes place in Budapest at the Hungarian Supreme Court (Curia) and Constitutional Court. It is co-hosted by Pázmány Péter Catholic University.

The CEEMC competition was first held in 1995 and, since then, has been held in multiple cities and countries throughout Central and Eastern Europe. The CEEMC enjoys extremely close links with many of the judges, Advocates General and referendaires of the Court of Justice of the European Union (CJEU), some of whom are regular members of the CEEMC's judicial panel. We celebrated the 25th anniversary of the competition at the CJEU in Luxembourg in May 2019. After being forced to cancel the 2020 event and holding the event online in 2021, due to the coronavirus pandemic, we look forward to a return of face-to-face mooting in May 2022!

The CEEMC is held under the auspices of the University of Cambridge and the Court of Justice of the European Union, both of which host the best speakers/team. The participating teams and mooters have included *inter alia* those from Armenia, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Lithuania, Latvia, Kazakhstan, Hungary, Malta, Moldova, Poland, Romania, Russia, Slovak Republic, Slovenia, Turkey and Ukraine.

The CEEMC question, which is prepared by a committee of organisers and external experts (including from the CJEU itself) aims to reproduce, as closely as possible, the discussion and argument of a genuine preliminary referral to the CJEU. The bundle of supporting materials and authorities which is provided alongside the CEEMC question includes all of the authorities to which that teams are permitted to refer to during the competition. In other words, no reference can be made in a team's written or oral pleadings to any legal sources other than those which are found in the bundle.

If your team has any questions regarding the competition, please email us at: organisers@ceemc.co.uk

IMPORTANT DATES:
To be eligible to participate, teams must register online at the CEEMC website or by sending an e-mail to the organising committee (organisers@ceemc.co.uk). They must also pay the competition fees and submit written pleadings. The relevant dates for each step are given below:

Date for registering a competing team: 24th January 2022
NB. The organising committee retains a discretion to consider applications from teams who have not registered their team by this date. To enquire about the possibility of late registration, please contact us at organisers@ceemc.co.uk as soon as possible, entitling your mail **'CEEMC- Late registration request'.** We will inform you of our decision by email.

Final date for providing organisers with proof of fees payment: 7th March 2022 (see section 5 below for details of the organisers' bank details)

Final date for submitting written pleadings: 11th April 2022

2. Participating Teams

The CEEMC is open to teams comprising a maximum of four members, each of whom must be a national of a country from Central and Eastern Europe (including southern states who have applied for entry or have recently entered the EU, specifically Turkey, Cyprus and Malta). Each team member must also:

- be enrolled as a full-time student on a University course; and:
- be not older than 30 years; and
- not be a qualified and practising lawyer; and
- not have previously participated in the CEEMC

A participating university may register more than one moot team, provided that each team submits a separate set of written pleadings and pays a separate registration fee. Teams should notify us if they are aware that their University wishes/intends to submit two teams.

A CEEMC team may include participants from various Universities (i.e. a mixed team), but any team wishing to register as a mixed team must clearly inform us of this when registering.

3. The Stages of the CEEMC

The CEEMC question is based on an area of European Union substantive and/or procedural law, involving a preliminary reference to the Court of Justice of the EU under Article 267 TFEU. Each competing team must submit written pleadings (by the date indicates above) and participate in the oral pleadings at the CEEMC venue. Each team must submit written pleadings on behalf of *both* the applicant and the respondent to the case. Likewise, during the oral rounds, each team will (in different rounds) act as both applicant and the respondent

The team with the highest overall score wins the CEEMC competition. A team's score is calculated as the aggregate of its scores granted for four separate rounds, described below.

All rounds are organised on the basis that English is the official language of the CEEMC.

ROUND 1: *Submission of written pleadings*

Each team must prepare written pleadings on the following basis:

- Each team must prepare a set of written pleadings for the applicant and a separate set of written pleadings for the respondent;
- The maximum permissible length of each set of pleadings is 10 pages (Times New Roman font, size 11), excluding the accompanying bibliography of legal authorities relied upon in the pleadings;
- Pleadings should contain clear headings/sub-headings and each paragraph of the pleadings should be consecutively numbered;
- Arguments contained in the pleadings should be supported, insofar as is possible, by reference to existing legal authorities (i.e. cases/legislation);
- Any legal authorities referred to in written pleadings must be contained or referred to in the moot bundle;
- When referring to legal authorities, ensure that you reference the paragraph of the case (or number of the Article in legislation) and to refer to the page of the CEEMC bundle on which it can be found;
- The written pleadings must be sent by email to us at: organisers@ceemc.co.uk

- The written pleadings must be sent by the end of the day indicated in section 1 above (**Competition and important dates)**
- The organisers will confirm the receipt of your team's pleadings within 3 days of submission.
- When submitting the written pleadings, please also attach a copy of your **proof of payment for the CEEMC**
- A maximum of 20 points are awarded for each team's written pleadings
- A prize is awarded for the best written pleadings, sponsored by Clifford Chance law firm.

ROUND 2: *Day 1 of Oral Pleadings*

At the moot venue, each team participates in oral pleadings *twice* on the first day (Saturday) – i.e. in one moot as the applicant, and in the other moot as the respondent. In each of the two moots that happen on day one, your team will most probably moot against different opponents. You will be informed about the timings of your moots (and in which of those moots you are acting as applicant or respondent) and the identity of your opponents in the CEEMC timetable, which will be provided in advance (usually one day before the first day of oral pleadings).

During the first day of oral pleadings, all team members must actively submit pleadings (i.e. speak). However, it is *not* necessary for all members to speak in *each* of the two separate moots on day 1 (e.g. a team with 4 people may decide that 2 team members shall plead for the applicants in moot 1, while the other 2 shall plead for the respondent in moot 2). The crucial thing is that, by the end of Day 1, all team members must have delivered oral pleadings.

Timings:

The following timings apply to all moots except the final.

Pleadings for applicant: Max 20 minutes (this includes dealing with all questions to be mooted on that day)
Pleadings for respondent: Max 20 minutes (this includes dealing with all questions to be mooted on that day)
Reply for applicant: Max 5 minutes (limited to commenting on matters raised in the respondent's pleadings)
Rejoinder for respondent: Max 5 minutes (limited to commenting on matters raised in the applicant's reply)

In the event of exceeding these time limits, it is entirely within the discretion of the court whether or not the team will be allowed to continue (having requested an extra time period, not exceeding 5 extra minutes).

NB. The clock stops 'running' when a judge asks a question or makes a comment, but continues to 'run' again when the judge finishes.

NB. The timings for the final are explained below.

Scoring Criteria:

The following scoring criteria are applied by the judges to each individual moot during the CEEMC's oral-pleading stages (i.e. to all moots on Day 1 and Day 2, including the final):

Criteria	**Maximum Points Awarded**
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Ability to respond effectively to judges' questions.	10
Effectiveness of reply/rejoinder	20

ROUND 3: Day 2 of Oral Pleadings

Eight teams are selected from the first day of oral pleadings to progress to the second day (Sunday). During day 2, the qualifying teams deal with different questions to those argued during the first day. Details of which questions are will be deal with on each day are provided below. However, after Day 1 has finished, the CEEMC judges may decide that they also wish one/more of the questions from Day 1 to be discussed again during the Day 2 moots. Information about this will be provided when the teams are informed whether or not they will progress to Day 2.

Each of the eight teams competing in Day 2 will again have two moots (mooting once as applicant, once as respondent). However, a key difference between the Day 1 rules is that, on Day 2, *each and every team member must speak (plead) during BOTH of the team's two moots.*

Day 2 lasts until lunchtime, at which time the two teams selected to proceed to the final (later that same day) will be announced.

ROUND 4: Final

At lunchtime on Day 2 (Sunday), two teams are chosen (from the eight competing on Day 2) to face each other in the final. The role to be played by each finalist (applicant or respondent) is chosen by lot. The judges will announce which questions they wish to be mooted in pleadings during the final (selected from the questions dealt with during Day 1 and Day 2).

Each and every member of the team must speak (plead) in the final. It is permitted for a particular team member's speaking role to be limited to only a small fraction of the team's overall speaking time (e.g. by dealing only with one sub-part of a question, or saying very little during reply/rejoinder), but this may lead to the judges to draw adverse inferences regarding the team's overall quality and team-work.

The scoring criteria that apply to the final are identical to the other rounds (as described above) but the timings are adapted as below:

Pleadings for applicant:	Max 45 minutes (this includes dealing with all questions to be mooted on that day)
Pleadings for respondent:	Max 45 minutes (this includes dealing with all questions to be mooted on that day)
Reply for applicant:	Max 10 minutes (limited to commenting on the respondent's pleadings)
Rejoinder for respondent:	Max 10 minutes (limited to commenting on the applicant's reply)

Time extensions are *not permissible* in the final.

Post-final: awards ceremony

Following the CEEMC final, the awards ceremony will be held. During this ceremony, each team member will received a certificate to commemorate their performance, signed by the CEEMC President. Special prizes will also be awarded to:

- the winning team
- the person chosen as best speaker (being a person who mooted at any stage on Day 2, but not necessarily in the final)
- other individual speakers whom the judges feel deserve special recognition
- best written pleadings

4. Fees

The competition fee is **EUR 800**. The competition fee should be paid by bank transfer and confirmation of payment should be sent (as an attachment to an e-sent to: organisers@ceemc.co.uk) by no later than the date specified in

Section 1 above **Competition and important dates)**

This *per team* fee allows the participation of a one team including three or four team members and one accompanying coach. An extra fee of EUR 100 per person applies to any team that wishes to send an extra coach or observer.

The fee covers the cost of participating in the CEEMC and subsistence from the CEEMC's opening ceremony until the final party at the end of the competition. Each team is individually responsible for their other costs, including their travel to/from the competition, their accommodation and any administrative or visa charges to the CEEMC location (please contact us if you need additional support when applying for a visa).

When registering your team on the website, please contact us if you wish to receive an official invitation, which may be useful to apply for university funding or a visa (where necessary).

Teams are responsible for organising and paying for their own accommodation, but we hope to be able to provide you with some potential accommodation choices that we reserve as part of the BLC's block-booking reservation. If you wish to receive such information, please contact the organisers at organisers@ceemc.co.uk.

Payment of the competition fee must be done by bank transfer - cash payments are NOT accepted.

5. Organiser's Bank details

Recipient name:	Juris Angliae Scientia Ltd
Recipient address:	Faculty of Law, University of Cambridge, 10 West Road, Cambridge United Kingdom, CB3 9BZ
Account no: (this is a Euro account)	PL90 1750 0009 0000 0000 4001 2915
BIC/SWIFT code:	PPABPLPK
Bank name:	BNP Paribas

NB. Please ensure that payments received are made in Euro and that any/all bank fees are paid.

The CEEMC is organised by the British Law Centres of the English charity Juris Angliae Scientia. To contact us, please write to: s.terrett@britishlawcentre.co.uk

PRELIMINARY INFORMATION ON THE CJEU

The following is a short introductory guide to the role of the Court of Justice to the European Union (formerly – and still commonly – known as the European Court of Justice or ECJ) and its relationship with the national courts of the Member States.

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

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

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the CJEU to rule upon a certain issue of European Union law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 267 reference to the CJEU asking for guidance on the interpretation, application or validity of an EU measure. (NB. Remember that the Treaty article which describes the preliminary ruling procedure has been renumbered over the years and moved from the EEC Treaty to the EC Treaty to TFEU, so some (earlier) cases may refer to the earlier numbering of Article 177 or Article 234).

- The CJEU is assisted by Advocate-Generals, who produce reasoned opinions on a case before the CJEU 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 CJEU but they are very influential and are often followed in practice.

- The CJEU 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 CJEU has already been seen to have reversed its own jurisprudence on a number of occasions.

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

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

FRIDAY 6th May 2022
16.00-18.00 Registration of teams
18.00 Welcome Reception

SATURDAY 7th May 2022
09.00 Opening words by Organising Committee and Judges

Round 1 of Competition
09.30 - 11.00 Group 1
11.15 - 12.45 Group 2

13.00 - 14.00 LUNCH

14.15 - 15.45 Group 3
16.00 - 17.30 Group 4

20.00 DINNER (Announcement of semi-finalists)

SUNDAY 8th May 2022

Round 2 of Competition

09.00 - 11.00 First semi-finals
11.15 - 13.15 Second semi-finals

13.30 LUNCH BREAK (Announcement of finalists)

Round 3 of Competition
15.00 FINAL (followed immediately by presentation of moot-participation certificates and prize ceremony)

20.00 Celebration dinner, party and singing competition.

MONDAY 9th May 2022
Departure of teams.

PART B. EU LEGISLATIVE MATERIALS

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, HER MAJESTY THE QUEEN OF DENMARK, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF IRELAND, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MAJESTY THE KING OF SPAIN, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE PORTUGUESE REPUBLIC, HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

(List of plenipotentiaries not reproduced)

TITLE I
COMMON PROVISIONS

Article 1

(ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This 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.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

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

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

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

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

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

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

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

Article 5

(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently

achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

(ex Article 6 TEU)

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

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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

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

Article 7

(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 8

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

TITLE II
PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12

National Parliaments contribute actively to the good functioning of the Union:

(a)through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b)by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c)by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d)by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e)by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f)by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

TITLE III
PROVISIONS ON THE INSTITUTIONS

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

— the European Parliament,

— the European Council,

— the Council,

— the European Commission (hereinafter referred to as ‘the Commission’),

— the Court of Justice of the European Union,

— the European Central Bank,

— the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

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

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

4. The European Parliament shall elect its President and its officers from among its members.

Article 15

1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.

4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

6. The President of the European Council:

(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council shall not hold a national office.

Article 16

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

3. The Council shall act by a qualified majority except where the Treaties provide otherwise.

4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.

5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.

6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.

8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 of the Treaty on the Functioning of the European Union.

Article 17

1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

3. The Commission's term of office shall be five years.

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

4. The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice-Presidents.

5. As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.

6. The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;

(b)decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;

(c)appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

Article 18

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.

2. The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.

3. The High Representative shall preside over the Foreign Affairs Council.

4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

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

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS, ([1])

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

(List of plenipotentiaries not reproduced)

PART ONE
PRINCIPLES

Article 1

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.

2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as ‘the Treaties’.

TITLE I

CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;

(b) industry;

(c) culture;

(d) tourism;

(e) education, vocational training, youth and sport;

(f) civil protection;

(g) administrative cooperation.

TITLE II
PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8

(ex Article 3(2) TEC) [(2)]

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 11

(ex Article 6 TEC)

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Article 12

(ex Article 153(2) TEC)

Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Article 13

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Article 14

(ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 15

(ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

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

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

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

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

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

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

Article 16

(ex Article 286 TEC)

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free

movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Article 17

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

PART TWO
NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18

(ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19

(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20

(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21

(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22

(ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote

and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23

(ex Article 20 TEC)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24

(ex Article 21 TEC)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25

(ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

PART THREE

UNION POLICIES AND INTERNAL ACTIONS

TITLE I
THE INTERNAL MARKET

Article 26

(ex Article 14 TEC)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

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

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

Article 27

(ex Article 15 TEC)

When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions.

If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.

TITLE IV
FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1
WORKERS

Article 45

(ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c)to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d)to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 46

(ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b)by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c)by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d)by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 47

(ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 48

(ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a)aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

CHAPTER 2
RIGHT OF ESTABLISHMENT

Article 49

(ex Article 43 TEC)

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 54, 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 50

(ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, 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 Union 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 39(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 others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h)by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 51

(ex Article 45 TEC)

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 European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 52

(ex Article 46 TEC)

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

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

Article 53

(ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and 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.

2. 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 54

(ex Article 48 TEC)

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 Union 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 55

(ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

CHAPTER 3
SERVICES

Article 56

(ex Article 49 TEC)

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

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

Article 57

(ex Article 50 TEC)

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

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

Article 58

(ex Article 51 TEC)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 59

(ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 60

(ex Article 53 TEC)

The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(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 61

(ex Article 54 TEC)

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 56.

Article 62

(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

[...]

TITLE VII
COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1
RULES ON COMPETITION

SECTION 1
RULES APPLYING TO UNDERTAKINGS

Article 101

(ex Article 81 TEC)

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

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

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

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

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

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a)directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c)applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d)making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103

(ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a)to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b)to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c)to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d)to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e)to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104

(ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105

(ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106

(ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[...]

TITLE IX
EMPLOYMENT

Article 145

(ex Article 125 TEC)

Member States and the Union shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.

Article 146

(ex Article 126 TEC)

1. Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 145 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Union adopted pursuant to Article 121(2).

2. Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 148.

Article 147

(ex Article 127 TEC)

1. The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

2. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

Article 148

(ex Article 128 TEC)

1. The European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.

2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee referred to in Article 150, shall each year draw up guidelines which the Member States shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 121(2).

3. Each Member State shall provide the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2.

4. The Council, on the basis of the reports referred to in paragraph 3 and having received the views of the Employment Committee, shall each year carry out an examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment. The Council, on a recommendation from the Commission, may, if it considers it appropriate in the light of that examination, make recommendations to Member States.

5. On the basis of the results of that examination, the Council and the Commission shall make a joint annual report to the European Council on the employment situation in the Union and on the implementation of the guidelines for employment.

Article 149

(ex Article 129 TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may adopt

incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.

Those measures shall not include harmonisation of the laws and regulations of the Member States.

Article 150

(ex Article 130 TEC)

The Council, acting by a simple majority after consulting the European Parliament, shall establish an Employment Committee with advisory status to promote coordination between Member States on employment and labour market policies. The tasks of the Committee shall be:

—to monitor the employment situation and employment policies in the Member States and the Union,

—without prejudice to Article 240, to formulate opinions at the request of either the Council or the Commission or on its own initiative, and to contribute to the preparation of the Council proceedings referred to in Article 148.

In fulfilling its mandate, the Committee shall consult management and labour.

Each Member State and the Commission shall appoint two members of the Committee.

TITLE X
SOCIAL POLICY

Article 151

(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Article 152

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

Article 153

(ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

—shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,

—shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 154

(ex Article 138 TEC)

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 155

(ex Article 139 TEC)

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

Article 156

(ex Article 140 TEC)

With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to:

— employment,

— labour law and working conditions,

— basic and advanced vocational training,

— social security,

— prevention of occupational accidents and diseases,

— occupational hygiene,

— the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 158

(ex Article 142 TEC)

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

Article 159

(ex Article 143 TEC)

The Commission shall draw up a report each year on progress in achieving the objectives of Article 151, including the demographic situation in the Union. It shall forward the report to the European Parliament, the Council and the Economic and Social Committee.

Article 160

(ex Article 144 TEC)

The Council, acting by a simple majority after consulting the European Parliament, shall establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission. The tasks of the Committee shall be:

—to monitor the social situation and the development of social protection policies in the Member States and the Union,

—to promote exchanges of information, experience and good practice between Member States and with the Commission,

—without prejudice to Article 240, to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative.

In fulfilling its mandate, the Committee shall establish appropriate contacts with management and labour.

Each Member State and the Commission shall appoint two members of the Committee.

Article 161

(ex Article 145 TEC)

The Commission shall include a separate chapter on social developments within the Union in its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

[…]

TITLE XII

EDUCATION, VOCATIONAL TRAINING, YOUTH AND SPORT

Article 165

(ex Article 149 TEC)

1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

—developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,

—encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,

— promoting cooperation between educational establishments,

—developing exchanges of information and experience on issues common to the education systems of the Member States,

—encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,

— encouraging the development of distance education,

—developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.

4. In order to contribute to the achievement of the objectives referred to in this Article:

—the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

— the Council, on a proposal from the Commission, shall adopt recommendations.

Article 166

(ex Article 150 TEC)

1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

2. Union action shall aim to:

—facilitate adaptation to industrial changes, in particular through vocational training and retraining,

—improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,

—facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,

—stimulate cooperation on training between educational or training establishments and firms,

—develop exchanges of information and experience on issues common to the training systems of the Member States.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.

[...]

PART SIX
INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I
INSTITUTIONAL PROVISIONS

CHAPTER 1
THE INSTITUTIONS

[...]

SECTION 5
THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251

(ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.

When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252

(ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253

(ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 254

(ex Article 224 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

Article 255

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Article 256

(ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Article 257

(ex Article 225a TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance

certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Article 258

(ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259

(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260

(ex Article 228 TEC)

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

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 261

(ex Article 229 TEC)

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

Article 262

(ex Article 229a TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Article 263

(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal

effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

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

Article 264

(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265

(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266

(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b)the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

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 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.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268

(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 270

(ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Article 271

(ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a)the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;

(b)measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;

(c)measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;

(d)the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Article 272

(ex Article 238 TEC)

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

Article 273

(ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

Article 274

(ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 275

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Article 276

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 277

(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 278

(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279

(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Article 280

(ex Article 244 TEC)

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Article 281

(ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

[…]

CHAPTER 2
LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1
THE LEGAL ACTS OF THE UNION

Article 288

(ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

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

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

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

Recommendations and opinions shall have no binding force.

Article 289

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

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

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

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

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

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

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

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

Article 291

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

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

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

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

Article 292

The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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

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

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

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

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

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

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

TITLE I
DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II
FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III
EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

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

Article 26

Integration of persons with disabilities

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

TITLE IV
SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article 28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V
CITIZENS' RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

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

Article 43

European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Article 44

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI
JUSTICE

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII

GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53

Level of protection

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

Article 54

Prohibition of abuse of rights

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

TITLE III
REFERENCES FOR A PRELIMINARY RULING

Chapter 1
GENERAL PROVISIONS

Article 93

Scope

The procedure shall be governed by the provisions of this Title:

(a) in the cases covered by Article 23 of the Statute,

(b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

Article 94

Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 95

Anonymity

1. Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceedings pending before it.

2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

Article 96

Participation in preliminary ruling proceedings

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

(a) the parties to the main proceedings,

(b) the Member States,

(c) the European Commission,

(d) the institution which adopted the act the validity or interpretation of which is in dispute,

(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

Article 97

Parties to the main proceedings

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.

3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

TITLE III
PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Official Journal L 303 , 02/12/2000 P. 0016 - 0022

Council Directive 2000/78/EC

of 27 November 2000

establishing a general framework for equal treatment in employment and occupation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

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

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

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

Having regard to the Opinion of the Committee of the Regions(4),

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions(5).

(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

(7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

(10) On 29 June 2000 the Council adopted Directive 2000/43/EC(6) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

(26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community(7), the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities(8), affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

(32) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.

(33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.

(34) The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.

(37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1: Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

Article 13

Social dialogue

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.

2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Article 14

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

CHAPTER III

PARTICULAR PROVISIONS

Article 15

Northern Ireland

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

CHAPTER IV

FINAL PROVISIONS

Article 16

Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

Article 17

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The

sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 18

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.

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

Article 19

Report

1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 20

Entry into force

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

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 November 2000.

2003/778/EC: Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League) (Text with EEA relevance.) (notified under document number C(2003) 2627)

Official Journal L 291 , 08/11/2003 P. 0025 - 0055

Commission Decision

of 23 July 2003

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League)

(notified under document number C(2003) 2627)

(Only the English text is authentic)

(Text with EEA relevance)

(2003/778/EC)

CONTENTS

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty(1), as last amended by Regulation (EC) No 1/2003(2), and in particular Articles 6 and 8 thereof,

Having regard to the application for negative clearance submitted by UEFA on 1 February 1999 pursuant to Article 2 of Regulation No 17 and the notification with a view to obtaining an exemption submitted by UEFA on 1 February 1999 on 1 February 1999 and as amended on 13 May 2002 pursuant to Article 4 of Regulation No 17,

Having regard to the Commission decision of 18 July 2001 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity(3) to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the Treaty(4),

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

Having regard to the final report of the Hearing Officer in this case(5),

Whereas:

1. INTRODUCTION

(1) This Decision relates to the rules, regulations and all implementing decisions taken by Union des Associations Européennes de Football (UEFA) and its members concerning the joint selling arrangement regarding the sale of the commercial rights(6) of the UEFA Champions League, a pan-European club football competition. The Regulations of the UEFA Champions League provide UEFA, as a joint selling body, with the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the participating football clubs. The joint selling arrangement restricts competition among the football clubs in the sense that it has the effect of co-ordinating the pricing policy and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. However, the Commission considers that such restrictive rules can be exempted in the specific circumstances of this case. UEFA's joint selling arrangement provides the consumer with the benefit of league focused media products from this pan-European football club competition that is sold via a single point of sale and which could not otherwise be produced and distributed equally efficiently.

2. PARTIES

(2) UEFA is a company, registered in the register of companies under the terms of the Swiss civil code, with its headquarters located in Nyon, Switzerland(7). UEFA is an association of national football associations. Its membership comprises national football associations situated in the European continent(8). Currently, UEFA has 51 members; 21 of these member associations are located in the EEA(9).

(3) UEFA is the regulatory authority of European football. UEFA has the sole jurisdiction to organise or abolish international competitions in Europe in which member associations and/or their football clubs participate. Other international competitions or tournaments require the approval of UEFA(10) except for those organised by Fédération internationale de football association (FIFA). UEFA organises a number of European football tournaments in addition to the UEFA Champions League.

(4) UEFA's congress is the supreme controlling organ of UEFA. Each national football association has one vote at the congress(11). The congress adopts UEFA's statutes. It elects the president(12) and the Executive Committee(13). The Executive Committee consists of the president and 13 members who must hold office within a national member association(14). The Executive Committee manages UEFA, except to the extent it has delegated responsibility to the Chief Executive Officer(15) whom it also appoints(16). The Executive Committee draws up the regulations governing the conditions for participation in and the staging of UEFA competitions, including the Regulations of the UEFA Champions League. It is a condition for entry into the UEFA Champions League competition that each member association and/or football club affiliated to a Member Association agrees to comply with the statutes and regulations and decisions of the competent UEFA organs(17).

3. THE NOTIFIED AGREEMENT

3.1. The UEFA Champions League

3.1.1. The origins of the UEFA Champions League

(5) The UEFA Champions League is UEFA's most prestigious club competition. Originally created as the European Champion Clubs' Cup prior to the 1955/1956 season, the competition changed format and name in time for the 1992/1993 season. The UEFA Champions League is open to each national football association's domestic club champions, as well as the clubs, which finish just behind them in the domestic championship table. The number of clubs that can be entered by an association depends on the football association's position in UEFA's coefficient ranking list. Including the qualifying stages, a total of 96 football clubs participate in the UEFA Champions League.

3.1.2. The UEFA Champions League format

(6) The UEFA Champions League format applicable at the time of the notification(18) consisted of two qualifying phases prior to the UEFA Champions League. The UEFA Champions League itself consisted of the group matches and a final knockout phase of quarter-finals, semi-finals and a final. The UEFA Executive Committee decided on 10 and 11 July 2002 to replace the second group stage with a knockout phase as from the 2003/2004 season. With the elimination of the second group stage, there will be a total of 125 matches and a total of 13 match days in the 2003/2004 UEFA Champions League format.

(7) In the 2003/2004 season the competition consists of the following phases. 80 football clubs participate in three initial qualifying rounds playing a total of 160 matches, which is required to find 16 qualifiers to join the top 16 automatic qualifiers playing in the UEFA Champions League. The UEFA Administration seeds football clubs for the qualifying rounds and the group stage in accordance with the club rankings established at the beginning of the season. These rankings are drawn up on the basis of a combination of the national associations' coefficient and the football clubs' individual performance in the UEFA club competitions during the same period. For the qualifying rounds, a draw between the same number of seeded and unseeded football clubs determines the pairings. For the third qualifying round the UEFA administration is empowered to form groups in accordance with set principles. For the purpose of the draw, the 32 football clubs involved in the UEFA Champions League group stage are seeded into eight groups of four in accordance with the aforementioned rankings. All matches are played according to UEFA's match calendar. The venues, dates and kick-off times of all qualifying matches must be confirmed and communicated to the UEFA administration by the national associations of the football clubs concerned.

(8) Member associations and their affiliated organisations or football clubs sell the media rights of these three qualifying rounds themselves. UEFA does not participate in the selling of these rights and UEFA consequently does not undertake organisational and administrative responsibilities other than conducting the draw procedure and appointing referees and a "match delegate" to oversee sporting/disciplinary standards. UEFA is not involved in the selection or appointment of third party service providers to provide services that are required in connection with a match. Nor is UEFA involved in production of full audio visual match coverage for each match or appointment of commercial partners: sponsors, suppliers, or licensees.

(9) The football clubs have not extended the joint selling arrangement to these three qualifying rounds and the manner in which these rights are sold are therefore not relevant for the purposes of this decision. It would appear that the UEFA and football clubs have decided not to extend the joint selling arrangement to these matches as demand for such early stage qualifying matches is rather low and of a local nature. The matches that will take place between small and big clubs due to UEFA's seeding system are without pan-European cross-border appeal. Demand is typically from broadcasters of the two countries of the football clubs. It would moreover greatly increase the costs for UEFA to maintain the consistency of branding and presentation of the UEFA Champions League if it were to include all the qualifying matches in the joint selling concept (more than 100 matches). UEFA would have to make site surveys and visits to all the additional match venues. It would have to ensure compliance with all standard UEFA Champions League broadcaster facilities. It would have to make sure "clean" stadia would be provided for the UEFA Champions League commercial partners and so forth. UEFA would have to monitor all the other obligations, which clubs must meet for participation in the UEFA Champions League. This would explain the fact that UEFA and the football clubs do not find it efficient to sell those media rights jointly or indispensable to restrict football clubs in their individual marketing.

(10) The qualifying-phase matches are played according to a knockout system with each club playing each opponent twice in home and away matches. The team which scores the greater aggregate of goals in the two matches qualifies for the next stage (second qualifying round, third qualifying round or the UEFA Champions League group stage, as applicable). The football clubs defeated in the first and second qualifying rounds are eliminated from the competition. The 16 clubs defeated in the third qualifying round are entitled to play in the first round of the current UEFA Cup.

(11) Beginning in September these 32 football clubs then contest the group stage, comprising eight groups of four clubs. The winners and runners-up from these eight groups, in total 16 football clubs, then advance to a second knockout phase on a home and away basis. The surviving football clubs contest the quarter-finals. For the quarter-final (8 clubs) and semi-final stage (4 clubs), the clubs play two matches against each other on a home and away basis, with the team scoring the greater aggregate of goals qualifying for the next round. The two winners of the two semi-finals play in the final, which is staged as a single match.

(12) The games are played on Tuesday or Wednesday nights from September with the final played in May. As a rule, matches in the UEFA Champions League kick off at 20.45 hours central European time. The UEFA Champions League therefore avoids clashing with the fixtures of domestic leagues, which are mostly played weekends, and the UEFA Cup, which is mostly played on Thursdays.

3.1.3. UEFA's role in the UEFA Champions League

(13) UEFA has the organisational and administrative responsibility for the UEFA Champions League. UEFA conducts the draw procedure and approves the participants. UEFA appoints referees, match delegates and referee observers and covers their expenses. It is the disciplinary body supervising and enforcing all aspects of the competition. UEFA selects and appoints a wide range of third party service providers to provide services that are required in connection with a match(19).

(14) Television Event and Media Marketing AG (TEAM), an independent marketing company, assists UEFA in the implementation and follow-up of the commercial aspects of the UEFA Champions League. As an agent under UEFA's control and responsibility, TEAM conducts negotiations with the commercial partners. The agreements are signed and executed by UEFA, which assumes all legal responsibilities.

(15) UEFA arranges for the production of full audio visual match coverage for each match. UEFA's broadcast partners act as host-broadcaster for the matches within their territory. UEFA assumes the responsibility towards the broadcasters if any match should be cancelled or postponed.

(16) In addition to media operators, UEFA has three types of commercial partners: sponsors, suppliers(20), and licensees(21).

3.1.4. The football clubs' role in the UEFA Champions League

(17) The participating football clubs provide a team of football players and the stadium. UEFA has no direct contacts with the stadium owners. The football clubs are obliged to follow the guidelines set out by UEFA and act under UEFA's supervision. They are responsible for fulfilling safety and security requirements. The football clubs also provide facilities for the press, hospitality areas, offices, working areas and seats for UEFA's commercial partners. UEFA appoints a "Venue Team" that carries out a "site survey" to ensure that the stadium is equipped to stage an UEFA Champions League match.

3.2. The notification

(18) UEFA notified the rules, regulations and implementing decisions regarding its joint selling arrangement to the Commission on 19 February 1999. The notification included standard rights agreements for conclusion with

television broadcasters, sponsors and suppliers. The Commission issued a statement of objections on 18 July 2001, which stated that the notified joint selling arrangement relating to the sale of the television broadcasting rights infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. It also stated that the joint selling arrangement was not eligible for exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

(19) The statement of objections concluded that the notified joint selling arrangement prevented the individual football clubs participating in the UEFA Champions League from taking independent commercial action in respect of the TV rights and excluded competition between them in individually supplying TV rights to interested buyers. The effect of such joint selling arrangement was the restriction of competition. The implication for third parties is that they only have a single source of supply. The statement of objections moreover found that the possible efficiencies and benefits that the joint selling arrangement could provide for the TV broadcasting market were negated by the commercial policy pursued by UEFA. The reason was that UEFA sold the free-TV and pay-TV rights on an exclusive basis in a single bundle to a single TV broadcaster per territory for several years in a row. Since the broadcasting rights agreements covered all TV rights of the UEFA Champions League, it made it possible for a single large broadcaster per territory to acquire all TV rights of the UEFA Champions League to the exclusion of all other broadcasters. It also left a number of rights effectively unexploited. Such a broad exclusivity did not have any beneficial effects on the TV broadcasting market and was not in line with the Helsinki Report on Sport(22).

(20) In most countries football is not only the driving force for the development of pay-TV services but is also an essential programme item for free-TV broadcasters. Joint selling of free-TV and pay-TV rights combined with wide exclusive terms therefore has significant effects on the structure of the TV broadcasting markets as it can enhance media concentration and hamper competition between broadcasters. If one broadcaster holds all or most of the relevant football TV rights in a Member State, it is extremely difficult for competing broadcasters to establish themselves successfully in that market.

3.3. UEFA's amendment of the notification

(21) UEFA replied to the statement of objections on 16 November 2001. On 8 January 2002 UEFA submitted an outline of a new joint selling arrangement. Subsequently, on 12 March 2002, UEFA presented a rights segmentation table for the exploitation of not only the TV broadcasting rights but, also, all the other media rights of the UEFA Champions League. These include rights for radio, television, Internet, universal mobile telecommunications system (UMTS) and physical media such as DVD, VHS, CD-ROM, etc.

(22) UEFA's proposal for a new joint selling arrangement means a reduction of UEFA's exclusive right to sell the UEFA Champions League media rights. The new joint selling arrangement would allow also the football clubs to sell on a non-exclusive basis in parallel with UEFA certain media rights relating to action in which they are participating. UEFA's proposal also implies an unbundling of the media rights by splitting them up into several different rights packages that would be offered for sale in separate packages to different third parties.

(23) UEFA's proposal for a new joint selling arrangement was the subject of several meetings between UEFA and the Commission and it was modified in a number of points at the request of the Commission. Subsequent to the introduction of these modifications, the Commission's preliminary view was that the competition concerns as expressed in the statement of objections would be remedied by UEFA's proposal. The Commission therefore intended to take a favourable view in respect of UEFA's proposal, which UEFA notified to the Commission on 13 May 2002. However, the Commission's preliminary approval was subject to giving third parties the opportunity to comment on the proposal following the publication of a notice pursuant to Article 19(3) of Regulation No 17.

(24) That notice was published in the Official Journal of the European Communities on 17 August 2002 and prompted reactions from a number of interested third parties. The third party comments, which are summarised below in section 5, resulted in the Commission requesting UEFA to make further amendments in its joint selling arrangement. UEFA agreed to amend its joint selling arrangement in most respects, but not all. At a meeting on 4 April 2003 UEFA was informed that the Commission intended to attach conditions to the exemption decision. It was subsequently notified thereof by letter dated 5 May 2003, in which UEFA was invited to communicate its position on the Commission's intention to impose a condition. UEFA indicated in its reply of 15 May 2003 that it could accept the Commission's intention.

3.4. UEFA's amended joint selling arrangement

(25) UEFA proposes, as a general principle, that media rights contracts be concluded for a period not exceeding three UEFA Champions League seasons.

3.4.1. TV broadcasting rights

3.4.1.1. Football matches subject to joint selling

(26) As already explained in recital 9, UEFA's joint selling arrangement does not apply to the three initial qualifying rounds prior to the UEFA Champions League. The individual football clubs sell the TV broadcasting rights of those matches individually. This involves 80 football clubs playing 160 matches. UEFA's joint selling arrangement applies only to the UEFA Champions League group stage and final knockout phases. The joint selling arrangement therefore applies to a total of 32 football clubs playing a total of 125 matches during a total of 13 match days from September to May. In UEFA's terminology, a match day consists of two calendar days (currently Tuesday and Wednesday).

3.4.1.2. Tendering procedure

(27) The award of the rights contracts follows an "invitation to tender" giving all qualified broadcasters an equal opportunity to bid for the rights in the full knowledge of the key terms and conditions.

(28) UEFA will, from time to time, publish criteria on the standards which broadcasters must satisfy for televising the UEFA Champions League. A "qualified broadcaster" is a television broadcast organisation that holds a television broadcast licence for the relevant territory and that has the appropriate infrastructure, resources and standing to broadcast UEFA Champions League programming. Contracts for the award of the rights are advertised on the UEFA website (www.uefa.com) at appropriate times and all qualified broadcasters in the contract territory are entitled to request the invitation to bid documentation. All rights packages are, in principle, put on the market at the same time.

(29) The invitation to bid documentation contains relevant details of all rights packages together with key terms and conditions and an explanation of the information which interested parties must provide with their bid. All qualified broadcasters are entitled to request a presentation to explain the various rights packages on offer and the sales process. All qualified broadcasters must be given a reasonable time limit in which to submit their bids.

(30) UEFA has indicated that it will evaluate the bids in accordance with a number of objective criteria, including in particular the following:

(a) price offered for the rights package or packages;

(b) acceptance by the bidder of all relevant broadcast obligations;

(c) level of audience penetration of the bidder in the contract territory;

(d) proposed method of delivery or transmission;

(e) proposed promotional support offered for the UEFA Champions League;

(f) production capability and host broadcast expertise;

(g) combination of rights packages offered in the contract territory;

(h) balance between free and pay television.

(31) Negotiations may take place with individual bidders on the basis of offers received. The content of all offers remains confidential.

3.4.1.3. Rights packaging

(32) UEFA will offer its TV rights in several smaller packages on a market-by-market basis. The precise format may vary depending on the structure of the TV market in the Member State in which the rights are being offered.

(33) UEFA will have the exclusive right to sell two main live rights packages for free-TV or pay-TV each comprising two matches per match night(23). UEFA Champions League matches are currently played Tuesdays and Wednesdays. The packages will usually include two picks per match day. These two packages would cover 47 matches out of a total of 125. Consequently, when the competition has reached the final stages the two main live packages will absorb all TV rights of the UEFA Champions League.

(34) UEFA will likewise initially have the exclusive right to sell the remaining matches(24). UEFA has decided to sell them for live pay-TV/pay-per-view exploitation. However, if UEFA has not managed to sell the rights within one week after the draw for the group stage of the UEFA Champions League, UEFA will lose its exclusive right to sell these TV rights. Thereafter, UEFA will have a non-exclusive right to sell these TV rights in parallel with the individual home clubs participating in the match(25). UEFA's rights segmentation means that the football clubs selling the live TV rights comprised by package 5 individually are restricted to sell these only to pay-TV or pay-per-view exploitation.

(35) The right of UEFA and the individual football clubs to sell these remaining matches will be subject to picks made by the broadcasters having bought the main live packages 1 and 2.

(36) UEFA will moreover have the exclusive right to sell a highlight package covering all matches of the UEFA Champions League available as of 22.45 on each match night(26).

(37) Football clubs exploiting UEFA Champions League footage individually must present the footage in a club-focused manner and relating only to matches in which they are participating. Broadcasters who exploit the TV rights which are sold by the individual clubs are not allowed to package such rights into a single product which would appear as an UEFA Champions League branded product. In particular regarding live TV rights, UEFA defines an UEFA Champions League branded programme as one consisting of more than two live UEFA Champions League matches per day.

(38) As of Thursday midnight, that is to say, one day after the last matches of the match week the football clubs can exploit the deferred TV rights in parallel with UEFA. UEFA exploitation must be related to action from the whole UEFA Champions League competition. The individual football clubs' exploitation must be related only to matches in which they participate. The individually sold matches must be "club branded" and must not be bundled with rights of other clubs to create an alternative UEFA Champions League branded product. In this context UEFA accepts programmes with delayed TV rights on club channels containing 100 % UEFA Champions League content. Regarding club magazine programmes, UEFA defines a programme as UEFA Champions League branded, when it contains more than 50 % UEFA Champions League content. In general programming, a programme should not contain more than 30 % UEFA Champions League content to avoid being defined as UEFA Champions League branded. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme or in general programming then the respective 50 % and 30 % rule would not apply and the programme could consist mostly or entirely of that single match.

(39) UEFA will have the exclusive right to sell live TV rights outside the EEA. Deferred rights available to clubs are subject to the same rules both inside and outside the EEA.

3.4.2. Internet rights

(40) Both UEFA (in respect of all matches) and the football clubs (in respect of matches in which they participate) will have a right to provide video content on the Internet one and a half hours after the match finishes, that is to say, as from midnight on the night of the match. Live streaming will not be made possible because of the technical development of the Internet at this stage, which does not permit the maintenance of a satisfactorily high quality. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future.

(41) UEFA will offer "competition specific" or "UEFA branded" products whereas the football clubs will offer "club specific" or "club branded" products. For Internet rights UEFA accepts club channel programmes containing 100 % UEFA Champions League content. Club magazine programmes may contain no more than 50 % UEFA Champions League content without being defined as a UEFA Champions League branded product. In general programming the maximum permissible UEFA Champions League content is 30 % of the programme. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme or in general programming then the respective 50 % and 30 % rule would not apply and the programme could consist mostly or entirely of that single match.

(42) Both UEFA and the football clubs may choose to provide their services themselves or via Internet service providers. The content will be based on the raw feed produced for television. UEFA intends to build a service that will produce UEFA Champions League content for streaming of moving pictures on the Internet. This service can be exploited both via "www.uefa.com" and via the football clubs' websites. UEFA will offer technical expertise and know-how in the new media area to clubs.

(43) Clubs may acquire the raw feed from UEFA or they may participate in the UEFA service. Clubs may customise and edit the content for the purposes of creating a club focused and club branded product. UEFA will apply its principle of financial solidarity by redistributing the revenues from new media. However, for the initial three-year period (seasons 2003/2004 to 2005/2006), football clubs will not pay any solidarity fee for the raw feed but only technical costs, a situation, which will be reviewed at the end of the second season (2004/2005). Any fee must be transparent and fair, reasonable and non-discriminatory and submitted to an arbitration system to solve possible disputes. UEFA will establish a revenue sharing mechanism from the income generated from "www.uefa.com".

3.4.3. Wireless 3G/UMTS rights

(44) Both UEFA (in respect of all matches) and the clubs(in respect of matches in which they participate) will have a right to provide audio/video content via UMTS services available maximum 5 minutes after the action has taken place (technical transformation delay). This content will be based on the raw feed produced for television. UEFA will apply a revenue sharing system in respect of the income generated from the raw feed or the UMTS content.

(45) UEFA intends to build a 3G/UMTS wireless product that will be based on an extensive video database to be developed by UEFA. UEFA will offer the rights on an exclusive or non-exclusive basis to operator(s) with an UMTS licence, initially and exceptionally for a period of four years and subsequently for periods of three years.

(46) Clubs may acquire the raw feed from UEFA or they may participate in the UEFA service. The clubs may customise and edit the content for the purposes of creating a club focused and club branded product. This product may not consist solely or mostly of UEFA Champions League content and must include other club-related multimedia content as well. Clubs will pay a fee for the UEFA wireless service and/or the raw feed. This fee must be transparent and fair, reasonable, and non-discriminatory and submitted to an arbitration system to solve possible disputes.

3.4.4. Physical media rights

(47) Both UEFA and the football clubs are entitled to exploit the physical media rights of DVD, VHS, CD-ROM, and so forth to archive material from the previous UEFA Champions League season with an embargo of 48 hours after the final. While UEFA's rights extend to all action in the UEFA Champions League, the rights of the football clubs include only action in which they participate.

3.4.5. Audio rights

(48) Both UEFA (in respect of all matches) and the football clubs (in respect of matches in which they participate) may sell licences to live radio broadcasting of UEFA Champions League football matches on a non-exclusive basis.

3.4.6. Other commercial rights

(49) UEFA also jointly sells other commercial rights relating to the UEFA Champions League which associate third parties with the UEFA Champions League brand such as sponsorship rights, suppliership rights, licensing rights and other intellectual property rights.

3.4.6.1. Sponsorship rights

(50) UEFA has a UEFA Champions League sponsorship package, which comprises traditional elements of event sponsorship with programme sponsorship and commercial airtime in the event broadcasts. Sponsors purchase a defined package of event rights including, among others, elements such as perimeter boards, sponsor logo identification on backdrops, tickets, advertisement in each match day programme, sponsor identification on tickets, use of official designations and the UEFA Champions League logo.

(51) In addition, media rights are available to sponsors, which consist, among others, of the broadcast sponsorship rights for up to two sponsors per programme, billboards in the opening and closing sequences of the UEFA Champions League programmes as well as "break-bumpers"(27). They also get an option to purchase commercial airtime in and around UEFA Champions League programmes through UEFA.

3.4.6.2. Suppliership rights

(52) In addition to the sponsorship rights, the UEFA Champions League concept allows for four supplier packages. For example there is a computer and telecommunications supplier, which provides technical support to the broadcast graphics service and, in return, receives on-screen credits in all the European live match broadcasts and during the highlights programme.

3.4.6.3. Licensing rights

(53) The UEFA Champions League licensing concept allows for selected companies to produce high quality products related to the UEFA Champions League, for example, UEFA Champions League video games, UEFA Champions League videos or UEFA Champions League CD-ROM football encyclopaedias.

3.4.6.4. Other intellectual property rights

(54) UEFA is the registered holder of various categories of intellectual property right such as trademark and design rights for example, the UEFA Champions League "Starball" logo, which is the recognised trademark of the UEFA Champions League along with the UEFA Champions League music. The UEFA Champions League logo, name, and the trophy have been protected as trademarks. The official music, which was commissioned by UEFA, forms part of the UEFA Champions League competition. This anthem is always played with the television opening and closing sequences as well as during the countdown to kick-off in all UEFA Champions League stadiums around Europe. UEFA holds the copyright in the music. Clubs, which qualify for the UEFA Champions League, may use the orthographic, musical and artistic forms developed in connection with the UEFA Champions League logo for non-commercial promotional purposes for the duration of the competition.

4. THE RELEVANT MARKET

4.1. Product markets

4.1.1. UEFA's submission

(55) UEFA submits that although the UEFA Champions League is a very important sport event, it does not constitute a separate relevant product market. UEFA argues that it is part of a much wider market with a large number of sports events in addition to the UEFA Champions League, which allow broadcasters, sponsors and suppliers to achieve the same commercial objective, such as the national club football leagues. In addition, there are other prestigious and quality sports events on the market. Furthermore, non-sport content, in particular, popular films, soap operas and comedy shows can also attract very sizeable audiences. UEFA moreover argues that the Commission should differentiate between UEFA Champions League matches involving domestic clubs and UEFA Champions League matches not involving domestic clubs. UEFA also submits that the free-TV market and the pay-TV market constitute distinct relevant product markets.

4.1.2. The markets

(56) The Commission considers that the following markets are relevant to an assessment of the effects of the joint selling arrangements:

(a) the upstream markets for the sale and acquisition of free-TV, pay-TV and pay-per-view rights;

(b) the downstream markets on which TV broadcasters compete for advertising revenue depending on audience rates, and for pay-TV/pay-per-view subscribers;

(c) the upstream markets for wireless/3G/UMTS rights, Internet rights and video-on-demand rights, which are emerging new media markets at both the upstream and downstream levels that parallel the development of the markets in the pay-TV sector;

(d) the markets for the other commercial rights namely sponsorship, suppliership and licensing.

4.1.3. The upstream market for the acquisition of TV broadcasting rights of football events played regularly throughout every year

(57) Viewer preferences are decisive for all types of broadcasters in their content acquisition policy as they determine the value of programmes to broadcasters(28). All broadcasters are actual or potential buyers of TV broadcasting rights of football events and football is equally important to all broadcasters whichever the market they operate in(29). Broadcasters acquire programmes in order to attract large audiences whether they are financed fully or partially by advertising revenues (to sell the opportunity to advertisers to get exposure to the audience) or not (to comply with their public service obligations). Pay-TV operators buy programmes to entice people to subscribe to their services.

(58) The characteristics of programmes that can achieve a desired purpose can delimit the ambit of the market for the acquisition of TV broadcasting rights. Substitutability can therefore be tested by analysing the extent to which other programmes achieve this desired purpose. If a specific type of content can regularly attract high audience numbers, specific audiences or provide a certain brand image, which cannot be achieved by means of other content, it may be considered that such content constitutes a separate relevant product market. Consequently, there are no other programmes which place a competitive restraint on the rights holders' ability to determine the price of these TV broadcasting rights.

(59) The Commission's investigation of the situation throughout the Community has gathered evidence suggesting the existence of a separate market for the acquisition of TV broadcasting rights of football events that are played regularly throughout every year. That conclusion represents an expansion of the conclusions reached in previous cases.

(60) In the TPS case(30) the Commission found that it is universally acknowledged that films and sporting events are the two most popular pay-TV products and it suggested that a separate market might exist for rights to broadcast sports events. The Commission found that sports programmes have particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers. However, the Commission did not adopt a precise definition of the market in that case.

(61) In the case regarding UEFA's Broadcasting Regulations(31), the Commission's investigation suggested the likelihood of the existence of a separate market for the acquisition of TV broadcasting rights of football events played regularly throughout every year. This definition would, in practice, mainly involve national first and second league and cup events as well as the UEFA Champions League and the UEFA Cup. It was suggested that a distinction could be made between football events that do not take place on a regular basis throughout the year. The reason is that the latter do not constitute an equally regular source of programming for broadcasters. Although the decision found that all elements were present for the definition of a separate

market for the TV broadcasting rights of football events played regularly throughout every year, the Commission did not actually define the relevant product market in that case.

(62) The Commission's market investigation in the case regarding the merger of the sports rights trading subsidiaries, Sport+ SNC and UFA Sports GmbH with the Groupe Jean-Claude Darmon SA(32) demonstrated that although sports broadcasting rights may constitute a distinct field from other television programming, that market ought to be further subdivided into other separate product markets and that, at least within the EEA, football broadcasting rights may not be regarded as substitutes to other sports broadcasting rights. The Commission therefore concluded that there is a separate market for the acquisition and resale of football broadcasting rights to events that are played regularly throughout every year. In practice this involves matches in the national leagues (primarily the first division) and cups, the UEFA Champions League and the UEFA Cup. It was concluded that events that take place more intermittently are not part of that market definition(33).

(63) In the present case, the Commission also considers that the relevant product market can appropriately be defined as the market for the acquisition of TV broadcasting rights of football events played regularly throughout every year. This definition would in practice mainly include national First and second division and cup events as well as the UEFA Champions League and UEFA Cup. The TV rights of football events create a particular brand image for a TV channel and allow the broadcaster to reach a particular audience at the retail level that cannot be reached by other programmes. In pay-TV football is a main driver of the sale of subscriptions. As regards free TV, football attracts a particular consumer demographic and hence advertising, which cannot be attracted with other types of programming.

4.1.3.1. Channel brand image

(64) Football is important to broadcasters due to its ability to act as a developer of a brand image of a channel. Football has a distinct high profile among desirable viewers. Football generally provides high audience figures and produces events which take place regularly throughout most of the year(34). Viewers are attracted not only to one match but also to the tournament as a whole. Football tournaments, not least those that are branded such as the UEFA Champions League, therefore guarantee viewership for long periods and induce viewers regularly to make an appointment to view a particular channel, which they associate with football. This contributes to developing the brand image of a channel.

(65) The development of a brand image is increasingly important in a TV industry where the number of channels among which the viewers can choose increases rapidly and where products are generally homogenised(35). With a wider choice available to viewers, it becomes increasingly difficult for a TV channel to attract and maintain audience loyalty. Branding therefore encourages audiences to schedule their viewing habits to make appointments to view a particular channel. However, such loyalty may be achieved only by offering a "differentiated" product including eye-catching programmes and by strongly associating the channel with those programmes. If a channel usually broadcasts certain programmes, such as the UEFA Champions League, which is in itself a strongly branded event, viewers may develop a habit of screening that channel as their first port of call in determining their viewing choices. The creation of a brand loyalty to a channel encourages viewers to use the channel as a "point of reference" for their viewing. This has beneficial effects on other programmes broadcast by the channel.

(66) While the ability to build up brand loyalty to a particular channel is important to all types of channels, it is especially important for advertising-funded TV channels. They must be able to present audiences to advertisers for all their broadcasts otherwise they will not be able to sell their advertising space. Football is particularly attractive in that respect, because it has a wide following with continuously high audience figures. Viewers wanting to watch a particular match may often switch to that channel well in advance of the match and some of them may "hang on" after the match to see whether the following broadcast is interesting. In some cases this is reflected in the advertising rates that are high not only in the advertising slots immediately before and after the match but also in respect of the programmes that are broadcast before and after the match.

(67) The Commission's investigation has confirmed that the development of a brand image is of particular importance for broadcasters when determining whether or not to acquire football rights(36). Broadcasters consider that football enables them to create a brand image without which their channels would not be able to develop. The availability of alternative programming does not alter their interest in or demand for broadcasting rights of football events(37).

(68) One of the particular values of football for broadcasters in brand building is its regularity. Unlike many other sport events, football is characterised by national and European tournaments which are played regularly throughout most of the year. The UEFA Champions League is one of the most recognised among those tournaments with a strongly developed own brand. Football, unlike other sports, therefore allows broadcasters to achieve high viewing figures on a regular, sustained and continuous basis if they can get access to these rights. Although there are league events for other sports and whilst such sports may produce large audience

figures, they do not achieve the same continued viewing figures as football. This is of significant value for the branding of a channel, since it can only be achieved over a sustained period.

(69) The quest for a brand image is so strong that broadcasters in certain circumstances do not mind losing money on individual programmes if they are of such a quality that they can pull viewers to the channel. For some broadcasters football could be considered as a kind of loss leader, because they may be willing to invest more in acquiring the TV rights than they can, strictly speaking, hope to recuperate looking at the possible revenues that they can make from the individual broadcasts in isolation(38).

(70) These features of the TV rights of football have the consequence that the prices which broadcasters are willing to pay for those rights exceed all other prices, including events such as Formula One(39). ONdigital states that "Football rights are the most expensive of any sport (...)"(40) The total expenditure on sports as a whole has recently seen substantial increases. Football accounted for the single highest proportion of TV channels' total sports expenditure(41). The European average was 44,6 % in 1998(42). The high percentage dedicated to the acquisition of TV rights of football represents the importance which broadcasters attach to football compared to the acquisition of the broadcasting rights to other sporting events.

4.1.3.2. A particular audience

(71) In order to attract the widest possible audiences, broadcasters will seek to have a balanced schedule with a range of different programmes. Catering to a wide audience is part of the public service remit for public service broadcasters. Pay-TV broadcasters wish to cater to the tastes of as many people as possible in order to sell subscriptions. For commercial free-TV broadcasters the reason for having a balanced schedule is that they generally sell "packages" of advertising slots spread across various programmes instead of individual slots during particular programmes(43). Producers wishing to advertise during for example, the UEFA Champions League will also purchase slots during other types of programmes. This reflects the optimum strategy for an advertiser whose aim is to reach as large a proportion of its potential customers as possible. Showing adverts across a range of carefully selected programmes, each one of which will be watched by different potential customer groups, is the best way to do this(44). The fact that football is a regular and frequent event, which attracts high viewing figures, enhances the value of football programmes as part of an advertising package, because it allows the advertiser to make frequent contacts with a potential customer with a distinct profile.

(72) In deciding on a "package", advertisers will not randomly pick programmes during which to show their adverts. The profile of the audience, which a programme attracts, will be a crucial factor to be taken into account. This reflects the "raison d'être" of advertising: companies essentially advertise in order to attract new customers or to keep the existing ones. In order for an advert to fulfil this purpose those who have at least a potential interest in the product being shown must see it(45).

(73) Not all types of viewers are of equal value to broadcasters (and advertisers). Some people watch more TV than others do. People have different spending powers and patterns. Amongst the most sought-after viewers are men with an above-average spending power and who are in the age groups of 16 to 20 and 35 to 40, because those groups are generally considered to have a less fixed spending pattern compared to older people. They are therefore more likely to try new products and services. The problem for broadcasters and advertisers is that these groups contain a high proportion of "light viewers" of television(46), who do not, as a rule, watch much television. It is therefore much harder for advertisers to get their message through to these target groups via television advertising compared to other groups of the population, for example, women aged 55 or over, who on average watch a great deal more television. The attractiveness, and elusiveness, of the target group make programmes watched by them of significant value to broadcasters that are keen to have programmes that attract this audience.

(74) The Commission's investigation of the situation in the Member States has shown that football, which is a mass attractive sport with high viewing figures, is the programme, which seems to be the most effective tool to address this particular group of the population. Two-thirds of the viewers are male and in the appropriate age groups(47).

(75) A result of football being a tool to reach a hard-to-get-to audience is that broadcasters are able to charge higher rates for advertising in connection with football compared to other programmes. The price of advertising slots during the transmission of football is higher than during the transmission of other sports, for example, the UEFA Champions League allows broadcasters to charge premiums of between 10 to 50 % depending on the teams involved and the stage of the tournament(48).

(76) The attraction of programmes and hence the level of competition for the TV rights to them varies according to the type of sport and the type of event. Mass sports like football generally attract large audiences. By contrast, minority sports achieve very low ratings. In most Member States football constantly achieves the highest audience figures. In 1997, football accounted for 21 of the top 25 European sports broadcasts. The popularity of football for viewers is also expressed in the number of hours dedicated to the broadcast of sport.

Between 1996 and 1997, the number of hours dedicated to football transmission was 13939. The second most transmitted sport was tennis which achieved less than half this at 5115 hours(49). These figures led the authors of Kagan to comment that "the TV sports hours breakdown illustrates soccer's position as the most valuable sport to cover"(50). Kagan confirms its findings in its 2002 report, where it states that: "Soccer is by far the most popular programming on TV in Western Europe, where it made up a massive 79 % of total sports programming in 2000"(51).

4.1.3.3. Conclusion regarding the upstream market

(77) The Commission's investigation shows that there are no programmes which place a competitive restraint on the ability of the holder of the TV rights to football events being played regularly throughout every year to determine the price of these TV rights. TV rights to other sports events or other types of programmes such as feature films do not put a competitive restraint on the holder of the TV rights to such football events. Including such rights in the market definition would make the definition too wide. In other words, there is no substitutability between the TV rights to football and the TV rights to other types of programmes.

(78) Some have suggested that narrower market definitions may exist, such as for matches involving only national clubs. Assuming that such market definitions were correct, they would nevertheless not substantially alter the market share of UEFA. As such it is not necessary to consider such alternative market definitions for the purposes of this case.

(79) The Commission therefore concludes that there is a separate market for the acquisition of TV broadcasting rights to football which is played regularly throughout every year. This definition would, in practice, mainly involve matches in national league and cup events as well as the UEFA Champions League and UEFA Cup.

4.1.4. The downstream markets on which broadcasters compete for advertising revenue depending on audience rates and pay-TV subscribers

(80) The acquisition of TV broadcasting rights of football events is closely linked with the downstream television markets in which the football events are broadcast as an important element of the TV broadcasters' competition for advertisers on free-TV, which depends on viewer interest/ratings and/or pay-TV subscribers, who may in particular be enticed into subscribing to a TV channel by means of football.

4.1.5. The upstream and downstream markets for the acquisition of media rights for new media (wireless 3G/UMTS and Internet) of football

(81) UEFA's joint selling arrangement is not limited to TV rights, but also covers all other forms of media rights to the UEFA Champions League. Although not addressed in the Commission's statement of objections, they were included in UEFA's amendments to the notified new joint selling arrangement.

(82) Regarding the new media rights such as wireless and Internet content rights, these markets are very much in their infancy. This is largely due to the fact that these technologies are currently at an early stage of development and also to the lack of infrastructure, which is presently available to deliver those services to the consumers. Therefore, there is no clear empirical evidence on which to base market definitions. It is nevertheless possible to draw some conclusions, however broad, which would permit a realistic appraisal of the restrictive effect of UEFA's joint selling arrangement on those new media markets.

(83) First, content rights will be necessary for the development of the new services, in the same way as content rights are necessary for TV broadcasting services, where football content is being used to entice consumers to take up pay-TV subscriptions and to attract advertisers to TV channels. As these new services allow increasingly narrowly targeted forms of content delivery, it will be possible to identify and supply narrower customer demands than is the case with current media delivery systems. As such, it is likely that relatively narrow upstream content markets will emerge, given the ability to supply narrow downstream markets. It is therefore likely that football content rights, in relation to TV broadcasting, will also constitute a separate relevant product market in relation to new media and that football content will have a similar function. It is likely that new media operators will wish to acquire football content to attract advertisers and subscribers.

(84) Secondly, it is likely that each different form of exploitation will provide a specific service to specific consumers. On-demand services delivered via wireless mobile devices or via the Internet will not compete with live TV broadcasting. Likewise mobile clip services will not compete with television highlights packages(52).

(85) It is therefore likely that new media markets will emerge at both the upstream and downstream levels, which parallel the development of markets in the pay-TV sector.

4.1.6. The upstream and downstream markets for the other commercial rights - sponsorship, suppliership and product licensing

(86) UEFA jointly sells a number of other commercial rights related to the UEFA Champions League such as sponsorship, suppliership and product licensing. These commercial rights are likely to form part of wider product markets for commercial advertising. However, since it is not likely that UEFA's sale of these commercial rights would appreciably restrict competition, it is not necessary for the purposes of this case to exactly define the scope of the relevant product markets.

4.2. The geographic markets

(87) UEFA submits that the geographic scope of the affected markets is essentially national in character because of cultural factors and national audience preferences.

4.2.1. The geographic scope of the upstream market

(88) Media rights to football events like the UEFA Champions League are normally sold on a national basis. This is due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The Commission therefore considers the geographic scope of the upstream markets for the media rights to be national.

(89) The geographic scope of the relevant product markets for the other commercial rights could be wider than national as the sponsors, etc., associate themselves with the UEFA Champions League as such and not with individual football clubs. However, since it is not likely that UEFA's joint selling arrangement regarding these commercial rights would appreciably restrict competition, it is not necessary for the purposes of this case to define exactly the geographic scope of the relevant product markets.

4.2.2. The geographic scope of the downstream market

(90) The reasons for defining the geographic scope of the upstream markets as national, such as varying regulatory regimes, language barriers, and cultural factors, are also decisive in the downstream market. A pay-TV broadcaster normally only sells subscriptions to viewers in a certain territory. TV advertising is normally adapted to fit the tastes and languages of a certain territory. The same would seem to apply to new media services. The Commission therefore considers the geographic scope of the downstream markets to be national or at least confined to linguistic regions.

5. THIRD-PARTY OBSERVATIONS

(91) The Commission published a notice in the Official Journal of the European Communities pursuant to Article 19(3) of Regulation No 17, which prompted reactions from a number of interested third parties.

(92) The football associations welcome the compromise. G14, a European economic interest grouping whose 18 founding members are leading European football clubs, in particular considers that the achievement of a segmentation of media rights in separate windows addresses in a satisfactory manner the objections raised by the Commission. G14 moreover considers that the mix of joint and individual sales strikes the right balance between solidarity and protection of the consumer and the freedom of individual clubs. G14 therefore supports the compromise solution and the new marketing model while emphasising that the implementation should involve active participation of the parties concerned within the decision-making bodies of UEFA.

(93) Some pay-TV broadcasters are concerned that the reorganisation of the UEFA Champions League media rights sales system will increase competition in the TV broadcasting markets and that it therefore does not take account of the current economic reality for pay-TV in Europe. The reduction of exclusivity through the splitting up into several packages and short embargoes reduce the value for broadcasters. They consider that a sport event only has value when it is held in exclusivity by one broadcaster. The segmentation of rights, which the Commission strives for, risks reducing the value of the event and could lead to more (too much) football on TV and viewers having to buy several subscriptions. They also fear competition from Internet/UMTS and wish for more restrictions imposed on new media rights, inter alia, with longer embargoes, which would hold back the development of these new media.

(94) Other free-TV broadcasters are positive to the opportunities created by the new solution and note, inter alia, that whether the package solution will further the opportunity for more than one free-TV broadcaster to broadcast UEFA competitions will have to be proved in practice. They note that the UEFA Cup already allows more than one free-TV broadcaster to broadcast UEFA competitions. A free-TV broadcaster states that it is unable to determine on the basis of the facts provided whether the new system would, in practice, alleviate the concerns risen in the statement of objections. It is however, concerned about the reduced level of exclusivity created by the packaging. The third package of live rights is of no real value to broadcasters as the national games by definition will be included in the Gold and Silver packages.

(95) One sport rights agency congratulates UEFA and the Commission for having agreed on a compromise that generally accepts the principle of joint selling. It considers that this principle guarantees the attraction of the product and the "UEFA Champions League" brand as being in the consumers' interest and is best fitted to

reconcile all the different interests at stake. However, it regrets the deviation from the joint selling principle created by package 5, as this may negatively influence the UEFA Champions League brand.

(96) Other sport rights agencies are not convinced that the compromise solves the issues objected to by the Commission regarding the TV broadcasting rights to football events, which represent 15 to 40 % of the value of broadcasting rights to regular football events. They argue that a joint selling arrangement is not necessary to establish the UEFA Champions League as a brand. Nor do they consider that solidarity or that a single point of sale are relevant arguments under Article 81(3). They further argue that the compromise is likely to serve as a model for other football competitions, including for the UEFA Cup. They consider that packages 1 and 2 will contain all commercially valuable matches whereas matches contained in package 5 have very little commercial value. Only UEFA can market a wireless and Internet service covering the whole UEFA Champions League. In addition, football clubs are restricted in marketing club branded and related services. They are therefore concerned that clubs may not create a product competing with the UEFA Champions League. Finally, they point out that clubs must pay a fee for the raw feed and that Internet rights are available only at midnight.

(97) A telecommunications operator that has interests in free-TV, Internet and wireless welcomes the Commission's initiative of opening the market for the sale of the UEFA Champions League media rights. It considers that packages 1 and 2 should be unbundled allowing broadcasters to bid for single matches and that, at least, a broadcaster should be prevented from bundling the two packages. It also argues that the same package should be sold to both a free-TV and a pay-TV broadcaster. It furthermore considers that TV broadcasters should be allowed to resell the rights to ISPs and wireless providers.

(98) Internet services providers would like to have live rights. They consider that the embargo is too long for deferred exploitation and that Internet and TV are two distinct markets. They regret that deferred rights are reserved for UEFA and the football clubs and that Internet service providers are excluded from competing for the rights.

(99) Only one national competition authority has submitted comments to the Commission. It considers that the compromise does not resolve the problems identified in the statement of objections and as such does not qualify for exemption. It considers that on the horizontal level the UEFA arrangement remains restrictive of competition as UEFA continues to maintain the exclusive right to sell all matches. In respect of the vertical level the new commercial model does not alleviate competition concerns, as the two main packages are still effectively only within the reach of large broadcasters. It moreover considers that the football clubs' sale of package 5 to pay-TV/pay-per-view is an illusion as in Germany there is only one pay-per-view broadcaster.

(100) Finally, radio broadcasters query how UEFA is able to sell radio rights in view of the right of information of the public. They argue that the right of the public to have access to information cannot be considered as a market like TV.

(101) UEFA was informed that, on the basis of the third party comments, the Commission had identified certain issues where a modification of the compromise would be required. The issues raised by the third party comments were discussed with UEFA in a number of meetings and gave rise to an exchange of correspondence following which UEFA agreed to amend its joint selling arrangement to accommodate those comments. The modifications relate, in particular, to restrictions imposed on football clubs' individual sale of media rights (for example, bundling, field of use restrictions) and achieving a more equitable balance between and mix of joint and individual selling. Also Internet service providers are granted better access to content.

6. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

6.1. Jurisdiction

(102) In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since UEFA's joint selling arrangement has an appreciable effect on competition in the common market as well as on trade between Member States.

6.2. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

(103) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(104) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced by a reference to "trade between contracting Parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the ... (EEA) Agreement".

6.3. Agreements or decisions between undertakings and associations of undertakings

(105) The Court of Justice has ruled that, having regard to the objectives of the Community, sport is subject to Community law to the extent it constitutes an economic activity within the meaning of Article 2 of the Treaty(53).

(106) Football clubs engage in economic activities(54) and they are undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The membership of the national football associations consists of those football clubs. The national football associations are therefore associations of undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The national football associations are also undertakings themselves in so far as they engage in economic activities(55). The members of UEFA are the national football associations. UEFA is therefore both an association of associations of undertakings as well as an association of undertakings. UEFA is moreover an undertaking in its own right as it also engages directly in economic activities.

(107) Notwithstanding the fact that some of these entities are non-profit making bodies, UEFA, the national football associations and the football clubs are all undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(108) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are applicable to associations of undertakings in so far as:

- the activities of the association or of the undertakings belonging to the association are calculated to produce the results which Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement aim to suppress(56), and/or

- the association intended to and did coordinate the conduct of its members on the market(57).

(109) The Regulations of the UEFA Champions League constitute a decision taken by an association of associations of undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement(58).

(110) The Regulations of the UEFA Champions League provide the regulatory basis for the manner in which the commercial rights of the UEFA Champions League are sold. UEFA's Executive Committee adopts the Regulations of the UEFA Champions League. UEFA's Congress, the membership of which consists of the national football associations of which the football clubs are members, appoints the Executive Committee. The Regulations of the UEFA Champions League are binding on the national football associations and on the football clubs. The football clubs playing in the UEFA Champions League, which are co-owners of the commercial rights of the UEFA Champions League, confirm the binding nature of the UEFA Statutes, the Regulations of the UEFA Champions League and other decisions relevant to the competition taken by the competent bodies of UEFA, referred to in the entry form, which they sign when they sign up for participation in the UEFA Champions League.

(111) In agreement with the aforementioned competent bodies of UEFA, associations and football clubs, UEFA adopted a new joint selling arrangement regarding the UEFA Champions League media rights, the content of which is summarised above under sections 1.4 to 1.6.

(112) UEFA will, in the future, conclude rights contracts with third parties on the basis of the principles enshrined in the notified joint selling arrangement. The vertical rights agreements with television broadcasters that were originally notified are no longer applicable following the introduction of the new joint selling arrangement and will therefore not be addressed in this Decision.

6.4. Restriction of competition

(113) The notified joint selling arrangement grants UEFA the exclusive right to sell jointly certain commercial rights on behalf of the football clubs participating in the UEFA Champions League. This includes media rights that relate to the UEFA Champions League as a whole and involving action from all matches of the UEFA Champions League. Those media rights, which are listed in section 1.6 above, relate to all types of media rights and are not restricted to the rights for specific markets. As such, the restrictive effects of UEFA's joint selling arrangement are capable of manifesting themselves on any of the markets where the rights could be used.

(114) UEFA's joint selling arrangement has the effect that through the agreement to jointly exploit the commercial rights of the UEFA Champions League on an exclusive basis through a joint selling body, UEFA, prevents the individual football clubs from individually marketing such rights. This prevents competition between the football clubs and also between UEFA and the football clubs in supplying in parallel media rights to the UEFA Champions League to interested buyers in the upstream markets. This means that third parties only have one single source of supply. Third-party commercial operators are therefore forced to purchase the relevant rights under the conditions jointly determined in the context of the invitation to bid, which is issued by

the joint selling body. This means that the joint selling body restricts competition in the sense that it determines prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. In the absence of the joint selling agreement the football clubs would set such prices and conditions independently of one another and in competition with one another. The reduction in competition caused by the joint selling arrangement therefore leads to uniform prices compared to a situation with individual selling.

(115) UEFA's joint selling arrangement also has the effect that certain restrictions are imposed on football clubs in respect of the exploitation of those commercial rights that they have not granted to UEFA for joint selling, but which are exploited by themselves individually. The restrictions imposed on individual football clubs concern in particular:

(a) a restriction on football clubs' individual selling of live TV rights, which restricts them to selling such live rights only to pay TV/pay-per-view broadcasters and prevents the sale of such rights to free-TV broadcasters (package 5 of the rights segmentation table);

(b) embargoes on the exploitation of deferred media rights, in particular TV and Internet rights, (packages 6, 7 and 12 of the rights segmentation table);

(c) a limitation on the bundling of individually sold live and deferred media rights restricting the football clubs from selling their individually sold media rights to end-users (broadcasters) which would exploit those rights as a UEFA Champions League focused product (packages 5, 6, 11 and 12 of the rights segmentation table).

(116) UEFA's joint selling arrangement therefore restricts competition in the upstream markets not only between football clubs but also between UEFA and the football clubs in supplying commercial rights to interested buyers. In addition, the notified joint selling arrangement has an impact on the downstream broadcasting markets as football events are an important element of TV broadcasters' competition for advertisers or for subscribers for pay-TV and pay-per-view services. Such an arrangement has as its effect the restriction of competition. It is therefore also caught by the prohibition in Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement(59).

6.4.1. Scope of the present procedure

(117) Under the new sales policy the media rights are no longer all offered to a single operator but are split up into a large number of smaller rights packages. It is not the object of the present procedure to ascertain whether individual rights contracts between UEFA and a broadcaster would restrict competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Nor is it possible to ascertain in the context of the present procedure whether competition would be restricted if a single operator acquired several packages of rights. This decision will therefore not deal with the individual rights contracts concluded by UEFA with third parties and does not in any way prejudice their evaluation under Community competition law.

6.5. Applicability of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement

6.5.1. League rights and individual football clubs' rights

(118) For each individual football match played in the UEFA Champions League, the two participating football clubs may claim ownership to the commercial rights. This is because it would be difficult to deny that an individual home club, as user of the football ground, has the right to deny admission to media operators wishing to record those matches. Likewise, it would be difficult to deny that the visiting club, as a necessary participant in the football match, should have some influence as to whether the match should be recorded and, if so, how and by whom.

(119) Looking at a whole football tournament, it would seem that each football club would have a stake in the rights in the different constellations in which they play but their ownership could not be considered to extend beyond that. Therefore, there are in a football tournament a large number of individual ownership constellations that are independent of one another. The fact that football clubs play in a football tournament does not mean that ownership extends to involve all matches in the tournament. Nor does it mean that ownership is inter-linked to an extent where it must be held that all clubs have an ownership share in the whole league as such and in each individual match.

(120) UEFA argues that it is UEFA's intellectual efforts and organisational responsibility that have created a football league with its own brand image distinct from that of the participating football clubs. Therefore, without any joint selling arrangement, no commercial rights would be available at all. UEFA argues that it is the owner of the UEFA Champions League property rights due to the tasks it undertakes. To the extent UEFA is selling its own property, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are inapplicable. According to UEFA, the case therefore does not concern the joint selling arrangement but the terms on which

the rights are sold to third parties. UEFA consequently argues that as long as these terms do not restrict competition, there is no infringement of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement.

(121) UEFA moreover argues that if UEFA cannot be considered as the sole owner of the property rights, it should be considered a "co-owner" of the rights. Therefore, according to UEFA, the notified joint selling arrangement is fundamentally different from any conventional joint selling arrangement in which the individual undertakings pool individually owned rights which they sell jointly, as UEFA, in this case, also exploits its own property rights. UEFA is stresses its view on the property rights situation with reference to the situation in the individual Member States(60).

(122) The Commission takes note of the fact that there is no common uniform concept in the EEA Member States regarding the ownership of the property media rights to football events nor is there any Community or EEA law concept(61). It is true that if UEFA were the sole owner of the rights in a Member State no horizontal restriction of competition would occur from UEFA selling the commercial rights. However, on the basis of the information submitted by UEFA, UEFA can at best be considered as a co-owner of the rights, but never the sole owner. The question of ownership is for national law and the Commission's appreciation of the issue in this case is without prejudice to any determination by national courts.

(123) The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament. It is not considered necessary for the purpose of this case to quantify the respective ownership shares.

(124) It suffices to note that there are multiple owners of the media rights to the UEFA Champions League. An agreement between the three owners (the two football clubs and UEFA) which are indispensable to produce one unit of output (the licence to broadcast one match) would not be caught by Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. However, since the agreement regarding UEFA's joint selling arrangement extends beyond that, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply to the arrangement.

6.5.2. The special characteristics of sport

(125) UEFA is of the opinion that it is not appropriate to evaluate the relationship between football clubs with a "free play of competition" test, as football clubs are not truly independent competitors. UEFA considers that this test may be valid to evaluate the merits of an agreement between independent business entities that would compete with one another under normal circumstances.

(126) Furthermore according to UEFA, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are not applicable because the structure and operation of the UEFA Champions League serves to promote and not to restrict competition in European football. UEFA considers that the model of financial solidarity helps to maintain a balance between clubs and to encourage recruitment of young players, which serves to promote competition in European football. As a result of the financial policies implemented by UEFA, competition between clubs in Europe is enhanced and the number of competitors on the market is increased.

(127) The Court of Justice has ruled that, having regard to the objectives of the Community, sport is subject to Community law to the extent it constitutes an economic activity within the meaning of Article 2 of the Treaty(62).

(128) UEFA and the football clubs are economic competitors in selling commercial rights (property rights and media rights) to football matches. If there were no joint selling arrangement these parties would be selling the rights individually and in competition with one another.

(129) In fact, the object of the notified agreement is not the organisation of the UEFA Champions League but the sale of the commercial rights of the UEFA Champions League. The Commission is aware that some form of cooperation among the participants is necessary to organise a football league and that there is, in this context, certain interdependence among clubs. This interdependence between all clubs does not, however, extend to all activities of the UEFA Champions League participants. Clubs already compete in the areas of sponsorship, stadium advertising and merchandising. Clubs also compete for players. Consequently, the decision of an association of associations of undertakings to sell the commercial rights jointly on behalf of its members, which is an area in which the clubs are economic competitors, is not necessary in terms of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to stage a football league. These provisions are therefore applicable to such an arrangement. Any need to take the specific characteristics of sport into account, such as the possible need to protect weaker clubs through a cross-subsidisation of funds from the richer to the poorer clubs, or by any other means, must be considered under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

(130) According to UEFA, its joint selling arrangement is a prerequisite for the existence of the UEFA Champions League. UEFA would not organise the UEFA Champions League without its joint selling arrangement

and without being able to redistribute the revenues. UEFA considers that the joint selling arrangement does not impede trade between Member States and that the redistribution of revenue by UEFA serves to enlarge the competitive base in European football. In UEFA's view, its financial policy pursues objectives that have been recognised by the Court of Justice in the Bosman case(63), that is to say, the objective of maintaining a balance between clubs by preserving a certain degree of equality, and encouraging the recruitment of players.

(131) The Commission fully endorses the specificity of sport, as expressed for example in the declaration of the European Council in Nice in December 2000. On that occasion the Council encouraged the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. However, while UEFA's interest in the commercial aspects is understandable, it has not demonstrated that a joint selling arrangement is an indispensable prerequisite for the redistribution of revenue. The UEFA Cup demonstrates that a pan-European football competition can exist without a joint selling arrangement for the sale of the TV rights, as in this case the individual football clubs are selling the TV rights individually. There are also national examples of this in Spain, Italy and Greece. A redistribution of revenue can be undertaken in other ways without being linked to any joint selling arrangement. It can be implemented through a taxation system or through voluntary contributions. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are therefore applicable to such a joint selling arrangement. In any event it is more appropriate to consider any such argument under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

6.5.3. Appreciability of the restriction on competition

(132) In assessing the appreciability of the restrictions of competition, the Commission notes that premium sports, in particular football, are regarded as one of the main drivers of television. UEFA sold the UEFA Champions League TV rights for more than CHF 800 million in 1999 (EUR 526 million). In the 1999/2000 season in a Community-wide average, the UEFA Champions League accounted for around 20 % of the money paid for TV rights of football events by broadcasters(64). Bearing in mind that football accounts for the single highest proportion of TV channels' sports expenditure(65), the Commission considers that the effect of UEFA's joint selling arrangement is to bring about an appreciable restriction of competition in the broadcasting market.

6.6. Effect on trade between Member States

(133) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets, or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(134) The commercial rights of the UEFA Champions League are sold throughout the EEA. UEFA's joint selling arrangement therefore affects trade between Member States. If the media rights were sold by the individual football clubs or on a non-exclusive basis, it would change the flow of trade in the TV rights.

(135) The UEFA Champions League is the most prestigious pan-European club football tournament, involving 32 of the best European clubs. The agreement establishing the joint selling arrangement between the football clubs participating in the UEFA Champions League has an appreciable effect on trade between Member States.

7. ARTICLE 81(3) OF THE TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

(136) In evaluating the restrictions of competition created by UEFA's joint selling arrangement pursuant to the criteria for exemption set out in Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the Commission has considered the benefits generated by the restrictive arrangement. Where the benefits are such as to offset the restrictive effects, then an exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is justified.

(137) The assessment required under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is therefore whether the benefits generated by the notified joint selling arrangement outweigh the negative effects that it deploys, namely:

(a) the grant by the football clubs to UEFA of the exclusive right to sell certain of the commercial rights relating to the UEFA Champions League;

(b) the restrictions agreed to by the football clubs in selling their commercial rights individually.

(138) Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement provide that the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement respectively may be declared inapplicable to any agreements between undertakings which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a

substantial part of the products in question. The following sections contain an assessment in relation to each of those four conditions.

7.1. Improvement in production or distribution and/or promoting technical or economic progress

(139) UEFA considers that its joint selling arrangement facilitates the business operations of UEFA's commercial partners by creating a single point of sale. The creation of a single point of sale is of particular interest for an international tournament such as the UEFA Champions League, because this tournament involves a great number of football clubs from many different countries. In addition to the practical difficulties that may create, there is moreover the issue that the ownership structures vary from Member State to Member State with the possibility of the presence of multiple different co-owners of the media rights to each match. Furthermore, there is dispersed demand from broadcasters who are likewise of different nationalities and operating in many different national markets.

(140) Moreover, UEFA argues that the creation of a single point of sale is a prerequisite for the existence of the UEFA Champions League product. Since no individual club knows before the start of the season how far it will get in the tournament it could not sign a commercial agreement with a broadcaster giving the broadcaster any certainty that the football clubs will make it to the very end of the UEFA Champions League season. This provides an element of uncertainty for broadcasters. Similarly, joint selling of the rights by UEFA allows sponsors and other suppliers to receive a uniform package for the duration of the competition guaranteeing them media exposure for the entire period of the event, which allows them to structure their advertising budgets accordingly.

(141) UEFA also considers that its joint selling arrangement enables UEFA to maintain the uniform excellence and consistency of the "product" at a level and quality which it would not be possible to achieve if the media rights were handled on an ad hoc basis by individual football clubs selling the media rights to a succession of different operators. This is essential for the maintenance of the distinctive UEFA Champions League brand, which is of particular interest to UEFA's commercial partners.

(142) UEFA finally argues that UEFA's financial solidarity model supports the development of football from the grass roots upwards. It improves production and stimulates the development of the sport in the smaller countries. This results in a more competitive base for the future of European football allowing even the smallest and financially weakest football clubs to compete with the biggest and strongest football clubs.

7.1.1. Single point of sale of a league product

(143) Joint selling of the media rights of a football tournament provides an advantage for media operators, football clubs and viewers since it leads to the creation of a single point of sale for the acquisition of a packaged league product.

(144) The advantages of a single point of sale are attractive in the context not only of a national football tournament, but also of an international competition where the difficulties in selling the rights are greater and where the efficiencies of joint selling may be particularly high. The creation of a single point of sale is of particular interest for an international tournament such as the UEFA Champions League, because this tournament involves a great number of football clubs from many different countries. In addition to the practical difficulties that may create, there is moreover the issue that the ownership structures vary from Member State to Member State. Furthermore, there is dispersed demand from broadcasters who are likewise of different nationalities and operating in many different national markets.

(145) Joint selling moreover allows the creation of packages of UEFA Champions League rights. This allows media operators to provide coverage to consumers of the league as a whole and over the course of an entire season. The creation of a single point of sale facilitates the existence of the UEFA Champions League product in view of the hybrid character of the UEFA Champions League which is a combination of a league and a knock-out competition where only a limited number of football clubs reach the final stages of the competition. Therefore, an individual club could not enter into a commercial agreement, which would give a broadcaster any guarantee of being able to plan its programme schedule for the whole UEFA Champions League season right to the final round. The joint selling of the TV rights solves this problem, as the broadcaster does not buy the rights of particular football clubs, but the right to broadcast the matches which are played on certain days.

(146) The benefits of this packaged approach are evident in every match week when rights to the entire UEFA Champions League allow a comprehensive highlights programme to be produced which offers the possibility of showing the most interesting bits of the action of the match days/week in question.

(147) The benefits are also evident in respect of live coverage. Joint selling provides media operators and consumers with an overview of the whole UEFA Champions League, benefiting, for example, those viewers who have a general interest in the UEFA Champions League as a whole. By ensuring that clubs grant rights to UEFA, which are then licensed to media operators, UEFA can offer a complete package of rights to such operators.

This package currently includes, for example, the first pick of matches played on each match day. It is obviously impossible to know at the start of the season which matches will be most interesting throughout the course of the season. The package therefore provides media operators with an opportunity to purchase, and then sell to consumers, a distinct and valuable media service, with guaranteed coverage of the most interesting matches throughout the whole season.

(148) It is conceivable that media operators could put such a package together even without joint selling. However, this would require the acquisition of significantly more rights than is currently the case. For a media operator to create the same end product in the context of individual sale of all media rights would risk being significantly less efficient, involving more acquisition and transaction costs(66). The only guarantee of an equally interesting selection of matches would be if one media operator were to buy all of the rights available individually either before the start of the football season or consecutively as the football season develops depending on the performance of the football clubs.

(149) In addition, instead of having to conduct negotiations with football clubs throughout the 51 different UEFA member territories with the communication difficulties and transaction costs that is likely to entail, broadcasters can acquire the league media rights packages from the original rights holders though a single outlet. Also in this respect, joint selling therefore reduces the transaction complexity and costs for broadcasters. Broadcasters can establish predictable commercial, technical and programming plans for a whole football season, which enhances the selling of advertising slots and subscriptions. It enables advertisers to build a campaign around the TV coverage of a league and is instrumental in securing broadcast sponsorship.

(150) Joint selling reduces broadcasters' financial risk. In a situation with individual selling of the media rights by the football clubs they risk a reduction in the value of the rights acquired from an individual club if that club performs badly in the league. Joint selling therefore allows a higher level of investment in the league product leading to more innovative match coverage such as better general presentation in both the stadium and the studio.

(151) Even in respect of competitions where the media rights are sold by the individual clubs, the rights are generally aggregated and packaged in later levels of the transaction chain by intermediaries such as sports agents or by the broadcasters creating clearing houses or joint exploitation bodies. A certain level of packaging or aggregation of the individual rights therefore seems optimal or even necessary for an efficient exploitation of the media rights of a football tournament.

(152) Viewers benefit from being offered multiple forms of coverage of the UEFA Champions League. The viewer is interested in having a choice between various forms of broadcasts of the matches of a league. A viewer is likely to wish to have a choice of being able to watch a match live in its total length and also to be informed about several matches in brief on a delayed basis at several different times. The viewer wants to gain information not only about a single match but also about all matches on a given match day. A jointly sold packaged league product is more likely to provide viewers with the product desired as a broadcaster cannot simply acquire the rights to a single match but also needs rights to provide a certain coverage of the other matches of the league on every match day(67).

(153) Football clubs benefit from the sale of the commercial rights via a single point of sale/joint selling agency. The football clubs avoid having to build up own commercial departments of the magnitude that is necessary to deal with the complexity of developing a commercial policy and executing the rights deals in a large number of countries. It is likely that it would be extremely difficult for many football clubs to be able to build up such commercial departments and it is therefore likely that an outsourcing of such function would be necessary in any circumstances. It would seem that the individual football clubs could more easily carry out such a task in respect of national competitions, as the national market would be much more easily accessible in terms of language, culture, communication and commercial transparency.

7.1.2. Branding

(154) UEFA's second argument that it is able to create and maintain the uniformity and consistency in quality of a UEFA Champions League product via its joint selling arrangement is not without merit. These are factors that contribute to establishing the reputation of a brand, which is associated with a uniform and high quality TV coverage underpinned by a homogeneous presentation which increases the attractiveness for the viewer(68). These are also factors that attract the best football clubs who want to participate in this particular international tournament. The UEFA Champions League has, in fact, become the most prestigious pan-European club football tournament with the participation of the very best European football clubs.

(155) Among the factors underlying the success of the UEFA Champions League and distinguishing it from other tournaments are the specific tasks undertaken by UEFA including the "dressing-up" of the stadium facilities, the recording of the match and the on-screen presentation, on-screen signage, music, etc.

(156) Furthermore, the organisational steps undertaken by UEFA and the joint selling of the league media products provide benefits for broadcasters in terms of a common and consistent look to the on-screen presentation of the matches by all partner broadcasters throughout the UEFA Champions League season. This is of benefit to viewers as they are able immediately to recognise a UEFA Champions League branded media product associated with quality football, which in turn stimulates viewers' interest and demand.

(157) UEFA's joint selling of packages of media rights to broadcasters leads to more objectivity in the media coverage of the UEFA Champions League. It provides coverage of the league in a manner that protects the league media product and the brand better than in a situation where one football club would be presented with a favourable bias to the detriment of other clubs and the league brand(69). This improves the coverage of and the interest in the UEFA Champions League brand, thereby improving the production and the distribution of the UEFA Champions League media product.

7.1.3. Football clubs' individual sale of live TV rights unsold by the joint selling body

(158) UEFA's exclusive right to sell the live TV rights comprised by package 4 of the rights segmentation table becomes a non-exclusive right one week after the draw for the first round for the UEFA Champions League, which normally takes place in August. Following that cut-off date, where UEFA fails to sell such rights, the football clubs will have an opportunity to offer such rights to the pay-TV/pay-per-view market on a non-exclusive basis in parallel with UEFA. These are the rights referred to in package 5 of the rights segmentation table.

(159) The philosophy behind the Commission's insistence in giving the football clubs an opportunity for individual sale of such live TV rights is twofold. First, the efficiencies and benefits of joint selling can be argued where the joint selling body fails to find demand in the market for such rights. Secondly, maintaining competition between UEFA and the football clubs in bringing such rights to the market helps to avoid rights to the UEFA Champions League remaining unused, where there is demand for them. Football clubs should therefore also be able to meet demand from free-TV broadcasters. For example, a risk of unused rights is likely to occur in territories where there are no pay-TV/pay-per-view broadcasters or where the existing pay-TV/pay-per-view broadcasters have already satisfied their demand with the Gold or Silver rights packages. In such cases, only free-TV broadcasters seem likely as potential buyers of such rights and there are no efficiencies in preventing them from potentially acquiring such rights. This decision should therefore be made subject to the condition that the provision in package 5 of the rights segmentation table restricting football clubs from selling live TV rights to free-TV broadcasters does not apply where there is no reasonable offer from any pay-TV broadcaster.

7.1.4. Football clubs' individual sale of deferred media rights

(160) The amended joint selling arrangement provides that a number of additional types of deferred TV rights, as well as new media rights, will be exploited not only by UEFA but also by the individual clubs in parallel. However, these additional media rights are made available for exploitation by UEFA and the football clubs only after some embargoes introduced to secure products for which there is much viewer interest and to establish the reputation of the UEFA Champions League brand, which is strictly associated with a uniform and high quality TV coverage, underpinned by a homogeneous presentation. Consequently, deferred TV rights are available as of midnight one day after the last of the games of the relevant match week. Archive rights are available 48 hours after the final. Given the current development of the Internet and to ensure that the UEFA Champions League Internet product remains a quality product, these rights are available 11/2 hour after the game. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future.

(161) Under these circumstances, the Commission considers that the negative effects arising from the joint selling arrangement are outweighed by the increased amount of content made available for a wider distribution, thereby promoting technical or economic progress of the media content itself and the new media carriers distributing them.

7.1.5. Enhancing the focus of the respective UEFA Champions League and football clubs' brands

(162) Football clubs exploiting UEFA Champions League footage individually will present the footage in a club-focused manner and relating only to action in which they are participating. Football clubs or the broadcasters exploiting the media rights in question(70) cannot package the rights from several football clubs into a single product which would appear as an UEFA Champions League branded product. In particular regarding live TV rights, UEFA defines as an UEFA Champions League branded product as one consisting of more than two live UEFA Champions League matches per day. Regarding delayed TV rights and Internet rights, UEFA would accept programmes containing 100 % UEFA Champions League content on a club channel. However, UEFA defines a UEFA Champions League branded programme as one presented as a club magazine programme, which contains more than 50 % UEFA Champions League content. In general programming, the maximum permissible

UEFA Champions League amounts to 30 % of the programme. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme then the 50 % rule would not apply and the programme could consist mostly or entirely of that single match. Similarly, if a whole match were broadcast in general programming on a channel, then the 30 % rule would not apply in that situation.

(163) The definitions of UEFA Champions League branded products will optimise the global interaction between UEFA Champions League branded and club branded products. The provisions regarding branding are aimed at furthering the development of the UEFA Champions League brand as being a unique independent quality labelled football media product distinguished from club branded products existing in parallel with the UEFA Champions League branded products. The definitions are designed to ensure that club rights do not metamorphose into a product which could be confused with the UEFA Champions League. This contributes to safeguarding the identity and reputation of the UEFA Champions League product, as the UEFA Champions League brand in many circumstances serves as a vehicle and a platform for exposure and promotion of the individual football clubs within and outside the EEA. This will be of benefit, in particular, to smaller clubs with less well-known brands in a wider geographic area who are likely to get broader television exposure through this means.

7.1.6. Solidarity

(164) In its notification, UEFA advanced as a justification for exemption the issue of financial solidarity. UEFA argues that its financial solidarity model supports the development of European football by ensuring a fairer distribution of revenue. The solidarity model could therefore be said to improve production and to stimulate the development of the sport(71).

(165) The Commission understands that it is desirable to maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches, which could be reflected in/translate into better media rights. The same applies to the education and supply of new players, as the players are a fundamental element of the whole venture. The Commission recognises that a cross-subsidisation of funds from richer to poorer may help achieve this. The Commission is therefore in favour of the financial solidarity principle, which was also endorsed by the European Council declaration on sport in Nice in December 2000(72).

(166) However, the Commission found that the efficiencies and the consumer benefits created by the originally notified joint selling arrangement in 1999 did not outweigh the negative impact of the restrictions of competition inherent in that system.

(167) The Commission nevertheless considers that it is not necessary for the purpose of this procedure to consider the solidarity argument any further. An exemption, under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, of the new and amended joint selling arrangement is justified because of the creation of a branded league product which is sold in packages via a single point of sale.

7.1.7. Conclusion regarding improvement in production or distribution and/or promoting technical or economic progress

(168) The Commission accepts that the decision of the football clubs and UEFA regarding the joint selling arrangement improves production and distribution of the UEFA Champions League within the meaning of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement by enabling the creation of a quality branded content product and by providing an advantage for media operators, football clubs and viewers, since it leads to the creation of a single point of sale for the acquisition of a packaged league product. However, since no such benefits arise from the restriction of football clubs' freedom to sell live TV rights under package 5 to other broadcasters than pay-TV/pay-per-view broadcasters, this decision should be subject to a condition, which will enable football clubs to sell their live TV rights to free-TV broadcasters, where there is no reasonable offer from any pay-TV broadcaster.

7.2. Fair share of the benefit to consumers

(169) The Commission considers that UEFA's joint selling arrangement provides consumers with a fair share of the benefits, which are in particular created by the single point of sale as explained above under section 7.1.1.

(170) The Commission considers that the creation of a UEFA Champions League packaged content, which is available from a single point of sale, is a genuine benefit, which flows from UEFA's joint selling arrangement. Media operators, as consumers of football content, get more efficient and easier access to this unique content which is in addition carrying the UEFA Champions League quality brand label.

(171) UEFA's joint selling arrangement therefore creates efficiencies, which allow media operators to invest more in new improved production and transmission technologies, quality television coverage, quality production and presentation, etc. It is also likely to lead to a more intensive and innovative exploitation of the rights to the

benefit of the consumer. The sale of the UEFA Champions League media rights in separate packages by means of a public bidding procedure should enhance the possibility for more broadcasters, including small and medium-sized companies, to obtain UEFA Champions League content. The UEFA Champions League joint selling arrangement also ensures that companies interested in new media and deferred media rights and archives will have the opportunity to bid for such content rights.

(172) The Commission also considers that viewers get access to better quality media coverage of the UEFA Champions League product allowing them to watch all premium matches of every match day over the course of the entire season which are of particular interest to them. Viewers also benefit from a facilitation of access to deferred media content and archive material, which may be of special interest to them.

(173) However, as indicated in section 3.4.1.3, the Commission considers that the restriction in package 5 of the rights segmentation table limiting football clubs to selling such TV rights to pay-TV/pay-per-view broadcasters does not lead to an improvement in production or distribution and/or the promotion of technical or economic progress. In addition, no benefits to consumers are likely to arise from such restrictions. In fact, the main justification put forward by UEFA to justify the restriction was linked to UEFA's fear that in the absence of the restriction, there would be a risk of severe economic devaluation of the main rights packages. It is difficult to see how such restriction designed to maintain or raise prices and to remove content from free-TV broadcasters could be regarded as enhancing consumer benefits.

7.3. Restrictions that are indispensable

7.3.1. Indispensability of restrictions to create a league product sold via a single point of sale

(174) The Commission notes that media rights of sport competitions most often are aggregated in some form at some level of the exploitation chain before they are offered to the viewer. The Commission is neutral as to who undertakes this task. The Commission notes that UEFA could have a legitimate interest in creating a UEFA Champions League focused product, separate from any interest that any other operators may have in creating aggregated products based on UEFA Champions League footage. The interests may overlap, but would not always coincide. UEFA could therefore not necessarily rely on broadcasters, sport rights agents or others to create a UEFA Champions League focused product on its behalf. If UEFA wishes to ensure the benefits for itself, its members and its supporters of a UEFA Champions League media product, it would appear indispensable for UEFA to take a role in ensuring the production of such product. Under the notified joint selling arrangement UEFA is therefore able to ensure the production of a quality product, which represents the UEFA Champions League in an objective and independent manner.

(175) Secondly, it would appear that the complexity of producing such a product through individual sales by the clubs could compromise the quality and availability of a UEFA Champions League product, and could be less efficient for media operators, in particular since the UEFA Champions League is a pan-European football tournament involving participants from many different countries. As a practical matter, an interesting UEFA Champions League media product would have to encompass matches of interest to consumers throughout the season. As it is impossible to predict accurately at the start of the season which matches will still be of interest at the end of the season, it would not be possible for media operators to buy those matches in advance. The alternative - buying a significant number of matches from a number of different clubs - would be inefficient and still not guarantee success. Media products of football leagues are generally aggregated into a media product covering the league as a whole. The Commission accepts that such aggregation seems indispensable to present a worthwhile product that interests viewers. The Commission will therefore simply have to examine the terms on which the aggregation takes place, not the identity of the body performing the task.

(176) Thirdly, it also seems indispensable that clubs are not able to sell on their own behalf precisely the same rights as those that are included in the jointly sold UEFA Champions League package. Where the same intellectual property is in the hands of two different sellers, it is likely that the combined revenue from the two possible sales would be significantly less than that which would be received were there only to be one seller. This is because a media operator would be less interested in rights which are available to all of its competitors, as there would be a reduced possibility to distinguish its product from those products of its competitors.

(177) In other words, it does not seem possible to alter the arrangements in such a way that the clubs grant UEFA a non-exclusive licence to all of their media rights while at the same time maintaining the improvements and efficiencies referred to in the first requirement of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. However, where the joint selling body has failed to sell the aggregated media rights - the media rights sold by UEFA being a composite product - the rights of the joint selling body should not remain exclusive, but the individual co-owners should have an opportunity to test market demand for their individual rights. It would moreover not be indispensable for the proper functioning of the joint selling body if any further restrictions were to be imposed on the football clubs when selling those rights individually(73).

(178) The Commission also accepts that it is indispensable for UEFA to have the exclusive right to sell the UEFA Champions League live and delayed TV rights outside Europe as it provides the likelihood of a wider and more efficient distribution of the UEFA Champions League. UEFA is, in principle, able to present a product of much wider appeal than any individual football clubs would be able to do.

(179) It is therefore likely that a centrally packaged product, identifiable as a UEFA Champions League product and focused not on one individual football club but on the UEFA Champions League as a whole, is most efficiently produced through joint selling. UEFA's role in coordinating this work through the mechanism of joint selling is indispensable to the provision to consumers of a UEFA Champions League media product.

(180) The Commission therefore accepts that the restrictions of competition in UEFA's joint selling arrangement are indispensable within the meaning of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement to provide the efficiencies and improvements leading to consumer benefits, as long as the joint selling body is able to find demand for the jointly sold media rights.

7.3.2. Individual football clubs' sale of own media rights

(181) It is a feature of European football that clubs typically participate in a number of different leagues, cups and tournaments over the course of a season. A successful UEFA Champions League team, for example, will also participate in national leagues and cups.

(182) Each individual football club has a group of supporters which is particularly interested in the fate and actions of that particular club. Consequently, there is demand for club-related items including club-related media products. Clubs already carry out a large number of commercial activities aimed at providing their fans with targeted services.

(183) For the football fan with an interest in one particular club, regardless of the tournament in which the club is participating, UEFA's new joint selling arrangement provides good opportunities to follow the club. While UEFA's joint selling arrangement is focused on the development of the UEFA Champions League brand, it nevertheless also allows clubs to pursue their relationship with their own fans.

(184) The football clubs are subject to limited restrictions in selling their media rights individually. However, these restrictions are considered to be indispensable for the functioning of UEFA's joint selling arrangement.

(185) UEFA's joint selling arrangement provides that the clubs may address their fans with live television if UEFA has not managed to sell those live rights. Football clubs may furthermore address their fans via deferred television, mechanical reproduction media, Internet, UMTS, etc.

(186) The live TV rights, which could be sold by the football clubs(74), concern the football matches which are not picked by the broadcasters that have bought the Gold and Silver live television packages or sold by UEFA as part of package 4 of the rights segmentation table. The rights that are referred to in packages 4 and 5 cover the same matches. In order to improve the chances of these residual rights finding a buyer, it is considered indispensable for UEFA, as the joint selling body, to be given a first exclusive right to sell those live TV rights.

(187) If the joint selling body, UEFA, fails to sell the rights in package 4 within one week after the draw for the group stage of the UEFA Champions League, UEFA loses its exclusive right to sell them. After this cut-off date both the football clubs holding the live TV rights to the matches in question also have an opportunity to sell those rights (referred to as package 5 in the rights segmentation table) on a non-exclusive basis in competition with UEFA.

(188) However, UEFA's rights segmentation means that the football clubs are restricted to selling the residual live TV rights to pay-TV or pay-per-view broadcasters. The Commission considers that this is a restriction imposed on the football clubs, which is not indispensable for the attainment of the objectives set out in Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. Once the joint selling body has proven inefficient in selling the residual rights in question at the cut-off date it cannot be considered indispensable to the proper operation of the joint selling arrangement and to the attainment of the resulting benefits that the football clubs are prevented from selling those rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster. This would be likely to occur in territories where there are no pay-TV/pay-per-view broadcasters or where the existing pay-TV/pay-per-view broadcasters have already satisfied their demand with the Gold or Silver rights packages.

(189) This decision should therefore be made subject to the condition that, to the extent there is no reasonable offer from any pay-TV/pay-per-view broadcaster, the restriction imposed by the joint selling arrangement under package 5 in the rights segmentation table, aimed at preventing football clubs from selling their live TV rights to free-TV broadcasters, shall not apply.

(190) The embargoes that are imposed on the exploitation of deferred media rights and which apply equally to rights sold jointly by UEFA as well as the rights sold individually by the football clubs, are indispensable to

enhance focus on the league product and in particular the highlights product(75) covering the UEFA Champions League in its entirety. The embargoes contribute to creating a product for which there is much viewer interest and to establishing the reputation of the UEFA Champions League brand, which is closely associated with uniform and high quality TV coverage underpinned by a homogeneous presentation, which affects the acceptance by the viewer. As regards the embargoes imposed on the exploitation of the Internet rights, the need to maintain such embargoes for quality reasons will, of course, change over time with the development of Internet technologies.

(191) Moreover, football clubs exploiting UEFA Champions League footage individually must present the footage in a club-focused manner and relating only to action in which they are participating. Football clubs or bodies to whom they cede their media rights are not allowed to package the rights from several football clubs into a single product which would appear as an alternative UEFA Champions League branded product. In particular regarding live TV rights, such a product is defined as one consisting of more than two live UEFA Champions League matches per match day. Regarding delayed TV rights and Internet rights, UEFA would accept programmes containing 100 % UEFA Champions League content on a club channel. However, UEFA defines a UEFA Champions League branded programme as one presented as a club magazine programme which contains more than 50 % UEFA Champions League content. In general programming, the maximum permissible UEFA Champions League could amount to 30 % of the programme. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme then the 50 % rule would not apply and the programme could consist mostly or entirely of that single match. Similarly, if a whole match were to be broadcast in general programming on a channel then the 30 % rule would not apply in that situation.

(192) The Commission accepts that provisions regulating the possibilities for third parties to bundle media rights sold by the individual football clubs are indispensable to preserve the integrity and branding of the jointly sold UEFA Champions League media rights. However, following receipt of the comments in reply to the notice published pursuant to Article 19(3) of Regulation No 17, the Commission requested clarifications of the rules, which lead to a reduction of their scope and intensity. It therefore has become possible for a single broadcaster to exploit two individually sold live matches contemporaneously. The Commission considers that opening up this possibility is likely to render the impact of the restriction so marginal that it will not be felt by the end-users of the rights, the broadcasters, as the rights available for any single broadcaster would be sufficient to satisfy existing demand from broadcasters for this type of residual matches. Likewise, regarding deferred rights, it has become possible to broadcast a whole match irrespective of the definition of a UEFA Champions League branded programme.

7.4. No elimination of competition

(193) Commercial rights are available from a number of football tournaments which fall within the scope of the relevant markets. For example, according to UEFA, the TV rights of UEFA Champions League represent on average only 20 % of the rights in the relevant market. Since new media rights affect emerging markets, it is not yet possible to ascertain the position of the UEFA Champions League content in those markets. However, it is not likely to be more significant than its position in the traditional TV rights markets. The media rights of the UEFA Champions League are therefore just one possibility for media operators wishing to acquire content concerning football events taking place regularly throughout every year.

(194) Moreover, jointly sold media rights of the UEFA Champions League are split up into several different rights packages, which are offered for sale in a competitive bidding procedure open to all interested media operators. This allows several media operators to acquire media rights of the UEFA Champions League from UEFA.

(195) Finally both UEFA and the football clubs sell certain categories of UEFA Champions League media rights on a non-exclusive basis. Interested buyers therefore have several possible sources of supply from the owners of such rights.

(196) The joint selling of the media rights of the UEFA Champions League by UEFA is therefore unlikely to eliminate competition in respect of a substantial part of the media rights in question.

7.5. Conclusion

(197) In the light of the foregoing, it can be concluded that the cumulative conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement are fulfilled and an exemption can therefore be granted in respect of the joint selling arrangement.

8. CONDITIONS AND DURATION OF EXEMPTION

(198) Under Article 8(1) of Regulation No 17, conditions may be attached to a declaration of exemption. In this case, the clause of the joint selling arrangement preventing football clubs from individually selling live TV rights

to free-TV broadcasters is a restriction on competition which does not satisfy all the conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. Such a restriction cannot be considered as improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and not imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.

(199) The exemption should therefore be subject to the condition that football clubs must not be prevented from selling their live TV rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster. The Commission considers that no reasonable offer would exist, in particular, when there is no offer from any pay-TV broadcaster, which is comparable to the offer from the free-TV broadcaster.

(200) Pursuant to Article 8(1) of Regulation No 17, a decision in application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is to be issued for a specified period. The notified joint selling arrangement works with cycles of contract periods of three years. It is therefore appropriate to define the duration of this exemption accordingly and to let the joint selling arrangement operate for two contract periods. Exemption should therefore be granted pursuant to Article 8(1) of Regulation No 17 from 13 May 2002, the date of notification of the last version of the joint selling arrangement, until 31 July 2009.

9. CONCLUSION

(201) It is concluded that UEFA's joint selling arrangement leads to the improvement of production and distribution by creating a quality branded league focused product sold via a single point of sale. Moreover consumers receive a real fair share of the benefits deriving from it. Furthermore, the restrictions inherent in UEFA's joint selling arrangement are indispensable for achieving these benefits, save for the provision prohibiting individual football clubs from selling live TV rights to free-TV broadcasters. Finally, it is concluded that the joint selling of the media rights to the UEFA Champions League by UEFA is unlikely to eliminate competition in respect of a substantial part of the media rights in question. It is therefore appropriate to grant an exemption pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, subject to a condition,

HAS ADOPTED THIS DECISION:

Article 1

1. Pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are declared inapplicable from 13 May 2002 until 31 July 2009 to the amended version of UEFA's joint selling arrangement in respect of the media rights to the UEFA Champions League, as described in this Decision.

2. The exemption in paragraph 1 shall be subject to compliance with the condition that the restriction prohibiting football clubs from selling live TV rights to free-TV broadcasters shall not apply where there is no reasonable offer from any pay-TV broadcaster.

Article 2

On the basis of the facts in its possession there are no grounds under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement for action by the Commission in respect of UEFA's joint selling arrangement for sponsorship, suppliership and IPR licensing relating to the UEFA Champions League.

Article 3

This Decision is addressed to:

Union des Associations Européennes de Football Route de Genève, 46 1260 Nyon 2 Switzerland

Done at Brussels, 23 July 2003.

For the Commission

Mario Monti

Member of the Commission

(1) OJ 13, 21.2.1962, p. 204/62.

(2) OJ L 1, 4.1.2003, p. 1.

(3) OJ C 196, 17.8.2002, p. 3.

(4) OJ L 354, 30.12.1998, p. 18.

(5) OJ C 269, 8.11.2003.

(6) Media rights (radio, television, Internet and UMTS), sponsorship, suppliership, licensing and IPRs.

(7) Article 1 of UEFA's Statutes (Edition 2000).

(8) Article 5 of UEFA's Statutes.

(9) In the United Kingdom, there are four UEFA member associations: England, Wales, Scotland and Northern Ireland.

(10) Article 48 of UEFA's Statutes.

(11) Article 18 of UEFA's Statutes.

(12) Article 13(1)(f) of UEFA's Statutes.

(13) Article 13(1)(g) of UEFA's Statutes.

(14) Article 21 of UEFA's Statutes.

(15) Article 23(2) of UEFA's Statutes.

(16) Article 24(1)(e) of UEFA's Statutes.

(17) Article 49 of UEFA's Statutes.

(18) Regulations for the UEFA Champions League 1998/1999.

(19) The range of services that UEFA arranges include: product development, sales, after sales services and client relations with broadcasters, sponsors, suppliers, licensees and participating clubs, media services (booking of commercial spots and broadcast sponsorship throughout the world), legal services, television production services, auditing and monitoring of UEFA Champions League television programs throughout the world, research services, operational implementation of the commercial concept, hospitality services, financial and administrative services, and statistical and information services (competition analysis).

(20) For example there is a computer and telecommunications supplier, which provides technical support to the broadcast graphics service and, in return, receives on-screen credits in all the European live match broadcasts and during the highlights programme.

(21) The UEFA Champions League licensing concept allows for selected companies to produce high-quality products related to the UEFA Champions League, for example, UEFA Champions League video games, UEFA Champions League videos or UEFA Champions League CD-ROM football encyclopaedias.

(22) See also point 4.2.1.3 of the Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - The Helsinki Report on Sport - of 10 December 1999:

"Any exemptions granted in the case of the joint sale of broadcasting rights must take account of the benefits for consumers and of the proportional nature of the restriction on competition in relation to the legitimate objective pursued. In this context, there is also a need to examine the extent to which a link can be established between the joint sale of rights and financial solidarity between professional and amateur sport, the objectives of the training of young sportsmen and women and those of promoting sporting activities among the population. However, with regard to the sale of exclusive rights to broadcast sporting events, it is likely that any exclusivity which, by its duration and/or scope, resulted in the closing of the market, would be prohibited."

(23) Referred to as package 1 and 2 and also as the Gold and Silver packages in UEFA's rights segmentation table.

(24) Referred to as package 4 in UEFA's rights segmentation table.

(25) Referred to as package 5 in UEFA's rights segmentation table.

(26) Referred to as package 3 in UEFA's rights segmentation table.

(27) A "break-bumper" is an editorial graphic element at the beginning and end of a commercial break, which is used to separate the match programme from commercial spots. It normally includes UEFA Champions League and sponsor identification.

(28) In a similar way as the customer substitutability determines the upstream market for the supply of digital interactive TV services by service providers to content providers, see Commission Decision 1999/781/EC in Case IV/36.539 British Interactive Broadcasting/Open (OJ L 312, 6.12.1999, p. 1).

(29) Commission Decision IV/M.553 - RTL/Veronica/Endemol (OJ L 134, 5.6.1996, p. 32) and Commission Decision 1999/242/EC - TPS (OJ L 90, 2.4.1999, p. 6).

(30) Commission Decision 1999/242/EC - TPS (OJ L 90, 2.4.1999, p. 6).

(31) Commission Decision 2001/478/EC - UEFA Broadcasting Regulations (OJ L 171, 26.6.2001, p. 12).

(32) Commission Decision COMP/M.2483 - Canal+/RTL/GJCD/JV (IP 01/1579).

(33) In the same manner the Commission stated in the Newscorp/Telepiù case, that there exists a separate market for the acquisition of exclusive broadcasting rights for football events played every year where national teams participate (the national league, primarily first division and cups, the UEFA Champions League and the UEFA Cup). Commission Decision COMP/M.2876 - Newscorp/Telepiù, (IP/03/478).

(34) For example, in Germany the Bundesliga commences in August and ends in May. There are 306 games played in the tournament, which are all broadcast live throughout the season.

(35) Vlaamse Media Maatschappij state in an answer of 26 November 1999 to the Commission's request for information that: "The acquisition (and broadcasting) of sports rights (programmes) is, in general not a profitable investment as such. However, the broadcasting of sports programmes, especially popular sports such as football and cycling, are important for the image and the branding of the channel."

(36) RTL considers in its answer of 15 November 1999 to the Commission's request for information that "The actual prices for football rights are so high that (...) they cannot be covered by the revenues generated with football programming." If such rights are still acquired anyway, it is reasonable to think that this is because of branding purposes.

(37) NOS in its reply of 16 November 1999 to the Commission's request for information of 21 September 1999 considers that: "Only to a limited extent NOS' interest in football is affected by the availability of TV rights for other sports (...) because it is the No 1 sports in the Netherlands (...) football plays a key role in NOS' sports programming (...) providing other sports broadcasts by NOS with an audience they would not normally attract." NOS also states that: "(...) football is a unique product in 'a league of its own'. No other sport has audience figures/market share that come close to those of football (...) enhance the image of NOS." ONdigital in its reply of 23 November 1999 to the Commission's request for information of 20 September 1999: "Our interest in football is not affected by the availability of other film, series, game shows or other content again, because of the unique market position football holds in the United Kingdom and partly because football is likely to appeal to a different market segment." Richard Russell Associates have described sport as a "driver" for BSkyB's 10-year old business in "Sports Television: The ever changing face", 16 February 1999, pp. 10 and 12.

(38) In its reply of 26 November 1999 to the Commission's request for information of 21 September 1999 Vlaamse Media Maatschappij states that "Actually, acquisition of TV rights for sport (especially football) is not a profitable operation as such (...). However...the branding of VMM's channels will be the decisive parameter for deciding the acquisition of TV rights for football games." For instance ONdigital, which has acquired the pay-TV rights to the UEFA Champions League and provided these rights on a promotional basis free to subscribers, states in its reply of 23 November 1999 to the Commission's request for information of 20 September 1999 that "In the early stages of platform growth building the subscriber base is considered to be more important than pure profit." Further in its reply ONdigital states that "ONdigital believes that the brand image and value attached to its consumer offer is directly affected by the sports content available on the platform."

(39) Kagan Euro TV Sports, 26 July 1996.

(40) ONdigital's reply of 23 November 1999.

(41) According to Kagan's "European media sports rights", April 1999, football took the major share of the total rights expenditure in most Member States in 1998 (the share of the nearest rival is in brackets): Austria 32,4 % (skiing 11,3 %); Belgium 53,6 % (cycling 9,5 %); Denmark 45,4 % (handball 13,2 %); Finland 32,1 % (ice hockey 16,9 %); France 37,8 % (motor racing 9,3 %); Germany 42 % (tennis 6,6 %); Greece 43,3 % (basketball 41,4 %); Ireland 47 % (horse racing 13,1 %); Italy 65,2 % (motor racing 7,4 %); Netherlands 54,5 % (motor racing 9,3 %); Portugal 44,3 % (motor racing 11,8 %); Spain 51,6 % (basketball 10,1 %); Sweden 39,5 % (ice hockey 19,1 %); United Kingdom 51,6 % (rugby 11,7 %).

(42) Kagan's "European media sports rights" April 1999.

(43) ITV's reply of 12 November 1999 to a request for information of 10 September 1999.

(44) Thus a football boot producer will, for example, reach a larger number of potential buyers by showing one advert during the final of a football tournament, when "aficionados" are likely to be watching, and another during a feature film, when the weekend player may be watching, than showing two adverts during the football final. In this way a larger number of potential buyers will be contacted.

(45) For example, whilst a producer of breakfast cereals may have a broader target group, a meat producer is unlikely to wish to place an advert during a programme dedicated to vegetarian issues, even if this programme is very popular. Thus if broadcasters wish to have the business of meat producers, they can not only show programmes about vegetarianism, they must also televise programmes which are watched by people who are at least willing to eat meat (even if the programmes attract fewer viewers).

(46) Channel 5's reply of 19 November 1999.

(47) RTL considers in its reply of 15 November 1999 to the Commission's request for information of 20 September 1999 that it "would lose advertising revenue if it substituted the UEFA Champions League by other football events or other sports events. Even if the viewer profile would be the same, the viewing times for these events would be much less because these sports events are less attractive." Young & Rubicam Europe states in its reply of 21 October 1999 to the Commission's request for information of 8 October 1999: product "categories targeting female consumers are unlikely to advertise in sports programmes." Channel 5's reply: "These (football) audiences are more male in profile than the average, younger than the average, and more upmarket than the average." ITV stated in its reply of 12 November 1999 to the Commission's request for information of 10 September 1999 that the audiences to the UEFA Champions League "are more male in profile than the average, younger than the average and more upmarket than the average." McCann-Erikson's reply of 3 November 1999 to the Commission's request for information of 8 October 1999 supports this.

(48) McCann-Erickson's reply of 3 November 1999 to a Commission request for information of 8 October 1999.

(49) Kagan Euro TV Sports, 26 July 1996, page 8.

(50) Kagan Euro TV Sports, 26 July 1996, page 163.

(51) Kagan World Media, 2002, page 3.

(52) See Commission Decision Comp/JV.48 - Vodafone/Vivendi/Canal+ (Vizzavi).

(53) See judgments of the Court of Justice in Case 36/74, Walrave v Union Cycliste Internationale, [1974] ECR 1405, paragraph 4; Case 13/76, Donà v Mantero, [1976] ECR 1333, paragraph 12; Case C-415/93, URBSF v Bosman, [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97, Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo (C-51/96) and François Pacquée (C-191/97) [2000] ECR 2549, paragraphs 41 and 42; Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), [2000] ECR 2681 paragraphs 32 and 33.

(54) For example, selling tickets, transferring players, distributing merchandising articles, concluding advertising and sponsorship contracts, selling broadcasting rights, etc. The size of the undertaking does not matter and the concept does not presuppose a profit-making intention. See opinion of Advocate General Lenz in Case C-415/93, URBSF v Bosman, [1995] ECR I-4921, paragraph 255 referring to the judgment in Joined Cases 209 to 215 and 218/78, Van Landewyck v Commission [1980] ECR 3125, paragraph 88.

(55) Opinion of Advocate General Lenz in Case C-415/93, URBSF v Bosman, [1995] ECR I-4921, paragraph 256. Commission Decision 92/521/EEC - Distribution of package tours during the 1990 World Cup, OJ L 326, 12.11.1992, p. 31, paragraph 49: "(...) FIFA is an entity carrying on activities of an economic nature and constitutes an undertaking within the meaning of Article 85 of the EEC Treaty" and paragraph 53: "The (Federazione Italiana Gioco Calcio = the national Italian football association) also carries on activities of an economic nature and is consequently an undertaking within the meaning of Article 85 of the EEC Treaty". Judgment in Case T-46/92, Scottish Football Association v Commission, [1994] ECR II-1039, from where it can be concluded that the Scottish Football Association is an undertaking or an association of undertakings within the meaning of Article 81 and 82. See also joined Cases C-51/96 and C-191/97, Christelle Deliège v Ligue Francophone de Judo et Disciplines ASBL and Others, [2000] ECR 2681 paragraphs 52-57, Case T-513/93 Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities ECR [2000] II-1807.

(56) Joined Cases 209 to 215 and 218/78 Fedetab, 1980 [ECR] 3125 at paragraph 88.

(57) Case 45/85 Sachversicherer at paragraph 32.

(58) If the Statutes were categorised as an agreement between undertakings, this would not change the situation since Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply in the same way to both categories. See Case C-415/93, URBSF v Bosman, [1995] ECR I-4921 at paragraph 46.

(59) See chapter 5 (in particular chapter 5.3.1.2) of the Commission's guidelines on the applicability of Article 81 to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2).

(60) In a reply of 16 February 2001 to the Commission's request for information of 15 November 2000, UEFA explains the situation regarding ownership to the TV rights in the EEA States is as follows: In Austria, the home club is recognised as the owner of the TV rights. Belgian legislation does not determine ownership to the TV rights to football. Danish legislation does not determine ownership, but in a concrete case the Danish competition authorities have allegedly stated that they consider that the TV rights of a match played in the Danish National Championship belong to the Danish Football Association, as the owner of the tournament, and the home club of the specific match jointly. English legislation is silent about the matter. The Finnish clubs are the owners to the TV rights to the matches of the Finnish club competitions. In France it is the club participating in the European tournament, which is the owner. In Germany, the clubs are the owners of the rights and the organiser, UEFA, could be considered to be a co-owner. According to Greek and Italian legislation the clubs are the owners of the TV rights. Luxembourg legislation is silent about the matter. Dutch case-law (under appeal) gives the ownership of the TV rights to the home club. In Northern Ireland, according to the Irish Football Association, the association owns the rights to the national league (no legal source quoted), however, the clubs themselves sell the TV rights to matches in European competitions. Portuguese legislation does not regulate the matter. In the Republic of Ireland it seems that the national association is the owner of the TV rights, but the TV rights to the European competitions are disposed of without interference from the football association. No information regarding the legislative situation in Scotland has been given. Reference is only made to the bylaws of the Scottish Football Association which claim ownership to the rights. Spanish legislation has not taken a position on the ownership issue. The clubs in the First and Second Division sell the rights individually. Swedish legislation is silent about the matter. No information has been submitted regarding the legal situation in Wales.

The Commission has asked the national football association in Iceland, Liechtenstein and Norway directly: In Iceland and Liechtenstein it is the clubs participating in the European competitions, which are considered as the owner. In Norway the individual clubs seem to be recognised as the owner of the TV rights.

(61) Article 295 of the Treaty provides that: "The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

(62) See judgements in Case 36/74, Walrave v Union Cycliste Internationale, [1974] ECR 1405, paragraph 4; Case 13/76, Donà v Mantero, [1976] ECR 1333, paragraph 12; Case C-415/93, URBSF v Bosman, [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97, Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo (C-51/96) and François Pacquée (C-191/97), [2000] ECR 2549, paragraphs 41-42; Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), [2000] ECR 2681 paragraphs 32-33.

(63) Case C-415/93, URBSF v Bosman, [1995] ECR I-4921.

(64) This figure is calculated on the basis of the acquisition of domestic and UEFA tournaments. Source: A study commissioned by UEFA from Oliver & Ohlbaum Associates, London.

(65) See footnote 41.

(66) ITV, in its reply of 12 May 1999 to the Commission's notice (OJ C 99, 10.4.1999, p. 23) states that joint selling by a central selling body "... also significantly reduces the transaction complexity for broadcasters."

(67) Taurus Holding in a letter dated 22 January 2002.

(68) KrichMedia in a letter dated 17 September 2002 in reply to the Article 19(3) notice.

(69) Taurus Holding in a letter dated 22 January 2002.

(70) The bundling limitation logically does not apply to the whole sale level, as there is no risk that viewers would experience any brand confusion caused by a bundling at that level.

(71) Case 26/76 Metro v Commission [1977] ECR 1975, Case 42/84 Remia v Commission [1985] ECR 2545 and Cases 56 and 58/64 Consten & Grundig v Commission [1966] ECR 299.

(72) "The European Council thinks that moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, are beneficial to the principle of solidarity between all levels and areas of sport."

(73) On this point see also section 3.4.3.2.

(74) Package 5 of the rights segmentation table.

(75) Package 3 of the rights segmentation table.

EU Commission White Paper - White Paper on Sport {SEC(2007) 932} {SEC(2007) 934} {SEC(2007) 935} {SEC(2007) 936} /* COM/2007/0391 final *

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WHITE PAPER

WHITE PAPER ON SPORT

(presented by the Commission){SEC(2007) 932}{SEC(2007) 934}{SEC(2007) 935}{SEC(2007) 936}

1. INTRODUCTION

" Sport is part of every man and woman's heritage and its absence can never be compensated for. " – Pierre de Coubertin[1]

Sport[2] is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity. The Olympic ideal of developing sport to promote peace and understanding among nations and cultures as well as the education of young people was born in Europe and has been fostered by the International Olympic Committee and the European Olympic Committees.

Sport attracts European citizens, with a majority of people taking part in sporting activities on a regular basis. It generates important values such as team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfilment. It promotes the active contribution of EU citizens to society and thereby helps to foster active citizenship. The Commission acknowledges the essential role of sport in European society, in particular when it needs to bring itself closer to citizens and to tackle issues that matter directly to them.

However, sport is also confronted with new threats and challenges which have emerged in European society, such as commercial pressure, exploitation of young players, doping, racism, violence, corruption and money laundering.

This initiative marks the first time that the Commission is addressing sport-related issues in a comprehensive manner. Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of the sector. The initiative aims to illustrate important issues such as the application of EU law to sport. It also seeks to set out further sports-related action at EU level.

This White Paper is not starting from scratch. Sport is subject to the application of the acquis communautaire and European policies in a number of areas already have a considerable and growing impact on sport.

The important role of sport in European society and its specific nature were recognised in December 2000 in the European Council’s Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies (the "Nice Declaration"). It points out that sporting organisations and Member States have a primary responsibility in the conduct of sporting affairs, with a central role for sports federations. It clarifies that sporting organisations have to exercise their task to organise and promote their particular sports "with due regard to national and Community legislation". At the same time, it recognises that, "even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured." The European institutions have recognised the specificity of the role sport plays in European society, based on volunteer-driven structures, in terms of health, education, social integration, and culture.

The European Parliament has followed the various challenges facing European sport with keen interest and has regularly dealt with sporting issues in recent years.

In preparing this White Paper, the Commission has held numerous consultations with sport stakeholders on issues of common interest as well as an on-line consultation. They have demonstrated that considerable expectations exist concerning the role of sport in Europe and EU action in this area.

This White Paper focuses on the societal role of sport, its economic dimension and its organisation in Europe, and on the follow-up that will be given to this initiative. Concrete proposals for further EU action are brought together in an Action Plan named after Pierre de Coubertin which contains activities to be implemented or supported by the Commission. A Staff Working Document contains the background and context of the

proposals, including annexes on Sport and EU Competition Rules, Sport and Internal Market Freedoms, and on consultations with stakeholders.

2. THE SOCIETAL ROLE OF SPORT

Sport is an area of human activity that greatly interests citizens of the European Union and has enormous potential for bringing them together, reaching out to all, regardless of age or social origin. According to a November 2004 Eurobarometer survey[3], approximately 60% of European citizens participate in sporting activities on a regular basis within or outside some 700,000 clubs, which are themselves members of a plethora of associations and federations. The vast majority of sporting activity takes place in amateur structures. Professional sport is of growing importance and contributes equally to the societal role of sport. In addition to improving the health of European citizens, sport has an educational dimension and plays a social, cultural and recreational role. The societal role of sport also has the potential to strengthen the Union's external relations.

2.1 Enhancing public health through physical activity

Lack of physical activity reinforces the occurrence of overweight, obesity and a number of chronic conditions such as cardio-vascular diseases and diabetes, which reduce the quality of life, put individuals' lives at risk and are a burden on health budgets and the economy.

The Commission's White Paper "A Strategy for Europe on Nutrition, Overweight and Obesity related health issues"[4] underlines the importance of taking pro-active steps to reverse the decline in physical activity, and actions suggested in the area of physical activity in the two White Papers will complement each other.

As a tool for health-enhancing physical activity, the sport movement has a greater influence than any other social movement. Sport is attractive to people and has a positive image. However, the recognised potential of the sport movement to foster health-enhancing physical activity often remains under-utilised and needs to be developed.

The World Health Organisation (WHO) recommends a minimum of 30 minutes of moderate physical activity (including but not limited to sport) per day for adults and 60 minutes for children. Public authorities and private organisations in Member States should all contribute to reaching this objective. Recent studies tend to show that sufficient progress is not being made.

(1) The Commission proposes to develop new physical activity guidelines with the Member States before the end of 2008. |

The Commission recommends strengthening the cooperation between the health, education and sport sectors to be promoted at ministerial level in the Member States in order to define and implement coherent strategies to reduce overweight, obesity and other health risks. In this context, the Commission encourages Member States to examine how to promote the concept of active living through the national education and training systems, including the training of teachers.

Sport organisations are encouraged to take into account their potential for health-enhancing physical activity and to undertake activities for this purpose. The Commission will facilitate the exchange of information and good practice, in particular in relation to young people, with a focus on the grassroots level.

(2) The Commission will support an EU Health-Enhancing Physical Activity (HEPA) network and, if appropriate, smaller and more focussed networks dealing with specific aspects of the topic. (3) The Commission will make health-enhancing physical activity a cornerstone of its sport-related activities and will seek to take this priority better into account in relevant financial instruments, including: The 7th Framework Programme for Research and Technological Development (lifestyle aspects of health); The Public Health Programme 2007-2013; The Youth and Citizenship programmes (cooperation between sport organisations, schools, civil society, parents and other partners at local level); The Lifelong Learning Programme (teacher training and cooperation between schools). |

- 2.2 Joining forces in the fight against doping

Doping poses a threat to sport worldwide, including European sports. It undermines the principle of open and fair competition. It is a demotivating factor for sport in general and puts the professional under unreasonable pressure. It seriously affects the image of sport and poses a serious threat to individual health. At European level, the fight against doping must take into account both a law-enforcement and a health and prevention dimension.

(4) Partnerships could be developed between Member State law enforcement agencies (border guards, national and local police, customs etc.), laboratories accredited by the World Anti-Doping Agency (WADA) and INTERPOL to exchange information about new doping substances and practices in a timely manner and in a

secure environment. The EU could support such efforts through training courses and networking between training centres for law enforcement officers. |

The Commission recommends that trade in illicit doping substances be treated in the same manner as trade in illicit drugs throughout the EU.

The Commission calls on all actors with a responsibility for public health to take the health-hazard aspects of doping into account. It calls on sport organisations to develop rules of good practice to ensure that young sportsmen and sportswomen are better informed and educated of doping substances, prescription medicines which may contain them, and their health implications.

The EU would benefit from a more coordinated approach in the fight against doping, in particular by defining common positions in relation to the Council of Europe, WADA and UNESCO, and through the exchange of information and good practice between Governments, national anti-doping organisations and laboratories. Proper implementation of the UNESCO Convention against Doping in Sport by the Member States is particularly important in this context.

(5) The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States. |

2.3 Enhancing the role of sport in education and training

Through its role in formal and non-formal education, sport reinforces Europe's human capital. The values conveyed through sport help develop knowledge, motivation, skills and readiness for personal effort. Time spent in sport activities at school and at university produces health and education benefits which need to be enhanced.

Based on experience gained during the 2004 European Year of Education through Sport, the Commission encourages support for sport and physical activity through various policy initiatives in the field of education and training, including the development of social and civic competences in accordance with the 2006 Recommendation on key competences for lifelong learning.[5]

(6) Sport and physical activity can be supported through the Lifelong Learning programme. Promoting participation in educational opportunities through sport is thus a priority topic for school partnerships supported by the Comenius programme, for structured actions in the field of vocational education and training through the Leonardo da Vinci programme, for thematic networks and mobility in the field of higher education supported by the Erasmus programme, as well as multilateral projects in the field of adult training supported by the Grundtvig programme. (7) The sport sector can also apply for support through the individual calls for proposals on the implementation of the European Qualifications Framework (EQF) and the European Credit System for Vocational Education and Training (ECVET). The sport sector has been involved in the development of the EQF and has been selected for financial support in 2007/2008. In view of the high professional mobility of sportspeople, and without prejudice to Directive 2005/36/EC on the mutual recognition of professional qualifications, it may also be identified as a pilot sector for the implementation of ECVET to increase the transparency of national competence and qualification systems. (8) The Commission will introduce the award of a European label to schools actively involved in supporting and promoting physical activities in a school environment. |

In order to ensure the reintegration of professional sportspersons into the labour market at the end of their sporting careers, the Commission emphasises the importance of taking into account at an early stage the need to provide "dual career" training for young sportsmen and sportswomen and to provide high quality local training centres to safeguard their moral, educational and professional interests.

The Commission has launched a study on the training of young sportsmen and sportswomen in Europe, the results of which could feed into the abovementioned policies and programmes.

Investment in and promotion of training of young talented sportsmen and sportswomen in proper conditions is crucial for a sustainable development of sport at all levels. The Commission stresses that training systems for talented young sportsmen and sportswomen should be open to all and must not lead to discrimination between EU citizens based on nationality.

(9) Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players. The ongoing study on the training of young sportsmen and sportswomen in Europe will provide valuable input for this analysis. |

2.4 Promoting volunteering and active citizenship through sport

Participation in a team, principles such as fair-play, compliance with the rules of the game, respect for others, solidarity and discipline as well as the organisation of amateur sport based on non-profit clubs and volunteering reinforce active citizenship. Volunteering in sport organisations provides many occasions for non-formal education which need to be recognised and enhanced. Sport also provides attractive possibilities for young people's engagement and involvement in society and may have a beneficial effect in helping people steer away from delinquency.

There are, however, new trends in the way people, particularly the young, practice sport. There is a growing tendency to practise sport individually, rather than collectively and in an organised structure, which is resulting in a declining volunteer base for amateur sport clubs.

(10) Together with the Member States, the Commission will identify key challenges for non-profit sport organisations and the main characteristics of services provided by these organisations. (11) The Commission will support grassroots sport through the Europe for Citizens programme. (12) The Commission will furthermore propose to encourage young people's volunteering in sport through the Youth in Action programme in fields such as youth exchanges and voluntary service for sporting events. (13) The Commission will further develop exchange of information and best practice on volunteering in sport involving Member States, sport organisations and local authorities. (14) In order to understand better the specific demands and needs of the voluntary sport sector in national and European policy making, the Commission will launch a European study on volunteering in sport. |

2.5 Using the potential of sport for social inclusion, integration and equal opportunities

Sport makes an important contribution to economic and social cohesion and more integrated societies. All residents should have access to sport. The specific needs and situation of under-represented groups therefore need to be addressed, and the special role that sport can play for young people, people with disabilities and people from less privileged backgrounds must be taken into account. Sport can also facilitate the integration into society of migrants and persons of foreign origin as well as support inter-cultural dialogue.

Sport promotes a shared sense of belonging and participation and may therefore also be an important tool for the integration of immigrants. It is in this context that making available spaces for sport and supporting sport-related activities is important for allowing immigrants and the host society to interact together in a positive way.

The Commission believes that better use can be made of the potential of sport as an instrument for social inclusion in the policies, actions and programmes of the European Union and of Member States. This includes the contribution of sport to job creation and to economic growth and revitalisation, particularly in disadvantaged areas. Non-profit sport activities contributing to social cohesion and social inclusion of vulnerable groups can be considered as social services of general interest.

The Open Method of Coordination on social protection and social inclusion will continue to include sport as a tool and indicator. Studies, seminars, conferences, policy proposals and action plans will include access to sport and/or belonging to social sport structures as a key element for analysis of social exclusion.

(15) The Commission will suggest to Member States that the PROGRESS programme and the Lifelong Learning, Youth in Action and Europe for Citizens programmes support actions promoting social inclusion through sport and combating discrimination in sport. In the context of cohesion policy, Member States should consider the role of sports in the field of social inclusion, integration and equal opportunities as part of their programming of the European Social Fund and the European Regional Development Fund, and they are encouraged to promote action under the European Integration Fund. |

The Commission furthermore encourages Member States and sport organisations to adapt sport infrastructure to take into account the needs of people with disabilities. Member States and local authorities should ensure that sport venues and accommodations are accessible for people with disabilities. Specific criteria should be adopted for ensuring equal access to sport for all pupils, and specifically for children with disabilities. Training of monitors, volunteers and host staff of clubs and organisations for the purpose of welcoming people with disabilities will be promoted. In its consultations with sport stakeholders, the Commission takes special care to maintain a dialogue with representatives of sportspeople with disabilities.

(16) The Commission, in its Action Plan on the European Union Disability Strategy, will take into account the importance of sport for disabled people and will support Member State actions in this field. (17) In the framework of its Roadmap for Equality between Women and Men 2006-2010, the Commission will encourage the mainstreaming of gender issues into all its sports-related activities, with a specific focus on access to sport for immigrant women and women from ethnic minorities, women's access to decision-making positions in sport and media coverage of women in sport. |

2.6 Strengthening the prevention of and fight against racism and violence

Violence at sport events, especially at football grounds, remains a disturbing problem and can take different forms. It has been shifting from inside stadiums to outside, including urban areas. The Commission is committed to contributing to the prevention of incidents by promoting and facilitating dialogue with Member States, international organisations (e.g. Council of Europe), sport organisations, law enforcement services and other stakeholders (e.g. supporters' organisations and local authorities). Law enforcement authorities cannot deal with the underlying causes of sport violence in isolation.

The Commission also encourages the exchange of best practice and of operational information on risk-supporters among police services and/or sport authorities. Particular importance will be given to police training on crowd management and hooliganism.

Sport involves all citizens regardless of gender, race, age, disability, religion and belief, sexual orientation and social or economic background. The Commission has repeatedly condemned all manifestations of racism and xenophobia, which are incompatible with the values of the EU.

(18) As regards racist and xenophobic attitudes, the Commission will continue to promote dialogue and exchange of best practices in existing cooperation frameworks such as the Football against Racism in Europe network (FARE). |

The Commission recommends sport federations to have procedures for dealing with racist abuse during matches, based on existing initiatives. It also recommends strengthening provisions regarding discrimination in licensing systems for clubs (see section 4.7).

The Commission will: (19) Promote, in accordance with the domestic and EU rules applicable, the exchange of operational information and practical know-how and experience on the prevention of violent and racist incidents between law enforcement services and with sport organisations; (20) Analyse possibilities for new legal instruments and other EU-wide standards to prevent public disorder at sport events; (21) Promote a multidisciplinary approach to preventing anti-social behaviour, with a special focus given to socio-educational actions such as fan-coaching (long-term work with supporters to develop a positive and non-violent attitude); (22) Strengthen regular and structured cooperation among law enforcement services, sport organisations and other stakeholders; (23) Encourage the use of the following programmes to contribute to the prevention of and fight against violence and racism in sport: Youth in Action, Europe for Citizens, DAPHNE III, Fundamental Rights and Citizenship and Prevention and Fight against Crime; (24) Organise a high level conference to discuss measures to prevent and fight violence and racism at sport events with stakeholders. |

2.7 Sharing our values with other parts of the world

Sport can play a role regarding different aspects of the EU's external relations: as an element of external assistance programmes, as an element of dialogue with partner countries and as part of the EU's public diplomacy.

Through concrete actions, sport has a considerable potential as a tool to promote education, health, inter-cultural dialogue, development and peace.

(25) The Commission will promote the use of sport as a tool in its development policy. In particular, it will: Promote sport and physical education as essential elements of quality education and as a means to make schools more attractive and improve attendance; Target action at improving access for girls and women to physical education and sport, with the objective to help them build confidence, improve social integration, overcome prejudices and promote healthy lifestyles as well as women's access to education; Support health promotion and awareness-raising campaigns through sport. |

- When addressing sport in its development policies, the EU will make its best effort to create synergies with existing programmes of the United Nations, Member States, local authorities and private bodies. It will implement actions that are complementary or innovative with respect to existing programmes and actions. The memorandum of understanding signed between the Commission and FIFA in 2006 to make football a force for development in African, Caribbean and Pacific countries is an example in this respect.

(26) The EU will include, wherever appropriate, sport-related issues such as international players' transfers, exploitation of underage players, doping, money-laundering through sport, and security during major international sport events in its policy dialogue and cooperation with partner countries. |

Rapid visa and immigration procedures for, in particular, elite sportspersons from non-EU countries are an important element to enhance the EU's international attractiveness. In addition to the on-going process of concluding visa facilitation agreements with third countries and the consolidation of the visa regime applicable to members of the Olympic family during Olympic Games, the EU needs to develop further (temporary) admission mechanisms for sportspersons from third countries.

The Commission will pay particular attention to the sport sector: (27) When implementing the recently presented Communication on circular migration and mobility partnerships with third countries; (28) When elaborating harmonised schemes for the admission of various categories of third country nationals for economic purposes on the basis of the 2005 Policy Plan on Legal Migration. |

2.8 Supporting sustainable development

The practice of sport, sport facilities and sport events all have a significant impact on the environment. It is important to promote environmentally sound management, fit to address inter alia green procurement, greenhouse gas emissions, energy efficiency, waste disposal and the treatment of soil and water. European sport organisations and sport event organisers should adopt environmental objectives in order to make their activities environmentally sustainable. By improving their credibility on environmental matters, responsible organisations could expect specific benefits while bidding to host sport events as well as economic benefits related to a more rationalised use of natural resources.

The Commission will: (29) Use its structured dialogue with leading international and European sport organisations and other sport stakeholders to encourage them and their members to participate in the Eco Management Audit Scheme (EMAS) and Community Eco-Label Award schemes, and promote these voluntary schemes during major sport events; (30) Promote green procurement in its political dialogue with Member States and other concerned parties; (31) Raise awareness, through guidance developed in cooperation with relevant stakeholders (policy makers, SMEs, local communities), about the need to work together in partnership at the regional level to organise sport events in a sustainable way; (32) Take sport into account as part of the "Information and Communication" component of the new LIFE+ programme. |

3. THE ECONOMIC DIMENSION OF SPORT

Sport is a dynamic and fast-growing sector with an underestimated macro-economic impact, and can contribute to the Lisbon objectives of growth and job creation. It can serve as a tool for local and regional development, urban regeneration or rural development. Sport has synergies with tourism and can stimulate the upgrading of infrastructure and the emergence of new partnerships for financing sport and leisure facilities.

Although sound and comparable data on the economic weight of sport are generally lacking, its importance is confirmed by studies and analyses of national accounts, the economics of large-scale sporting events, and physical inactivity costs, including for the ageing population. A study presented during the Austrian Presidency in 2006 suggested that sport in a broader sense generated value-added of 407 billion euros in 2004, accounting for 3.7% of EU GDP, and employment for 15 million people or 5.4% of the labour force.[6] This contribution of sport should be made more visible and promoted in EU policies.

A growing part of the economic value of sports is linked to intellectual property rights. These rights relate to copyright, commercial communications, trademarks, and image and media rights. In an increasingly globalised and dynamic sector, the effective enforcement of intellectual property rights around the world is becoming an essential part of the health of the sport economy. It is also important that recipients are guaranteed the possibility to have distance access to sport events at cross-border level within the EU.

On the other hand, notwithstanding the overall economic importance of sport, the vast majority of sporting activities takes place in non-profit structures, many of which depend on public support to provide access to sporting activities to all citizens.

3.1 Moving towards evidence -based sport policies

The launch of policy actions and enhanced cooperation on sport at EU level needs to be underpinned by a sound knowledge base. The quality and comparability of data need to be improved to allow for better strategic planning and policy-making in the area of sport.

Governmental and non-governmental stakeholders have repeatedly called upon the Commission to develop a European statistical definition of sport and to coordinate efforts to produce sport and sport-related statistics on that basis.

(33) The Commission, in close cooperation with the Member States, will seek to develop a European statistical method for measuring the economic impact of sport as a basis for national statistical accounts for sport, which could lead in time to a European satellite account for sport. (34) In addition, specific sport-related information surveys should continue to take place once every few years (e.g. Eurobarometer polls), in particular to provide non-economic information which cannot be provided on the basis of national statistical accounts for sport (e.g. participation rates, data on volunteering, etc.). (35) The Commission will launch a study to assess the sport sector's direct contribution (in terms of GDP, growth and employment) and indirect contribution (through education, regional development and higher attractiveness of the EU) to the Lisbon Agenda. (36) The Commission will organise the exchange of best practices among Member States and sports federations

concerning the organisation of large sport events, with a view to promoting sustainable economic growth, competitiveness and employment. |

3.2 Putting public support for sport on a more secure footing

Sport organisations have many sources of income, including club fees and ticket sales, advertising and sponsorship, media rights, re-distribution of income within the sport federations, merchandising, public support etc. However, some sport organisations have considerably better access to resources from business operators than others, even if in some cases a well-functioning system of redistribution is in place. In grassroots sport, equal opportunities and open access to sporting activities can only be guaranteed through strong public involvement. The Commission understands the importance of public support for grassroots sport and sport for all, and is in favour of such support provided it is granted in accordance with Community law.

In many Member States sport is partly financed through a tax or levy on state-run or state-licensed gambling or lottery services. The Commission invites Member States to reflect upon how best to maintain and develop a sustainable financing model for giving long-term support to sports organisations.

(37) As a contribution to the reflection on the financing of sport, the Commission will carry out an independent study on the financing of grassroots sport and sport for all in the Member States from both public and private sources, and on the impact of on-going changes in this area. |

In the field of indirect taxation, the EU's VAT legislation is laid down in Council Directive 2006/112/EC, which aims at ensuring that the application of Member State legislation on VAT does not distort competition or hinder the free movement of goods and services. The Directive provides for both the possibility for Member States to exempt certain sport-related services and, where exemption does not apply, the possibility to apply reduced rates in some cases.

(38) Given the important societal role of sport and its strong local anchoring, the Commission will defend maintaining the existing possibilities of reduced VAT rates for sport. |

4. THE ORGANISATION OF SPORT

The political debate on sport in Europe often attributes considerable importance to the so-called "European Sport Model". The Commission considers that certain values and traditions of European sport should be promoted. In view of the diversity and complexities of European sport structures it considers, however, that it is unrealistic to try to define a unified model of organisation of sport in Europe. Moreover, economic and social developments that are common to the majority of the Member States (increasing commercialisation, challenges to public spending, increasing numbers of participants and stagnation in the number of voluntary workers) have resulted in new challenges for the organisation of sport in Europe. The emergence of new stakeholders (participants outside the organised disciplines, professional sports clubs, etc.) is posing new questions as regards governance, democracy and representation of interests within the sport movement.

The Commission can play a role in encouraging the sharing of best practice in sport governance. It can also help to develop a common set of principles for good governance in sport, such as transparency, democracy, accountability and representation of stakeholders (associations, federations, players, clubs, leagues, supporters, etc.). While doing so the Commission will draw on previous work[7]. Attention should also be paid to the representation of women in management and leadership positions.

The Commission acknowledges the autonomy of sporting organisations and representative structures (such as leagues). Furthermore, it recognises that governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners. Nonetheless, dialogue with sports organisations has brought a number of areas to the Commission’s attention, which are addressed below. The Commission considers that most challenges can be addressed through self-regulation respectful of good governance principles, provided that EU law is respected, and is ready to play a facilitating role or take action if necessary.

4.1 The specificity of sport

Sport activity is subject to the application of EU law. This is described in detail in the Staff Working Document and its annexes. Competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding citizenship of the Union and equality between men and women in employment.

At the same time, sport has certain specific characteristics, which are often referred to as the "specificity of sport". The specificity of European sport can be approached through two prisms:

- The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;

- The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport;

The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law.

As is explained in detail in the Staff Working Document and its annexes, there are organisational sporting rules that – based on their legitimate objectives – are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued. Examples of such rules would be "rules of the game" (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, "at home and away from home" rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods.

However, in respect of the regulatory aspects of sport, the assessment whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis, as recently confirmed by the European Court of Justice in its Meca-Medina ruling.[8] The Court provided a clarification regarding the impact of EU law on sporting rules. It dismissed the notion of "purely sporting rules" as irrelevant for the question of the applicability of EU competition rules to the sport sector.

The Court recognised that the specificity of sport has to be taken into consideration in the sense that restrictive effects on competition that are inherent in the organisation and proper conduct of competitive sport are not in breach of EU competition rules, provided that these effects are proportionate to the legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector.

4.2 Free movement and nationality

The organisation of sport and of competitions on a national basis is part of the historical and cultural background of the European approach to sport, and corresponds to the wishes of European citizens. In particular, national teams play an essential role not only in terms of identity but also to secure solidarity with grassroots sport, and therefore deserve to be supported.

Discrimination on grounds of nationality is prohibited in the Treaties, which establish the right for any citizen of the Union to move and reside freely in the territory of the Member States. The Treaties also aim to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The same prohibitions apply to discrimination based on nationality in the provision of services. Moreover, membership of sports clubs and participation in competitions are relevant factors to promote the integration of residents into the society of the host country.

Equal treatment also concerns citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member States.

(39) The Commission calls on Member States and sport organisations to address discrimination based on nationality in all sports. It will combat discrimination in sport through political dialogue with the Member States, recommendations, structured dialogue with sport stakeholders, and infringement procedures when appropriate. |

The Commission reaffirms its acceptance of limited and proportionate restrictions (in line with EU Treaty provisions on free movement and European Court of Justice rulings) to the principle of free movement in particular as regards:

- The right to select national athletes for national team competitions;

- The need to limit the number of participants in a competition;

- The setting of deadlines for transfers of players in team sports.

(40) As regards access to individual competitions for non-nationals, the Commission intends to launch a study to analyse all aspects of this complex issue. |

4.3 Transfers

In the absence of transfer rules, the integrity of sport competitions could be challenged by clubs recruiting players during a given season to prevail upon their competitors. At the same time, any rule on the transfer of players must respect EU law (competition provisions and rules on the free movement of workers).

In 2001, in the context of the pursuit of a case concerning alleged infringements of EC competition law and after discussions with the Commission, football authorities undertook to revise FIFA Regulations on international football transfers, based on compensation for training costs incurred by sports clubs, the creation of transfer periods, the protection of school education of underage players, and guaranteed access to national courts.

The Commission considers such a system to constitute an example of good practice that ensures a competitive equilibrium between sport clubs while taking into account the requirements of EU law.

The transfer of players also gives rise to concerns about the legality of the financial flows involved. To increase transparency in money flows related to transfers, an information and verification system for transfers could be an effective solution. The Commission considers that such a system should only have a control function; financial transactions should be conducted directly between the parties involved. Depending on the sport, the system could be run by the relevant European sport organisation, or by national information and verification systems in the Member States.

4.4 Players' agents

The development of a truly European market for players and the rise in the level of players’ salaries in some sports has resulted in an increase in the activities of players’ agents. In an increasingly complex legal environment, many players (but also sport clubs) ask for the services of agents to negotiate and sign contracts.

There are reports of bad practices in the activities of some agents which have resulted in instances of corruption, money laundering and exploitation of underage players. These practices are damaging for sport in general and raise serious governance questions. The health and security of players, particularly minors, has to be protected and criminal activities fought against.

Moreover, agents are subject to differing regulations in different Member States. Some Member States have introduced specific legislation on players' agents while in others the applicable law is the general law regarding employment agencies, but with references to players' agents. Moreover, some international federations (FIFA, FIBA) have introduced their own regulations.

For these reasons, repeated calls have been made on the EU to regulate the activity of players' agents through an EU legislative initiative.

(41) The Commission will carry out an impact assessment to provide a clear overview of the activities of players' agents in the EU and an evaluation of whether action at EU level is necessary, which will also analyse the different possible options. |

4.5 Protection of minors

The exploitation of young players is continuing. The most serious problem concerns children who are not selected for competitions and abandoned in a foreign country, often falling in this way in an irregular position which fosters their further exploitation. Although in most cases this phenomenon does not fall into the legal definition of trafficking in human beings, it is unacceptable given the fundamental values recognised by the EU and its Member States. It is also contrary to the values of sport. Protective measures for unaccompanied minors in Member State immigration laws need to be applied rigorously. Sexual abuse and harassment of minors in sport must also be fought against.

(42) The Commission will continue to monitor the implementation of EU legislation, in particular the Directive on the Protection of Young People at Work. The Commission has recently launched a study on child labour as a complement to its monitoring of the implementation of the Directive. The issue of young players falling within the scope of the Directive will be taken into account in the study. (43) The Commission will propose to Member States and sport organisations to cooperate on the protection of the moral and physical integrity of young people through the dissemination of information on existing legislation, establishment of minimum standards and exchange of best practices. |

4.6 Corruption, money laundering and other forms of financial crime

Corruption, money laundering and other forms of financial crime are affecting sport at local, national and international levels. Given the sector's high degree of internationalisation, corruption in the sport sector often has cross-border aspects. Corruption problems with a European dimension need to be tackled at European level. EU anti-money laundering mechanisms should apply effectively also in the sport sector.

(44) The Commission will support public-private partnerships representative of sports interests and anti-corruption authorities, which would identify vulnerabilities to corruption in the sport sector and assist in the development of effective preventive and repressive strategies to counter such corruption. (45) The Commission will continue to monitor the implementation of EU anti-money laundering legislation in the Member States with regard to the sport sector. |

4.7 Licensing systems for clubs

The Commission acknowledges the usefulness of robust licensing systems for professional clubs at European and national levels as a tool for promoting good governance in sport. Licensing systems generally aim to ensure that all clubs respect the same basic rules on financial management and transparency, but could also include provisions regarding discrimination, violence, protection of minors and training. Such systems must be compatible with competition and Internal Market provisions and may not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organisation and conduct of sport.

Efforts need to concentrate on the implementation and gradual reinforcement of licensing systems. In the case of football, where a licensing system will soon be compulsory for clubs entering European competitions, action needs to concentrate on promoting and encouraging the use of licensing systems at national level.

(46) The Commission will promote dialogue with sport organisations in order to address the implementation and strengthening of self-regulatory licensing systems. (47) Starting with football, the Commission intends to organise a conference with UEFA, EPFL, Fifpro, national associations and national leagues on licensing systems and best practices in this field. |

4.8 Media

Issues concerning the relationship between the sport sector and sport media (television in particular) have become crucial as television rights are the primary source of income for professional sport in Europe. Conversely, sport media rights are a decisive source of content for many media operators.

Sport has been a driving force behind the emergence of new media and interactive television services. The Commission will continue to support the right to information and wide access for citizens to broadcasts of sport events, which are seen as being of high interest or major importance for society.

The application of the competition provisions of the EC Treaty to the selling of media rights of sport events takes into account a number of specific characteristics in this area. Sport media rights are sometimes sold collectively by a sport association on behalf of individual clubs (as opposed to clubs marketing the rights individually). While joint selling of media rights raises competition concerns, the Commission has accepted it under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports.

The Commission recognises the importance of an equitable redistribution of income between clubs, including the smallest ones, and between professional and amateur sport.

(48) The Commission recommends to sport organisations to pay due attention to the creation and maintenance of solidarity mechanisms. In the area of sports media rights, such mechanisms can take the form of a system of collective selling of media rights or, alternatively, of a system of individual selling by clubs, in both cases linked to a robust solidarity mechanism. |

5. FOLLOW-UP

The Commission will follow up on the initiatives presented in this White Paper through the implementation of a structured dialogue with sport stakeholders, cooperation with the Member States, and the promotion of social dialogue in the sport sector.

5.1 Structured dialogue

European sport is characterised by a multitude of complex and diverse structures which enjoy different types of legal status and levels of autonomy in Member States. Unlike other sectors and due to the very nature of organised sport, European sport structures are, as a rule, less well developed than sport structures at national and international levels. Moreover, European sport is generally organised according to continental structures, and not at EU level.

Stakeholders agree that the Commission has an important role to play in contributing to the European debate on sport by providing a platform for dialogue with sport stakeholders. Wide consultation with "interested parties" is one of the Commission's duties according to the Treaties.

In view of the complex and diverse sports culture in Europe, the Commission intends to involve notably the following actors in its structured dialogue:

- European Sport Federations;

- European umbrella organisations for sport, notably the European Olympic Committees (EOC), the European Paralympic Committee (EPC) and European non-governmental sport organisations;

- National umbrella organisations for sport and national Olympic and Paralympic Committees;

- Other actors in the field of sport represented at European level, including social partners;

- Other European and international organisations, in particular the Council of Europe's structures for sport and UN bodies such as UNESCO and the WHO.

(49) The Commission intends to organise the structured dialogue in the following manner: EU Sport Forum: an annual gathering of all sport stakeholders; Thematic discussions with limited numbers of participants. (50) The Commission will also seek to promote greater European visibility at sporting events. The Commission supports the further development of the European Capitals of Sport initiative. |

- 5.2 Cooperation with Member States

Cooperation among Member States on sport at EU level takes place in informal ministerial meetings, as well as at the administrative level by Sport Directors. A Rolling Agenda for sport was adopted by EU Sport Ministers in 2004 to define priority themes for discussions on sport among the Member States.

(51) In order to address the issues listed in this White Paper, the Commission proposes to strengthen existing cooperation among the Member States and the Commission. |

Based on a proposal from the Commission, Member States may wish to reinforce the mechanism of the Rolling Agenda, for example:

- To jointly define priorities for sport policy cooperation;

- To report regularly to EU Sport Ministers on progress.

Closer cooperation will require the regular organisation of Sport Ministers and Sport Directors meetings under each Presidency, which should be taken into account by future 18-month Presidency teams.

(52) The Commission will report on the implementation of the "Pierre de Coubertin" Action Plan through the mechanism of the Rolling Agenda. |

5.3 Social dialogue

In the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions.

The Commission has been supporting projects for the consolidation of social dialogue in the sport sector in general as well as in the football sector. These projects have created a basis for social dialogue at European level and the consolidation of European-level organisations. A Sectoral Social Dialogue Committee can be established by the Commission on the basis of a joint request by social partners. The Commission considers that a European social dialogue in the sport sector or in its sub-sectors (e.g. football) is an instrument which would allow social partners to contribute to the shaping of employment relations and working conditions in an active and participative way. In this area, such a social dialogue could also lead to the establishment of commonly agreed codes of conduct or charters, which could address issues related to training, working conditions or the protection of young people.

(53) The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector. It will continue to give support to both employers and employees and it will pursue its open dialogue with all sport organisations on this issue. |

The support that the Member States should make available for capacity building and joint actions of social partners through the European Social Fund in the convergence regions should also be used for capacity building of the social partners in the sport sector.

6. CONCLUSION

The White Paper contains a number of actions to be implemented or supported by the Commission. Together, these actions form the "Pierre de Coubertin" Action Plan which will guide the Commission in its sport-related activities during the coming years.

The White Paper has taken full advantage of the possibilities offered by the current Treaties. A mandate has been given by the European Council of June 2007 for the Intergovernmental Conference, which foresees a Treaty provision on sport. If necessary, the Commission may return to this issue and indicate further steps in the context of a new Treaty provision.

The Commission will organise a conference to present the White Paper to sport stakeholders in the autumn of 2007. Its findings will be presented to EU Sport Ministers by the end of 2007. The White Paper will also be presented to the European Parliament, the Committee of the Regions and the Economic and Social Committee.

[1] Pierre de Coubertin (1863-1937), French pedagogue and historian, founder of the modern Olympic Games.

[2] For the sake of clarity and simplicity, this White Paper will use the definition of "sport" established by the Council of Europe: "all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels."

[3] Special Eurobarometer (2004): The Citizens of the European Union and Sport.

[4] COM(2007)279 final of 30.5.2007

[5] Recommendation of the European Parliament and of the Council, of 18 December 2006, on key competences for lifelong learning (Official Journal L 394 of 30.12.2006).

[6] D. Dimitrov / C. Helmenstein / A. Kleissner / B. Moser / J. Schindler: Die makroökonomischen Effekte des Sports in Europa , Studie im Auftrag des Bundeskanzleramts, Sektion Sport, Wien, 2006

[7] E.g. the "Rules of the Game" conference organised in 2001 by FIA and the EOC and the Independent European Sport Review carried out in 2006.

[8] Case C-519/04P, Meca Medina v. Commission , ECR 2006, I-6991. For more details, see the Staff Working Document.

COMMISSION RECOMMENDATION

of 11 June 2013

on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

(2013/396/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, as well as the objective of ensuring a high level of consumer protection.

(2) The modern economy sometimes creates situations in which a large number of persons can be harmed by the same illegal practices relating to the violation of rights granted under Union law by one or more traders or other persons ('mass harm situation'). They may therefore have cause to seek the cessation of such practices or to claim damages.

(3) The Commission adopted a Green Paper on antitrust damages actions in 2005 [1] and a White Paper in 2008, which included policy suggestions on antitrust-specific collective redress [2]. In 2008 the Commission published a Green Paper on consumer collective redress [3]. In 2011 the Commission carried out a public consultation 'Towards a more coherent European approach to collective redress' [4].

(4) On 2 February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress', in which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights. The Parliament also stressed the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States [5].

(5) On 11 June 2013 the Commission issued a Communication 'Towards a European Horizontal Framework for Collective Redress' [6], which took stock of the actions to date and the opinions of stakeholders and of the European Parliament, and presented the Commission's position on some central issues regarding collective redress.

(6) It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights supplements public enforcement. Where this Recommendation refers to the violation of rights granted under Union Law, it covers all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons.

(7) Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in this Recommendation should be applied horizontally and

equally in those areas but also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.

(8) Individual actions, such as the small claims procedure for consumer cases, are the usual tools to address disputes to prevent harm and also to claim for compensation.

(9) In addition to individual redress, different types of collective redress mechanisms have been introduced by all Member States. These measures are intended to prevent and stop unlawful practices as well as to ensure that compensation can be obtained for the detriment caused in mass harm situations. The possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court.

(10) The aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse.

(11) In the area of injunctive relief, the European Parliament and the Council have already adopted Directive 2009/22/EC on injunctions for the protection of consumers' interests [7]. The injunction procedure introduced by the Directive does not, however, enable those who claim to have suffered detriment as a result of an illicit practice to obtain compensation.

(12) Procedures to bring collective claims for compensatory relief have been introduced in some Member States, and to differing extents. However, the existing procedures for bringing claims for collective redress vary widely between the Member States.

(13) This Recommendation puts forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States. These principles should ensure that fundamental procedural rights of the parties are preserved and should prevent abuse through appropriate safeguards.

(14) This Recommendation addresses both compensatory and — as far as appropriate and pertinent to the particular principles — injunctive collective redress. It is without prejudice to the existing sectorial mechanisms of injunctive relief provided for by Union law.

(15) Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions. In order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in this Recommendation. Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.

(16) Alternative dispute resolution procedures can be an efficient way of obtaining redress in mass harm situations. They should always be available alongside, or as a voluntary element of, judicial collective redress.

(17) Legal standing to bring a collective action in the Member States depends on the type of collective redress mechanism. In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified.

(18) In the case of a representative action, the legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities. The representative entity should be

required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner.

(19) The availability of funding for collective redress litigation should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest.

(20) In order to avoid an abuse of the system and in the interest of the sound administration of justice, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met.

(21) A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively.

(22) In fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, it is important to ensure consistency between the final decision concerning that violation and the outcome of the collective redress action. Moreover, in the case of collective actions following a decision by a public authority (follow-on actions), the public interest and the need to avoid abuse can be presumed to have been taken into account already by the public authority as regards the finding of a violation of Union law.

(23) With regard to environmental law, this Recommendation takes account of the provisions of Article 9(3), (4) and (5) of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') which, respectively, encourage wide access to justice in environmental matters, set out criteria that procedures should respect, including criteria that they be timely and not prohibitively expensive, and address information to the public and the consideration of assistance mechanisms.

(24) The Member States should take the necessary measures to implement the principles set out in this Recommendation at the latest two years after its publication.

(25) The Member States should report to the Commission on the implementation of this Recommendation. Based on this reporting, the Commission should monitor and assess the measures taken by Member States.

(26) Within four years after publication of this Recommendation, the Commission should assess if any further action, including legislative measures, is needed, in order to ensure that the objectives of this Recommendation are fully met. The Commission should in particular assess the implementation of this Recommendation and its impact on access to justice, on the right to obtain compensation, on the need prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust,

HAS ADOPTED THIS RECOMMENDATION:

I. PURPOSE AND SUBJECT MATTER

1. The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation.

2. All Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation. These principles should be common across the Union, while respecting the different legal traditions of the Member States. Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.

II. DEFINITIONS AND SCOPE

3.For the purposes of this Recommendation:

(a)'collective redress' means: (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress);

(b)'mass harm situation' means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons;

(c)'action for damages' means an action by which a claim for damages is brought before a national court;

(d)'representative action' means an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings;

(e)'collective follow-on action' means a collective redress action that is brought after a public authority has adopted a final decision finding that there has been a violation of Union law.

This Recommendation identifies common principles which should apply in all instances of collective redress, and also those specific either to injunctive or to compensatory collective redress.

III. PRINCIPLES COMMON TO INJUNCTIVE AND COMPENSATORY COLLECTIVE REDRESS

Standing to bring a representative action

4.The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:

(a) the entity should have a non-profit making character;

(b)there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and

(c)the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

5.The Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met.

6.The Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance as recommended in point 4 or by entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.

7.In addition, or as an alternative, the Member States should empower public authorities to bring representative actions.

Admissibility

8. The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.

9. To this end, the courts should carry out the necessary examination of their own motion.

Information on a collective redress action

10. The Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, ad hoc certified entity, a public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions.

11. The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court.

12. The dissemination methods are without prejudice to the Union rules on insider dealing and market manipulation.

Reimbursement of legal costs of the winning party

13. The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law.

Funding

14. The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.

15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

(a) there is a conflict of interest between the third party and the claimant party and its members;

(b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;

(c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

(a) to seek to influence procedural decisions of the claimant party, including on settlements;

(b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;

(c) to charge excessive interest on the funds provided.

Cross-border cases

17. The Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.

18. Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.

IV. SPECIFIC PRINCIPLES RELATING TO INJUNCTIVE COLLECTIVE REDRESS

Expedient procedures for claims for injunctive orders

19. The courts and the competent public authorities should treat claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation.

Efficient enforcement of injunctive orders

20. The Member States should establish appropriate sanctions against the losing defendant with a view to ensuring the effective compliance with the injunctive order, including the payments of a fixed amount for each day's delay or any other amount provided for in national legislation.

V. SPECIFIC PRINCIPLES RELATING TO COMPENSATORY COLLECTIVE REDRESS

Constitution of the claimant party by 'opt-in' principle

21. The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

22. A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.

23. Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice.

24. The defendant should be informed about the composition of the claimant party and about any changes therein.

Collective alternative dispute resolution and settlements

25. The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial, taking also into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [8].

26. The Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before

and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case.

27. Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an alternative dispute resolution procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.

28. The legality of the binding outcome of a collective settlement should be verified by the courts taking into consideration the appropriate protection of interests and rights of all parties involved.

Legal representation and lawyers' fees

29. The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.

30. The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.

Prohibition of punitive damages

31. The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.

Funding of compensatory collective redress

32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

Collective follow-on actions

33. The Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded.

34. The Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.

VI. GENERAL INFORMATION

Registry of collective redress actions

35. The Member States should establish a national registry of collective redress actions.

36. The national registry should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods.

37. The Member States, assisted by the Commission should endeavour to ensure coherence of the information gathered in the registries and their interoperability.

VII. SUPERVISION AND REPORTING

38. The Member States should implement the principles set out in this Recommendation in national collective redress systems by 26 July 2015 at the latest.

39. The Member States should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter and outcome of the cases.

40. The Member States should communicate the information collected in accordance with point 39 to the Commission on an annual basis and for the first time by 26 July 2016 at the latest.

41. The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.

Final provisions

42. The Recommendation should be published in the *Official Journal of the European Union*.

Done at Brussels, 11 June 2013.

For the Commission

The President

José Manuel BARROSO

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[1] COM(2005) 672, 19.12.2005.

[2] COM(2008) 165, 2.4.2008.

[3] COM(2008) 794, 27.11.2008.

[4] COM(2010) 135 final, 31.3.2010.

[5] 2011/2089(INI).

[6] COM(2013) 401 final.

[7] OJ L 110, 1.5.2009, p. 30.

[8] OJ L 136, 24.5.2008, p. 3.

PART C. CJEU JURISPRUDENCE

Case C-102/81: Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co.

IN CASE 102/81

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY WALTHER RICHTER , PRESIDENT OF THE HANSEATISCHEN OBERLANDESGERICHT (HANSEATIC HIGHER REGIONAL COURT) BREMEN , ACTING AS ARBITRATOR , FOR A PRELIMINARY RULING IN THE ARBITRATION BEFORE HIM BETWEEN

NORDSEE DEUTSCHE HOCHSEEFISCHEREI GMBH , BREMERHAVEN , FEDERAL REPUBLIC OF GERMANY ,

AND

1 . REEDEREI MOND HOCHSEEFISCHEREI NORDSTERN AG & CO . KG , BREMERHAVEN ,

2.REEDEREI FRIEDRICH BUSSE HOCHSEEFISCHEREI NORDSTERN AG & CO . KG , BREMERHAVEN ,

Subject of the case

ON THE INTERPRETATION OF REGULATION NO 17/64/EEC OF THE COUNCIL OF 5 FEBRUARY 1964 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1963-1964 , P . 103), REGULATION (EEC) NO 729/70 OF THE COUNCIL OF 21 APRIL 1970 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1970 (I), P . 218) AND REGULATION (EEC) NO 2722/72 OF THE COUNCIL OF 19 DECEMBER 1972 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1972 (28-30 DECEMBER), P . 31) ALL CONCERNING AID FROM THE GUIDANCE SECTION OF THE EUROPEAN AGRICULTURAL GUIDANCE AND GUARANTEE FUND ,

Grounds

1 BY A DECISION OF 22 APRIL 1981 WHICH WAS RECEIVED BY THE COURT ON 27 APRIL , THE ARBITRATOR IN A DISPUTE BETWEEN THREE UNDERTAKINGS , ALL INCORPORATED UNDER GERMAN LAW AND ESTABLISHED IN BREMERHAVEN , REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 177 OF THE TREATY AND THE INTERPRETATION OF REGULATION NO 17/64 OF THE COUNCIL OF 5 FEBRUARY 1964 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1963-1964 , P . 103), REGULATION (EEC) NO 729/70 OF THE COUNCIL OF 21 APRIL 1970 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1970 (I). P . 218) AND REGULATION (EEC) NO 2722/72 OF THE COUNCIL OF 19 DECEMBER 1972 (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1972 (28 TO 30 DECEMBER) P . 31), ALL CONCERNING AID FROM THE GUIDANCE SECTION OF THE EUROPEAN AGRICULTURAL GUIDANCE AND GUARANTEE FUND (HEREINAFTER REFERRED TO AS ' ' THE FUND ' ').

2 THE ORIGINAL DISPUTE RELATED TO PERFORMANCE OF A CONTRACT ENTERED INTO ON 27 JUNE 1973 BY A NUMBER OF GERMAN SHIPBUILDERS . THE CONTRACT CONCERNED A JOINT PROJECT FOR BUILDING THIRTEEN FACTORY-SHIPS FOR FISHING AND ITS PURPOSE WAS TO APPORTION EQUALLY AMONG THE CONTRACTING

PARTIES ALL FINANCIAL AID RECEIVED BY THEM FROM THE FUND , SO THAT ONE-THIRTEENTH OF THE TOTAL AMOUNT OF AID GRANTED WOULD BE ALLOTTED FOR EACH SHIP TO BE BUILT . BY MUTUAL AGREEMENT THE PARTIES TO THE CONTRACT HAD PREVIOUSLY SUBMITTED APPLICATIONS TO THE FUND FOR AID FOR THE CONSTRUCTION OF NINE SHIPS .

3 OF THOSE NINE APPLICATIONS THE COMMISSION FINALLY ACCEPTED ONLY SIX , THE OTHERS BEING EITHER WITHDRAWN OR REJECTED . ONE OF THE UNDERTAKINGS PARTICIPATING IN THE BUILDING PROGRAMME SOUGHT PAYMENT FROM TWO OF THE OTHER UNDERTAKINGS OF THE AMOUNTS TO WHICH IT WAS ENTITLED UNDER THE CONTRACT OF 27 JUNE 1973 .

4 A DISPUTE AROSE ON THE SUBJECT AND WAS SUBMITTED FOR ARBITRATION , AS THE CONTRACT OF 1973 CONTAINED A CLAUSE STATING THAT IN THE EVENT OF DISAGREEMENT BETWEEN THE PARTIES ON ANY QUESTION ARISING FROM THE CONTRACT A FINAL DECISION WAS TO BE GIVEN BY AN ARBITRATOR , ALL RECOURSE TO THE ORDINARY COURTS BEING EXCLUDED . IN ACCORDANCE WITH THAT CLAUSE THE ARBITRATOR WAS APPOINTED BY THE CHAMBER OF COMMERCE OF BREMEN AFTER IT HAD BECOME APPARENT THAT THE PARTIES TO THE DISPUTE COULD NOT AGREE ON THE APPOINTMENT OF AN ARBITRATOR .

5 DURING THE ARBITRATION HEARING THE RESPONDENTS CLAIMED THAT THE 1973 CONTRACT WAS VOID IN SO FAR AS IT ARRANGED FOR AID FROM THE FUND TO GO TO THE BUILDING OF SHIPS IN RESPECT OF WHICH THE COMMISSION HAD NOT GRANTED SUCH AID . THEY TOOK THE VIEW THAT AID FROM THE FUND WAS LINKED TO COMPLETION OF A SPECIFIC PROJECT AND COULD NOT THEREFORE VALIDLY BE TRANSFERRED BY THE RECIPIENT TO A DIFFERENT PROJECT .

6 THE ARBITRATOR WAS OF THE OPINION THAT UNDER GERMAN LAW THE VALIDITY OF A CONTRACT TO SHARE AID FROM THE FUND DEPENDED ON WHETHER SUCH SHARING AMOUNTED TO AN IRREGULARITY UNDER THE RELEVANT COMMUNITY REGULATIONS . CONSIDERING THAT A DECISION ON THE POINT WAS NECESSARY IN ORDER TO ALLOW HIM TO MAKE HIS AWARD HE REFERRED THE MATTER TO THE COURT FOR A PRELIMINARY RULING .

APPLICABILITY OF ARTICLE 177

7 SINCE THE ARBITRATION TRIBUNAL WHICH REFERRED THE MATTER TO THE COURT FOR A PRELIMINARY RULING WAS ESTABLISHED PURSUANT TO A CONTRACT BETWEEN PRIVATE INDIVIDUALS THE QUESTION ARISES WHETHER IT MAY BE CONSIDERED AS A COURT OR TRIBUNAL OF ONE OF THE MEMBER STATES WITHIN THE MEANING OF ARTICLE 177 OF THE TREATY .

8 THE FIRST QUESTION PUT BY THE ARBITRATOR CONCERNS THAT PROBLEM . IT IS WORDED AS FOLLOWS :

“IS A GERMAN ARBITRATION COURT , WHICH MUST DECIDE NOT ACCORDING TO EQUITY BUT ACCORDING TO LAW , AND WHOSE DECISION HAS THE SAME EFFECTS AS REGARDS THE PARTIES AS A DEFINITIVE JUDGMENT OF A COURT OF LAW (ARTICLE 1040 OF THE ZIVILPROZESSORDNUNG (RULES OF CIVIL PROCEDURE)) AUTHORIZED TO MAKE A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES FOR A

PRELIMINARY RULING PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 177 OF THE EEC TREATY?"

9 IT MUST BE NOTED THAT , AS THE QUESTION INDICATES , THE JURISDICTION OF THE COURT TO RULE ON QUESTIONS REFERRED TO IT DEPENDS ON THE NATURE OF THE ARBITRATION IN QUESTION .

10 IT IS TRUE , AS THE ARBITRATOR NOTED IN HIS QUESTION , THAT THERE ARE CERTAIN SIMILARITIES BETWEEN THE ACTIVITIES OF THE ARBITRATION TRIBUNAL IN QUESTION AND THOSE OF AN ORDINARY COURT OR TRIBUNAL INASMUCH AS THE ARBITRATION IS PROVIDED FOR WITHIN THE FRAMEWORK OF THE LAW , THE ARBITRATOR MUST DECIDE ACCORDING TO LAW AND HIS AWARD HAS , AS BETWEEN THE PARTIES , THE FORCE OF RES JUDICATA , AND MAY BE ENFORCEABLE IF LEAVE TO ISSUE EXECUTION IS OBTAINED . HOWEVER , THOSE CHARACTERISTICS ARE NOT SUFFICIENT TO GIVE THE ARBITRATOR THE STATUS OF A ' ' COURT OR TRIBUNAL OF A MEMBER STATE ' ' WITHIN THE MEANING OF ARTICLE 177 OF THE TREATY .

11 THE FIRST IMPORTANT POINT TO NOTE IS THAT WHEN THE CONTRACT WAS ENTERED INTO IN 1973 THE PARTIES WERE FREE TO LEAVE THEIR DISPUTES TO BE RESOLVED BY THE ORDINARY COURTS OR TO OPT FOR ARBITRATION BY INSERTING A CLAUSE TO THAT EFFECT IN THE CONTRACT . FROM THE FACTS OF THE CASE IT APPEARS THAT THE PARTIES WERE UNDER NO OBLIGATION , WHETHER IN LAW OR IN FACT , TO REFER THEIR DISPUTES TO ARBITRATION .

12 THE SECOND POINT TO BE NOTED IS THAT THE GERMAN PUBLIC AUTHORITIES ARE NOT INVOLVED IN THE DECISION TO OPT FOR ARBITRATION NOR ARE THEY CALLED UPON TO INTERVENE AUTOMATICALLY IN THE PROCEEDINGS BEFORE THE ARBITRATOR . THE FEDERAL REPUBLIC OF GERMANY , AS A MEMBER STATE OF THE COMMUNITY RESPONSIBLE FOR THE PERFORMANCE OF OBLIGATIONS ARISING FROM COMMUNITY LAW WITHIN ITS TERRITORY PURSUANT TO ARTICLE 5 AND ARTICLES 169 TO 171 OF THE TREATY , HAS NOT ENTRUSTED OR LEFT TO PRIVATE INDIVIDUALS THE DUTY OF ENSURING THAT SUCH OBLIGATIONS ARE COMPLIED WITH IN THE SPHERE IN QUESTION IN THIS CASE .

13 IT FOLLOWS FROM THESE CONSIDERATIONS THAT THE LINK BETWEEN THE ARBITRATION PROCEDURE IN THIS INSTANCE AND THE ORGANIZATION OF LEGAL REMEDIES THROUGH THE COURTS IN THE MEMBER STATE IN QUESTION IS NOT SUFFICIENTLY CLOSE FOR THE ARBI TRATOR TO BE CONSIDERED AS A ' ' COURT OR TRIBUNAL OF A MEMBER STATE ' ' WITHIN THE MEANING OF ARTICLE 177 .

14 AS THE COURT HAS CONFIRMED IN ITS JUDGMENT OF 6 OCTOBER 1981 BROEKMEULEN , CASE 246/80 (1981) ECR 2311), COMMUNITY LAW MUST BE OBSERVED IN ITS ENTIRETY THROUGHOUT THE TERRITORY OF ALL THE MEMBER STATES ; PARTIES TO A CONTRACT ARE NOT , THEREFORE , FREE TO CREATE EXCEPTIONS TO IT . IN THAT CONTEXT ATTENTION MUST BE DRAWN TO THE FACT THAT IF QUESTIONS OF COMMUNITY LAW ARE RAISED IN AN ARBITRATION RESORTED TO BY AGREEMENT THE ORDINARY COURTS MAY BE CALLED UPON TO EXAMINE THEM EITHER IN THE CONTEXT OF THEIR COLLABORATION WITH ARBITRATION TRIBUNALS , IN PARTICULAR IN ORDER TO ASSIST THEM IN CERTAIN PROCEDURAL MATTERS OR TO INTERPRET THE LAW APPLICABLE , OR IN THE COURSE OF A REVIEW OF AN ARBITRATION AWARD - WHICH MAY BE MORE OR LESS

EXTENSIVE DEPENDING ON THE CIRCUMSTANCES - AND WHICH THEY MAY BE REQUIRED TO EFFECT IN CASE OF AN APPEAL OR OBJECTION , IN PROCEEDINGS FOR LEAVE TO ISSUE EXECUTION OR BY ANY OTHER METHOD OF RECOURSE AVAILABLE UNDER THE RELEVANT NATIONAL LEGISLATION .

15 IT IS FOR THOSE NATIONAL COURTS AND TRIBUNALS TO ASCERTAIN WHETHER IT IS NECESSARY FOR THEM TO MAKE A REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE TREATY IN ORDER TO OBTAIN THE INTERPRETATION OR ASSESSMENT OF THE VALIDITY OF PROVISIONS OF COMMUNITY LAW WHICH THEY MAY NEED TO APPLY WHEN EXERCISING SUCH AUXILIARY OR SUPERVISORY FUNCTIONS .

16 IT FOLLOWS THAT IN THIS INSTANCE THE COURT HAS NO JURISDICTION TO GIVE A RULING .

COSTS

17 THE COSTS INCURRED BY THE KINGDOM OF DENMARK , THE ITALIAN REPUBLIC , THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN DISPUTE ARE CONCERNED , IN THE NATURE OF A STEP IN THE ARBITRATION PROCEEDINGS , THE DECISION AS TO COSTS IS A MATTER FOR THE ARBITRATOR .

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE ARBITRATOR IN THE DISPUTE BETWEEN NORDSEE DEUTSCHE HOCHSEEFISCHEREI GMBH , ON THE ONE HAND , AND REEDEREI MOND HOCHSEEFISCHEREI NORDSTERN AG & CO . KG AND REEDEREI FRIEDRICH BUSSE HOCHSEEFISCHEREI NORDSTERN AG & CO . KG , ON THE OTHER HAND , BY A DECISION OF 22 APRIL 1981 , HEREBY RULES :

THE COURT HAS NO JURISDICTION TO GIVE A RULING ON THE QUESTIONS REFERRED TO IT BY THE ARBITRATOR.

Case C-109/88: Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss

REFERENCE to the Court under Article 177 of the EEC Treaty by the Faglige Voldgiftsret (Denmark) for a preliminary ruling in the proceedings pending before that Court between

Handels - og Kontorfunktionaerernes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark)

and

Dansk Arbejdsgiverforening (Danish Employers' Association), acting on behalf of Danfoss A/S

on the scope of the principle of equal pay for men and women,

THE COURT

composed of : O.Due, President, M . Zuleeg (President of Chamber), T . Koopmans, R . Joliet, J . C . Moitinho de Almeida, G . C . Rodríguez Iglesias and M . Díez de Velasco, Judges,

Advocate General : C . O . Lenz

Registrar : H . A . Ruehl, Principal Administrator

after considering the observations submitted on behalf of

Handels - og Kontorfunktionaerernes Forbund i Danmark, by L . S . Andersen,

the Dansk Arbejdsgiverforening, by H . Werner

the Commission of the European Communities, by J . Currall and I . Langermann, members of its Legal Department, acting as Agents,

the Danish Government, by P . Vesterdorf, Legal Adviser, acting as Agent,

the United Kingdom, by S . J . Hay and D . Wyatt, acting as Agents,

the Italian Government, by P . G . Ferri, avvocato dello Stato,

the Portuguese Government, by Mr Fernandez and Mrs Leitão, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 10 May 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 31 May 1989,

gives the following

Judgment

Grounds

1 By order of 12 October 1987, which was received at the Court on 5 April 1988, the Faglige Voldgiftsret (a Danish industrial arbitration board) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (Official Journal 1975, L 45, p . 19), hereinafter referred to as "the Equal Pay Directive ".

2 Those questions were raised in proceedings between the Handels - og Kontorfunktionaerernes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark, hereinafter referred to as "the Employees' Union ") and the Dansk Arbejdsgiverforening (Danish Employers' Association on behalf

of Danfoss, hereinafter referred to as "the Employers' Association "), acting on behalf of Danfoss A/S . The Employees' Union maintains that Danfoss' s practice in the matter of wages and salaries involves sexual discrimination and therefore infringes the provisions of Article 1 of the Danish Law No 237 of 5 May 1986 which implements the Equal Pay Directive .

3 Danfoss A/S pays the same basic wage to employees in the same wage group . Making use of the possibility open to it under Article 9 of the collective agreement made on 9 March 1983 between the Employers' Association and the Employees' Union it awards, however, individual pay supplements calculated, inter alia, on the basis of mobility, training and seniority .

4 In the main proceedings the Employees' Union had first brought Danfoss A/S before the Industrial Arbitration Board, basing its case on the principle of equal pay for the benefit of two female employees, one of whom worked in the laboratory and the other in the reception and despatch department . In support of its action it had shown that in these two wage groups a man' s average wage was higher than that of a woman' s . In its decision of 16 April 1985 the Industrial Arbitration Board had however considered that in view of the small number of employees on whose pay the calculations had been based the Employees' Union had not proved discrimination . The Employees' Union thereupon brought fresh proceedings in which it produced more detailed statistics relating to the wages paid to 157 workers between 1982 and 1986 and showing that the average wage paid to men is 6.85% higher than that paid to women .

5 In those circumstances the Industrial Arbitration Board stayed the proceedings and referred to the Court a number of questions for a preliminary ruling for the interpretation of the Equal Pay Directive . They are worded as follows :

"1 (a) Where it is established that a male and female employee do the same work of equal value, who, in the view of the Court of Justice, is the person (employer or employee) on whom the burden lies of proving that a differentiation in pay between the two employees is attributable/not attributable to considerations determined by sex?

1 (b) Is it incompatible with the directive on equal pay to give higher pay to male employees, who do the same work as female employees or work of equal value, solely by reference to subjective criteria - for example, staff mobility?

2 (a) Is it contrary to the directive to give to employees of a different sex who do the same work or work of equal value, over and above the basic pay for the job, special supplements for length of service, training, etc .?

2 (b) If so, how can an undertaking, without infringing the directive, make a differentiation in pay between individual members of staff?

2 (c) Isit contrary to the directive for employees of different sex who do the same work or work of equal value to be paid differently by reference to different training?

3 (a) Can an employee or an employees' organization, by proving that an undertaking with a large number of employees (e.g . at least 100) engaged in work of the same nature or value pays on average the women less than the men, establish that the directive is thereby infringed?

3 (b) If so, does it follow that the two groups of employees (men and women) must on average receive the same pay?

4 (a) In so far as it may be found that a difference in pay for the same work is attributable to the fact that the two employees are covered by different collective agreements, will it follow from that finding that the directive does not apply?

4 (b) Is it of importance in considering that question whether the two agreements in each case cover, exclusively or to an overwhelming degree, male and female employees respectively?"

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

The judicial nature of the Industrial Arbitration Board

7 As regards the question whether the Industrial Arbitration Board is a court or tribunal of a Member State within the meaning of Article 177 of the Treaty, it should first be pointed out that, according to Article 22 of the Danish Law No 317 of 13 June 1973 on the Labour Court, disputes between parties to collective agreements are, in the absence of special provisions in such agreements, subject to the Agreed Standard Rules adopted by the Employers' Association and Employees' Union . An industrial arbitration board then hears the dispute at last instance . Either party may bring a case before the board irrespective of the objections of the other . The board' s jurisdiction thus does not depend upon the parties' agreement .

8 The same provision of the aforementioned law governs the composition of the board and in particular the number of members who must be appointed by the parties and the way in which the umpire must be appointed in the absence of agreement between them . The composition of the industrial arbitration board is thus not within the parties' discretion .

9 In those circumstances the Industrial Arbitration Board must be regarded as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty .

[…]

Case C-202/88: French Republic v Commission of the European Communities.

Judgment of the Court of 19 March 1991.
French Republic v Commission of the European Communities.
Competition in the markets in telecommunications terminals equipment.
Case C-202/88.

European Court Reports 1991 I-01223

ECLI identifier: ECLI:EU:C:1991:120

Keywords

1. Competition - Public undertakings and undertakings to which the Member States have granted special or exclusive rights - - Powers of the Commission - Adoption of directives specifying in general terms the obligations of the Member States

(EEC Treaty, Art. 90(1) and (3))

2. Competition - Undertakings to which the Member States have granted special or exclusive rights - Compatibility with the Treaty of the rights conferred - No presumption to that effect

(EEC Treaty, Art. 90(1)

3. Competition - Public undertakings and undertakings to which the Member States have granted special or exclusive rights - Powers of the Commission by virtue of its duty of supervision and legislative powers of the Council

(EEC Treaty, Arts 87, 90(3) and 100a)

4. Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Interpretation of Article 30 of the Treaty in the light of Articles 2 and 3 - Telecommunications terminals - Exclusive importation and marketing rights granted by the Member States - Not permissible - Corollary - Exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment not permissible - Withdrawal legally required by Directive 88/301 - Obligation, in order to ensure equal opportunities between economic agents, to entrust the drawing up of technical specifications and type-approval of equipment to an independent body

(EEC Treaty, Arts 2, 3(f) and 30; Commission Directive 88/301, Arts 2, 3 and 6)

5. Competition - Undertakings to which the Member States have granted special or exclusive rights - Recourse to Article 90 of the Treaty in order to deal with anti-competitive conduct engaged in by undertakings on their own initiative - Illegality - Appropriate legal basis - Articles 85 and 86 of the Treaty

(EEC Treaty, Arts 85, 86 and 90; Commission Directive 88/301, Art. 7)

Summary

1. Article 90(3) of the Treaty empowers the Commission to specify in general terms, by adopting directives, the obligations imposed on the Member States by Article 90(1) as regards public undertakings and undertakings to which they have granted special or exclusive rights. That power, which is exercised without taking into consideration the situation prevailing in any particular Member State, differs by its very nature from that exercised by the Commission when seeking a declaration that a Member State has failed to fulfil a particular obligation under the Treaty.

2. The fact that Article 90(1) of the Treaty presupposes the existence of undertakings which have special or exclusive rights cannot be construed as meaning that such rights are necessarily compatible with the Treaty. They must be assessed in the light of different rules of the Treaty, to which Article 90(1) refers.

3. The subject-matter of the power conferred on the Commission by Article 90(3) of the Treaty, namely supervision of measures adopted by the Member States in relation to undertakings with which they have certain specific links, is different from, and more specific than, that of the powers conferred on the Council by either Article 100a or Article 87. Furthermore, the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under certain articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission.

4. The grant by a Member State of exclusive importation and marketing rights in the telecommunications terminals sector is capable of restricting intra-Community trade and therefore constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. In the first place, the existence of such

rights deprives traders without such rights of the opportunity of having their products purchased by consumers, and secondly the diversity and technical nature of the products in that sector are such that there is no certainty that the holder of exclusive rights can offer the entire range of models available on the market, inform customers about the state and operation of all the terminals and guarantee their quality. Accordingly, Article 2 of Directive 88/301 rightly requires such rights to be withdrawn, whilst Article 3 sets limits thereto which are imposed by the requirements of safety, protection of networks and interworking of equipment.

Furthermore, Article 30 et seq. of the Treaty has to be interpreted in the light of Articles 2 and 3. Those articles set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted, which means that the competition aspect of Article 3(f) has to be taken into account. In addition, if exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment were retained, traders engaged in the marketing of such equipment might not be able to carry on business in conditions of competition which are not distorted, since there would be no certainty that the holder of those exclusive rights would be able to guarantee the reliability of those services for every type of terminal available on the market and the utilization of all those terminals, nor would he have any incentive to do so. Consequently the directive rightly requires those rights to be withdrawn also.

That same need to ensure that competition is not distorted and to secure equality of opportunity as between the various economic operators justifies the requirement laid down in Article 6 of the directive to the effect that Member States must entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

5. Where undertakings to which Member States have granted special or exclusive rights engage in anti-competitive conduct on their own initiative, Article 90 of the Treaty, which confers powers on the Commission only in relation to State measures, does not constitute an appropriate legal basis for requiring such conduct to be brought to an end. Such conduct can be called in question only by individual decisions adopted under Articles 85 and 86 of the Treaty.

Consequently, it is necessary to annul Article 7 of Directive 88/301, by which the Commission sought to require Member States to make it possible to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights granted to certain undertakings at the time of the conclusion of the contracts, since it has not been established that the conclusion of long-term contracts, which are regarded as anti-competitive, was the result of encouragement or coercion on the part of the national authorities.

Parties

In Case C-202/88,

French Republic, represented by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry for Foreign Affairs, acting as Agent, and by Géraud de Bergues, Assistant Secretary for Foreign Affairs in the same Ministry, acting as deputy Agent, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince-Henri,

applicant,

supported by

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Legal Affairs Department, and by Ivo M. Braguglia, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

Kingdom of Belgium, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry for Economic Affairs, acting as Agent, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Emile-Reuter,

and

Hellenic Republic, represented by Nikos Frangakis, Legal Adviser in the office of the Greek Permanent Representative to the European Communities, by Stamatina Vodina, Advocate, a member of the Legal Department of the office of the Greek Permanent Representative to the European Communities, and by Galateia Alexaki, Advocate, Legal Assistant in the Ministry for Economic Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

interveners,

v

Commission of the European Communities, represented by Jean-Louis Dewost, Director General of the Legal Department, Goetz zur Hausen, Legal Adviser, and Luís Antunes, a member of the Commission' s Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment,

THE COURT,

composed of: O. Due, President, G.F. Mancini, T.F. O' Higgins, J.C. Moitinho de Almeida and G.C. Rodríguez Iglesias (Presidents of Chambers), C.N. Kakouris, R. Joliet, F.A. Schockweiler and M. Zuleeg, Judges,

Advocate General: M.G. Tesauro,

Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral arguments by the parties at the hearing on 26 October 1989,

after hearing the Opinion of the Advocate General at the sitting on 13 February 1990,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 22 July 1988, the French Republic brought an action before the Court under the first paragraph of Article 173 of the EEC Treaty for the annulment of Articles 2, 6, 7 and, in so far as necessary, Article 9 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (Official Journal 1988 L 131, p. 73). The Italian Republic, the Kingdom of Belgium, the Federal Republic of Germany and the Hellenic Republic have intervened in the proceedings in support of the form of order sought by the French Republic.

2 Directive 88/301 was adopted on the basis of Article 90(3) of the Treaty. According to Article 2 of that directive, Member States which have granted special or exclusive rights to undertakings for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment are to ensure that those rights are withdrawn and are to inform the Commission of the measures taken or draft legislation introduced to that end.

3 According to Article 3, Member States are to ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may:

in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2(17) of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (Official Journal 1986 L 217, p. 21);

require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

4 According to Article 6 of the directive, Member States are to ensure that, from 1 July 1989, responsibility for drawing up specifications, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

5 Article 7 requires Member States to take the necessary steps to make it possible for customers to terminate, with maximum notice of one year, leasing or maintenance contracts relating to terminal equipment which at the time of when the contracts were concluded were subject to exclusive or special rights granted to certain undertakings.

6 Finally, according to Article 9, Member States are to provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.

7 For a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, reference is made to the Report for the Hearing, which is mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The French Government relies on four pleas in law, alleging misuse of procedure, lack of powers of the Commission, breach of the principle of proportionality and infringement of essential procedural requirements. As part of its plea in law alleging lack of powers, the French Government also claims that the Commission has misapplied the rules of the Treaty. Since that allegation in fact constitutes a separate plea, it will be considered on its own.

I - Legal background to the dispute

9 The pleas in law and arguments put forward in this case relate essentially to the interpretation of Article 90 of the Treaty. According to paragraph (3) of that article, on the basis of which the contested regulation was adopted, "the Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States".

10 In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Article 90(1) prohibits the Member States generally from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

11 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to those rules, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, on condition, however, that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.

12 In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community' s interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market.

13 In paragraph 11 of the preamble to the contested directive, the Commission states that the conditions for applying the exception in Article 90(2) of the Treaty are not fulfilled. Neither the French Government nor the interveners have challenged that. It follows that this dispute falls within the scope of paragraphs (1) and (3) of Article 90 of the Treaty.

14 Inasmuch as it makes it possible for the Commission to adopt directives, Article 90(3) of the Treaty empowers it to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2).

15 Accordingly, the parties' pleas in law and arguments must be considered in the light of the question whether in this case the Commission has remained within the bounds of the legislative power thus conferred upon it by the Treaty.

II - Misuse of procedure

16 In its first plea in law the French Government claims that the Commission adopted the contested directive pursuant to Article 90(3) of the Treaty instead of initiating the procedure provided for in Article 169. In its view, Article 90(3) is intended to enable the Commission to inform the Member States, in cases where it is unclear how compliance with the Treaty is to be achieved, of the means which must be used in order to ensure such compliance. In contrast, recourse must be made to Article 169 where it is clear that a measure is wholly contrary to the Treaty and must be brought to an end forthwith.

17 It must be held in that regard that Article 90(3) of the Treaty empowers the Commission to specify in general terms the obligations arising under Article 90(1) by adopting directives. The Commission exercises that power where, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them under the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty.

18 However, it appears from the content of the directive at issue in this case that the Commission merely determined in general terms obligations which are binding on the Member States under the Treaty. The directive therefore cannot be interpreted as making specific findings that particular Member States failed to fulfil their obligations under the Treaty, with the result that the plea in law relied upon by the French Government must be rejected as unfounded.

III -- Competence of the Commission

19 In its second plea in law the French Government, supported by the interveners, argues that by adopting a directive providing simply for the withdrawal of special and exclusive rights for the importation, marketing, connection, bringing into service and/or maintenance of telecommunications terminal equipment, the Commission exceeded the supervisory powers conferred upon it by Article 90(3) of the Treaty. In the French Government' s view, that provision presupposes the existence of special and exclusive rights. Accordingly, to take the view that the maintenance of those rights constitutes in itself a measure within the meaning of Article 90 disregards the scope of that article.

20 The Belgian and French Governments further consider that a policy on the restructuring of the telecommunications sector, as envisaged by the Directive, fell within the sole competence of the Council, acting under Article 100a. The Belgian and Italian Governments maintain in addition that the directive is contrary to Article 87 of the Treaty

inasmuch as only the Council is empowered to lay down rules for the application of Articles 85 and 86 of the Treaty in specific sectors.

21 As far as the first argument is concerned, it must be held in the first place that the supervisory power conferred on the Commission includes the possibility of specifying, pursuant to Article 90(3), obligations arising under the Treaty. The extent of that power therefore depends on the scope of the rules with which compliance is to be ensured.

22 Next, it should be noted that even though that article presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty. That depends on different rules, to which Article 90(1) refers.

23 As regards the allegation that the Commission has encroached on the powers conferred on the Council by Articles 87 and 100a of the Treaty, those provisions have to be compared with Article 90, taking into account their respective subject-matter and purpose.

24 Article 100a is concerned with the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Article 87 is concerned with the adoption of any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86, that is to say the competition rules applicable to all undertakings. As for Article 90, it is concerned with measures adopted by the Member States in relation to undertakings with which they have specific links referred to in the provisions of that article. It is only with regard to such measures that Article 90 imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States.

25 It must therefore be held that the subject-matter of the power conferred on the Commission by Article 90(3) is different from, and more specific than, that of the powers conferred on the Council by either Article 100a or Article 87.

26 It should also be noted that, as the Court held in Joined Cases 188 to 190/80 (France, Italy and United Kingdom v Commission [1982] ECR 2545, at paragraph 14), the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission.

27 The plea in law alleging lack of powers on the part of the Commission must therefore be rejected.

IV - The principle of proportionality

28 In claiming that there has been a breach of the principle of proportionality the French Government alleges that the Commission failed to use appropriate means to bring to an end any abuse by telecommunications undertakings of their special or exclusive rights. As a result, that plea in law merges with the pleas in law alleging a misuse of procedure and lack of powers which have been dismissed; it therefore does not have to be considered separately.

V - Application of the rules of the Treaty

29 The French Government and the interveners allege that Articles 2, 6, 7 and 9 of the directive are unlawful, on the ground that those provisions are wrongly based on an infringement by the Member States of Articles 30, 37, 59 and 86 of the Treaty.

30 On the basis of the observations set out above, that complaint must be construed as being directed against the misapplication by the Commission of the aforesaid provisions of the Treaty. Articles 2, 6, 7 and 9 of Directive 88/301 must therefore be considered in the light of the grounds on which they are based.

1. Legality of Article 2 of Directive 88/301 (withdrawal of special and exclusive rights)

31 Article 2 of the contested directive requires Member States which have granted undertakings special or exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment to withdraw those rights and to inform the Commission of the measures taken or draft legislation introduced to that end.

32 It follows that the directive is concerned with exclusive rights, on the one hand, and special rights, on the other. It is appropriate to follow that classification in considering this complaint.

33 With regard to exclusive importation and marketing rights, it should be borne in mind that, as the Court has consistently held (see, in particular, the judgment in Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, at paragraph 5), the prohibition of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

34 In that regard it should be noted first that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers.

35 It should be pointed out, secondly, that the terminals sector is characterized by the diversity and technical nature of the products concerned and by the ensuing constraints. In those circumstances there is no certainty that the holder of the monopoly can offer the entire range of models available on the market, inform customers about the state and operation of all the terminals and guarantee their quality.

36 Accordingly, exclusive importation and marketing rights in the telecommunications terminal sector are capable of restricting intra-Community trade.

37 With regard to the question whether such rights can be justified, it should be noted that in Article 3 of the contested directive the Commission specified the extent and the limits of the withdrawal of special and exclusive rights so as to take into account certain requirements such as those listed in Article 2(17) of Council Directive 86/361, namely user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm and interworking of terminal equipment in justified cases.

38 For its part, the French Government has not challenged Article 3 of the contested directive, nor has it argued that there are other essential requirements which the Commission should have complied with in this case.

39 In those circumstances, the Commission was right to consider exclusive importation and marketing rights in the telecommunications terminal sector incompatible with Article 30 of the Treaty.

40 So far as concerns exclusive rights regarding the connection, bringing into service and maintenance of telecommunications terminal equipment, paragraph 6 of the preamble to the directive states that:

"... The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights ...".

41 In that regard it should be borne in mind, in the first place, that, as the Court has consistently held, Articles 2 and 3 of the Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted (see, in particular, the judgment in Case 229/83 Leclerc v Au Blé Vert [1985] ECR 1, at paragraph 9). Article 30 et seq. must therefore be interpreted in the light of that principle, which means that the competition aspect of Article 3(f) of the Treaty has to be taken into account.

42 Next, it should be noted that in a market which exhibits the characteristics described above (see paragraph 35), there is no certainty that a holder of exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment can guarantee the reliability of those services for every type of terminal available on the market and thereby enable them all to be used, nor that he will have any incentive to do so. Accordingly, when the exclusive marketing right has been withdrawn, an economic agent must himself be able to connect, bring into service and maintain equipment in order to be able to carry on his marketing activity in conditions of competition which are not distorted.

43 Accordingly, the Commission rightly regarded exclusive rights regarding the connection, bringing into service and maintenance of telecommunications terminal equipment as incompatible with Article 30.

44 It follows from the foregoing that the Commission was justified in requiring the withdrawal of exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

45 As far as special rights are concerned, it should be noted that neither the provisions of the directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty.

46 It follows that the Commission has failed to justify the obligation to withdraw special rights regarding the importation, marketing, connection, bringing into service and/or maintenance of telecommunications terminal equipment.

47 Accordingly, Article 2 must be declared void in so far as it concerns the withdrawal of those rights.

2. Legality of Article 6 of Directive 88/301 (drawing up specifications, monitoring their application and granting type-approval for terminal equipment)

48 According to Article 6 of the contested directive, Member States are to ensure that from 1 July 1989 responsibility for drawing up the specifications referred to in Article 5 of the directive, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

49 Paragraph 9 of the preamble to the directive states that:

"... To ensure that [technical specifications and type-approval procedures] are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question ...".

50 Paragraph 17 of the preamble to the directive states that:

"Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals".

51 It should be observed that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.

52 Consequently, the Commission was justified in seeking to entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

3. Legality of Article 7 of Directive 88/301 (termination of leasing or maintenance contracts)

53 Article 7 of the contested directive requires Member States to take the necessary steps to make it possible to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights granted to certain undertakings at the time of the conclusion of the contracts.

54 Paragraph 18 in the preamble to the directive states that:

"The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts".

55 In that regard, it should be noted that Article 90 of the Treaty confers powers on the Commission only in relation to State measures (see paragraph 24) and that anti-competitive conduct engaged in by undertakings on their own initiative can be called in question only by individual decisions adopted under Articles 85 and 86 of the Treaty.

56 It does not appear either from the provisions of the directive or from the preamble thereto that the holders of special or exclusive rights were compelled or encouraged by State regulations to conclude long-term contracts.

57 Article 90 cannot therefore be regarded as an appropriate basis for dealing with the obstacles to competition which are purportedly created by the long-term contracts referred to in the directive. It follows that Article 7 must be declared void.

4. Legality of Article 9 of Directive 88/301 (annual report)

58 Article 9, which requires Member States to provide the Commission at the end of each year with a report allowing it to monitor compliance with certain provisions of the directive, must also be declared void in so far as it refers to the provisions of Article 2 which are concerned with special rights and to Article 7 of the contested directive.

VI - Infringement of essential procedural requirements

59 The French Government further claims that the contested directive does not contain an adequate statement of reasons.

60 It should be pointed out in limine that that plea in law must be considered only in so far as it relates to aspects of the contested directive which have not already been declared invalid.

61 In that regard, it should be noted that the reasons which led the Commission to require the withdrawal of exclusive rights regarding the importation, marketing, connection, bringing into service and maintenance of terminal equipment are sufficiently clear from the preamble to the directive. The same is true as regards the obligations imposed on the Member States by Article 6 of the contested directive.

62 The plea in law alleging infringement of essential procedural requirements therefore cannot be upheld.

Operative part

On those grounds, THE COURT hereby:

1. Declares Article 2 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment void in so far as it requires Member States which grant undertakings special rights regarding the importation, marketing, connection or bringing into service of terminal equipment and/or maintenance of such equipment to withdraw such rights and to inform the Commission of the measures taken or draft legislation introduced to that end;

2. Declares void Article 7 of the directive;

3. Declares Article 9 of the directive void in so far as it refers to the provisions of Article 2 which are concerned with special rights and to Article 7 of the directive;

4. Dismisses the remainder of the application;

C-24/92: Pierre Corbiau v Administration des contributions.

Judgment of the Court of 30 March 1993.
Pierre Corbiau v Administration des contributions.
Reference for a preliminary ruling: Directeur des contributions directes et des accises - Luxembourg.
Meaning of "court of tribunal of a Member State" for the purposes of Article 177 of the EEC Treaty.
Case C-24/92.

European Court Reports 1993 I-01277

Keywords

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Preliminary rulings ° Reference to the Court ° Court or tribunal of a Member State within the meaning of Article 177 of the Treaty ° Concept ° Director of the Revenue Services ruling on a taxpayer' s complaint concerning a tax assessment made by a department under his authority ° Excluded

(EEC Treaty, Art. 177)

Summary

The concept of a court of tribunal, within the meaning of Article 177 of the Treaty, is a concept of Community law and by its very nature can embrace only authorities acting as a third party in relation to the authority which adopted the decision under appeal.

The Director of the Revenue Services of a Member State hearing a taxpayer' s complaint does not act as such a third party because a clear organizational link exists between him and the department which made the disputed tax assessment.

Parties

In Case C-24/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Directeur des Contributions Directes et des Accises (Director of Taxation and Excise Duties) of the Grand Duchy of Luxembourg for a preliminary ruling in the proceedings pending before him between

Pierre Corbiau

and

Administration des Contributions du Grand-Duché de Luxembourg

on the interpretation of Article 48 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G.C. Rodríguez Iglesias, M. Zuleeg, J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler,

J.C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: M. Darmon,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of the Commission of the European Communities by its Principal Legal Adviser, H. Étienne, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Luxembourg Government, represented by J.-M. Klein, Conseiller de Direction de Première Classe at the Ministry of Finance, and of the Commission at the hearing on 12 January 1993

after hearing the Opinion of the Advocate General at the sitting on 16 February 1993,

gives the following

Judgment

Grounds

1 By a decision of 28 January 1992, received at the Court the same day, the Directeur des Contributions Directes et des Accises (Director of Taxation and Excise Duties) of the Grand Duchy of Luxembourg (hereinafter "the Directeur des Contributions") referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 48 of that Treaty.

2 The question had arisen in an administrative appeal brought before the Directeur des Contributions by Mr Corbiau for the repayment of excessive amounts of income tax.

3 Mr Corbiau, who is a Belgian national, works at Banque Paribas in Luxembourg. He lived in Luxembourg until 25 October 1990, on which date he transferred his residence to Belgium while remaining employed in Luxembourg. Formerly a resident taxpayer in Luxembourg, he now became a non-resident taxpayer.

4 During the period from 1 January 1990 until 25 October 1990, his employer deducted income tax from his salary at the rate which would have been applicable if he had been a taxpayer resident in Luxembourg throughout the year.

5 When the amount of tax due was finally assessed, Mr Corbiau' s income for the first ten months of the 1990 tax year was taxed at the progressive rate normally applicable to such income if earned over the whole year. Because that rate was lower than the one applied in calculating the amount of the deductions, the tax statement for 1990 showed excess taxation amounting to LFR 180 048.

6 The Luxembourg tax authorities refused to repay the excessive amount of tax deducted, relying on Article 154(6) of the Loi sur l' Impôt sur le Revenu (Income Tax Law), which provides that amounts deducted by way of tax from the salaries and wages of employed persons who are resident taxpayers for only part of the year are to become the property of the Treasury, whether such persons take up residence in the country or leave it during the course of the year.

7 On 28 June 1991, Mr Corbiau made an application to the Directeur des Contributions under Paragraph 131 of the Tax Code.

8 That provision provides that "the Minister for Finance may in individual cases (or in several individual cases, as in the event of bad weather or other exceptional circumstances) grant full or partial remission of taxes owed to the State which it would be inequitable to collect having regard to the particular case, or order that taxes already paid be repaid or credited".

9 Article 8 of the Grand-Ducal Order of 26 October 1944 provides that "taxpayers' complaints and applications for remission or reduction of taxes shall be dealt with by the head of the relevant department or his deputy save where appeal is made to a body to be designated by ministerial order".

10 Under Article 2(1) of the Law of 17 April 1964 reorganizing the Administration of Direct Taxes and Excise Duties, as amended by the Law of 20 March 1970, that function is conferred upon a director, who is the head of the administration.

11 Finally, Article 1 of the Ministerial Order of 10 April 1946 designated the Judicial Committee of the Conseil d' État (State Council), sitting with three members, as the body competent to rule at final instance on appeals in matters of taxation, contributions and entitlements.

12 In the proceedings before the Directeur des Contributions, Mr Corbiau relied on the judgment in Case C-175/88 Biehl v Administration des Contributions [1990] ECR I-1779, in which the Court held that: "Article 48(2) of the Treaty precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are

resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable".

13 Being uncertain as to how that judgment was to be applied to the matter before him, the Directeur des Contributions decided to refer the following question to the Court for a preliminary ruling:

"In a Member State where employed persons who have been resident taxpayers for the whole tax year are entitled to repayment of sums legally deducted by way of tax from their salaries by their employer if and to the extent to which the total of those deductions exceeds the amount of income tax assessed at the rate corresponding to the whole of their income for the year, is the fact that a Community national who has been a resident taxpayer for part of the year can obtain repayment of amounts of tax lawfully deducted only on the same condition and to the same extent contrary to Article 48 of the EEC Treaty?"

14 Before answering that question, the Court must consider whether the Directeur des Contributions constitutes a "court or tribunal" within the meaning of Article 177 of the Treaty and whether, in consequence his reference is admissible.

15 It must be remembered that the expression "court or tribunal" is a concept of Community law, which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings.

16 In this instance, the Directeur des Contributions does not act as such a third party. Being at the head of the Direction des Contributions Directes et des Accises (Direct Taxes and Excise Duties Directorate), he has a clear organizational link with the departments which made the disputed tax assessment, against which the complaint submitted to him is directed. This is confirmed, moreover, by the fact that, if the matter were to come before the Conseil d' État on appeal, the Directeur des Contributions would be a party to the proceedings.

17 The Directeur des Contributions is not, therefore, a court or tribunal within the meaning of Article 177 of the Treaty and the reference he has made must therefore be held inadmissible.

Decision on costs

Costs

18 The costs incurred by the Luxembourg Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these

proceedings are, for the parties to the main proceedings, a step in the proceedings before the Directeur des Contributions of the Grand Duchy of Luxembourg, the decision on costs is a matter for him.

Operative part

On those grounds,

THE COURT,

hereby rules:

The reference made by the Directeur des Contributions Directes et des Accises of the Grand Duchy of Luxembourg is inadmissible.

C-250/92: Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA

JUDGMENT OF THE COURT (Fifth Chamber) 15 December 1994

In **Case C-250/92,**

REFERENCE to the Court under Article 177 of the EEC Treaty by the Østre Landsret for a preliminary ruling in the proceedings pending before that court between

Gøttrup-Klim Grovvareforening and Others and

Dansk Landbrugs Grovvareselskab AmbA (DLG),

on the interpretation of Articles 85 and 86 of the EEC Treaty and of Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129),

THE COURT (Fifth Chamber),

composed of: G. C. Rodriguez Iglesias, President, acting as President of the Chamber, J. C. Moitinho de Almeida and D. A. O. Edward (Rapporteur), Judges,

Advocate General: G. Tesauro,

Registrar: H. v. Holstein, Deputy Registrar, after considering the written observations submitted on behalf of:

— Gøttrup-Klim Grovvareforening and Others, by M. P. Vesterdorf, Legal

Adviser, and B. Jacobi, of the Copenhagen Bar,

— Dansk Landbrugs Grovvareselskab AmbA, by A. Spang-Hanssen and S. Werdelin, of the Copenhagen Bar,

— the Commission of the European Communities, by H. P. Hartvig, Legal

Adviser, and B. J. Drijber, of its Legal Service, acting as Agents, having regard to the Report for the Hearing,

after hearing the oral observations of:

Gøttrup-Klim Grovvareforening and Others, represented by B. Jacobi, assisted by

M. P. Vesterdorf,

Dansk Landbrugs Grovvareselskab AmbA, represented by A. Spang-Hanssen and S. Werdelin, assisted by J. Fejø, Advokat,

the Commission of the European Communities, represented by H. P. Hartvig,

Legal Adviser, and B. J. Drijber,

at the hearing on 16 December 1993,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1994, gives the following

Judgment

1 By order of 20 March 1991 and by decision of 10 April 1992, both received at the Court on 1 June 1992, the Østre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 85 and 86 of the EEC Treaty and of Council Regulation No 26/62 of 4 April 1962 applying certain rules of

competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129).

2 Those questions were raised in proceedings between 37 local cooperative associations specializing in the distribution of farm supplies (hereinafter 'the plaintiffs') and Dansk Landbrugs Grovvareselskab AmbA (Danish cooperative association distributing farm supplies, hereinafter 'DLG'). The plaintiffs in the main proceedings are all members of the Landsforeningen af den Lokale andel, known until 1991 as the Landsforeningen af Andels Grovvareforeninger (National Union of cooperative associations specializing in the distribution of farm supplies, hereinafter 'LAG'). The main proceedings concern the lawfulness and the economic consequences of an amendment which was made by DLG to its statutes and which led to the exclusion of the plaintiffs.

3 DLG is a cooperative society with limited liability which has existed in its present form since 1969. Its object is to provide its members with farm supplies, including fertilizers and plant protection products, at the lowest prices. In addition, it offers its members certain services, particularly in the areas of finance and insurance, undertakes to negotiate the best prices for its members' produce and gives them access to logistical resources and research facilities. It has members throughout Denmark.

4 DLG's members fall into four categories: 'A', 'B', 'C' and 'D'. 'B' members are local associations or other cooperatives whose object is trading in and/or producing goods appearing in the range of products offered by DLG. Before they were excluded, the plaintiffs were 'B' members and, because they belonged to that category, they were entitled to some extent to take part in DLG's management.

5 LAG was formed in 1975 by the 'B' members of DLG. During the 1980s, some 'B' members, dissatisfied with the prices charged by DLG on the sale of fertilizers and plant protection products, took the initiative and began themselves to import those products. As a result, they started to cooperate amongst themselves within LAG.

6 On 9 June 1988 DLG amended its statutes because of increasing competition from LAG, in spite of opposition from the 'B' members.

7 Paragraph 7 of the statutes was amended as follows:

'1. As regards "B" and "D" members, membership of, or any other kind of participation in, associations, societies or other forms of cooperative organization in competition with this association on the wholesale market, with regard to the purchase and sale of fertilizers and plant protection products, shall be regarded with effect from 1 January 1989 as incompatible with membership of DLG. The association shall offer its services as intermediary to "B" and "D" members who require them in relation to the purchase of fertilizers and plant protection products.

2. Members who, before this provision enters into force, belong to associations or participate therein in one way or another contrary to paragraph 1, shall by 31 December 1988 at the latest either cease to be members of or to work with competing associations or resign from DLG. If such a member chooses to resign from DLG, notification in writing to the association by 15 December 1988 shall be deemed to be adequate notice, so that the member resigning shall be entitled to repayment of the cooperative share capital paid up by it and of any sum paid into the development loan account, over a period of ten years, in accordance with the rules applicable to members resigning lawfully .

3. Any infringement of paragraph 1 after that provision is brought into force on 1 January 1989 shall lead to exclusion from DLG, whether membership or cooperation contrary to the statutes took place before or after 1 January 1989. In such a situation, a member resigning shall, in the most favourable circumstances, that is, in so far as no decision has been taken to confiscate its assets in whole or in part, receive the cooperative share capital paid up by it and also any sums appearing in the development loan account, over a period of ten years, in equal instalments, the first of which shall be paid by the end of the first financial year following the member's exclusion.

4. The stricter rules applicable to "B" and "D" members of DLG shall come into force, as stated above, on 1 January 1989 which shall at the same time be the starting date for the new period of membership for "B" and "D" members ... The purpose of the new provisions is not to put obstacles in the way of "B" and "D" members making wholesale purchases of farm supplies through suppliers (agents, brokers and undertakings marketing basic products in Denmark and abroad) other than the association, as long as those substitute purchases are not made through any organized membership of or participation in other associations etc. contrary to paragraph 1.'

8 At the same time, the rules governing withdrawal and resignation were amended so that DLG membership now lasts for five, instead of ten, years.

9 It was subsequently decided that, if it proved necessary to exclude 'B' members, they would be treated as members resigning lawfully. As a result, they would obtain repayment over a period of ten years of their registered cooperative share capital, consisting of any original contribution and of a share in subsequently declared and undistributed surpluses, but would have no claim to a share in the undistributed assets, that is to say a proportional share of DLG's net worth, after deduction of share capital.

10 By letter of 29 December 1988, DLG submitted that amendment of its statutes to the Commission in order to obtain negative clearance as provided for in Article 2 of Council Regulation No 17/62 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) or, alternatively, a declaration that the rules on competition are inapplicable under Article 4 of that regulation.

11 In that notification, DLG explained the objectives pursued in amending its statutes as follows:

'The aim of the abovementioned amendment to the statutes is to stand up to a few very large multinational producers of fertilizers and plant protection products in order to obtain lower purchase prices for Danish farmers and, secondarily, to prevent competitors' representatives from taking part in the association's management bodies (shareholders' committee and board of directors) in which business secrets are discussed

12 Some of the 'B' members refused to comply with the amendments to the statutes, with the result that 37 local associations which were 'B' members were excluded from DLG as of March 1989.

13 The Commission has still not answered DLG's letter of notification of 29 December 1988.

14 During 1989, the amendments to the statutes of DLG were examined by the Monopoltilsynet (Danish Monopolies Office) and the Monopolråd (Danish Monopolies Board), the national competition authorities. Neither considered

that any national competition rules had been infringed. Their examination did not take into account Articles 85 and 86 of the Treaty.

15 On 1 December 1989, those 'B' members which had been expelled from DLG brought an action against that association before the Østre Landsret for the annulment of the amendments to the statutes, an order prohibiting DLG from applying the new articles and an order that the defendant should pay a sum totalling DKR 200 000 000 and compensation for the damage and disadvantages sustained as a result of their exclusion, plus interest on those sums. In support of their arguments, the plaintiffs in the main proceedings claim in particular that, by closing the Danish market to a wide variety of foreign suppliers, the amendment to DLG's statutes is contrary to Articles 85 and 86 of the Treaty.

16 By order of 20 March 1991 the Østre Landsret, taking the view that a ruling on the interpretation of Articles 85 and 86 of the Treaty was necessary in the proceedings pending before it, decided to refer the matter to the Court.

17 On 10 April 1992, it referred the following questions to the Court for a preliminary ruling:

Question 1:

Is Article 85(1) of the Treaty to be interpreted as meaning that the prohibition in that provision of certain forms of anti-competitive conduct applies to the situation where a commercial cooperative society founded in 1969 (A) makes a change in its statutes in 1988 with the purpose of excluding undertakings or associations from membership of the society if they are participants in associations, societies or other cooperative organizations which compete with A on the wholesale market with regard to the purchase and sale of fertilisers and plant protection products, where the object of the amendment was a purchasing cooperative (B) comprising a number of A's members at the time of the change in the statutes?

Question 2:

Is it relevant to the answer to Question 1 that the change in the statutes was also intended to prevent the continuation of a situation where A's management bodies (shareholders' committee and board of directors) included persons who at the same time, either as members of the board of directors or in any other capacity, took part in or exercised actual influence over the management of the competing purchasing cooperative B, so that there was a risk of abuse for the benefit of B of the knowledge that those persons had acquired or would acquire of A's business secrets ?

Question 3:

Is it relevant to the answer to Question 1 that the change in the statutes was carried out in the face of protests from a number of members who voted against the exclusion provision in the statutes in question, partly because the provision would prevent those members of undertaking A from making organized purchases of fertiliser and plant protection products outside A and partly because they considered that by purchasing through B they might be able to obtain lower prices or better conditions of sale than A could offer?

Question 4:

*I*s it relevant to the answer to Question 1 that as a result of their exclusion the excluded undertakings or associations were placed in the same position as members which lawfully resigned, so that

(a) on the one hand, they have no claim to a share in A's undistributed assets (a proportional share of A's net worth after deduction of share capital), but are repaid their registered share capital, about DKR 37 million, over a period of 10 years, but

(b) on the other hand, there was no confiscation of share capital, which would have been possible under paragraphs 8(4) and 7(3) of the statutes?

Question 5:

Is it relevant to the answer to Question 1 that subsequent developments have shown that the excluded members were able through B to continue their activities in respect of fertiliser and plant protection products on the Danish market for farm supplies with a market share which in terms of total turnover corresponded in 1990 to the turnover of undertaking A?

Question 6:

Is it relevant to the answer to Question 1 that the case brought before the ØstreLandsret by the excluded members of A against A concerns the question whether the excluded undertakings are entitled to a share in A's undistributed assets (cf. Question 4) and that the plaintiff undertakings have not submitted a claim to be readmitted as members of A?

Question 7:

Is it relevant to the answer to Question 1 that under A's statutes members are entitled to make purchases of fertiliser and plant protection products outside undertaking A if that is done otherwise

than through an organized consortium, that is to say either individually by each member for itself or by several members together, but in that case only as a one-off common purchase of a single consignment or shipload ?

Question 8:

Is it relevant to the answer to Question 1 that the provision of the statutes is formulated in such a way that cooperative arrangements managed by A for the purchase of fertiliser and plant protection products can be proposed under which A acts as an intermediary and waives any profit on the goods?

Question 9:

Is it relevant to the answer to Question 1 that after the amendment to the statutes and the exclusion of members from A it was possible for outsiders, including the excluded members, to purchase from A its entire range of goods, including fertiliser and plant protection products, on the normal commercial wholesale conditions prevailing in the sector?

Question 10:

Is it relevant to the answer to Question 1 that the amendment to the statutes is restricted to fertiliser and plant protection products, which at the time of the amendment accounted for the shares of A's total turnover described in the introduction?

Question 11:

Is it relevant to the answer to Question 1 that satisfactory information is provided to the ØstreLandsret on the nature of the products in question, including the existence and sale of substitute products, and information on the products, turnover figures and market shares of A, B and the undertakings competing with A and B?

Question 12:

Must it be assumed that fertiliser and plant protection products are covered by Council Regulation No 26/62 of 4 April 1962 and for example Council Directive 91/414/EEC of 15 July 1991 on the placing of plant protection products on the market (OJ 1991 L 230, p. 1), which refers for its legal basis in particular to Article 43 of the Treaty?

Question 13:

Is the condition in Article 85(1) and Article 86 of the Treaty regarding the effect on trade between Member States fulfilled where the purchases of fertiliser and plant protection products made through B by the excluded members at the time of the amendment to the statutes in question were in part made direct from producers established outside the Common Market?

Question 14:

How must the exemption provision in Article 85(3) of the Treaty be understood and applied in relation to the situations set out in the above questions, where it is established that the amendment to the statutes in paragraph 7 was notified to the Commission with a view to obtaining negative clearance under Article 2 of Council Regulation No 17/62 or in the alternative exemption under Article 4 of that regulation?

Question 15:

Must Article 86 of the Treaty be interpreted as meaning that an amendment to the statutes such as that described in Question 1 can constitute an infringement of that provision of the Treaty where at the time of the amendment undertaking A had the market share in fertiliser and plant protection products stated in the introduction?

Question 16:

Is it relevant for the application of Article 86 of the Treaty that at the time of the amendment to the statutes A was registered as a dominant single undertaking in the register of the Danish Monopolies Office, where such registration lapsed on 1 January 1990 in conjunction with the new law on competition introduced in Denmark with effect from the same date, and A's registration was not replaced by any new registration under that law?

Question 17:

Is it relevant for the application of Article 86 of the Treaty that on 22 February 1989 the Danish Monopolies Board stated that having regard to the circumstances described in Question 2 it did not consider that there were grounds for taking action in relation to the amendment to A's statutes?

18 In its order for reference, the Østre Landsret proceeds on the basis that DLG in essence sought to induce all the 'B' members to stop purchasing fertilisers and plant protection products outside DLG, so that within the cooperative sector in Denmark there would be just one large association purchasing supplies on behalf of Danish farmers.

19 Some figures regarding the state of the relevant markets have been provided in the order for reference, the observations submitted to the Court and the written replies to the questions put by the Court to DLG and the plaintiffs. It is apparent that in 1988, when it amended its statutes, DLG held about 36% of the Danish fertilizer market, while about 23% was held by Korn & Foderstof A/S (a limited company), about 14% by Superfos A/S (a limited company) and about 10% by LAG. Furthermore, DLG held about 32% of the Danish market in plant protection products. After their exclusion, the plaintiffs succeeded, operating within LAG, in competing so strongly with DLG on the Danish market in farm supplies that in 1990 they held a market share similar to DLG's. It is also apparent from these figures that around 60% of total fertilizer consumption in Denmark is met by imports, both from the Member States and from non-member countries. Danish consumption of plant protection products is met almost entirely by imports.

20 The 17 questions referred by the national court can be grouped under five main heads, which can best be treated in the following order:

— the scope of the derogation from the Community competition rules in Article 42 of the Treaty and Regulation No 26/62, cited above (Question 12);

— the concept of restriction of competition in Article 85(1) of the Treaty (Questions 1 to 11);

— the concept of abuse of a dominant position in Article 86 of the Treaty (Questions 15 to 17);

— the concept of effect on intra-Community trade within the meaning of Articles 85(1) and 86 of the Treaty (Question 13);

— the jurisdiction of the national court where an application for negative clearance or for exemption is currently pending before the Commission (Question 14).

Applicability of Regulation No 26/62

21 In its first set of questions, the national court seeks to ascertain whether fertilizers and plant protection products come within the scope of the derogation from the competition rules laid down in Article 42 of the Treaty and Regulation No 26/62.

22 Pursuant to Article 42 of the Treaty, the provisions of the chapter relating to rules on competition are to apply to production of and trade in agricultural products only to the extent determined by the Council. Article 38(3) of the Treaty provides that the products subject to the provisions of Articles 39 to 46 inclusive of the Treaty are listed in Annex Il to the Treaty. It adds that

the Council may, within two years of entry into force of the Treaty, add other products to that list.

23 According to consistent case-law (see in particular the judgment of the Court in Case 61/80 Coöperatieve Stremsel-en Kleurselfabriek v Commission [1981] ECR 851, the 'rennet' case, paragraph 21, and of the Court of First Instance in Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR 11-1931, paragraphs 36 and 37), it was in accordance with those provisions of the Treaty that the scope of Regulation No 26/62 was restricted by Article 1 thereof to production of and trade in the products listed in Annex Il to the Treaty. That regulation cannot therefore be applied to trade in a product which does not fall within Annex Il even if it is a substance ancillary to the production of another product which itself falls within that annex. In order for the regulation to apply to fertilizers and plant protection products, those products would themselves have to fall within Annex Il to the Treaty, which they do not.

24 It follows that Regulation No 26/62 does not apply in this case, and that Articles 85 and 86 of the Treaty are fully applicable.

25 That conclusion is not called into question by the fact that Directive 91/414 (cited above) was adopted specifically on the basis of Article 43 of the Treaty.

26 Suffice it to note that Article 42 is a derogating provision, the scope of which, as of Regulation No 26/62, cannot implicitly be widened by adoption of measures based on Article 43 of the Treaty, a provision which confers on the Council the power to adopt measures for the purpose of implementing the common agricultural policy.

27 The answer to the first set of questions must therefore be that fertilizers and plant protection products do not fall within the scope of the derogation from the competition rules which is laid down in Article 42 of the Treaty and Regulation No 26/62.

Restriction of competition

28 In the second set of questions, the national court seeks to ascertain whether a provision in the statutes of a cooperative purchasing association, the effect of which is to forbid its members to participate in other forms of organized cooperation which are in direct competition with it, is caught by the prohibition in Article 85(1) of the Treaty.

29 The plaintiffs in the main proceedings claim that the object or effect of such an amendment to the statutes is to restrict competition, inasmuch as the objective pursued was to put an end to 'B' members purchasing through LAG in competition with DLG, and thus to acquire a dominant position on the markets concerned.

30 A cooperative purchasing association IS a voluntary association of persons established in order to pursue common commercial objectives.

31 The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned.

32 In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

33 Where some members of two competing cooperative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves cooperative associations with a large number of individual members.

34 It follows that such dual membership would jeopardize both the proper functioning of the

cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) of the Treaty and may even have beneficial effects on competition.

35 Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in Article 85(1) of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

36 The particular features of the case at issue in the main proceedings, which are referred to in the questions submitted by the national court, must be assessed in the light of the foregoing considerations. In addition, it is necessary to establish whether the penalties for non-compliance with the statutes are disproportionate to the objective they pursue and whether the minimum period of membership is unreasonable.

37 First of all, the amendment of DLG's statutes is restricted so as to cover only fertilizers and plant protection products, the only farm supplies in respect of which a direct relationship exists between sales volume and price.

38 Furthermore, even after DLG has amended its statutes and excluded the plaintiffs, it is open to 'non-members' of the association, including the plaintiffs, to buy from it the whole range of products which it sells, including fertilizers and plant protection products, on the same commercial terms and at the same prices as members, except that 'non-members' are obviously not entitled to receive a yearly discount on the amount of the transactions carried out.

39 Finally, DLG's statutes authorize its members to buy fertilizers and plant protection products without using DLG as an intermediary, provided that such transactions are carried out otherwise than through an organized consortium. In that context, each member acts individually or m association with others but, in the latter case, only in making a one-off common purchase of a particular consignment or shipload.

40 Taking all those factors into account, it would not seem that restrictions laid down in the statutes, of the kind imposed on DLG members, go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

41 As regards the penalties imposed on the plaintiffs as a result of their exclusion for infringing DLG's rules, these would not appear to be disproportionate, since DLG has treated the plaintiffs as if they were members exercising their right to withdraw.

42 So far as concerns the membership period, this has been reduced from ten to five years, which does not seem unreasonable.

43 It is significant, in the last analysis, that after their exclusion, the plaintiffs succeeded, through LAG, in competing vigorously with DLG, with the result that in 1990 their market share was similar to DLG's.

44 The other matters mentioned in the second set of questions referred by the national court are not such as to affect the analysis of the problem.

45 The answer to the second set of questions referred by the national court must therefore be that a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organized cooperation which are in direct competition with it, is not caught by the prohibition in Article 85(1) of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

Abuse of a dominant position

46 In the third set of questions, the national court seeks to ascertain whether a provision in the statutes of a cooperative purchasing association, the effect of which is to prohibit its members from participating in other forms of organized cooperation which are in direct competition with it, may constitute an abuse of a dominant position contrary to Article 86 of the Treaty.

47 The concept of a dominant position is defined in settled case-law as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general the existence of a dominant position derives from a combination of several factors which, taken separately, are not necessarily decisive (see, in particular, the judgments in Case 27/76 United Brands v Commission [1978] ECR 207, paragraphs 65 and 66, and Case T-30/89 Hilti v Commission [1991] ECR 11-1439, paragraph 90).

48 It is true that in certain cases the fact that an undertaking holds a large market share may be considered to be a strong indication of the existence of a dominant position. According to the national court, at the time when DLG amended its statutes in 1988, it held around 36% of the Danish fertilizer market and 32% of the Danish market in plant protection products. While an undertaking which holds market shares of that size may, depending on the strength and number of its competitors, be considered to be in a dominant position, those market shares cannot on their own constitute conclusive evidence of the existence of a dominant position.

49 So far as concerns the concept of abuse of a dominant position, the first point to note is that neither the creation nor the strengthening of a dominant position is in itself contrary to Article 86 of the Treaty.

50 As pointed out above (paragraph 32), the activities of cooperative purchasing associations may encourage more effective competition on some markets, if the conditions imposed on the members are limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

51 It does not appear that restrictions laid down in the statutes, such as those imposed on DLG members in the dispute in the main proceedings, exceed those limits (see paragraphs 36 to 42 above).

52 The answer to the third set of questions referred by the national court must therefore be that even if a cooperative purchasing association holds a dominant position on a given market, an amendment of its statutes prohibiting its members from participating in other forms of organized cooperation which are in direct competition with it does not constitute an abuse of a dominant position contrary to Article 86 of the Treaty, so long as the abovementioned provision is limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

Effect on intra-Community trade

53 In its fourth set of questions, the national court asks whether intra-Community trade is affected, within the meaning of Articles 85(1) and 86 of the Treaty, since the transactions involving the purchase of basic products are in part concluded directly with producers established in non-member countries.

54 The Court has consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States (see Case 42/84 Remia v Commission [1985] ECR 2545, paragraph 22). Accordingly, the effect on intra Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily

decisive.

55 It is for the national court, where appropriate, to undertake the economic analysis required, in accordance with the criteria laid down in the case-law cited above. However, in view of the answers given to the previous questions, such an analysis would not seem to be necessary in the dispute in the main proceedings.

56 The answer to the fourth set of questions must therefore be that intra-Community trade may be affected, within the meaning of Articles 85(1) and 86 of the Treaty, even where the basic products concerned by a provision in the statutes are in part imported from non-member countries.

Jurisdiction of the national court

57 In its fifth and final question, the national court seeks to ascertain what are the powers of the national court where an agreement has been notified to the Commission in order to obtain negative clearance or exemption pursuant to Regulation No 17/62.

58 If the conditions for application of Article 85(1) are clearly not satisfied so that there is scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue (see the judgment in Case C-234/89 Delimitis v Henninger Bräu AG [1991] ECR 1-935, paragraph 50).

59 In the dispute in the main proceedings, the Commission stated, in reply to a question from the Court, that in its view the amendment to DLG's statutes is not caught by the prohibition laid down in Article 85(1) of the Treaty.

60 The answer to the fifth question must therefore be that a national court has jurisdiction to rule on the lawfulness of an agreement notified to the Commission where that court considers that the conditions for application of Article 85(1) of the Treaty are clearly not satisfied.

Costs

61 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Østre Landsret by order of 20 March 1991 and by decision of 10 April 1992, hereby rules:

1. Fertilizers and plant protection products do not come within the scope of the derogation from the competition rules laid down in Article 42 of the Treaty and Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products.

2. A provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organized cooperation which are in direct competition with it, is not caught by the prohibition in Article 85(1) of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

3. Even if a cooperative purchasing association holds a dominant position on a given market, an amendment of its statutes prohibiting its members from participating in other forms of organized cooperation which are in direct competition with it does not constitute an abuse of a dominant

position contrary to Article 86 of the Treaty, so long as the abovementioned provision is limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power. in relation to producers.

4. Intra-Community trade may be affected, within the meaning of Articles 85(1) and 86 of the Treaty, even where the basic products concerned by a provision in the statutes are in part imported from non-member countries.

5. A national court has jurisdiction to rule on the lawfulness of an agreement notified to the Commission of the European Communities where that court considers that the conditions for application of Article 85(1) of the Treaty are clearly not satisfied,

Joined cases C-358/93 and C-416/93: Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre.

Judgment of the Court of 23 February 1995.

References for a preliminary ruling: Audiencia Nacional - Spain.

Directive 88/361/EEC - Authorization for the transfer of money in the form of banknotes.

JUDGMENT OF THE COURT

23 February 1995

In Joined Cases C-358/93 and C-416/93,

REFERENCES to the Court under Article 177 of the EEC Treaty by the Juzgado Central de 10 Penal de la Audiencia Nacional for a preliminary ruling in the criminal proceedings before that court against

Aldo Bordessa (Case C-358/93)

and against

Vicente Marf Mellado,

Concepcion Barbero Maestre (Case C-416/93),

on the interpretation of Articles 30 and 59 of the EEC Treaty, and Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5),

THE COURT,

composed of: G. C. Rodriguez Iglesias, President, F. A. Schockweiler and

P. J. G. Kapteyn (Rapporteur), (Presidents of Chambers), G. F. Mancini,

C. N. Kakouris, J. C. Moitinho de Almeida and J. L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted:

in Case C-358/93 on behalf of:

— the Ministerio Fiscal, by Florentino Orti Ponte, Fiscal de la Audiencia Nacional,

— Aldo Bordessa, by Francisco Velasco Mufioz Cuellar, Procurador de los Tribunales, and José Colls Alsius, of the Barcelona Bar,

— the Spanish Government, by A. Navarro González, Director-General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,

— the Netherlands Government, by J. G. Lammers, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Portuguese Government, by Luis Fernandes, Director in the Legal Service of the Directorate-

General for the European Communities in the Ministry of Foreign Affairs, and Jorge Santos, Legal Adviser with the Bank of Portugal, acting as Agents,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, and Derrick Wyatt QC, acting as Agents,

— the Commission of the European Communities, by Thomas Cusack, Legal Adviser, and Blanca Rodriguez Galindo, of the Legal Service, acting as Agents,

and, in Case C-416/93 on behalf of:

— the Ministerio Fiscal, by Florentino Orti Ponte, Fiscal de la Audiencia Nacional,

— the Spanish Government, by A. Navarro Gonzålez, Director-General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,

— the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Nicolas Eybalin, Foreign Affairs Secretary in the same Ministry, acting as Agents,

— the Portuguese Government, by Luis Fernandes, Director in the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, and Jorge Santos, Legal Adviser with the Bank of Portugal, acting as Agents,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent,

— the Commission of the European Communities, by Blanca Rodriguez Galindo and Hélöne Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Ministerio Fiscal, Aldo Bordessa (Case C-358/93), Vicente Mari Mellado and Concepci6n Barbero Maestre (Case C-416/93), represented by D. Alvarez Pastor, of the Madrid Bar, the Spanish Government, the Belgian Government, represented by P. Duray, Assistant Adviser in the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, and J.-V. Louis, Head of the Legal Service at the Banque Nationale de Belgique, acting as Agents, the Portuguese Government, the United Kingdom, and the Commission, at the hearing on 4 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1994,

gives the following

Judgment

1 By order of 19 June 1993, received at the Court on 16 July 1993 and registered under number C-358/93, and by order of 20 September 1993, received at the Court on 7 October 1993 and registered under number C-416/93, the Audiencia Nacional (National High Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 30 and 59 of the EEC Treaty, and Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5, hereinafter 'the Directive').

2 Those questions were raised in two sets of criminal proceedings. On 10 November 1992 Aldo Bordessa (Case C-358/93), an Italian national residing in Italy, arrived at the customs post of La Junquera, Gerona (Spain) travelling towards France. When his car was inspected, banknotes worth approximately PTA 50 million were discovered in it, concealed in different places. Since Mr Bordessa did not possess the authorization required under Spanish law for the export of such a sum, he was arrested and the money confiscated. On 19 November 1992, Marf Mellado and Barbero Maestre (Case C-416/93), a married couple of Spanish nationality residing in Spain, crossed the frontier at the same customs post. In the course of an inspection carried out inside France, the French authorities

subsequently discovered banknotes worth a total of PTA 38 million in their car, Since no application had been made to the Spanish authorities for authorization to export that amount, criminal proceedings were initiated before the Spanish courts.

3 Under Article 4(1) of Royal Decree 1816 of 20 December 1991 on economic transactions with other countries, the export of such items as coins, banknotes and bank cheques payable to the bearer, made out in pesetas or in foreign currencies, is sub" ject to a prior declaration when the amount is in excess of PTA 1 million per person and per journey and subject to prior administrative authorization when the amount is in excess of PTA 5 million per person and per journey.

4 That decree was amended by Royal Decree 42 of 15 January 1993 which, according to the national court, constitutes no more than a technical improvement.

5 The national court considers that it is necessary to determine the validity and effect of that provision in the light of Community law before making a finding on a criminal offence under Law No 40 of 10 December 1979 on the regulations governing exchange control, as amended by Organic Law No 10 of 16 August 1983. Accordingly it stayed proceedings and submitted the following questions to the Court for a preliminary ruling:

'(1) Does Article 30 of the EEC Treaty preclude rules of a Member State which require a person leaving national territory bearing coins, banknotes or bearer cheques to make a prior declaration if the amount is in excess of PTA 1 million and to obtain prior administrative authorization if the amount exceeds PTA 5 million, where non-compliance with those requirements entails criminal penalties which may include detention?

(2) Does Article 59 of the EEC Treaty preclude rules such as those described in Question 1?

(3) Are rules such as those described in the previous questions compatible with Articles 1 and 4 of Directive 88/361/EEC?

(4) If Question 3 is answered in the negative, do the rules in Article 1 in conjunction with Article 4 of Directive 88/361/EEC meet the necessary conditions in order for them to be relied on as against the Spanish State before national courts and to render inapplicable national rules which conflict with them?'

6 By order of the President of 13 June 1994 the two cases were joined, in accordance with Article 43 of the Rules of Procedure, for the purposes of the oral procedure and the final judgment.

7 It Should first be observed that Article 1 (1) of the Directive requires Member States to abolish restrictions on movements of capital taking place between persons resident in Member States. However, as indeed the national court pointed out, the Kingdom of Spain was authorized under Article 6(2) of the Directive temporarily to continue to apply restrictions to the capital movements lisped in Annex IV, subject to the conditions and time-limits laid down therein. Among the transactions mentioned in Annex IV, List IV specifies inter alia the physical import and export of financial assets — means of payment, the liberalization of which the Kingdom of Spain was permitted to defer until 31 December 1992.

8 Since the facts which gave rise to the two cases occurred before that date, the French and Portuguese Governments have expressed doubts regarding the applicability of the Directive to those facts.

9 It is clear nevertheless from the order for reference that the national court considered it necessary to seek a ruling from the Court of Justice on the interpretation of Articles 1 and 4 of the Directive on the ground that, if appropriate, it would apply the principle recognized in its domestic law of the retroactive effect of the more favourable criminal provision. It would therefore refrain from applying domestic law in so far as it conflicted with Community law. That was moreover confirmed at the hearing by the parties to the main proceedings.

10 Consequently it is necessary to answer the questions submitted since it is for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see the judgment in Case C-30/93 AC-ATEL Electronics Vertriebs GmbH v Hauptzollamt Minden-Mitte [1994] ECR 1-2305).

Questions 1 and 2

11 By its first two questions, the national court wishes to know whether Articles 30 and 59 of the Treaty preclude rules which, as in the present case, make the export of coins, banknotes or bearer cheques conditional upon a prior declaration or administrative authorization and make that requirement subject to criminal penalties.

12 As regards Article 30 of the Treaty in particular, it should first be pointed out that, according to settled case-law, under the system of the Treaty means of payment are not to be regarded as goods falling within the purview of Articles 30 to 37 of the Treaty (see Case 7/78 Regina v Thompson and Others [1978] ECR 2247, paragraph 25).

13 It is also clear from the system of the Treaty that the physical transfer of assets falls not under Articles 30 and 59 but under Article 67 and the directive implementing that provision.

Even if it were established that such a transfer constituted a payment connected with trade in goods or services, the transaction would be governed not by Articles 30 and 59 but by Article 106 of the Treaty.

15 Consequently it should be stated in reply to the first two questions that rules which make the export of coins, banknotes or bearer cheques conditional upon a prior declaration or administrative authorization and which make that requirement subject to criminal penalties do not fall within the scope of Articles 30 and 59 of the Treaty.

Question 3

16 By its third question, the national court is essentially asking whether Articles 1 and 4 of the Directive preclude national legislation from making the export of coins, banknotes or bearer cheques conditional on a prior declaration or authorization.

17 It should first be noted that the Directive brought about the full liberalization of capital movements, for which purpose Article 1 required Member States to abolish restrictions on movements of capital taking place between persons resident in Member States.

18 Under the first paragraph of Article 4 of the Directive, Member States may 'take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information'.

19 The effectiveness of tax controls and the fight against illegal activities, such as tax evasion, money laundering, drug trafficking and terrorism, have been invoked as aims justifying the rules at issue.

20 It must therefore be examined whether Member States, in pursuing those aims, are taking measures which fall under the first paragraph of Article 4 of the Directive and consequently concern interests which those States are entitled to protect.

21 The first paragraph of Article 4 of the Directive expressly refers to the requisite measures to prevent infringements of the laws and regulations of Member States, 'inter alia' in the field of taxation and the prudential supervision of financial institutions. It follows that other measures are also permitted in so far as they are designed to prevent illegal activities of comparable seriousness, such as money laundering, drug trafficking or terrorism.

22 That interpretation is confirmed moreover by the insertion in the Treaty establishing the

European Community of Article 73d, paragraph (l)(b) of which essentially reproduces the first paragraph of Article 4 of the Directive but also provides that Member States have the right to take measures which are justified on grounds of public policy or public security.

23 It is in the light of those considerations that it should be determined whether the requirement laid down by the authorities of a Member State of a prior declaration or authorization for the transfer of coins, banknotes or bearer cheques is to be regarded as a requisite measure within the meaning of the first paragraph of Article 4 of the Directive.

24 As the Advocate General pointed out at point 17 of his Opinion, authorization has the effect of suspending currency exports and makes them conditional in each case upon the consent of the administrative authorities, which must be sought by means of a special application.

25 A requirement of that nature would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory (see Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 34). It might have the effect of impeding capital movements carried out in accordance with Community law, contrary to the second paragraph of Article 4 of the Directive.

26 Pursuant to that provision, the application of the measures and procedures referred to in the first paragraph 'may not have the effect of impeding capital movements carried out in accordance with Community law'.

27 A prior declaration, on the other hand, may be one of the requisite measures which Member States are permitted to take since, unlike prior authorization, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations.

28 However, the Spanish Government defended the need for prior authorization, claiming that it was only by virtue of such a system that non-compliance could be classified as criminal and hence criminal penalties imposed. Failure to meet that requirement could also lead to confiscation of the capital sums involved in the crime.

29 That view must, however, be rejected,

30 The Spanish Government has failed to provide sufficient proof that it is impossible to attach criminal penalties to the failure to make a prior declaration.

31 Consequently, it should be stated in reply to the third question that Articles 1 and

4 of the Directive preclude the export of coins, banknotes or bearer cheques being made conditional on prior authorization but do not by contrast preclude transactions of that nature being made conditional on a prior declaration.

Question 4

32 By its fourth question, the national court is asking whether the provisions of Article 1 in conjunction with Article 4 of the Directive have direct effect.

33 The requirement under Article 1 of the Directive for Member States to abolish all restrictions on movements of capital is precise and unconditional and does not require a specific implementing measure.

34 Application of the proviso in Article 4 of the Directive is amenable to review by the courts, and hence the fact that a Member State may avail itself of that possibility does not prevent Article 1 of the Directive, which enshrines the principle of the free movement of capital, from conferring rights on individuals which they may rely on before the courts and which the national courts must uphold.

35 Consequently, the reply to the national court's fourth question should be that Article 1 in

conjunction with Article 4 of the Directive may be relied on before national courts and render inapplicable national rules which conflict with those provisions.

Costs

36 The costs incurred by the Spanish, Belgian, French, Netherlands and Portuguese Governments, the United Kingdom, and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Juzgado Central de 10 Penal de la Audiencia Nacional, by order of 19 June 1993 (Case C-358/93) and by order of 20 September 1993 (Case C-416/93), hereby rules:

1. Rules which make the export of coins, banknotes or bearer cheques conditional upon a prior declaration or an administrative authorization and make that requirement subject to criminal penalties do not fall within the scope of Articles 30 and 59 of the Treaty.

2. Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty preclude the export of coins, banknotes or bearer cheques being made conditional on prior authorization but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration.

3. Article 1 in conjunction with Article 4 of Directive 88/361/EEC may be relied on before national courts and render inapplicable national rules which conflict with those provisions.

C-54/96: Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH

Case C-54/96

Judgment of the Court of 17 September 1997. - Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH. - Reference for a preliminary ruling: Vergabeüberwachungsausschuß des Bundes - Germany. - Meaning of 'national court or tribunal' for the purposes of Article 177 of the Treaty - Procedures for the award of public service contracts - Directive 92/50/EEC - National review body.

In Case C-54/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Vergabeüberwachungsausschuß des Bundes (Germany) for a preliminary ruling in the proceedings pending before that body between

Dorsch Consult Ingenieurgesellschaft mbH

and

Bundesbaugesellschaft Berlin mbH

on the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray and L. Sevón (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Dorsch Consult Ingenieurgesellschaft mbH, by Franz Günter Siebeck, Rechsanwalt, Munich,

- the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same ministry, acting as Agents,

- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Claudia Schmidt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Dorsch Consult Ingenieurgesellschaft mbH, of the German Government and of the Commission at the hearing on 28 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 May 1997,

gives the following

Judgment

Grounds

1 By order of 5 February 1996, received at the Court on 21 February 1996, the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board,

hereinafter `the Federal Supervisory Board') referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 The question has been raised in proceedings between Dorsch Consult Ingenieurgesellschaft mbH (hereinafter `Dorsch Consult') and Bundesbaugesellschaft Berlin mbH (hereinafter `the awarding authority') concerning a procedure for the award of a service contract.

3 On 28 June 1995 the awarding authority published in the Official Journal of the European Communities a notice advertising the award of a contract for architectural and construction engineering services. On 25 August 1995 Dorsch Consult submitted its tender to the awarding authority. In all, 18 tenders were received, of which seven, including that of Dorsch Consult, were chosen for further consideration. On 30 November 1995, two companies, together with an architect, were chosen to form a working party to perform the services which were the subject of the contract. The contract itself was signed on 12 January 1996. Dorsch Consult was informed on 25 January 1996 that its tender was not the most advantageous economically.

4 Having learned that the awarding authority had not chosen it for the contract but before its tender was formally rejected, Dorsch Consult had applied, on 14 December 1995, to the Bundesministerium für Raumordnung, Bauwesen und Städtebau (Federal Ministry for Regional Planning, Building and Urban Planning), as the body responsible for reviewing public procurement awards (Vergabeprüfstelle), seeking to have the contract-awarding procedure stopped and the contract awarded to it. It considered that, in concluding the contract with another undertaking, the awarding authority had acted in breach of both Directive 92/50 and Paragraph 57a(1) of the Haushaltsgrundsätzegesetz (Budget Principles Law, hereinafter `the HGrG'). By decision of 20 December 1995, the review body held that it had no competence in the matter on the ground that, under Paragraphs 57a and 57b of the HGrG, it had no power to review the award of contracts when they related to services.

5 In those circumstances, on 27 December 1995 Dorsch Consult lodged an application for a determination by the Federal Supervisory Board on the ground that the review body had wrongly declined jurisdiction. It stated that, in so far as Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) had not been transposed, it was directly applicable and had to be complied with by the review bodies.

6 The Federal Supervisory Board found that the Federal Republic of Germany had not yet transposed Directive 92/50. Although a circular had been issued by the Federal Ministry for Economic Affairs on 11 June 1993 stating that the directive was directly applicable and that it had to be applied by the administration, it could not be regarded as a proper transposition of the directive. According to the Federal Supervisory Board, where public service contracts are concerned, German domestic law does not empower a review body to determine whether the provisions governing public procurement have been complied with. It is quite possible that the provisions of Directive 92/50 have direct effect. Finally, the Federal Supervisory Board is unsure whether, by virtue of Article 41 of Directive 92/50, the competence of existing review bodies also applies directly to the award of public service contracts.

7 The Federal Supervisory Board therefore suspended proceedings and referred the following question to the Court of Justice:

`Is Article 41 of Council Directive 92/50/EEC of 18 June 1992 to be interpreted to the effect that, after 30 June 1993, the bodies set up by the Member States which, under Council Directive 89/665/EEC of 21 December 1989, are competent to review procedures for the award of public contracts falling within the scope of Directives 71/305/EEC and 77/62/EEC are also competent to review procedures for the award of public service contracts within the meaning of Directive 92/50/EEC in order to determine whether alleged infringements of Community public procurement law or of domestic rules enacted in implementation of that law have taken place?'

Legal background

8 The purpose of Directive 92/50 is to regulate the award of public service contracts. It applies to contracts having a value above a certain limit. As far as the matter of legal protection is concerned, Article 41 provides:

`Article 1(1) of Council Directive 89/665/EEC ... shall be replaced by the following:

"1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law."'

.9 In accordance with Article 44(1), Directive 92/50 had to be transposed by the Member States before 1 June 1993.

10 Article 2(8) of Directive 89/665 provides:

`Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

11 Directive 89/665 was transposed into German law by a Law of 26 November 1993 (BGBl. I, p. 1928), which supplemented the HGrG by adding Paragraphs 57a to 57c.

12 Paragraph 57a(1) of the HGrG provides:

`In order to meet obligations arising from directives of the European Communities, the Federal Government shall regulate, by means of regulations, with the assent of the Bundesrat, the award of public supply contracts, public works contracts and public service contracts and the procedures for awarding public service contracts ...'

13 Paragraph 57b(1) of the HGrG makes provision for the procedures for awarding public supply contracts, public works contracts and public service contracts mentioned in Paragraph 57a(1) to be reviewed by review bodies. Under Paragraph 57b(2), the Federal Government is to adopt, in the form of regulations, with the assent of the Bundesrat, the provisions governing the competence of those review bodies. According to subparagraph (3), a review body must initiate a review procedure if there is evidence of a breach of procurement rules applicable under a regulation adopted pursuant to Paragraph 57a. In particular, it must initiate that procedure where a person who has, or had, an interest in a particular contract claims that the aforementioned provisions were contravened.

14 According to Paragraph 57b(4) of the HGrG, the review body must determine whether the provisions adopted pursuant to Paragraph 57a have been complied with. It may compel the awarding authority to annul unlawful measures or decisions or to take lawful measures or decisions. It may also provisionally suspend a procedure for the award of a contract. Under Paragraph 57b(5), a review body may require the awarding authority to provide the information necessary for it to carry out its task. Subparagraph (6)

provides that actions for damages in the event of breach of the provisions applicable in relation to the award of contracts are to be brought before the ordinary courts.

15 Paragraph 57c(1) of the HGrG provides that the Federation and the Länder must each establish a supervisory board, performing its functions independently and on its own responsibility, to supervise procedures for the award of contracts in the fields concerning them. According to subparagraphs (2), (3) and (4) of that provision, each supervisory board is to sit in chambers composed of a chairman, an official assessor and a lay assessor, who are to be independent and subject only to observance of the law. The chairman and one of the assessors must be public officials. As regards annulment or withdrawal of their appointment and their independence and dismissal, various provisions of the Richtergesetz (Law on the Judiciary) apply by analogy. As regards the annulment or withdrawal of a lay member's appointment, certain provisions of the Richtergesetz also apply by analogy. Where a lay member commits a serious breach of his duties, his appointment must be annulled. The term of office of a supervisory board's lay members is five years.

16 Under subparagraph (5), the supervisory board is to determine the legality of determinations made by review bodies but it does not review the way in which they ascertain the facts. Where a determination is found to be unlawful, the supervisory board directs the review body to make a fresh determination taking account of its own legal findings. Paragraph 57c(6) of the HGrG provides that any person claiming that the provisions governing the award of public contracts have been infringed may make application to the supervisory board within a period of four weeks following the relevant determination of the review body.

17 Paragraph 57c(7) of the HGrG establishes a Federal Supervisory Board (Vergabeüberwachungsausschuß des Bundes). Its official members are the chairman and assessors from the decision-making departments of the Bundeskartellamt (Federal Cartel Office). The president of the Bundeskartellamt decides on the composition of the Federal Supervisory Board and the formation and composition of its chambers. He appoints lay assessors and their deputies on a proposal from the leading public-law trade boards. He also exercises administrative supervisory control on behalf of the Federal Government. The Federal Supervisory Board adopts its own internal rules of procedure.

18 Pursuant to Paragraph 57a of the HGrG the Federal Government adopted a regulation on the award of contracts. This regulation is, however, applicable only to supply contracts and works contracts and not to contracts for services. Directive 92/50 has not yet been transposed by the Federal Republic of Germany.

19 Pursuant to Paragraphs 57b and 57c of the HGrG, the Federal Government has adopted a regulation on the procedure for review of public procurement awards (Verordnung über das Nachprüfungsvesfahren für öffentliche Verträge, BGBl. I 1994, p. 324). Paragraph 2(3) of the regulation provides:

`The review body's determination regarding the awarding authority shall be given in writing, contain a statement of reasons and be notified without delay. The review body shall send without delay to the person claiming that there has been a breach of public procurement provisions the text of its determination, shall draw attention to the possibility of making application for a determination by the supervisory board within a period of four weeks and shall name the competent supervisory board.'

20 Paragraph 3 provides:

`(1) Procedure before the Public Procurement Awards Supervisory Board shall be governed by Paragraph 57c of the Haushaltsgrundsätzegesetz and by this regulation according to the rules of procedure which the board shall adopt.

(2) The Public Procurement Awards Supervisory Board shall be obliged, under Article 177 of the Treaty establishing the European Community, to make a reference to the Court of Justice of the European Communities when it considers that a preliminary ruling on a question relating to the interpretation of that Treaty or to the validity and interpretation of a legal act adopted on that basis is necessary in order to enable it to make its determination.

(3) Before a chamber makes any determination, the parties to the procedure before the procurement review body shall be heard.

(4) A chamber shall not be empowered to suspend a procedure for the award of a contract or to give other directions concerning a procedure for the award of a contract.

(5) A chamber shall reach its determination by an absolute majority of votes. Determinations shall be in writing, contain a statement of reasons and shall be sent to the parties without delay.'

21 The rules of procedure of the Federal Supervisory Board regulate the organization and allocation of cases and the conduct of procedure, which consists of a hearing to which the persons concerned are called, and the conditions governing determinations of the Federal Supervisory Board.

Admissibility

22 Before the question submitted by the national court is addressed, it is necessary to examine whether the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty. That question must be distinguished from the question whether the Federal Supervisory Board fulfils the conditions laid down in Article 2(8) of Directive 89/665, which is not in point in this case.

23 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, the judgments in Case 61/65 Vaassen (neé Göbbels) [1966] ECR 261; Case 14/86 Pretore di Salò v Persons unkown [1987] ECR 2545, paragraph 7; Case 109/88 Danfoss [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 Almelo and Others [1994] ECR I-1477; and Case C-111/94 Job Centre [1995] ECR I-3361, paragraph 9).

24 As regards the question of establishment by law, the Commission states that the HGrG is a framework budgetary law which does not give rise to rights or obligations for citizens as legal persons. It points out that the Federal Supervisory Board's action is confined to reviewing determinations made by review bodies. However, in the field of public service contracts, there is, as yet, no competent review body. The Commission therefore concludes that in such matters the Federal Supervisory Board has no basis in law on which it can act.

25 It is sufficient to note in this regard that the Federal Supervisory Board was established by Paragraph 57c(7) of the HGrG. Its establishment by law cannot therefore be disputed. In determining establishment by law, it is immaterial that domestic legislation has not conferred on the Federal Supervisory Board powers in the specific area of public service contracts.

26 Nor is there any doubt about the permanent existence of the Federal Supervisory Board.

27 The Commission also submits that the Federal Supervisory Board does not have compulsory jurisdiction, a condition which, in its view, may mean two things: either that the parties must be required to apply to the relevant review body for settlement of their dispute or that determinations of that body are to be binding. The Commission, adopting the second interpretation, concludes that German legislation does not provide for the determinations made by the Federal Supervisory Board to be enforceable.

28 It must be stated first of all that Paragraph 57c of the HGrG establishes the supervisory board as the only body for reviewing the legality of determinations made by review bodies. In order to establish a breach of the provisions governing public procurement, application must be made to the supervisory board.

29 Secondly, under Paragraph 57c(5) of the HGrG, when the supervisory board finds that determinations made by a review body are unlawful, it directs that body to make a fresh determination, in conformity

with the supervisory board's findings on points of law. It follows that determinations of the supervisory board are binding.

30 The Commission also submits that since, according to the Federal Supervisory Board's own evidence, procedure before that body is not inter partes, it cannot be regarded as a court or tribunal within the meaning of Article 177 of the Treaty.

31 It must be reiterated that the requirement that the procedure before the hearing body concerned must be inter partes is not an absolute criterion. Besides, under Paragraph 3(3) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.

32 According to the Commission, the criterion relating to the application of rules of law is not met either, because, under Paragraph 57c of the HGrG and Paragraph 3(1) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, procedure before the Federal Supervisory Board is governed by rules of procedure which it itself adopts, which do not take effect in relation to third parties and which are not published.

33 It is, however, undisputed that the Federal Supervisory Board is required to apply provisions governing the award of public contracts which are laid down in Community directives and in domestic regulations adopted to transpose them. Furthermore, general procedural requirements, such as the duty to hear the parties, to make determinations by an absolute majority of votes and to give reasons for them are laid down in Paragraph 3 of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, which is published in the Bundesgesetzblatt. Consequently, the Federal Supervisory Board applies rules of law.

34 Finally, both Dorsch Consult and the Commission consider that the Federal Supervisory Board is not independent. They point out that it is linked to the organizational structure of the Bundeskartellamt, which is itself subject to supervision by the Ministry for Economic Affairs, that the term of office of the chairman and the official assessors is not fixed and that the provisions for guaranteeing impartiality apply only to lay members.

35 It must be observed first of all that, according to Paragraph 57c(1) of the HGrG, the supervisory board carries out its task independently and under its own responsibility. According to Paragraph 57c(2) of the HGrG, the members of the chambers are independent and subject only to observance of the law.

36 Under Paragraph 57c(3) of the HGrG, the main provisions of the Richtergesetz concerning annulment or withdrawal of their appointments and concerning their independence and removal from office apply by analogy to official members of the chambers. In general, the provisions of the Richtergesetz concerning annulment and withdrawal of judges' appointments apply also to lay members. Furthermore, the impartiality of lay members is ensured by Paragraph 57c(2) of the HGrG, which provides that they must not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers.

37 It must also be pointed out that, in this particular instance, the Federal Supervisory Board exercises a judicial function, for it can find that a determination made by a review body is unlawful and it can direct the review body to make a fresh determination.

38 It follows from all the foregoing that the Federal Supervisory Board, in the procedure which led to this reference for a preliminary ruling, is to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, so that the question it has referred to the Court is admissible.

[…]

Judgment of the Court of 1 June 1999.
Eco Swiss China Time Ltd v Benetton International NV.
Reference for a preliminary ruling: Hoge Raad - Netherlands.
Competition - Application by an arbitration tribunal, of its own motion, of Article 81 EC (ex Article 85) - Power of national courts to annul arbitration awards.
Case C-126/97.

Case C-126/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Eco Swiss China Time Ltd

and

Benetton International NV

on the interpretation of Article 85 of the EC Treaty (now Article 81 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida (Rapporteur), C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: A. Saggio,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Eco Swiss China Time Ltd, by P.V.F. Bos and M.M. Slotboom, of the Rotterdam Bar, and S.C. Conway, Attorney-at-Law admitted to the District of Columbia and Illinois Bar,

- Benetton International NV, by I. Van Bael and P. L'Ecluse, of the Brussels Bar, and H.A. Groen, of The Hague Bar,

- the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in the same directorate, acting as Agents,

- the Italian Government, by Professor U. Leanza, Head of the Contentious Diplomatic Affairs Department in the Ministry of Foreign Affairs, acting as Agent, assisted by I.M. Braguglia, Avvocato dello Stato,

- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by V.V. Veeder QC,

- the Commission of the European Communities, by C.W.A. Timmermans, Deputy Director-General, W. Wils and H. van Vliet, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eco Swiss China Time Ltd, represented by P.V.F. Bos, L.W.H. van Dijk and M. van Empel, of the Brussels Bar; of Benetton International NV, represented by H.A. Groen and I. Van Bael; of the Netherlands Government, represented by M.A. Fierstra; of the French Government, represented by R. Loosli-Surrans; of the Italian Government, represented by I.M. Braguglia; of the United Kingdom Government, represented by S. Boyd QC and P. Stanley, Barrister; and of the Commission, represented by C.W.A. Timmermans, W. Wils and H. van Vliet, at the hearing on 7 July 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 February 1999,

gives the following

Judgment

1 By order of 21 March 1997, received at the Court on 27 March 1997, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) five questions on the interpretation of Article 85 of the EC Treaty (now Article 81 EC).

2 Those questions have been raised in proceedings brought by Benetton International NV (`Benetton') for stay of enforcement of an arbitration award ordering it to pay damages to Eco Swiss China Time Ltd (`Eco Swiss') for breach of a licensing agreement concluded with the latter, on the ground that the award in question was contrary to public policy within the meaning of Article 1065(1)(e) of the Wetboek van Burgerlijke Rechtsvordering (hereinafter referred to as `the Code of Civil Procedure') by virtue of the nullity of the licensing agreement under Article 85 of the Treaty.

The national legislation

3 Article 1050(1) of the Code of Civil Procedure provides:

`No appeal shall lie from an arbitration award to a higher arbitration tribunal unless otherwise agreed by the parties'.

4 Article 1054(1) of the Code states:

`In making their awards, arbitration tribunals shall apply rules of law'.

5 Article 1059 of the Code provides:

`1. An arbitration award, whether complete or partial, shall not acquire the force of res judicata unless it is a final award. It shall acquire that force from the date on which it is made.

2. However, where, in accordance with the agreement between the parties, an appeal may be made to a higher arbitration tribunal against a complete or partial final award, that award shall acquire the force of res judicata as from the date on which the time-limit for appealing expires or, if an appeal is lodged, from the date on which the decision is given in the appeal proceedings, if and in so far as that decision upholds the award appealed against.'

6 As regards judicial review of arbitration awards, Article 1064 of the Code of Civil Procedure provides:

`1. An action contesting (a) a final arbitration award, whether complete or partial, against which no appeal may be made to a higher arbitration tribunal or (b) a final arbitration award, whether complete or partial, made on appeal to a higher arbitration tribunal may be brought only by way of an application for annulment or a request-civiel in accordance with the provisions of this section.

2. An application for annulment shall be made to the Rechtbank, at the registry of which the

original of the award must be lodged pursuant to Article 1058(1).

3. A party may lodge an application for annulment as soon as the award has acquired the force of res judicata. The right to bring an action shall expire three months after the date of lodgement of the award at the registry of the Rechtbank. However, where the award, endorsed with an order for its enforcement, is served on the other party to the proceedings, that party may, notwithstanding the expiry of the period of three months referred to in the previous sentence, lodge an application for annulment within three months from the date of such service.

4. An application may be lodged for annulment of an interim arbitration award only together with the application for annulment of the complete or partial final arbitration award.

...'.

7 Article 1065 of the Code provides:

`1. Annulment may be ordered only on one or more of the following grounds:

(a) there is no valid arbitration agreement;

(b) the arbitration tribunal has been constituted in breach of the applicable rules;

(c) the arbitration tribunal has failed to comply with its terms of reference;

(d) the award has not been signed or does not state the reasons on which it is based, contrary to the provisions of Article 1057;

(e) the award or the manner in which it has been made is contrary to public policy or accepted principles of morality.

...

4. An award may not be annulled on the ground referred to in paragraph 1(c) above if the party pleading that ground took part in the proceedings without raising it in those proceedings despite having been aware that the arbitration tribunal was failing to comply with its terms of reference.'

8 Finally, Article 1066(1) and (2) of the Code of Civil Procedure provides that an application for annulment does not operate to stay enforcement of the award, but the court seised of such an application may, if a stay is justified and at the request of either party, order a stay of enforcement pending a definitive decision on the application for annulment. An application for a stay must be based on the existence of a reasonable prospect that the arbitration award will be annulled.

The main proceedings

9 On 1 July 1986 Benetton, a company established in Amsterdam, concluded a licensing agreement for a period of eight years with Eco Swiss, established in Kowloon (Hong Kong), and Bulova Watch Company Inc. (`Bulova'), established in Wood Side (New York). Under that agreement, Benetton granted Eco Swiss the right to manufacture watches and clocks bearing the words `Benetton by Bulova', which could then be sold by Eco Swiss and Bulova.

10 Article 26.A of the licensing agreement provides that all disputes or differences arising between the parties are to be settled by arbitration in conformity with the rules of the Nederlands Arbitrage Instituut (Netherlands Institute of Arbitrators) and that the arbitrators appointed are to apply Netherlands law.

11 By letter of 24 June 1991, Benetton gave notice of termination of the agreement with effect from 24 September 1991, three years before the end of the period originally provided for. Arbitration proceedings were instituted between Benetton, Eco Swiss and Bulova in relation to the termination of the agreement.

12 In their award of 4 February 1993, entitled `Partial Final Award' (hereinafter `the PFA'), lodged at the registry of the Rechtbank (District Court) te 's-Gravenhage on the same date, the arbitrators directed inter alia that Benetton should compensate Eco Swiss and Bulova for the damage which they had suffered as a result of Benetton's termination of the licensing agreement.

13 When the parties failed to come to agreement on the quantum of damages to be paid by Benetton to Eco Swiss and Bulova, the arbitrators on 23 June 1995 made an award entitled `Final Arbitral Award' (hereinafter `the FAA'), which was lodged at the registry of the Rechtbank on 26 June 1995, ordering Benetton to pay USD 23 750 000 to Eco Swiss and USD 2 800 000 to Bulova by way of compensation for the damage suffered by them. By order of the President of the Rechtbank of 17 July 1995, leave was given to enforce the FAA.

14 On 14 July 1995, Benetton applied to the Rechtbank for annulment of the PFA and the FAA on the ground, inter alia, that those arbitration awards were contrary to public policy by virtue of the nullity of the licensing agreement under Article 85 of the Treaty, although during the arbitration proceedings neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to that provision.

15 The Rechtbank dismissed that application by decision of 2 October 1996, whereupon Benetton appealed to the Gerechtshof (Regional Court of Appeal) te 's-Gravenhage, before which the case is pending.

16 By application lodged at the registry of the Rechtbank on 24 July 1995 Benetton also requested that court to stay enforcement of the FAA and, in the alternative, to order Eco Swiss to provide security.

17 By order of 19 September 1995 the Rechtbank allowed only the alternative claim.

18 Benetton lodged an appeal against that decision. By order of 28 March 1996 the Gerechtshof essentially allowed the primary claim.

19 The Gerechtshof took the view that Article 85 of the Treaty is a provision of public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure, infringement of which may result in annulment of an arbitration award.

20 However, the Gerechtshof considered that, in the proceedings before it for stay of enforcement, it was unable to examine whether a partial final award such as the PFA was in conformity with Article 1065(1)(e) of the Code of Civil Procedure, since Benetton had not lodged an application for annulment within three months after the lodging of that award at the registry of the Rechtbank, as required by Article 1064(3) of the Code of Civil Procedure.

21 Nevertheless, the Gerechtshof took the view that it was able to examine the FAA in relation to Article 1065(1)(e), particularly as regards the effect of Article 85(1) and (2) of the Treaty on the assessment of damage, since to award compensation for damage flowing from the wrongful termination of the licensing agreement would amount to enforcing that agreement, whereas it was, at least in part, void under Article 85(1) and (2) of the Treaty. The agreement in question enabled the parties to operate a market-sharing arrangement, since Eco Swiss could no longer sell watches and clocks in Italy and Bulova could no longer do so in the other countries which were then Member States of the Community. As Benetton and Eco Swiss acknowledge, the licensing agreement was not notified to the Commission and is not covered by a block exemption.

22 The Gerechtshof considered that, in the procedure for annulment, the FAA could be held to be contrary to public policy, and therefore decided to grant the application for a stay in so far as it related to the FAA.

23 Eco Swiss brought proceedings in cassation before the Hoge Raad against the decision of the Gerechtshof and Benetton lodged a cross-appeal.

24 The Hoge Raad observes that an arbitration award is contrary to public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure only if its terms or enforcement conflict with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. It states that, in Netherlands law, the mere fact that, because of the terms or enforcement of an arbitration award, a prohibition laid down in competition law is not applied is not generally regarded as being contrary to public policy.

25 However, referring to the judgment in Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v SPF [1995] ECR I-4705, the Hoge Raad wonders whether the position is the same where, as in the case now before it, the provision in question is a rule of Community law. The Hoge Raad infers from that judgment that Article 85 of the Treaty is not to be regarded as a mandatory rule which is so fundamental that no restrictions of a procedural nature should prevent it from being observed.

26 Moreover, since it is not disputed that the question whether the licensing agreement might be void under Article 85 of the Treaty was not raised in the course of the arbitration proceedings, the Hoge Raad considers that the arbitrators would have gone beyond the ambit of the dispute if they had inquired into and ruled on that question. In such a case, their award would have been open to annulment pursuant to Article 1065(1)(c) of the Code of Civil Procedure, because they would have failed to comply with their terms of reference. Furthermore, according to the Hoge Raad, the parties themselves could not have raised the question of the possible nullity of the licensing agreement for the first time in the context of the proceedings for annulment.

27 The Hoge Raad states that such rules of procedure are justified by the general interest in having an effectively functioning arbitration procedure and that they are no less favourable to application of rules of Community law than to application of rules of national law.

28 However, the Hoge Raad is uncertain whether the principles laid down by the Court in Van Schijndel and Van Veen, cited above, also apply to arbitrators, particularly since, according to the judgment in Case 102/81 Nordsee v Reederei Mond [1982] ECR 1095, an arbitration tribunal constituted pursuant to an agreement under private law, without State intervention, is not to be regarded as a court or tribunal for the purposes of Article 177 of the Treaty and cannot therefore make references for a preliminary ruling under that article.

29 The Hoge Raad explains that, under Netherlands procedural law, where arbitrators have settled part of a dispute by an interim award which is in the nature of a final award, that award has the force of res judicata and, if annulment of that interim award has not been sought in proper time, the possibility of applying for annulment of a subsequent arbitration award proceeding upon the interim award is restricted by the principle of res judicata. However, the Hoge Raad is uncertain whether Community law precludes the Gerechtshof from applying such a procedural rule where, as in the present case, the subsequent arbitration award, the annulment of which has been applied for in proper time, proceeds upon an earlier arbitration award.

30 In those circumstances, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`(1) To what extent is the ruling of the Court of Justice in Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v SPF [1995] ECR I-4705 applicable by analogy if, in a dispute concerning a private law agreement brought before arbitrators and not before the national courts, the parties make no reference to Article 85 of the EC Treaty and, according to the rules of national procedural law applicable to them, the arbitrators are not at liberty to apply those provisions of their own motion?

(2) If the court considers that an arbitration award is in fact contrary to Article 85 of the EC Treaty, must it, on that ground and notwithstanding the rules of Netherlands procedural law set out in paragraphs 4.2 and 4.4 above [according to which a party may claim annulment of an

arbitration award only on a limited number of grounds, one ground being that an award is contrary to public policy, which generally does not cover the mere fact that through the terms or enforcement of an arbitration award no effect is given to a prohibition laid down by competition law], allow a claim for annulment of that award if the claim otherwise complies with statutory requirements?

(3) Notwithstanding the rules of Netherlands procedural law set out in paragraph 4.5 above [according to which arbitrators must not go outside the ambit of disputes and must keep to their terms of reference], is the court also required to allow such a claim if the question of the applicability of Article 85 of the EC Treaty remained outside the ambit of the dispute in the arbitration proceedings and the arbitrators therefore made no determination in that regard?

(4) Does Community law require the rules of Netherlands procedural law set out in paragraph 5.3 above [according to which an interim arbitration award that is in the nature of a final award acquires the force of res judicata and is open to appeal only within a period of three months following lodgement of the award at the registry of the Rechtbank] to be disapplied if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which an interim arbitration award having the force of res judicata has held to be valid may nevertheless be void because it conflicts with Article 85 of the EC Treaty?

(5) Or, in a case such as that described in Question 4, is it necessary to refrain from applying the rule that, in so far as an interim arbitration award is in the nature of a final award, annulment of that award may not be sought simultaneously with that of the subsequent arbitration award?'

The second question

31 By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 85 of the Treaty although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.

32 It is to be noted, first of all, that, where questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award, which may be more or less extensive depending on the circumstances and which they are obliged to carry out in the event of an appeal, for setting aside, for leave to enforce an award or upon any other form of action or review available under the relevant national legislation (Nordsee, cited above, paragraph 14).

33 In paragraph 15 of the judgment in Nordsee, the Court went on to explain that it is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain an interpretation or assessment of the validity of provisions of Community law which they may need to apply when reviewing an arbitration award.

34 In this regard, the Court had held, in paragraphs 10 to 12 of that judgment, that an arbitration tribunal constituted pursuant to an agreement between the parties is not a `court or tribunal of a Member State' within the meaning of Article 177 of the Treaty since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.

35 Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards

should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.

36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37 It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.

38 That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention).

39 For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.

40 Lastly, it should be recalled that, as explained in paragraph 34 above, arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 Federconsorzi [1992] ECR I-4035, paragraph 7). It follows that, in the circumstances of the present case, unlike Van Schijndel and Van Veen, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

41 The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

The first and third questions

42 In view of the reply given to the second question, there is no need to answer the first and third questions.

The fourth and fifth questions

43 By its fourth and fifth questions, which can be examined together, the referring court is asking essentially whether Community law requires a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question

by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of the subsequent award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

44 According to the relevant domestic rules of procedure, application for annulment of an interim arbitration award which is in the nature of a final award may be made within a period of three months following the lodging of that award at the registry of the court having jurisdiction in the matter.

45 Such a period, which does not seem excessively short compared with those prescribed in the legal systems of the other Member States, does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.

46 Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become res judicata, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of res judicata, which is an expression of that principle.

47 In those circumstances, Community law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

48 The answer to be given to the fourth and fifth questions must therefore be that Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

Costs

49 The costs incurred by the Netherlands, French, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by order of 21 March 1997, hereby rules:

1. A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the EC Treaty (now Article 81 EC), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

2. Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the

prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 85 of the Treaty.

C-205/99: Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado.

Judgment of the Court of 20 February 2001.
Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado.
Reference for a preliminary ruling: Tribunal Supremo - Spain.
Freedom to provide services - Maritime cabotage - Conditions for the grant and continuation of prior administrative authorisation - Concurrent application of the methods of imposing public service obligations and of concluding public service contracts.
Case C-205/99.

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JUDGMENT OF THE COURT

20 February 2001 (1)

(Freedom to provide services - Maritime cabotage - Conditions for the grant and continuation of prior administrative authorisation - Concurrent application of the methods of imposing public service obligations and of concluding public service contracts)

In Case C-205/99,

REFERENCE to the Court under Article 234 EC by the Tribunal Supremo, Spain, for a preliminary ruling in the proceedings pending before that court between

Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others

and

Administración General del Estado

on the interpretation of Articles 1, 2 and 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann and M. Wathelet (Presidents of Chambers), D.A.O. Edward, P. Jann, L. Sevón, R. Schintgen, F. Macken, N. Colneric, S. von Bahr and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

- Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), by T. García Peña, abogada,
- Fletamientos de Baleares SA, by J.L. Goñi Etchevers, abogada,
- Unión Sindical Obrera (USO), by B. Hernández Bataller, abogada,

- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the Greek Government, by K. Paraskevopoulou-Grigoriou and S. Vodina, acting as Agents,
- the French Government, by K. Rispal-Bellanger and D. Colas, acting as Agents,
- the Norwegian Government, by H. Seland, acting as Agent,
- the Commission of the European Communities, by B. Mongin and M. Desantes, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), represented by B. Hernández Bataller; of the Spanish Government, represented by N. Díaz Abad; of the Greek Government, represented by K. Paraskevopoulou-Grigoriou and S. Vodina; of the French Government, represented by M. Seam, acting as Agent; of the Norwegian Government, represented byH. Seland; and of the Commission, represented by M. Desantes, at the hearing on 24 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2000,

gives the following

Judgment

1. By order of 12 May 1999, received at the Court on 31 May 1999, the Tribunal Supremo (Supreme Court), Spain referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 1, 2 and 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

2. Those questions have been raised in four sets of proceedings between Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), Isleña de Navegación SA (Isnasa), Fletamientos de Baleares SA and Unión Sindical Obrera (USO) ('Analir and Others'), respectively, on the one hand, and Administración General del Estado, on the other, concerning applications by the applicants for annulment of Royal Decree No 1466/1997 of 19 September 1997 on the legal rules governing regular maritime cabotage lines and public-interest shipping (BOE No 226 of 20 September 1997, p. 27712; 'Royal Decree No 1466') on the ground that it is contrary to Community legislation.

Relevant provisions

Community legislation

3. Article 1(1) of Regulation No 3577/92 provides:

'As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of, a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State, including ships registered in Euros, once that register is approved by the Council.'

4. Article 2 of Regulation No 3577/92 provides:

'For the purposes of this regulation:

1. " maritime transport services within a Member State (maritime cabotage)" shall mean services normally provided for remuneration and shall in particular include:

(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;

(b) off-shore supply services: the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State;

(c) island cabotage: the carriage of passengers or goods by sea between:

- ports situated on the mainland and on one or more of the islands of one and the same Member State,

- ports situated on the islands of one and the same Member State;

Ceuta and Melilla shall be treated in the same way as island ports.

...

3. ” a public service contract” shall mean a contract concluded between the competent authorities of a Member State and a Community shipowner in order to provide the public with adequate transport services.

A public service contract may cover notably:

- transport services satisfying fixed standards of continuity, regularity, capacity and quality,

- additional transport services,

- transport services at specified rates and subject to specified conditions, in particular for certain categories of passengers or on certain routes,

- adjustments of services to actual requirements;

4. ” public service obligations” shall mean obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions;

...‘ .

5.
Article 4 of Regulation No 3577/92 states:

'1. A Member State may conclude public service contracts with, or impose public service obligations as a condition for the provision of cabotage services on, shipping companies participating in regular services to, from and between islands.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.

2. In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.

Where applicable, any compensation for public service obligations must be available to all Community shipowners.

3. Existing public service contracts may remain in force up to the expiry date of the relevant contract.‘

6.
Under Article 7 of Regulation No 3577/92:

'Article 62 of the Treaty shall apply to the matters covered by this regulation.‘

National legislation

7.

Article 7(4) of Spanish Law No 27/1992 of 24 November 1992 concerning State and Merchant Navy Ports (BOE No 283 of 25 November 1992, p. 39953) defines 'public-interest shipping' as that which is regarded as necessary in order to provide essential maritime connections for the peninsula, between the peninsula and the non-peninsular Spanish territories, and between the latter territories. Furthermore, under that provision, it is for the Government to determine which shipping is of public interest and to specify the means of ensuring that that interest is protected.

8.

Article 4 of Royal Decree No 1466 states:

'Pursuant to Article 7(4) in conjunction with Article 6(1)(h) of the Law concerning State and Merchant Navy Ports services on regular island cabotage lines, meaning services for the carriage of passengers or goods by sea between ports situated on the peninsula and the non-peninsular territories and between ports of those territories, in accordance with Article 2(1)(c) of Regulation (EEC) No 3577/92, are declared to be public-interest shipping.

The provision of regular shipping services of public interest shall be subject to prior administrative authorisation, the validity of which is conditional on the fulfilment ofpublic service obligations imposed by the Directorate General of the Merchant Navy. Exceptionally, the competent administrative authorities may enter into public-interest contracts in order to ensure the existence of adequate services for the maintenance of maritime connections.'

9.

The administrative authorisation provided for in Royal Decree No 1466 is subject to two types of conditions. First, Article 6 of that decree, entitled 'Conditions for authorisation' , provides:

'Authorisation to operate a regular island cabotage line shall be issued subject to the following conditions:

(a) the applicant must be a shipowner or shipping company having no outstanding tax or social security debts;

(b) in the case of hiring or chartering, it must be shown that the owner or the charterer has no outstanding tax or social security debts;

...

(e) the undertaking which owns the ships assigned to the line must have no outstanding tax or social security debts;

(f) the applicant must, within the first 15 days of June and December of each year, renew the documents provided for under (a), (b) and (e) above, proving that there are no outstanding tax or social security debts;

...' .

10.

Second, Article 8 of Royal Decree No 1466, entitled 'Public service obligations' , states:

'1. Only the following may be regarded as public service obligations: conditions for authorisation to operate a regular line concerning the regularity and continuity of the service, the capacity to provide it, the manning of the vessel or vessels and, where appropriate, the ports to be served, the frequency of the service and where relevant the rates.

The imposition of public service obligations must in any event be based on objective public-interest reasons which are duly justified by the need to ensure an adequate regular maritime transport service.

In order to prevent distortion of competition the obligations must be imposed in such a way as not to discriminate between undertakings providing the same or similar services on lines which cover the same or similar routes.

2. Exceptionally, economic compensation may be granted for the public service obligations. The compensation may not discriminate in any way between similar services on lines which cover the same routes.

The right to economic compensation in respect of the fulfilment of public service obligations may be afforded at the request of the party concerned, or by the Ministry of Public Works after a general call for tenders has been issued for the purpose of establishing services on a regular line with public service obligations.

Where the person concerned requests that that right be afforded, the undertaking which seeks authorisation to operate a regular line must first demonstrate to the Directorate General of the Merchant Navy that that line would be profitable in itself if it were not subject to public service obligations.

The undertaking making the request must automatically submit the relevant documentary proof at the same time as those which it must submit in order to obtain the authorisation.

The Directorate General of the Merchant Navy shall base its assessment on, in particular, the level of competition which the requested line will provide for other existing lines and it shall also take account of the rates to be charged.

3. In addition to the public service obligations which are set out in Regulation (EEC) No 3577/92 and referred to in the authorisation, the Directorate General of the Merchant Navy may, in accordance with Article 83(2) of the Law concerning State and Merchant Navy Ports, impose on shipping undertakings providing cabotage services specific public service obligations concerning rescue, maritime safety, pollution control, health standards and other essential matters of public or social interest. This shall, where appropriate, entitle the undertakings concerned to receive appropriate economic compensation for the supplementary costs they have incurred.'

The main proceedings and the questions referred for a preliminary ruling

11.
Analir and Others brought separate actions, which were subsequently joined, before the Tribunal Supremo, which in this case is the court with jurisdiction at first and last instance, for annulment of Royal Decree No 1466. They submitted, in support of their claims, that Royal Decree No 1466 was inconsistent with Community law, in particular Regulation No 3577/92.
12.
Since it considered that the outcome of the proceedings before it depended on the interpretation of that regulation, the Tribunal Supremo decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. May Article 4, in conjunction with Article 1, of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) be interpreted as permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation?

2. If so, may the grant and continuation of such administrative authorisation be made subject to conditions, such as having no outstanding tax or social security debts, other than those set out in Article 4(2) of the regulation?

3. May Article 4(1) of Regulation No 3577/92 be interpreted as permitting public service obligations to be imposed on some shipping companies and public service contracts within the meaning of

Article 1(3) of the regulation to be concluded with others at the same time for the same line or route, in order to ensure the same regular traffic to, from or between islands?'

The first question

13.

Analir and Others claim that the combined provisions of Articles 1 and 4 of Regulation No 3577/92 do not permit the provision of island cabotage services to be made subject to prior administrative authorisation, as required by Royal Decree No 1466. In their submission, it is sufficient to indicate when the activity is first undertaken on the basis of a system of licences by category and of declaration procedures, without prejudice to the option for the administrative authorities to impose public service obligations.

14.

They are supported by the Norwegian Government and the Commission, which consider that a system of prior administrative authorisation which, without any real connection with the public-service need, is generally applicable to any carriage between the peninsula and the Spanish islands and between those islands, does not meet the requirements of Articles 2 and 4 of Regulation No 3577/92. The implementation of Article 4 requires, in the Commission's submission, that the existence of such a need be determined separately in each case and for each line.

15.

On the other hand, the Spanish Government submits that the requirement of prior administrative authorisation does not constitute an obstacle to the liberalisation of maritime island cabotage. It has proved impossible in practice to provide detailed justification for each line, and on other economic markets which are also liberalised, such as telecommunications, the provision of services is still subject to an authorisation scheme. Extending by analogy the justifications which may be relied upon in connection with telecommunications to the field of maritime cabotage services, the fact that islands are involved should enable the Member States to impose universal service obligations by means of prior administrative authorisation.

16.

The Spanish Government is supported by the Greek Government, which submits that it is precisely with the aim of protecting the public interest that Article 4 of Regulation No 3577/92, which must be construed in the light of the generally liberal spirit of that regulation, provides for the possibility of imposing public service obligations by means of prior administrative authorisation.

17.

The first point to be noted here is that, under Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC), the activities of the Community are to include an internal market characterised, in particular, by the abolition, as between Member States, of obstacles to the free movement of services.

18.

Under Article 61 of the EC Treaty (now, after amendment, Article 51 EC), freedom to provide services in the field of transport is to be governed by the provisions of the title of that treaty relating to transport, which include Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC), which permits the Council of the European Union to lay down appropriate provisions for sea transport.

19.

On the basis of Article 84(2) of the Treaty, the Council adopted Regulation No 3577/92, the aim of which is to implement freedom to provide services for maritime cabotage under the conditions and subject to the exceptions which it lays down.

20.

To that end, Article 1 of that regulation clearly establishes the principle of freedom to provide maritime cabotage services within the Community. The conditions governing the application of the principle of freedom to provide services which is laid down *inter alia* in Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 61 of the Treaty have thus been defined in the maritime cabotage sector.

21.

It is settled case-law that freedom to provide services requires not only the elimination of all

discrimination on grounds of nationality against providers of services who are established in another Member State, 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, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 56; and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33).

22.

It is clear that national legislation, such as Article 4 of Royal Decree No 1466, which makes the provision of maritime cabotage services subject to prior administrative authorisation, is liable to impede or render less attractive the provision of those services and therefore constitutes a restriction on the freedom to provide them (see, to that effect, *Vander Elst*, paragraph 15; and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 35).

23.

However, the Spanish Government argues that Article 4 of Regulation No 3577/92 permits Member States to impose public service obligations as a condition for the provision of maritime cabotage services and establish a prior administrative authorisation scheme to that end.

24.

In that regard, it should be noted, first, that the wording of Article 4 of Regulation No 3577/92 provides no indication as to whether a prior administrative authorisation scheme may be used as a means of imposing the public service obligations to which that article refers.

25.

Second, it is important to note that freedom to provide services, as a fundamental principle of the Treaty, may be restricted only by rules which are justified by overriding reasons in the general interest and are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation in question must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (see, to that effect, *Säger*, paragraph 15; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and *Guiot*, paragraphs 11 and 13).

26.

Accordingly, it is necessary to consider whether the establishment of a prior administrative authorisation scheme may be justified as a means of imposing public service obligations.

27.

First, it cannot be denied that the objective pursued, namely to ensure the adequacy of regular maritime transport services to, from and between islands, is a legitimate public interest.

28.

The possibility of imposing public service obligations for maritime cabotage with, and between, islands was expressly afforded by Article 4 of Regulation No 3577/92. The Treaty, as amended by the Treaty of Amsterdam, also takes into account, in the conditions which it lays down, the particular nature of island regions, as is clear from the second paragraph of Article 158 EC and Article 299(2) EC. That particular nature was further referred to in Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam.

29.

However, it cannot be inferred from those provisions that all maritime cabotage services with, or between, islands within a Member State must, by reason of the fact that islands are involved, be regarded as public services.

30.

Second, the question thus arises of whether a prior administrative authorisation scheme is necessary having regard to the objective pursued.

31.

The first point to note in that respect is that the purpose of imposing public service obligations is to ensure adequate regular transport services to, from and between islands, as the ninth recital in the

preamble to Regulation No 3577/92 states.

32.

Furthermore, public service obligations were defined in Article 2(4) of that regulation as obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

33.

Moreover, the aim of the public service contract provided for in Article 4 of Regulation No 3577/92 was expressly defined in Article 2(3) thereof as being to provide the public with adequate transport services.

34.

It follows that the application of a prior administrative authorisation scheme as a means of imposing public service obligations presupposes that the competent national authorities have first been able to determine, for specific routes, that the regular transport services would be inadequate if their provision were left to market forces alone. In other words, it must be possible to demonstrate that there is a real public service need.

35.

Second, for a prior administrative authorisation scheme to be justified, it must also be demonstrated that such a scheme is necessary in order to be able to impose public service obligations and that it is proportionate to the aim pursued, inasmuch as the same objective could not be attained by measures less restrictive of the freedom to provide services, in particular a system of declarations *ex post facto* (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* [1995] ECR I-4821, paragraphs 23 to 28).

36.

It is possible that prior administrative authorisation is a sufficient and appropriate means of enabling the content of the public service obligations to be imposed on an individual shipowner to be specified, taking account of his particular circumstances, or of enabling a prior check to be made on his ability to fulfil such obligations.

37.

However, such a scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see, to that effect, Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; and *Sanz de Lera*, paragraph 25).

38.

Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them.

39.

It is for the national court to consider and determine whether the prior administrative authorisation scheme at issue in the case before it satisfies those conditions and those criteria.

40.

In the light of the foregoing, the answer to the first question must be that the combined provisions of Articles 1 and 4 of Regulation No 3577/92 permit the provision of regular maritime cabotage services to, from and between islands to be made subject to prior administrative authorisation only if:

- a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated;

- it is also demonstrated that that prior administrative authorisation scheme is necessary and proportionate to the aim pursued;

- such a scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned.

The second question

41.

By its second question, the national court asks, in the event of the first question being answered in the affirmative, whether the grant and continuation of prior administrative authorisation may be made subject to conditions, such as having no outstanding tax or social security debts, other than those set out in Article 4(2) of Regulation No 3577/92.

42.

Analir and Others, supported by the Norwegian Government, claim that the obligation of having no outstanding tax or social security debts has no specific connection with the maritime traffic which is the subject-matter of the prior administrative authorisation. Furthermore, such an obligation does not fall within the public service obligations set out in Article 4(2) of that regulation. They infer that national legislation making the grant and continuation of prior administrative authorisation subject to conditions other than those set out in Regulation No 3577/92 is a national measure which constitutes a new restriction on the freedom already in fact attained, within the meaning of Article 62 of the EC Treaty (repealed by the Treaty of Amsterdam), and which is, accordingly, contrary to the EC Treaty.

43.

The Spanish Government submits that the conditions relating to the absence of outstanding tax or social security debts set out in Article 6 of Royal Decree No 1466 constitute general conditions for the grant of prior administrative authorisation and are not 'public service obligations' within the meaning of Regulation No 3577/92. Accordingly, in its submission, that national provision does not go beyond the requirements of Article 4(2) of the regulation and is thus compatible with Community law.

44.

The Commission, for its part, submits that the conditions mentioned in Article 6 of Royal Decree No 1466 may be regarded as covered by the reference to 'capacity to provide the service' in Article 4(2) of Regulation No 3577/92, which includes not only the economic capacity of the Community shipowner, but also his financial capacity.

45.

The first point to be noted here is that it follows from the answer to the first question that the public service obligations imposed by Member States for certain maritime cabotage services by means of prior administrative authorisation may be compatible with Community law provided that certain conditions are satisfied.

46.

The national court is essentially asking, by its second question, whether in such a case a Member State may, where it intends to impose public service obligations for maritime cabotage to, from and between islands, make authorisation relating to such a service subject to the condition that the shipowner have no outstanding tax or social security debts.

47.

In that regard, it must be borne in mind that the public service obligations which may be imposed under Article 4(2) of Regulation No 3577/92 relate to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel. No condition according to which the shipowner must have no outstanding tax or social security debts is expressly mentioned among those requirements. Clearly, such a condition, taken in isolation, cannot itself be characterised as a public service obligation.

48.

However, where public service obligations for maritime cabotage are imposed on Community shipowners by means of prior administrative authorisation, the checks carried out by a Member State in order to ascertain whether the shipowners have any outstanding tax or social security debts may be regarded as being a requirement coming within the notion of 'capacity to provide the service', as mentioned in Article 4(2) of the regulation.

49.

Where a Community shipowner is subject to public service obligations, such as ensuring the regularity of the maritime cabotage service to be supplied, the fact that he is in a precarious financial position - of which failure to pay his tax or social security debts could be an indication - may show that he would not be capable, in the more or less long term, of providing the public services imposed on him.

50.

It follows that the Member State may take account of the solvency of a Community shipowner who performs public service obligations in the field of maritime cabotage in order to assess that shipowner's financial capacity to supply the services which have been entrusted to him, by requiring that he have no outstanding tax or social security debts. It goes without saying that such a condition must be applied on a non-discriminatory basis.

51.

Accordingly, the answer to the second question must be that Community law permits a Member State to include in the conditions for granting and maintaining prior administrative authorisation as a means of imposing public service obligations on a Community shipowner a condition enabling account to be taken of his solvency, such as the requirement that he have no outstanding tax or social security debts, thus giving the Member State the opportunity to check the shipowner's 'capacity to provide the service' , provided that such a condition is applied on a non-discriminatory basis.

The third question

52.

By its third question, the national court asks whether Article 4(1) of Regulation No 3577/92 is to be interpreted as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts within the meaning of Article 2(3) of the regulation with others for the same line or route, in order to ensure the same regular traffic to, from or between islands.

53.

It should be noted at the outset that there is an obvious typing error in this last question. The reference to 'Article 1(3)' of Regulation No 3577/92 must be understood as meaning 'Article 2(3)' of the regulation, since Article 1 is not relevant for the purposes of the answer to the question. There is, in any event, no paragraph (3) in Article 1.

54.

As regards this question, Analir and Others claim, essentially, that concluding a public service contract or imposing public service obligations on economic operators under Article 4 of Regulation No 3577/92 are alternative options available to the Member States, which cannot be exercised simultaneously. Having a 'public service contract' for certain lines whilst imposing 'public service obligations' on other economic operators serving the same lines is contradictory, and constitutes a distortion of free competition under the relevant Treaty provisions.

55.

More specifically, Analir and Others submit that the operator which concludes a 'public service contract' with the competent authorities receives, unlike the other operators, specific subsidies in respect of the transport services provided. In view of the fact that, in addition, the operators which enter into such 'public service contracts' are either public operators or undertakings which formerly enjoyed monopolies, the resulting situation constitutes a breach of Article 90(1) of the EC Treaty (now Article 86(1) EC) on the ground of discrimination and distortion of the rules of free competition.

56.

On the other hand, the Spanish Government submits that the two methods by which maritime cabotage services may be carried out, namely the 'public service contract' and 'public service obligations' , mentioned in Article 4 of Regulation No 3577/92, may be used concurrently. The two systems which make it possible to ensure the provision of the public service, namely the conclusion of a contract or the imposition of publicservice obligations on the shipowner, have very different purposes. According to the Spanish Government, the Member State imposes public service obligations in order to ensure a minimum provision of a specific public service. It could, where appropriate, supplement that regime by concluding a contract.

57.

The French Government, whose written observations deal only with the third question, supports the Spanish Government's argument. It submits that the criteria for using the public service contract or public service obligations are different and that those two methods may therefore be used simultaneously in relation to one route, regardless of which method was established first.

58.

At the hearing, the Norwegian Government refined its written observations by submitting that each Member State should, first of all, define the level of maritime cabotage services which it seeks to have in its territory in respect of certain, or all, of the maritime cabotage lines to, from or between islands. Next, it should examine whether, without public authority intervention, the market can, by itself, meet such a level in respect of the lines or routes to be served. If it cannot, the Member State concerned should, finally, determine whether public service obligations imposed on Community shipowners would be likely to ensure the level of maritime cabotage services which it deems desirable. It is only where such a level could not be ensured by imposing public service obligations on those shipowners that the Member State would be able to resort to the method of concluding a public service contract with one of them.

59.

The Commission considers that, in principle, there is nothing to prevent a Member State from deciding to impose public service obligations generally and from concluding a public service contract in respect of one or more lines subject to those obligations in order to ensure an adequate level of service. However, where the two methods are used at the same time, the Commission submits that the level of the public service obligations should be as low as possible in order not to create obstacles which might result in distortion of competition.

60.

In that regard, it must be noted that Article 4(1) of Regulation No 3577/92 does not expressly indicate whether the two methods of performing the public service laid down in those provisions, namely the public service contract or the imposition of public service obligations on the shipowners, may be used by Member States at the same time or only as alternatives.

61.

Furthermore, the two methods pursue the same objective, namely to ensure an adequate level of regular maritime transport services to, from and between islands, as stated in the ninth recital in the preamble to Regulation No 3577/92.

62.

However, it is important to specify that those two methods differ both in nature and degree.

63.

First, use of the contractual method enables the public authority to obtain an undertaking from the shipowner to provide the transport services stipulated in the contract. Second, the shipowner will generally be prepared to be bound by such stipulations only if the Member State agrees to grant him a quid pro quo, such as financial compensation.

64.

On the other hand, where public service obligations are imposed in the absence of a contract, the shipowner remains generally free to withdraw from the provision of the transport services in question. It is only if he wishes to provide those services that he must comply with the obligations imposed. Moreover, that method could also be combined with a scheme of financial compensation under the second subparagraph of Article 4(2) of Regulation No 3577/92, as evidenced by the Spanish legislation at issue in the main proceedings.

65.

It therefore follows from a comparison of the features of the two methods of performing the maritime cabotage service that the contract gives more guarantees to the State that that service will actually be provided. Furthermore, as the Spanish Government rightly pointed out, the contractual method makes it possible to ensure that, if the contract is terminated, the provider will continue to carry out the service until a new contract is concluded, assuming that such a guarantee will normally be obtained only by granting a quid pro quo.

66.

In the light of the features of the two methods in question and their shared purpose, there is no reason why they should not be used concurrently in respect of one line or transport route in order to ensure a certain level of public service. For the reasons given by the Advocate General in points 109 to 111 of his Opinion, where the level of service attained, even after public service obligations have been imposed on the shipowners, is not regarded as adequate or where there are still specific gaps, complementary services could be provided by concluding a public service contract, as laid down in the Spanish legislation.
67.

Therefore, although Regulation No 3577/92, and more specifically Article 4 thereof, does not preclude national legislation such as that at issue in the main proceedings, which allows the public service contract method to be employed where the public service obligations imposed on the shipowner in respect of the regular maritime cabotage transport services on a certain line or route to, from and between islands have proved to be insufficient to ensure an adequate level of transport, such application of those two methods concurrently in a concrete case will be compatible with Community law only if a number of specific conditions are met.
68.

In the first place, it is clear from paragraph 34 of this judgment that Member States may impose public service obligations on Community shipowners only if a real public service need can be demonstrated. The same must also be true of the conclusion of a public service contract. Any combination of the two methods in respect of one line or route would be justified only if the same condition were met.
69.

Second, as is also clear from Article 4(1) and (2) of Regulation No 3577/92, any application of the two methods concurrently must be on a non-discriminatory basis in respect of all Community shipowners.
70.

Third, as an obstacle to the freedom to provide maritime cabotage services is involved, any application of the two methods concurrently must, if it is to be justified and compatible with Article 1 in conjunction with Article 4(1) and (2) of that regulation, be consistent with the principle of proportionality. In other words, the combination of the two methods of having those services performed must be such as to ensure an adequate level of the services and not have restrictive effects on the freedom to provide maritime cabotage services which would go beyond what is necessary in order to attain the objective pursued.
71.

Accordingly, the answer to the third question must be that Article 4(1) of Regulation No 3577/92 is to be interpreted as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts within the meaning of Article 2(3) of the regulation with others for the same line or route in order to ensure the same regular traffic to, from or between islands, provided that a real public service need can be demonstrated and in so far as that application of the two methods concurrently is on a non-discriminatory basis and is justified in relation to the public-interest objective pursued.

Costs

72.

The costs incurred by the Spanish, Greek, French and Norwegian 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Supremo by order of 12 May 1999, hereby rules:

1. The combined provisions of Article 1 and Article 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime

transport within Member States (maritime cabotage) permit the provision of regular maritime cabotage services to, from and between islands to be made subject to prior administrative authorisation only if:

- a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated;

- it is also demonstrated that that prior administrative authorisation scheme is necessary and proportionate to the aim pursued;

- such a scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned.

2. Community law permits a Member State to include in the conditions for granting and maintaining prior administrative authorisation as a means of imposing public service obligations on a Community shipowner a condition enabling account to be taken of his solvency, such as the requirement that he have no outstanding tax or social security debts, thus giving the Member State the opportunity to check the shipowner's 'capacity to provide the service' , provided that such a condition is applied on a non-discriminatory basis.

3. Article 4(1) of Regulation No 3577/92 is to be interpreted as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts within the meaning of Article 2(3) of the regulation with others for the same line or route in order to ensure the same regular traffic to, from or between islands, provided that a real public service need can be demonstrated and in so far as that application of the two methods concurrently is on a non-discriminatory basis and is justified in relation to the public-interest objective pursued.

C-157/99: B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen

JUDGMENT OF THE COURT

12 July 2001 (1)

(Freedom to provide services - Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC) -

Sickness insurance - System providing benefits in kind - System of agreements - Hospital treatment costs incurred in another Member State - Prior authorisation - Criteria - Justification)

In Case C-157/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arrondissementsrechtbank te Roermond (Netherlands) for a preliminary ruling in the proceedings pending before that court between

B.S.M. Geraets-Smits

and

Stichting Ziekenfonds VGZ

and between

H.T.M. Peerbooms

and

Stichting CZ Groep Zorgverzekeringen,

on the interpretation of Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola (Rapporteur), M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Stichting CZ Groep Zorgverzekeringen, by E.P.H. Verdeuzeldonk, acting as Agent,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Belgian Government, by A. Snoecx, acting as Agent,
- the Danish Government, by J. Molde, acting as Agent,
- the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,
- the French Government, by K. Rispal-Bellanger and C. Bergeot, acting as Agents,
- the Irish Government, by M.A. Buckley, acting as Agent, assisted by D. Barniville, BL,

- the Portuguese Government, by L. Fernandes and P. Borges, acting as Agents,

- the Finnish Government, by T. Pynnä and E. Bygglin, acting as Agents,

- the Swedish Government, by L. Nordling, acting as Agent,

- the United Kingdom Government, by M. Ewing, acting as Agent, assisted by S. Moore, Barrister,

- the Icelandic Government, by E. Gunnarsson and V. Hauksdóttir, acting as Agents,

- the Norwegian Government, by H. Seland, acting as Agent,

- the Commission of the European Communities, by P. Hillenkamp, P.J. Kuijper and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the observations of Stichting Ziekenfonds VGZ, represented by H.G. Sevenster, J.K. de Pree and E.H. Pijnacker Hordijk, advocaten; Stichting CZ Groep Zorgverzekeringen, represented by E.P.H. Verdeuzeldonk; of the Netherlands Government, represented by M.A. Fierstra; of the Danish Government, represented by J. Molde; of the German Government, represented by W.-D. Plessing; of the French Government, represented by C. Bergeot; of the Irish Government, represented by D. Barniville; of the Austrian Government, represented by G. Hesse, acting as Agent; of the Finnish Government, represented by E. Bygglin; of the Swedish Government, represented by A. Kruse, acting as Agent; of the United Kingdom Government, represented by E. Ewing, assisted by S. Moore; of the Icelandic Government, represented by E. Gunnarsson; and of the Commission, represented by H.H. Speyart, at the hearing on 4 April 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

1.
By order of 28 April 1999, received at the Court on 30 April 1999, the Arrondissementsrechtbank te Roermond (District Court, Roermond) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article234 EC) two questions on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the Treaty (now Article 50 EC).
2.
The two questions have been raised in proceedings between Mrs Geraets-Smits and Stichting Ziekenfonds VGZ ('Stichting VGZ') and between Mr Peerbooms and Stichting CZ Groep Zorgverzekeringen ('Stichting CZ') concerning the reimbursement of hospital treatment costs incurred in Germany and Austria respectively.

National legal framework

3.
In the Netherlands, the sickness insurance scheme is based principally on the Ziekenfondswet of 15 October 1964 (Law on Sickness Funds, *Staatsblad* 1964, No 392, as subsequently amended, 'the ZFW'), the Algemene Wet Bijzondere Ziektekosten of 14 December 1967 (Law on general insurance for special sickness costs, *Staatsblad* 1967, No 617, as subsequently amended, 'the AWBZ') and the Wet op de toegang tot ziektekostenverzekeringen (Law on access to sickness insurance, 'the WTZ'). Both the ZFW and the AWBZ establish a system of benefits in kind under which an insured person is entitled not to reimbursement of costs incurred for medical treatment but to free treatment. Both laws are based on a system of agreements made between sickness funds and providers of health care. The WTZ, on the other hand, establishes a system under which insured persons are reimbursed costs and is

not based on a system of agreements.

4.

Under Articles 2 to 4 of the ZFW, workers whose annual income does not exceed an amount determined by law (NLG 60 750 in 1997), persons treated as such and persons in receipt of social benefits and dependent members of their families living with them in the same household are compulsorily and automatically insured under that law.

5.

Article 5(1) of the ZFW provides that any person coming within its scope who wishes to claim entitlement under that law must register with a sickness fund operating in the municipality in which he resides.

6.

Article 8 of the ZFW provides:

'1. An insured person shall be entitled to benefits in the form of necessary medical care, provided that he is not entitled to such care under the Algemene Wet Bijzondere Ziektekosten ... Sickness funds shall ensure that any insured person registered with them is able to rely on that right.

2. The nature, content and extent of the benefits shall be defined by or pursuant to a Royal Decree, it being understood that they shall in any event include medical assistance, the extent of which remains to be defined, and also the care and treatment provided in categories of institutions to be defined. Furthermore, thegrant of a benefit may be conditional on a financial contribution by the insured person; this contribution need not be the same for all insured persons.

...'

7.

The Verstrekkingenbesluit Ziekenfondsverzedering of 4 January 1966 (Decree on sickness insurance benefits in kind, *Staatsblad* 1966, No 3, as subsequently amended, 'the Verstrekkingenbesluit') implements Article 8(2) of the ZFW.

8.

The Verstrekkingenbesluit thus determines entitlement to benefits and the extent of such benefits for various categories of care, including in particular the categories 'medical and surgical assistance' and 'in-patient hospital treatment'.

9.

Article 2(3) of the Verstrekkingenbesluit provides that entitlement to benefit cannot be claimed unless the insured person, in the light of his needs and with a view to effective therapy, has no reasonable choice other than to seek a benefit of that nature, content and extent.

10.

Under Article 3 of the Verstrekkingenbesluit, the category of medical and surgical care is to include care provided by a general practitioner and a specialist, 'the extent [of which] shall be determined in accordance with what is normal in the professional circles concerned'.

11.

As regards in-patient hospital treatment, Articles 12 and 13 of the Verstrekkingenbesluit provide, first, that such treatment may involve, *inter alia*, medical, surgical and obstetric examination, treatment and care and, second, that there must be evidence that hospital treatment is justified. The Besluit ziekenhuisverpleging ziekenfondsverzekering of 6 February 1969 (Decree on care provided in hospitals under sickness insurance, *Staatscourant* 1969, No 50), determines the cases in which evidence justifying hospital treatment is established.

12.

The ZFW is applied by sickness funds, which are legal persons approved by the Minister in accordance with Article 34 of the ZFW. The Ziekenfondsraad is responsible for advising and informing the Minister concerned and with overseeing the management and administration of the sickness funds. Where a complaint is lodged against a sickness fund decision concerning entitlement to

a benefit, the sickness fund is required to obtain the opinion of the Ziekenfondsraad before reaching a decision on the complaint.

13.

The ZFW provides for the establishment of a system of agreements, the principal features of which are as follows.

14.

Article 44(1) of the ZFW provides that the sickness funds are to 'enter into agreements with persons and establishments offering one or more forms of care, as referred to in the Royal Decree adopted to implement Article 8'.

15.

Article 44(3) of the ZFW provides that such agreements are to include at least provisions concerning the nature and extent of the parties' mutual obligations and rights, the categories of care to be provided, the quality and effectiveness of the care and supervision of compliance with the terms of the agreement, including supervision of the benefits provided or to be provided and the accuracy of the amounts charged for those benefits, and also an obligation to communicate the information necessary for that supervision.

16.

The agreements do not, however, apply to the scales of charges for health care. These are governed exclusively by the Wet tarieven gezondheidszorg (Law on the scales of charges for health care). According to the explanations provided by the Netherlands Government, however, that does not mean that agreements on costs cannot be entered into between the sickness funds and care providers. All the factors which influence the level of costs and hospital budgets can form the subject of an agreement between the parties.

17.

The sickness funds are free to enter into agreements with any care provider, subject to a twofold reservation. First, it follows from Article 47 of the ZFW that any sickness fund 'is required to enter into an agreement ... with any establishment in the area in which it operates or which the population of that area regularly attend'. Second, agreements can only be entered into with establishments which are duly authorised to provide the care in question or with persons lawfully authorised to do so.

18.

Article 8a of the ZFW provides:

'1. An establishment providing services such as those referred to in Article 8 must be authorised to do so.

2. A Royal Decree may provide that an establishment belonging to a category to be defined by Royal Decree is to be regarded as authorised for the purposes of this Law. ...'

19.

It follows from Article 8c(a) of the ZFW that approval of an establishment operating hospitals must be refused if that establishment does not meet the requirements of the Wet ziekenhuisvoorzieningen (Law on hospital equipment) on distribution and needs. That law, its implementing directives (in particular the directive based on Article 3 of the law, *Staatscourant* 1987, No 248) and also the district plans determine in greater detail the national needs in relation to various categories of hospitals and their distribution between the various regions defined within the Netherlands for health purposes.

20.

As regards the specific implementation of the right to benefits, Article 9 of the ZFW provides:

'1. Save as provided for in the Royal Decree referred to in Article 8, an insured person wishing to claim entitlement to a benefit shall apply to a person or an establishment with whom or with which the sickness insurance fund with which he is registered has entered into an agreement for that purpose, subject to the provisions of paragraph 4.

2. The insured person may choose from among the persons and establishments mentioned in paragraph 1, subject to the provisions of paragraph 5 and the provision regarding conveyance by

ambulance, as laid down in the Wet ambulancevervoer ((Law on conveyance by ambulance), *Staatsblad* 1967, No 369).

3. [repealed]

4. A sickness insurance fund may, by way of derogation from paragraphs 1 and 2 hereof, authorise an insured person, for the purpose of claiming entitlement to a benefit, to apply to another person or establishment in the Netherlands where this is necessary for his medical treatment. The Minister may determine the cases and circumstances in which an insured person may be granted authorisation, in claiming entitlement to a benefit, to apply to a person or an establishment outside the Netherlands.

...'

21.
The Minister exercised the powers conferred on him by the final sentence of Article 9(4) of the ZFW in adopting the Regeling hulp in het buitenland ziekenfondsverzekering of 30 June 1988 (Regulation on care provided abroad under the sickness insurance rules, *Staatscourant* 1988, No 123, 'the Rhbz'). Article 1 of the Rhbz provides:

'A sickness insurance fund may authorise an insured person claiming entitlement to a benefit to apply to a person or establishment outside the Netherlands in those cases in which the sickness insurance fund shall determine that such action is necessary for the health care of the insured person.'

22.
The national court states that, under the case-law of the Centrale Raad van Beroep (Netherlands appellate court in social security matters) on applications for authorisation to receive medical treatment abroad funded under the ZFW, two conditions must be satisfied here.
23.
First, the treatment in question must be capable of being regarded as a qualifying benefit within the meaning of Article 8 of the ZFW and of the Verstrekkingenbesluit. As stated above, the relevant test under Article 3 of the Verstrekkingenbesluit is whether the proposed treatment is regarded as 'normal in the professional circles concerned' (decision of the Centrale Raad van Beroepof 23 May 1995, RZA 1995, No 126). For example, as regards a particular type of treatment in Germany, the Centrale Raad van Beroep has held that 'the basis [for the treatment] is not (yet) sufficiently recognised in scientific circles and, according to current thinking in the Netherlands, is regarded as experimental' (decision of 19 December 1997, RZA 1998, No 48). It is thus clear from the case-law that in practice reference is made to the views prevailing within professional circles in the Netherlands in order to determine whether treatment can be held to be normal and not experimental.
24.
Second, it must be determined whether the treatment is necessary for the medical treatment of the insured person within the meaning of Article 9(4) of the ZFW and Article 1 of the Rhbz. The national court states that in practice it is necessary to take into account the methods of treatment available in the Netherlands (see, in particular, the decision of the Centrale Raad van Beroep of 13 December 1994, RZA 1995, No 53) and to ascertain whether adequate treatment can be available without undue delay in the Netherlands.

The main proceedings

The Geraets-Smits case

25.
Mrs Geraets-Smits suffers from Parkinson's disease. By letter of 5 September 1996, she requested Stichting VGZ to reimburse the costs of care received at the Elena-Klinik in Kassel in Germany for specific, multidisciplinary treatment of that disease. That method involves, *inter alia*, examinations

and treatment to determine the ideal medical treatment, physiotherapy and ergotherapy and socio-psychological support.

26.

By decisions of 30 September and 28 October 1996, Stichting VGZ informed Mrs Geraets-Smits that the costs of the treatment would not be refunded under the ZFW. The reasons stated were that satisfactory and adequate treatment for Parkinson's disease was available in the Netherlands, that the specific clinical treatment provided at the Elena-Klinik provided no additional advantage and that there was therefore no medical necessity justifying treatment in that clinic.

27.

Mrs Geraets-Smits sought the opinion of the Ziekenfondsraad on 14 November 1996. On 7 April 1997, the Ziekenfondsraad issued an opinion stating that it regarded the decision of Stichting VGZ refusing her request as proper.

28.

Mrs Geraets-Smits then lodged an appeal with the Arrondissementsrechtbank te Roermond against the decision of 30 September 1996. She claims, in substance, that the specific clinical treatment provided in Germany has a number of advantages over the 'symptomatic' approach used in the Netherlands, whereby the various manifestations of the disease are treated individually, on a symptom-by-symptom basis.

29.

In its examination, the Arrondissementsrechtbank finds that the decision refusing to reimburse Mrs Geraets-Smits's costs was based, first, on the fact that the specific clinical method is not regarded as normal treatment within the professional circles concerned and is therefore not one of the benefits covered by Article 8 of the ZFW. Should the treatment, or part of it, none the less be regarded as normal, the refusal is based, second, on the consideration that, since satisfactory and adequate treatment was available in the Netherlands at an establishment having contractual arrangements with the sickness insurance fund, the treatment in Kassel was not necessary within the meaning of Article 9(4) of the ZFW and Article 1 of the Rhbz.

30.

The national court appointed a neurologist as an expert witness. In the report which he filed on 3 February 1998, the expert concluded that there was no clinical or scientific evidence that the specific clinical approach was more appropriate and that therefore there was no strictly medical justification for the treatment received by Mrs Geraets-Smits in Germany.

The Peerbooms case

31.

Mr Peerbooms fell into a coma following a road accident on 10 December 1996. He was taken to hospital in the Netherlands and then transferred in a vegetative state to the University Clinic in Innsbruck in Austria on 22 February 1997.

32.

The Innsbruck clinic gave Mr Peerbooms special intensive therapy using neurostimulation. In the Netherlands, that technique is used only experimentally at two medical centres and patients over the age of 25 years are not allowed to undergo this therapy. It is therefore common ground that if Mr Peerbooms, who was born in 1961, had remained in the Netherlands, he would not have been able to receive such treatment.

33.

By letter of 24 February 1997, Mr Peerbooms's neurologist requested Stichting CZ to pay the costs of the treatment at the University Clinic in Innsbruck.

34.

That request was rejected by decision of 26 February 1997, delivered after consideration of the opinion of the medical consultant, on the ground that adequate treatment could have been obtained in the Netherlands from a care provider and/or an establishment with which Stichting CZ had entered into an agreement.

35.

Mr Peerbooms's neurologist repeated his request, which was again refused on 5 March 1997. The complaint lodged against those decisions was rejected by Stichting CZ on 12 June 1997.

36.

In the meantime, Mr Peerbooms came out of his coma. He was able to leave the Innsbruck clinic on 20 June 1997 and was transferred to the clinic in Hoensbroeck (Netherlands) to continue his rehabilitation.

37.

Mr Peerbooms lodged an appeal before the Arrondissementsrechtbank te Roermond against Stichting CZ's decision of 12 June 1997 rejecting his complaint.

38.

According to the explanations provided by that court, Stichting CZ's refusal was based, first, on the fact that, owing to the experimental nature of therapy using neurostimulation and the absence of scientific evidence of its effectiveness, that type of treatment was not regarded as normal within the professional circles concerned nor, consequently, as a benefit qualifying for reimbursement under Article 8 of the ZFW. Should that treatment none the less be held to be normal, the refusal was based, second, on the consideration that, since satisfactory and adequate treatment was available without undue delay in the Netherlands at an establishment with which the sickness insurance fund had contractual arrangements, the treatment at Innsbruck was not necessary within the meaning of Article 9(4) of the ZFW and Article 1 of the Rhbz.

39.

The neurologist appointed as an expert witness by the Arrondissementsrechtbank concluded in his report submitted on 12 May 1998 that appropriate and adequate treatment, such as that provided to Mr Peerbooms in Innsbruck, was not available in the Netherlands owing to his age and that he would not have been able to receive adequate therapy in another hospital centre in the Netherlands. The neurologist advising Stichting CZ stated in reply that that method of treatment was experimental and had not so far been approved in scientific circles. However, the court expert stated in a further report filed on 31 August 1998 that he stood by his conclusions.

Questions referred to the Court

40.

By order of 28 April 1999, the Arrondissementsrechtbank te Roermond decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Must Articles 59 and 60 of the EC Treaty be interpreted as meaning that a provision such as Article 9(4) of the ZFW in conjunction with Article 1 of the Rhbz is inconsistent with those Treaty provisions where the national rules cited provide that a person insured under the sickness insurance fund requires prior authorisation from the sickness insurance fund in order to claim his entitlement to benefits from a person or establishment outside the Netherlands?

(b) What is the answer to Question 1(a) where the authorisation referred to therein is refused or does not apply, because the relevant treatment in the other Member State is not regarded □as normal in professional circles□ and thus is deemed not to constitute a benefit within the meaning of Article 8 of the ZFW? Does it make any difference in that connection whether regard is had solely to the conceptions ofNetherlands professional circles and whether national or international scientific yardsticks are applied and, if so, in what respect? Is it also relevant whether the relevant treatment is reimbursed under the social security system provided for under the law of that other Member State?

(c) What is the answer to Question 1(a) where the treatment abroad is deemed to be normal and therefore to constitute a benefit but the requisite authorisation is refused on the ground that

timely and adequate care can be obtained from a contracted Netherlands care provider and treatment abroad is therefore not necessary for the health care of the person concerned?

2. If the requirement to obtain authorisation constitutes a barrier to the freedom to provide services enshrined in Articles 59 and 60 of the EC Treaty, are the overriding reasons in the general interest relied on by the defendants ... sufficient in order for the barrier to be regarded as justified?'

41.
The national court observes that, although the requirements relating to the approval of hospital establishments provided for in the ZFW do not appear to preclude approval of foreign establishments, for example those in border areas, it can be inferred from those requirements, and in particular from the principle of the geographical distribution governing approval, that it is essentially establishments in the Netherlands which will be approved.

42.
The national court goes on to state that particular attention must be paid to what is actually meant by 'normal' treatment where it is a matter of deciding whether or not Netherlands sickness insurance funds should authorise the assumption of costs of treatment provided outside the Netherlands. If the sickness insurance funds have regard solely to what is considered normal within Netherlands professional circles, that may mean that certain methods of treatment, which are none the less generally accepted in other Member States and for which reimbursement is made because professional circles in those Member States hold views different from those prevailing in the Netherlands, will not be regarded as benefits covered by the ZFW, so that authorisation will have to be refused.

The questions referred to the Court

43.
By its two questions, which fall to be dealt with together, the national court is asking essentially whether Articles 59 and 60 of the Treaty are to be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, which makes the assumption of the costs of care provided in a hospital establishment in another Member State conditional upon prior authorisation by the sickness insurance fund with which the insured person isregistered, that authorisation being granted only in so far as the following two conditions are satisfied. First, the proposed treatment must be among the benefits for which the sickness insurance scheme of the first Member State assumes responsibility, which means that the treatment must be regarded as 'normal in the professional circles concerned'. Second, the treatment abroad must be necessary in terms of the medical condition of the person concerned, which supposes that adequate care cannot be provided without undue delay by a care provider which has entered into an agreement with a sickness insurance fund in the first Member State.

The power of the Member States to arrange their social security systems and the obligation to comply with Community law in exercising that power

44.
In order to answer the questions as thus reformulated, it should be remembered at the outset that, according to settled case-law, Community law does not detract from the power of the Member States to organise their social security systems (Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16, Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17).

45.
In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme (Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12, Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15, and *Kohll*, paragraph 18) and, second, the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 *Stöber and Piosa*

Pereira [1997] ECR I-511, paragraph 36, and *Kohll*, paragraph 18).

46.

Nevertheless, the Member States must comply with Community law when exercising that power.

Application to hospital care of the provisions on freedom to provide services

47.

It is first necessary to determine whether the situations at issue in the main proceedings do indeed fall within the ambit of the freedom to provide services provided for in Articles 59 and 60 of the Treaty.

48.

A number of the governments which have submitted written observations to the Court have argued that hospital services cannot constitute an economic activity within the meaning of Article 60 of the Treaty, particularly when they are provided in kind and free of charge under the relevant sickness insurance scheme.

49.

Relying in particular on Case 263/86 *Humbel* [1988] ECR 5365, paragraphs 17 to 19, and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 18, they argue, in particular, that there is no remuneration within the meaning of Article 60 of the Treaty where the patient receives care ina hospital infrastructure without having to pay for it himself or where all or part of the amount he pays is reimbursed to him.

50.

Some of those governments also maintain that it follows from Case 293/83 *Gravier* [1985] ECR 593 and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 17, that a further condition to be satisfied before a service can constitute an economic activity within the meaning of Article 60 of the Treaty is that the person providing the service must do so with a view to making a profit.

51.

The German Government considers that the structural principles governing the provision of medical care are inherent in the organisation of the social security systems and do not come within the sphere of the fundamental economic freedoms guaranteed by the EC Treaty, since the persons concerned are unable to decide for themselves the content, type and extent of a service and the price they will pay.

52.

None of those arguments can be upheld.

53.

It is settled case-law that medical activities fall within the scope of Article 60 of the Treaty, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16; *Society for the Protection of Unborn Children Ireland*, paragraph 18, concerning advertising for clinics involved in the deliberate termination of pregnancies; and *Kohll*, paragraphs 29 and 51).

54.

It is also settled case-law that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement (Case 279/80 *Webb* [1981] ECR 3305, paragraph 10, and *Kohll*, paragraph 20), so that the fact that the national rules at issue in the main proceedings are social security rules cannot exclude application of Articles 59 and 60 of the Treaty (*Kohll*, paragraph 21).

55.

With regard more particularly to the argument that hospital services provided in the context of a sickness insurance scheme providing benefits in kind, such as that governed by the ZFW, should not be classified as services within the meaning of Article 60 of the Treaty, it should be noted that, far from falling under such a scheme, the medical treatment at issue in the main proceedings, which was provided in Member States other than those in which the persons concerned were insured, did lead to the establishments providing the treatment being paid directly by the patients. It must be accepted that

a medical service provided in one Member State and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind.
56.

Furthermore, the fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services within the meaning of Article 60 of the Treaty.
57.

First, it should be borne in mind that Article 60 of the Treaty does not require that the service be paid for by those for whom it is performed (Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16, and Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 56).
58.

Second, Article 60 of the Treaty states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (*Humbel*, paragraph 17). In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.
59.

Since the provisions of services at issue in the main proceedings do fall within the scope of the freedom to provide services within the meaning of Articles 59 and 60 of the Treaty, it is necessary to consider whether the rules at issue in the main proceedings place restrictions on that freedom and, if so, whether those restrictions can be objectively justified.

The restrictive effects of the legislation at issue in the main proceedings

60.

It is necessary to determine whether there is a restriction on freedom to provide services within the meaning of Article 59 of the Treaty where the costs of treatment provided in a hospital in another Member State is assumed under the sickness insurance scheme only on condition that the person receiving the treatment obtains prior authorisation, which is granted only if the treatment concerned is covered by the sickness insurance scheme of the Member State in which the patient is insured, which requires that the treatment be 'normal within the professional circles concerned', and where the insured person's sickness fund has decided that his medical treatment requires that he be treated in the hospital establishment concerned, presupposing that adequate timely treatment cannot be provided by a contracted care provider in the Member State in which the patient is insured.
61.

According to settled case-law, Article 59 of the Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17, and *Kohll*, paragraph 33).
62.

In the present case, while the ZFW does not deprive insured persons of the possibility of using a provider of services established in another Member State, it does nevertheless make reimbursement of the costs incurred in another Member State subject to prior authorisation and provides for such reimbursement to be refused where the two requirements referred to in paragraph 60 above are not satisfied.
63.

As regards the first of those requirements, namely that the proposed treatment must be treatment covered by the ZFW, in other words treatment which can be regarded as 'normal in the professional

circles concerned', it is sufficient to point out that by its very essence such a condition is liable to lead to refusals of authorisation. It is only the precise frequency with which authorisation is refused, not refusal itself, that will be determined by the interpretation of 'normal' treatment and 'the professional circles concerned'.

64.

As regards the second requirement, namely that provision of hospital treatment in another Member State must be a medical necessity, which will be the case only if adequate treatment cannot be obtained without undue delay in contracted hospitals in the Member State in which the person seeking treatment is insured, this requirement by its very nature will severely limit the circumstances in which such authorisation can be obtained.

65.

The Netherlands Government and the Commission have stressed, however, that it was open to the sickness insurance funds to enter into agreements with hospital establishments outside the Netherlands and that in such a case no prior authorisation would be required in order for the cost of treatment provided by such establishments to be assumed under the ZFW.

66.

Even disregarding the fact that no such possibility is apparent from the provisions of national law to which the Court has been referred, the order for reference points out that in practice, having regard, in particular, to the contracting conditions, it will be mainly hospital establishments in the Netherlands that will strike contractual arrangements with the sickness insurance funds. It must also be recognised that, with the exception of hospitals situated in areas adjoining the Netherlands, it seems unlikely that a significant number of hospitals in other Member States would ever enter into agreements with the Netherlands sickness insurance funds, their prospects of admitting patients insured by those funds remaining uncertain and limited.

67.

It is therefore accepted that in the majority of cases the assumption of costs, under the ZFW, of hospital treatment provided by establishments in Member States other than the Member State in which a person is insured will have to be subject to prior authorisation, as is indeed the case for the treatment at issue in the main proceedings, and that this authorisation will be refused if the two requirements set out in paragraph 60 above are not satisfied.

68.

By comparison, treatment provided in contracted hospitals situated in the Netherlands, which represents the greater part of the hospital treatment provided there to persons covered by the ZFW, is paid for by the sickness insurance funds without any prior authorisation being required.

69.

It follows from the foregoing considerations that rules such as those at issue in the main proceedings deter, or even prevent, insured persons from applying to providers of medical services established in another Member State and constitute, both for insured persons and service providers, a barrier to freedom to provide services (see, to that effect, *Luisi and Carbone*, paragraph 16, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 31, and *Kohll*, paragraph 35).

70.

Consequently, it is necessary to examine whether, in so far as they concern medical services provided within a hospital infrastructure, such as those at issue in the main proceedings, such rules can be objectively justified.

71.

In that regard, it is first necessary to determine whether there are overriding reasons which can be accepted as justifying barriers to freedom to provide medical services supplied in the context of a hospital infrastructure, then to determine whether the prior authorisation principle is justifiable in the light of such overriding needs and last to consider whether the conditions governing the grant of prior authorisation can themselves be justified.

Overriding considerations which may be relied on to justify barriers to the exercise of freedom to provide services in the sphere of hospital treatment

72.

As all the governments which have submitted observations to the Court have pointed out, the Court has held that it cannot be excluded that the possible risk of seriously undermining a social security system's financial balance may constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services (*Kohll*, paragraph 41).

73.

The Court has likewise recognised that, as regards the objective of maintaining a balanced medical and hospital service open to all, that objective, even if intrinsically linked to the method of financing the social security system, may also fall within the derogations on grounds of public health under Article 56 of the EC Treaty (now, after amendment, Article 46 EC), in so far as it contributes to the attainment of a high level of health protection (*Kohll*, paragraph 50).

74.

The Court has further held that Article 56 of the Treaty permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival of, the population (*Kohll*, paragraph 51).

75.

It is therefore necessary to determine whether the national rules at issue in the main proceedings can actually be justified in the light of such overriding reasons and, in such a case, in accordance with settled case-law, to make sure that they do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules (Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraphs 27 and 29; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; and Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 30 and 31).

The prior authorisation requirement

76.

As regards the prior authorisation requirement to which the ZFW subjects the assumption of the costs of treatment provided in another Member State by a non-contracted care provider, the Court accepts, as all the governments which have submitted observations have argued, that, by comparison with medical services provided by practitioners in their surgeries or at the patient's home, medical services provided in a hospital take place within an infrastructure with, undoubtedly, certain very distinct characteristics. It is thus well known that the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible.

77.

As may be seen, in particular, from the contracting system involved in the main proceedings, this kind of planning therefore broadly meets a variety of concerns.

78.

For one thing, it seeks to achieve the aim of ensuring that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned.

79.

For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage is all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for health care are not unlimited, whatever the mode of funding applied.

80.

From both those perspectives, a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another Member State must be subject to prior authorisation appears to be a measure which is both necessary and reasonable.

81.

Looking at the system set up by the ZFW, it is clear that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no contractual arrangements, whether they were situated in the Netherlands or in another Member State, all the planning which goes into the contractual system in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke.

82.

Although, for the considerations set out above, Community law does not in principle preclude a system of prior authorisation, the conditions attached to the grant of such authorisation must none the less be justified with regard to the overriding considerations examined and must satisfy the requirement of proportionality referred to in paragraph 75 above.

The condition that the proposed treatment be 'normal'

83.

As observed above, the rules at issue in the main proceedings subject the grant of authorisation to the condition that the proposed medical or surgical treatment can be regarded as 'normal in the professional circles concerned'.

84.

It should be emphasised at the outset that, under Article 3 of the Verstrekkingenbesluit, this condition applies generally to the assumption of costs, under the ZFW, of all medical and surgical treatment, so that in principle it applies regardless of whether the proposed treatment is to be provided in a contracted establishment or outside such an establishment, within the Netherlands or outside the Netherlands.

85.

With that point in mind, it should also be remembered, as already stated in paragraphs 44 and 45 above, that it is for the legislation of each Member State to organise its national social security system and in particular to determine the conditions governing entitlement to benefits.

86.

The Court has thus held, in particular, that it is not in principle incompatible with Community law for a Member State to establish, with a view to achieving its aim of limiting costs, limitative lists excluding certain products from reimbursement under its social security scheme (*Duphar and Others*, paragraph 17).

87.

The same principle must apply to medical and hospital treatment when it is a matter of determining which treatments will be paid for by the social security system of the Member State concerned. It follows that Community law cannot in principle have the effect of requiring a Member State to extend the list of medical services paid for by its social insurance system: the fact that a particular type of medical treatment is covered or not covered by the sickness insurance schemes of other Member States is irrelevant in this regard.

88.

None the less, as observed in paragraph 46 above, in exercising that power the Member State must not disregard Community law.

89.

Thus it follows from the Court's case-law that the list of medicinal preparations excluded from reimbursement must be drawn up in accordance with Article 30 of the EC Treaty (now, after amendment, Article 28 EC) and that this will be so only where the list is drawn up in accordance with objective criteria, without reference to the origin of the products (*Duphar*, paragraph 21).

90.

It likewise follows from settled case-law that a scheme of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at

issue in the main proceedings (see, to that effect, Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28, and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37). Therefore, in order for a prior administrative authorisation scheme to be justified even though it derogates from such a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Analir and Others*, paragraph 38). Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings.

91.

The actual system of sickness insurance laid down by the ZFW is not based on a pre-established list of types of treatment issued by the national authorities for which payment will be guaranteed. The Netherlands legislature has enacted a general rule under which the costs of medical treatment will be assumed provided that the treatment is 'normal in the professional circles concerned'. It has therefore left it to the sickness insurance funds, acting where necessary under the supervision of the Ziekenfondsraad and the courts, to determine the types of treatment which actually satisfy that condition.

92.

In the present two cases, it is clear from the arguments submitted to the national court, reflected in part (b) of the first preliminary question, and from the observations submitted to the Court that the expression 'normal in the professional circles concerned' is open to a number of interpretations, depending, in particular, on whether it is considered that regard should be had to what is considered normal only in Netherlands medical circles, which, to judge by the order for reference, seems to be the interpretation favoured by the national court (see paragraph 23 above) or, on the other hand, to what is considered normal according to the state of international medical science and medical standards generally accepted at international level.

93.

In that regard, the Netherlands Government has explained that when a specific treatment constitutes professionally appropriate treatment having a valid scientific basis, it is regarded as a qualifying benefit for the purposes of the ZFW, so that the application of the 'normal' criterion must not have the consequence that only treatment normally available in the Netherlands can qualify for reimbursement. According to the Netherlands Government, professional opinion in the Netherlands is also based on the state of the art and on scientific thinking at international level and depends on whether, in the light of the state of national and international science, the treatment is regarded as normal treatment. That criterion thus applies, it says, without distinction to the various types of treatment provided in the Netherlands and also to those for which the insured person wishes to go abroad.

94.

Only an interpretation on the basis of what is sufficiently tried and tested by international medical science can be regarded as satisfying the requirements set out in paragraphs 89 and 90 above.

95.

It follows from the those requirements that the institution of a system such as that at issue in the main proceedings, under which the authorisation decision needed to undergo hospital treatment in another Member State is entrusted to the sickness insurance funds, means that the criteria which those funds must apply in reaching that decision must be objective and independent where the providers of treatment are established.

96.

To allow only treatment habitually carried out on national territory and scientific views prevailing in national medical circles to determine what is or is not normal will not offer those guarantees and will make it likely that Netherlands providers of treatment will always be preferred in practice.

97.

If, on the other hand, the condition that treatment must be regarded as 'normal' is extended in such a way that, where treatment is sufficiently tried and tested by international medical science, the authorisation sought under the ZFW cannot be refused on that ground, such a condition, which is objective and applies without distinction to treatment provided in the Netherlands and to treatment provided abroad, is justifiable in view of the need to maintain an adequate, balanced and permanent supply of hospital care on national territory and to ensure the financial stability of the sickness insurance system, so that the restriction of the freedom to provide services of hospitals situated in other Member States which might result from the application of that condition does not infringe Article 59 of the Treaty.

98.

Further, where, as in the present case, a Member State decides that medical or hospital treatment must be sufficiently tried and tested before its cost will be assumed under its social security system, the national authorities called on to decide, for authorisation purposes, whether hospital treatment provided in another Member States satisfies that criterion must take into consideration all the relevant available information, including, in particular, existing scientific literature and studies, the authorised opinions of specialists and the fact that the proposedtreatment is covered or not covered by the sickness insurance system of the Member State in which the treatment is provided.

The condition concerning the necessity of the proposed treatment

99.

Under the rules at issue in the main proceedings, the grant of authorisation allowing assumption of the costs of a medical service provided abroad is subject to a second condition, namely that it be proved that the insured person's medical treatment requires that service.

100.

As the national court states, it follows from the wording of Article 9(4) of the ZFW and Article 1 of the Rhbz that in principle that condition applies irrespective whether the request for authorisation relates to treatment in an establishment located in the Netherlands with which the sickness insurance fund has no contractual arrangements or in an establishment located in another Member State.

101.

As regards the provision of hospital treatment outside the Netherlands, the national court states, however, that in practice this condition often appears to be interpreted as meaning that the provision of such treatment is not to be authorised unless it appears that appropriate treatment cannot be provided without undue delay in the Netherlands. No distinction is therefore drawn in this respect between whether the treatment could be provided by a contracted establishment or by a non-contracted establishment.

102.

The Netherlands Government explains that the legislation at issue in the main proceedings does not compel refusal of a request for authorisation if the treatment sought is available in the Netherlands. Under Article 9(4) of the ZFW, read in conjunction with Article 1 of the Rhbz, authorisation must be refused only where the treatment required by the insured person's state of health is available from contracted providers of treatment. The Netherlands Government points out that the sickness insurance funds appear, however, to regard a care provider's country of establishment as a relevant factor, an interpretation which it considers inappropriate.

103.

In view of what is stated in paragraph 90 above, it can be concluded that the condition concerning the necessity of the treatment, laid down by the rules at issue in the main proceedings, can be justified under Article 59 of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another Member State may be refused on that ground only if the same or equally effective treatment can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements.

104.

Furthermore, in order to determine whether equally effective treatment can be obtained without

undue delay from an establishment having contractualarrangements with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought but also of his past record.

105.

Such a condition can allow an adequate, balanced and permanent supply of high-quality hospital treatment to be maintained on the national territory and the financial stability of the sickness insurance system to be assured.

106.

Were large numbers of insured persons to decide to be treated in other Member States even when the hospitals having contractual arrangements with their sickness insurance funds offer adequate identical or equivalent treatment, the consequent outflow of patients would be liable to put at risk the very principle of having contractual arrangements with hospitals and, consequently, undermine all the planning and rationalisation carried out in this vital sector in an effort to avoid the phenomena of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage.

107.

However, once it is clear that treatment covered by the national insurance system cannot be provided by a contracted establishment, it is not acceptable that national hospitals not having any contractual arrangements with the insured person's sickness insurance fund be given priority over hospitals in other Member States. Once such treatment is ex hypothesi provided outside the planning framework established by the ZFW, such priority would exceed what is necessary for meeting the overriding requirements referred to in paragraph 105 above.

108.

In view of all the foregoing considerations, the answer to be given to the national court must be that Articles 59 and 60 of the Treaty do not preclude legislation of a Member State, such as that at issue in the main proceedings, which makes the assumption of the costs of treatment provided in a hospital located in another Member State subject to prior authorisation from the insured person's sickness insurance fund and the grant of such authorisation subject to the condition that (i) the treatment must be regarded as 'normal in the professional circles concerned', a criterion also applied in determining whether hospital treatment provided on national territory is covered, and (ii) the insured person's medical treatment must require that treatment. However, that applies only in so far as

- the requirement that the treatment must be regarded as 'normal' is construed to the effect that authorisation cannot be refused on that ground where it appears that the treatment concerned is sufficiently tried and tested by international medical science, and

- authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured person's sickness insurance fund.

Costs

109.

The costs incurred by the Netherlands, Belgian, Danish, German, French, Irish, Austrian, Portuguese, Finnish, Swedish, United Kingdom, Icelandic and Norwegian Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arrondissementsrechtbank te Roermond by order of 28 April 1999, hereby rules:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) do not preclude legislation of a Member State, such as that at issue in the main proceedings, which makes the assumption of the costs of treatment provided in a hospital located in another Member State subject to prior authorisation from the insured person's sickness insurance fund and the grant of such authorisation subject to the condition that (i) the treatment must be regarded as 'normal in the professional circles concerned', a criterion also applied in determining whether hospital treatment provided on national territory is covered, and (ii) the insured person's medical treatment must require that treatment. However, that applies only in so far as

- the requirement that the treatment must be regarded as 'normal' is construed to the effect that authorisation cannot be refused on that ground where it appears that the treatment concerned is sufficiently tried and tested by international medical science, and

- authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured person's sickness insurance fund.

C-390/99: Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)

Judgment of the Court of 22 January 2002.

Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS).

Reference for a preliminary ruling: Tribunal Supremo - Spain.

Articles 30 and 59 of the EC Treaty (now, after amendment, Articles 28 EC and 49 EC) - Directive 95/47/EC - National legislation requiring operators of conditional-access television services to register in a national register created for that purpose, indicating the characteristics of the technical equipment they use, and subsequently to obtain administrative certification thereof - Directive 83/189/EEC - Meaning of "technical regulation".

Case C-390/99.

JUDGMENT OF THE COURT

22 January 2002 (1)

(Articles 30 and 59 of the EC Treaty (now, after amendment, Articles 28 EC and 49 EC) - Directive 95/47/EC - National legislation requiring operators of conditional-access television services to register in a national register created for that purpose, indicating the characteristics of the technical equipment they use, and subsequently to obtain administrative certification thereof - Directive 83/189/EEC - Meaning of ' technical regulation')

In Case C-390/99,

REFERENCE to the Court under Article 234 of the EC Treaty by the Tribunal Supremo (Spain) for a preliminary ruling in the proceedings pending before that court between

Canal Satélite Digital SL

and

Administracíon General del Estado,

intervener:

Distribuidora de Televisión Digital SA (DTS),

on the interpretation of Articles 30 and 59 of the EC Treaty (now, after amendment, Articles 28 EC and 49 EC), read in conjunction with Articles 1 to 5 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51) and of Article 1, point 9, of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994 (OJ 1994 L 100, p. 30),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F. Macken, and N. Colneric (Presidents of Chambers), C. Gulmann, D.A.O. Edward (Rapporteur), A. La Pergola, J.-P. Puissochet, R. Schintgen and V. Skouris, Judges,

Advocate General: C. Stix-Hackl,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Canal Satélite Digital SL, by P. Cortés and J.M. Jiménez Laiglesia, abogados,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the Belgian Government, by P. Rietjens, acting as Agent,
- the Commission of the European Communities, by G. Valero Jordana, acting as Agent,
- the EFTA Surveillance Authority, by P. Dyrberg and J. Svenningsen, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Canal Satélite Digital SL, of the Spanish Government, of the Commission and of the EFTA Surveillance Authority at the hearing on 28 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2001,

gives the following

Judgment

1. By order of 22 September 1999, received at the Court on 12 October 1999, the Tribunal Supremo (Supreme Court) referred to the Court for a preliminary ruling three questions on the interpretation of Articles 30 and 59 of the EC Treaty (now, after amendment, Articles 28 EC and 49 EC), read in conjunction with Articles 1 to 5 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51) and of Article 1, point 9, of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994 (OJ 1994 L 100, p. 30; hereinafter ' Directive 83/189').

2. Those questions were raised in administrative-law proceedings brought by Canal Satélite Digital SL (' Canal Satélite Digital') before the Tribunal Supremo for a declaration that Royal Decree No 136/1997 of 31 January 1997 approving the Technical Regulation on Provision of the Satellite Telecommunications Service (*Boletin Oficial del Estado* No 28 of 1 February 1997, p. 3178; hereinafter ' Decree 136/1997') is void.

Legal background

Community legislation

3. Under the first paragraph of Article 1 of Directive 95/47:

' Member States shall take appropriate measures to promote the accelerated development of advanced television services including wide-screen television services, high definition television services and television services using fully digital transmission systems.'

4. Article 8 of Directive 83/189 lays down an information procedure, whereby Member States are required to communicate to the Commission any draft technical regulation within the scope of that directive.

5. Article 1, points 2 and 9, of Directive 83/189 provide:

' For the purposes of this Directive, the following meanings shall apply:

…

(2) " technical specification" : a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures

…

(9) " technical regulation" : technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.'

6.

The first subparagraph of Article 8(1) of Directive 83/189 provides:

' Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.'

7.

Under Article 10(1) of the same directive:

' Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:

- comply with binding Community acts which result in the adoption of technical specifications,

…'

National legislation

8.

On 31 January 1997, the Spanish Government adopted Royal Decree-Law 1/1997, transposing into Spanish law Directive 95/47/EC on the use of standards for the transmission of television signals and approving additional measures for the liberalisation of that sector (*Boletin Oficial del Estado* No 28, of 1 February 1997, p. 3174; hereinafter ' Decree-Law 1/1997'). That decree-law was ratified by the Cortes in accordance with Spanish constitutional rules and thus became Law No 17/1997 of 3 May 1997 (*Boletin Oficial del Estado* No 108, of 6 May 1997, p. 14953).

9.

Article 1(1) of Decree-Law 1/1997 approved the transposition into Spanish law of the technical specifications set out in Directive 95/47. Article 1(2), which provides for the creation of a register of operators of conditional-access services (' the register'), is worded as follows:

' In order to enable any person to verify that they comply with the technical specifications contained in this decree-law, operators of conditional-access services shall be required to be registered in the register which is to be created for that purpose at the Commission for the Telecommunications Market. That register, which shall be open to the public, shall contain personal information relating to the operators, details of the technical equipment they use, and their undertaking to comply with the aforementioned technical specifications, together with the appropriate supporting documentation. The structure and operation of the register shall be determined by Royal Decree.'

10.

Decree-Law 1/1997 also contains a single additional provision, headed ' Penalties' , which reads as

follows:

‘ The marketing, distribution, temporary transfer or hiring-out of apparatus, equipment, decoders or any system falling within the ambit of this Royal Decree-Law without prior certification of compliance with the rules laid down therein shall be punishable as a serious or a very serious offence under Article 33(2)(h) and (3)(c) of Law 31/1987 on the Regulation of Telecommunications, as amended by Law 32/1992 of 3 December 1992. Prosecution may result in the adoption of the precautionary measures laid down in Article 34(2) and (3) of Law 31/1987, and the imposition of the penalties provided for in the same article.’

11.
On 31 January 1997, the Spanish Government also adopted Decree 136/1997. Article 2 of that decree provides for the implementation, in relation to the register, of Article 1(2) of Decree-Law 1/1997. Under Article 2:

‘ 1. The register of operators of conditional-access services for digital television, created by Decree-Law 1/1997 transposing into Spanish law Directive 95/47/EC … shall be maintained by the Commission for the Telecommunications Market and shall serve to ensure the compulsory registration of natural or legal persons engaged in the marketing, distribution, temporary transfer or hiring-out of decoders.

2. The registration procedure shall be initiated at the request of the natural or legal persons required to register, by means of an application addressed to the President of the Commission for the Telecommunications Market which shall be filed at any legally competent registry.

3. On the application form, applicants shall state their name or the name of the company, their address and tax identification number, the nature of their business, and, where appropriate, their entry number in the Commercial Register, as well as the type and model of the conditional-access telecommunications apparatus, equipment, devices or systems which they offer or market.

4. Upon receipt of the form, the Commission for the Telecommunications Market shall process the application for registration, and, in so doing, may require such proof and conduct such checks as it considers appropriate in connection with the information provided. In any event, it shall request the mandatory report produced by the technical services of the Directorate-General of Telecommunications at the Ministry of Public Works on compliance with the provisions of Decree-Law 1/1997 …

5. If registration cannot be carried out because the information provided is insufficient, the applicant shall be required to supply the missing information within 10 working days, in accordance with Article 71 of the Law on the Rules governing Administrative Authorities and the Common Administrative Procedure.

6. On completion of the procedure, the Council of the Commission for the Telecommunications Market shall decide whether or not to approve registration, and shall advise the applicant of its decision and of the number assigned to him in the register.

Once the period for rectification has elapsed, the initial and any subsequent applications for registration shall not be granted where the information to be registered has not been provided in full, or where such information is inaccurate.

Information relating to the operators shall be registered separately from that relating to each type or model of telecommunications apparatus, equipment, devices or systems suitable for decoding which those operators market or offer for sale.

7. At the Registry, a book shall be kept in which each operator shall be assigned a folio on which shall be set out the information identifying the natural or legal person who is registered.

An auxiliary register shall also be kept, consisting of an indeterminate number of numbered pages, one per operator, organised in such a way that the serial numbers of the pages in the auxiliary register correspond to the numbers assigned in the main register; the auxiliary register shall record the names of the natural or legal persons listed in the main register.

Each of those pages shall be followed by as many other pages as may be necessary, the latter in turn classified by the number appearing on the first page followed by a letter in alphabetical order. The alphabetically-ordered pages shall list, one after the other, in separate, numbered entries, the individual type, model and acceptance-certificate number, if any, of the telecommunications apparatus, equipment, devices or systems suitable for conditional-access services which the operator offers or markets.

8. The register, which is national in its scope, shall be open to the public and the certificates issued by the Secretary of the Council of the Commission for the Telecommunications Market shall constitute the sole means of providing irrefutable evidence of the content of the entries in the register. Registration, the making of further entries in the register and the issue of certificates at the request of any party shall be subject to the payment of charges determined in accordance with the Law on the Regulation of Telecommunications.

The information in the register shall be available for consultation by interested third parties on request.

On completion of the initial registration, each operator must apply to register any other type or model of telecommunications apparatus, equipment, device or system suitable for decoding which forms part of his business and which has not previously been registered.

Similarly, he must apply to remove from the register details of any type or model of decoding equipment, apparatus, device or system which he no longer markets or offers.

Registration as an operator shall be cancelled at the request of the natural or legal person registered, by decision of the Council of the Commission for the Telecommunications Market.

9. In any event, the provisions of this article are without prejudice to the powers of the Commission for the Telecommunications Market, under Article 1(2)(2)(d) of Decree-Law 6/1996 of 7 June 1996 on the Liberalisation of Telecommunications, to limit or prohibit the activities of operators of conditional-access services ... and of broadcasters in order to protect competition and guarantee plurality in the provision of services.'

12.

According to the national court, the most coherent interpretation of that legislation is that, by means of Article 2 of Decree 136/1997, in conjunction with Article 1(2) of Decree-Law 1/1997 and the single additional provision thereof, the Spanish authorities created a compulsory register in which operators of conditional-access services are required to record details not only of themselves but also of the telecommunications apparatus, equipment, devices and systems which they market or offer. Registration in that register is by no means automatic, but is subject to a prior administrative decision which may be negative. To be entered in the register, it is not sufficient for the operator concerned to ' undertake to comply with the technical specifications' , but he first has to obtain a prior technical report by officials of the Ministry of Public Works stating that the technical and other requirements laid down in Decree-Law 1/1997 have been complied with. Only after successfully completing the registration procedure and obtaining the relevant ' certification' is it legally possible to market, distribute, transfer or hire out the equipment, systems and decoders necessary for the digital transmission of television signals. Operators engaging in the marketing, distribution, transfer or hiring-out of the aforementioned apparatus without having obtained such certification commit a serious or a very serious offence punishable under administrative law.

The main proceedings and the questions referred to the Court

13.

Canal Satélite Digital provides conditional-access services for digital satellite television broadcasting and the reception of televised messages. Digital broadcasting and access to encoded television services are made possible by purchasing or renting special decoding apparatus. Canal Satélite supplies such decoders in Spain, which have been lawfully manufactured and marketed in Belgium and the United Kingdom. Despite the fact that neither Canal Satélite Digital nor the decoders which it distributes have been registered, Canal Satellite has many customers in Spain who use its decoders. It has not, however, been subject to an administrative penalty.

14.

Spanish law permits natural or legal persons whose interests may be affected by a general provision of secondary legislation to bring an action for annulment directly before the courts. Where the general provision is issued by the Council of Ministers, as royal decrees are, the contentious administrative chamber of the Tribunal Supremo has jurisdiction at first and last instance to declare that general provision void *erga omnes*.

15.

Considering itself directly affected by Article 2 of Decree 136/1997, Canal Satélite Digital brought an administrative action against that provision before the Tribunal Supremo, seeking a declaration that it was void. The pleas in law in support of that action relate both to procedural defects allegedly vitiating that provision and to matters of substance, including infringement of Community rules.

16.

Having doubts as to the correct interpretation of the relevant Community law, the Tribunal Supremo decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

' 1. Does Article 30 of the EC Treaty, in conjunction with the provisions of Articles 1 to 5 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals ... preclude national legislation which imposes on operators of conditional-access services, as a condition of their being permitted to market apparatus, equipment, decoders or systems for the digital transmission and reception of television signals by satellite, including those lawfully manufactured or marketed in other Member States, the following cumulative requirements:

- the obligation to register details of themselves and of the aforementioned apparatus, equipment, decoders and systems in a compulsory official register, such registration being conditional not only on an undertaking by the operator concerned of compliance with the technical specifications, but also on a prior technical report from the national authorities on compliance with the technical and other requirements laid down in the national legislation;

- the obligation, following completion of the registration procedure referred to above, to obtain the appropriate administrative " certification" of compliance with the aforementioned technical and other requirements laid down in the national legislation?

2. Does Article 59 of the EC Treaty, in conjunction with Articles 1 to 5 of Directive 95/47/EC, preclude national legislation which imposes the administrative requirements set out above on operators of conditional-access services?

3. Is a national legislative provision which prescribes compliance with such requirements to be regarded as a " technical regulation" for the purposes of the duty to notify the Commission referred to in Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations ...?'

Admissibility of the reference

17.

The Spanish Government argues that the case in the main proceedings is exclusively concerned with Article 2 of Decree 136/1997, given that, in Spanish law, an administrative-law action cannot be concerned with statutory rules, as is the case with Decree-Law 1/1997, which became Law 17/1997. It was not Article

2 of Decree 136/1997 which required operators to register but Decree-Law 1/1997. Article 2 of Decree 136/1997 merely governs the ' structure and operation' of that register. The Spanish Government concludes that examination of the case in the main proceedings by the Tribunal Supremo must necessarily be limited to Article 2 of Decree 136/1997 and that, in those circumstances, the questions referred for a preliminary ruling are purely hypothetical.

18.

It is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, for example, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

19.

However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, for example, Case C-379/98 *PreussenElektra* [2001] I-2099, paragraph 39).

20.

In this case, even if the Court's answer to Questions 1 and 2 may have repercussions on the conformity of Decree-Law 1/1997 with Community law and the assessment of that conformity does not constitute the subject-matter of the case in the main proceedings, which is limited to the examination of Decree 136/1997, it cannot be argued that the reply to those questions cannot be of use in enabling the national court to determine whether Decree 136/1997 is consistent with Community law. If compulsory registration is, as such, contrary to Community law, national provisions relating to that registration, whatever their position in the hierarchy of legal rules, cannot be applied.

21.

It follows that the reference for a preliminary ruling is admissible.

The first and second questions

22.

In its first two questions, the national court is asking, essentially, whether Articles 1 to 5 of Directive 95/47, read in conjunction with Articles 30 and 59 of the EC Treaty, preclude a Member State from making the marketing by conditional-access service operators of apparatus, equipment, decoders or systems for the digital transmission and reception of television signals by satellite conditional upon a prior authorisation procedure with the following features:

- that it involves the obligation to enter both the operators and their products in an official register, and

- that in order to obtain that registration, operators must:

(a) undertake to comply with the technical specifications and

(b) obtain a prior technical report drawn up by the national authorities and prior administrative ' certification' , stating that the technical and other requirements laid down in the national legislation have been complied with.

The legal nature of entry in the register

23.

The Spanish Government challenges the national court's interpretation of the legislation at issue in the main proceedings. In its submission, entry in the register does not constitute a precondition for marketing decoders or carrying on the business of operator, since that registration does not create or alter rights and is simply intended to establish, for the information of third parties, that the operators are complying with the rules and technical specifications laid down by Community legislation. It maintains that that interpretation is supported by the wording of Article 1(2) of Decree-Law 1/1997, according to which entry in the register must ' enable any person to verify that [operators] comply with the technical specifications contained in this decree-law' .

24.

In that respect, it is sufficient to point out that the Court of Justice has no jurisdiction either to decide whether the referring Court's interpretation of provisions of national law is correct or to rule, in the context of a reference for a preliminary ruling, on the conformity of those provisions with Community law. It is the task of the Court solely to interpret provisions of Community law in order to give the national court all the guidance on matters of Community law that it needs in order to decide the case before it (Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24).

25.

The relevant interpretation of national law for the Court of Justice is therefore that adopted by the referring court and reproduced in paragraph 12 of this judgment.

Directive 95/47

26.

Forming as it does a part of the overall Community strategy of establishing the internal market for advanced television technologies, Directive 95/47 is designed to promote rapid development of large-format television services (16:9) and the introduction of high definition television (HDTV) in Europe. To that end, it contains provisions relating to the new market in conditional-access digital television services (' pay TV'), including provisions relating both to the obligations of conditional-access service operators and to the features of the equipment which they rent out or sell.

27.

On the other hand, Directive 95/47 does not contain any provisions concerning detailed administrative rules for implementing the obligations incumbent on Member States under that directive. That finding does not, however, justify the conclusion that the Member States may not establish a prior authorisation procedure consisting of compulsory entry in a register together with the requirement of a prior technical report drawn up by the national authorities.

28.

However, where they establish such an administrative procedure, Member States must at all times comply with the fundamental freedoms guaranteed by the Treaty.

The existence of restrictions on the fundamental freedoms guaranteed by the Treaty

29.

The requirement imposed on an undertaking wishing to market apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite to register as an operator of conditional-access services and to state in that register the products which it proposes to market restricts the free movement of goods and the freedom to provide services guaranteed by Articles 30 and 59 of the Treaty respectively (see, as regards crafts businesses, *Corsten*, paragraph 34).

30.

Moreover, the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the abovementioned requirements from being treated as selling arrangements within the meaning of paragraph 16 of Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

Justification for the restrictions found to exist

31.

Where a national measure restricts both the free movement of goods and the freedom to provide

services, the Court will in principle examine it in relation to one only of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, in relation to lottery activities, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22).

32. In the field of telecommunications, however, it is difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority. As the case in the main proceedings shows, the two aspects are often intimately linked. The supply of telecommunication equipment is sometimes more important than the installation or other services connected therewith. In other circumstances, by contrast, it is the economic activities of providing know-how or other services of the operators concerned which are dominant, whilst delivery of the apparatus, equipment or conditional-access telecommunication systems which they supply or market is only accessory.

33. Accordingly, the question whether the restrictions referred to in paragraph 29 of this judgment are justified must be examined simultaneously in the light of both Article 30 and Article 59 of the Treaty, in order to determine whether the national measure at issue in the main proceedings pursues an objective of public interest and whether it complies with the principle of proportionality, that is to say whether it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35; and *Corsten*, paragraph 39).

34. It is undisputed that informing and protecting consumers, as users of products or services, constitute legitimate grounds of public interest which are in principle capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty. However, in order to determine whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account considerations which include the following.

35. First, it is settled case-law that a system of prior administrative authorisation cannot legitimise discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, particularly those relating to the fundamental freedoms at issue in the main proceedings (Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 90). Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Analir*, paragraph 38).

36. Second, a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State.

37. First, it is well established in case-law that a product which is lawfully marketed in one Member State must in principle be able to be marketed in any other Member State without being subject to additional controls, save in the case of exceptions provided for or allowed by Community law (see, in particular, Case 120/78 *Rewe-Zentral* (' Cassis de Dijon') [1979] ECR 649, paragraph 14, and Case C-123/00 *Bellamy and English Shop Wholesale* [2001] ECR I-2795, paragraph 18).

38. Second, it is incompatible in principle with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; *Arblade*, paragraph 34).

39.

Third, a prior authorisation procedure will be necessary only where a subsequent control is to be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued.

40.

In order to determine whether that is the case, it is necessary to consider, on the one hand, whether it is possible to discover defects in the products and services concerned at the time when the statements made by the operators of conditional-access services are checked, and, on the other hand, the risks and dangers that would result from not discovering those defects until after the products have been marketed or the services supplied to end-users.

41.

Finally, it should be noted that, for as long as it lasts, a prior authorisation procedure completely prevents traders from marketing the products and services concerned. It follows that, in order to comply with the fundamental principles of the free movement of goods and the freedom to provide services, such a procedure must not, on account of its duration, the amount of costs to which it gives rise, or any ambiguity as to the conditions to be fulfilled, be such as to deter the operators concerned from pursuing their business plan.

42.

In that regard, once examination of the conditions for obtaining registration has been carried out and it has been established that those conditions have been satisfied, the requirement to obtain certification for the apparatus, equipment or conditional-access telecommunication systems after that registration procedure must neither delay nor complicate exercise of the right of the undertaking concerned to market those products and related services. Moreover, the requirements of entry on a register and the obtaining of certification, assuming they are justified, must not give rise to disproportionate administrative expenses (*Corsten*, paragraphs 47 and 48).

43.

In the light of all the foregoing considerations above, the answer to the first and second questions must be:

1. National legislation which makes the marketing of apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite and the provision of related services by operators of conditional-access services subject to a prior authorisation procedure restricts both the free movement of goods and the freedom to provide services. Therefore, in order to be justified with regard to those fundamental freedoms, such legislation must pursue a public-interest objective recognised by Community law and comply with the principle of proportionality; that is to say, it must be appropriate to ensure achievement of the aim pursued and not go beyond what is necessary in order to achieve it.

2. In determining whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account the following considerations in particular:

- for a prior administrative authorisation scheme to be justified even though it derogates from those fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;

- a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State;

- a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;

- a prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.

The third question

44.

By its third question, the referring court is asking, first, essentially, whether national legislation which requires operators of conditional-access services to have their name entered in a register and indicate therein the products which they propose to market, and to obtain prior certification for those products, constitutes a ' technical regulation' within the meaning of Article 1, point 9, of Directive 83/189, and, second, whether such national legislation must be notified to the Commission in accordance with that directive.

45.

As regards the first part of that question, the Court has already held that national provisions which merely lay down conditions governing the establishment of undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations within the meaning of Article 1, point 9, of Directive 83/189. Technical regulations within the meaning of that provision are specifications defining the characteristics of products and not specifications concerning economic operators (Case C-194/94 *CIA Security* [1996] ECR I-2201, paragraph 25; Case C-278/99 *Van der Burg* [2001] ECR I-2015, paragraph 20).

46.

However, a national provision must be classified as a technical regulation within the meaning of Article 1, point 9, Directive 83/189 if it requires the undertakings concerned to apply for prior approval of their equipment (*CIA Security*, paragraph 30).

47.

It follows that a national rule which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a ' technical regulation' within the meaning of Article 1, point 9, of Directive 83/189.

48.

As regards the second part of the third question, which relates to the obligation under Article 8 of Directive 83/189 to communicate any draft technical regulation to the Commission, Article 10 of that directive shows that Articles 8 and 9 do not apply to laws, regulations or administrative provisions of Member States, or to voluntary agreements entered into by them, whereby Member States comply with binding Community measures which result in the adoption of technical specifications. So, to the extent that the national legislation at issue in the main proceedings transposes Directive 95/47, and to that extent only, there will be no duty of notification under Directive 83/189.

49.

However, having regard to the content of Directive 95/47 referred to in paragraphs 26 and 27 of this judgment, the national legislation in question, in so far as it establishes a system of prior administrative authorisation, cannot qualify as legislation whereby the Member State complies with a binding Community measure resulting in the adoption of technical specifications.

50.

The answer to the third question must therefore be that national legislation which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a ' technical regulation' within the meaning of Article 1, point 9, of Directive 83/189.

Costs

51.

The costs incurred by the Spanish and Belgian Governments, by the Commission and by the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Supremo by order of 22 September 1999, hereby rules:

1. National legislation which makes the marketing of apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite and the provision of related services by operators of conditional-access services subject to a prior authorisation procedure restricts both the free movement of goods and the freedom to provide services. Therefore, in order to be justified with regard to those fundamental freedoms, such legislation must pursue a public-interest objective recognised by Community law and comply with the principle of proportionality; that is to say, it must be appropriate to ensure achievement of the aim pursued and not go beyond what is necessary in order to achieve it.

2. In determining whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account the following considerations in particular:

- for a prior administrative authorisation scheme to be justified even though it derogates from those fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;

- a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State;

- a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;

- a prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.

3. National legislation which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a ' technical regulation' within the meaning of Article 1, point 9, of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994.

C-309/99: J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten

Judgment of the Court of 19 February 2002.

J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap.

Reference for a preliminary ruling: Raad van State - Netherlands.

Professional body - National Bar - Regulation by the Bar of the exercise of the profession - Prohibition of multi-disciplinary partnerships between members of the Bar and accountants - Article 85 of the EC Treaty (now Article 81 EC) - Association of undertakings - Restriction of competition - Justification - Article 86 of the Treaty (now Article 82 EC) - Undertaking or group of undertakings - Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 and 49 EC) - Applicability - Restrictions - Justification.

Case C-309/99.

JUDGMENT OF THE COURT

19 February 2002(1)

(Professional body - National Bar - Regulation by the Bar of the exercise of the profession - Prohibition of multi-disciplinary partnerships between members of the Bar and accountants - Article 85 of the EC Treaty (now Article 81 EC) - Association of undertakings - Restriction of competition - Justification - Article 86 of the EC Treaty (now Article 82 EC) - Undertaking or group of undertakings - Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) - Applicability - Restrictions - Justification)

In Case C-309/99,

REFERENCE to the Court under Article 234 EC by the Raad van State for a preliminary ruling in the proceedings pending before that court between

J.C.J. Wouters,

J.W. Savelbergh,

Price Waterhouse Belastingadviseurs BV

and

Algemene Raad van de Nederlandse Orde van Advocaten,

intervener:

Raad van de Balies van de Europese Gemeenschap,

on the interpretation of Articles 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), 5 of the EC Treaty (now Article 10 EC), 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric, and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, M. Wathelet (Rapporteur), R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Wouters, by H. Gilliams and M. Wladimiroff, advocaten,

- Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, by D. van Liedekerke and G.J. Kemper, advocaten,

- the Algemene Raad van de Nederlandse Orde van Advocaten, by O.W. Brouwer, F.P. Louis and S.C. van Es, advocaten,

- the Raad van de Balies van de Europese Gemeenschap, by P. Glazener, advocaat,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Danish Government, by J. Molde, acting as Agent,

- the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,

- the French Government, by K. Rispal-Bellanger, R. Loosli-Surrans and F. Million, acting as Agents,

- the Austrian Government, by C. Stix-Hackl, acting as Agent,

- the Portuguese Government, by L. Fernandes, acting as Agent,

- the Swedish Government, by A. Kruse, acting as Agent,

- the Government of the Principality of Liechtenstein, by C. Büchel, acting as Agent,

- the Commission of the European Communities, by W. Wils and B. Mongin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Wouters, represented by H. Gilliams, of Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, represented by D. van Liedekerke and G.J. Kemper, of the Algemene Raad van de Nederlandse Orde van Advocaten, represented by O.W. Brouwer and W. Knibbeler, advocaat, of the Raad van de Balies van de Europese Gemeenschap, represented by P. Glazener, of the Netherlands Government, represented by J.S. van den Oosterkamp, acting as Agent, of the German Government, represented by A. Dittrich, of the French Government, represented by F. Million, of the Luxembourg Government, represented by N. Mackel, acting as Agent, assisted by J. Welter, avocat, of the Swedish Government, represented by I. Simfors, acting as Agent, and of the Commission, represented by W. Wils, at the hearing on 12 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2001,

gives the following

Judgment

1.
By judgment of 10 August 1999, received at the Court on 13 August 1999, the Raad van State (Netherlands Council of State) referred to the Court for a preliminary ruling under Article 234 EC nine questions on the interpretation of Articles 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), 5 of the EC Treaty (now Article 10 EC), 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC), and 85, 86 and 90 of the EC Treaty (now Articles 81 EC, 82 EC and 86 EC).

2.

Those questions were raised in proceedings brought by members of the Bar, among others, against the refusal of the Arrondissementsrechtbank te Amsterdam (Amsterdam District Court, ' the Rechtbank') to set aside the decisions of the Nederlandse Orde van Advocaten (Bar of the Netherlands) refusing to set aside the decisions of the Supervisory Boards of the Amsterdam and Rotterdam Bars prohibiting them from practising as members of the Bar in full partnership with accountants.

The relevant national legislation

3.

Article 134 of the Constitution of the Kingdom of the Netherlands deals with the establishment of, and the legal rules governing, public bodies. It provides that:

' (1) Public professional bodies and other public bodies may be established and dissolved by or under statute.

(2) The duties and organisation of such public bodies, the composition and powers of the governing bodies and public access to their meetings shall be governed by statute. Powers to adopt regulations may be granted to the governing bodies by or under statute.

(3) Supervision of the governing bodies shall be governed by statute. Their decisions may be annulled only where they are contrary to law or to the public interest.'

The Advocatenwet

4.

Pursuant to that provision, a law was adopted on 23 June 1952 establishing the Bar of the Netherlands and laying down the internal regulations and the disciplinary rules applicable to ' advocaten' and ' procureurs' (' the Advocatenwet' , the Law on the Bar).

5.

Article 17 of the Advocatenwet provides that:

' (1) The Bar of the Netherlands, based in The Hague, shall be composed of all members of the Bar registered in the Netherlands and shall be a public body within the meaning of Article 134 of the Constitution.

(2) All members of the Bar registered with the same court shall form the Bar of the district concerned.'

6.

Articles 18(1) and 22(1) of the Advocatenwet provide that the governing bodies of the Bar of the Netherlands and the District Bars are to be the Algemene Raad van de Nederlandse Orde van Advocaten (General Council of the Bar of the Netherlands, ' the General Council') and the Raden van Toezicht van de Orden in de Arrondissementen (Supervisory Boards of the District Bars, the ' Supervisory Boards') respectively.

7.

Articles 19 and 20 of the Advocatenwet regulate the election of the members of the General Council. They are elected by the College van Afgevaardigen (College of Delegates), who are themselves elected at meetings of the various District Bars.

8.

Article 26 of the Advocatenwet states that:

' [T]he General Council and the Supervisory Boards shall ensure the proper practice of the profession and have the power to adopt any measures which may contribute to that end. They shall defend the rights and interests of members of the Bar as such, ensure that the obligations of the latter are fulfilled and discharge the duties imposed on them by regulation.'

9.

Article 28 of the Advocatenwet provides:

‘ (1) The College of Delegates may adopt regulations in the interests of the proper practice of the profession, including regulations concerning provision for members of the Bar affected by old age or total or partial incapacity for work, and provision for the next-of-kin of deceased members. Furthermore, the College shall adopt the necessary regulations concerning the administration and organisation of the Bar.

(2) Draft regulations shall be submitted to the College of Delegates by the General Council or by at least five delegates. The General Council may invite the Supervisory Boards to state their views on a draft regulation before submitting it to the delegates.

(3) As soon as they have been adopted, regulations shall be communicated to the Ministry of Justice and published in the Official Gazette.’

10.
Article 29 of the Advocatenwet states that:

‘ (1) Regulations shall be binding on the members of the Bar of the Netherlands and on visiting lawyers …

(2) They may not contain any provision relating to matters governed by or under statute, nor may they concern matters which, on account of the differing situations in each district, do not lend themselves to uniform regulation.

(3) Any provision in a regulation which applies to a matter governed by or under statute shall by operation of law cease to be valid.

11.
According to Article 16b and 16c of the Advocatenwet, the term ‘ visiting lawyers’ means persons who are not registered as members of the Bar in the Netherlands but who are authorised to carry on their professional activity in another Member State of the European Union under the title of advocate or an equivalent title.
12.
Article 30 of the Advocatenwet provides:

‘ (1) Decisions adopted by the College of Delegates, the General Council or any other organs of the Bar of the Netherlands may be suspended or annulled by royal decree in so far as they are contrary to law or to the public interest.

(2) Such suspension or annulment shall be effected within six months of the communication referred to in Article 28(3) or, where the decision was adopted by the General Council or another body of the Bar of the Netherlands, within six months of its notification to the Minister for Justice, by reasoned decree prescribing, where relevant, the duration of the suspension.

(3) Suspension shall immediately cause the effects of the suspended provisions to lapse. The duration of the suspension may not be greater than one year, even after extension.

(4) If the suspended decision is not annulled by royal decree within the period prescribed it shall be deemed to be valid.

(5) Annulment shall entail annulment of all annullable effects of the annulled provisions, save as otherwise decided by royal decree.’

The Samenwerkingsverordening 1993

13.
Pursuant to Article 28 of the Advocatenwet, the College of Delegates adopted the Samenwerkingsverordening 1993 (Regulation on Joint Professional Activity 1993, ‘ the 1993 Regulation’).
14.

Article 1 of the 1993 Regulation defines ‘ professional partnership’ (samenwerkingsverband) as being ‘ any joint activity in which the participants practise their respective professions for their joint account and at their joint risk or by sharing control or final responsibility for that purpose’ .

15.

Article 2 of the 1993 Regulation provides:

‘ (1) Members of the Bar shall not be authorised to assume or maintain any obligations which might jeopardise the free and independent exercise of their profession, including the partisan defence of clients' interests and the corresponding relationship of trust between lawyer and client.

(2) The provision contained in subparagraph (1) shall also apply where members of the Bar do not work in professional partnership with colleagues or third parties.’

16.

Under Article 3 of the 1993 Regulation:

‘ Members of the Bar shall not be authorised to enter into or maintain any professional partnership unless the primary purpose of each partner's respective profession is the practice of the law.’

17.

Article 4 of the 1993 Regulation provides:

‘ Members of the Bar may enter into or maintain professional partnerships only with:

(a) other members of the Bar registered in the Netherlands;

(b) other lawyers not registered in the Netherlands, if the conditions laid down in Article 5 are satisfied;

(c) members of another professional category accredited for that purpose by the General Council in accordance with Article 6.’

18.

According to Article 6 of the 1993 Regulation:

‘ (1) The authorisation referred to in Article 4(c) may be granted on condition that:

(a) the members of that other professional category practise a profession, and

(b) the exercise of that profession is conditional upon possession of a university degree or an equivalent qualification; and

(c) the members of that professional category are subject to disciplinary rules comparable to those imposed on members of the Bar; and

(d) entering into partnership with members of that other professional partnership is not contrary to Articles 2 or 3.

(2) Accreditation may also be granted to a specific branch of a professional category. In that case, the conditions set out in (a) to (d) above shall be applicable, without prejudice to the General Council's power to lay down further conditions.

(3) The General Council shall consult the College of Delegates before adopting any decision as mentioned in the preceding subparagraphs of this Article.’

19.

Article 7(1) of the 1993 Regulation provides:

‘ In their communications with other persons members of the Bar shall avoid giving any inaccurate, misleading or incomplete impression as to the nature of any form of joint activity in which they participate, including any professional partnership.’

20.
In accordance with Article 8 of the 1993 Regulation:

‘ (1) Every professional partnership must have a collective name for all communications with other persons.

(2) The collective name must not be misleading.

(3) Members of the Bar who are members of professional partnerships shall be required to supply, on request, a list of the partners' names, their respective professions and place of establishment.

(4) Any written document produced by a professional partnership must include the name, status and place of establishment of the person who signs the document.’

21.
Finally, Article 9(2) of the 1993 Regulation provides:

‘ Members of the Bar shall not set up, or alter the constitution, of a professional partnership until the Supervisory Board has decided whether the conditions on which that partnership is formed or its constitution is altered, including the way in which it presents itself to other parties, satisfy the requirements imposed by or under this Regulation.’

22.
According to the recitals of the 1993 Regulation, members of the Bar have already been authorised to enter into partnership with notaries, tax consultants and patent agents and authorisation for those three professional categories remains valid. On the other hand, accountants are mentioned as an example of a professional category with which members of the Bar are not authorised to enter into partnership.

The directives concerning professional partnerships between members of the Bar and other (authorised) practitioners

23.
In addition to the 1993 Regulation, the Bar of the Netherlands has adopted directives concerning professional partnerships between members of the Bar and other (accredited) practitioners. Those directives are worded as follows:

‘ 1. Compliance with the rules of ethics and professional conduct

Rule No 1

Members of the Bar may not, as a result of participating in a professional partnership with a practitioner of another profession, limit or compromise compliance with the rules of ethics and professional practice applicable to them.

2. Separate files and separate management of files and archives

Rule No 2

Members of the Bar participating in a professional partnership with a practitioner of another profession are required, in respect of every case in which they act with that other practitioner, to open a separate file and to ensure, in relation to the professional partnership as such:

- that the management of the case file is kept separate from financial management;

- that files are kept in separate archives from those of practitioners of other professions.

3. Conflicts of interest

Rule No 3

Members of the Bar participating in a professional partnership with a practitioner of another profession may not defend the interests of a party where those interests are in conflict with those of

a party who has been, or is being, assisted by that other practitioner or where there is a risk that such a conflict of interests may arise.

4. Professional secrecy and registration of documents

Rule No 4

Members of the Bar participating in a professional partnership with a practitioner of another profession are required, in respect of every case in which they act with that other practitioner, to keep an accurate register of all letters and documents which they bring to the attention of the practitioner of the other profession.'

The disputes in the main proceedings

24.
Mr Wouters, a member of the Amsterdam Bar, became a partner in the partnership Arthur Andersen & Co. Belastingadviseurs (tax consultants) in 1991. Late in 1994 Mr Wouters informed the Supervisory Board of the Rotterdam Bar of his intention to enrol at the Rotterdam Bar and to practise in that city under the name of ' Arthur Andersen & Co., advocaten en belastingadviseurs' .
25.
By decision of 27 July 1995, that Supervisory Board found that the members of the partnership Arthur Andersen & Co. Belastingadviseurs were in professional partnership, within the meaning of the 1993 Regulation, with the members of the partnership Arthur Andersen & Co. Accountants, that is to say with members of the profession of accountants. Accordingly, Mr Wouters was in breach of Article 4 of the 1993 Regulation. In addition, the Supervisory Board considered that Mr Wouters would contravene Article 8 of the 1993 Regulation if he entered into a partnership the collective name of which included the name of the natural person ' Arthur Andersen' .
26.
By decision of 29 November 1995 the General Council dismissed as unfounded the administrative appeals brought by Mr Wouters, Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants against the decision of 27 July 1995.
27.
At the beginning of 1995 Mr Savelbergh, a member of the Amsterdam Bar, informed the Supervisory Board of the Amsterdam Bar of his intention to enter into partnership with the private company Price Waterhouse Belastingadviseurs BV, a subsidiary of the international undertaking Price Waterhouse, which includes both tax consultants and accountants.
28.
By decision of 5 July 1995 the Supervisory Board declared that the proposed partnership was contrary to Article 4 of the 1993 Regulation.
29.
By decision of 21 November 1995, the General Council dismissed the administrative appeal brought by Mr Savelbergh and Price Waterhouse Belastingadviseurs BV against that decision.
30.
Mr Wouters, Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants, on the one hand, and Mr Savelbergh and Price Waterhouse Belastingadviseurs BV, on the other, then appealed to the Rechtbank. They claimed, *inter alia*, that the decisions of the General Council of 21 and 29 November 1995 were incompatible with the Treaty provisions on competition, right of establishment and freedom to provide services.
31.
By judgment of 7 February 1997 the Rechtbank declared inadmissible the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants, and dismissed as unfounded those brought by Mr Wouters, Mr Savelbergh and Price Waterhouse Belastingadviseurs BV.
32.
The Rechtbank considered that the Treaty provisions on competition did not apply to the cases. It pointed out that the Bar of the Netherlands is a body governed by public law, established by statute in

order to further a public interest. For that purpose it makes use of the regulatory power conferred on it by Article 28 of the Advocatenwet. The Bar of the Netherlands is required to guarantee, in the public interest, the independence and loyalty to the client of members of the Bar who provide legal assistance. In the Rechtbank's view, the Bar of the Netherlands is not, therefore, an association of undertakings within the meaning of Article 85 of the Treaty, nor can it be regarded either as an undertaking or as an association of undertakings occupying a collective dominant position contrary to Article 86 of the Treaty.

33. Furthermore, according to the Rechtbank, Article 28 of the Advocatenwet does not transfer any powers to private operators in such a manner as to undermine the effectiveness of Articles 85 and 86 of the Treaty. As a result, that provision is not incompatible with the second paragraph of Article 5 of the Treaty, read in conjunction with Articles 3(g), 85 and 86 of the Treaty.

34. The Rechtbank also rejected the appellants' argument that the 1993 Regulation is incompatible with the right of establishment and the freedom to provide services enshrined in Articles 52 and 59 of the Treaty. In its view, there is no cross-border element in the cases in point, so that those provisions are not applicable. In any event, the prohibition on partnerships of members of the Bar and accountants is justified by overriding reasons relating to the public interest and is not disproportionately restrictive. In the absence of specific Community provisions in that field, it is open to the Kingdom of the Netherlands to make the exercise of the legal profession on its territory subject to rules intended to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance.

35. The five appellants appealed against the decision of the Rechtbank to the Raad van State.

36. The Raad van de Balies van de Europese Gemeenschap (the Council of the Bars and Law Societies of the European Community, ' the CCBE'), an association established under Belgian law, was granted leave to intervene in support of the forms of order sought by the General Council.

37. By judgment given on 10 August 1999, the Raad van State confirmed that the appeals brought by Arthur Andersen & Co. Belastingadviseurs and Arthur Andersen & Co. Accountants were inadmissible. As regards the other appeals, it considered that the outcome of the dispute in the main proceedings depended on the interpretation of several provisions of Community law.

38. The Raad van State questions, first, whether by adopting the 1993 Regulation under its powers pursuant to Article 28 of the Advocatenwet, the College of Delegates has infringed Articles 85 and 86 of the Treaty and, second, whether by empowering that College under Article 28 of the Advocatenwet to adopt regulations, the national legislature has infringed Articles 5, 85 and 86 of the Treaty. In addition, it enquires whether the Regulation is compatible with the right of establishment laid down in Article 52 of the Treaty and with the freedom to provide services in Article 59 of the Treaty.

39. Consequently, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

' 1 (a) Is the term " association of undertakings" in Article 85(1) of the EC Treaty (now Article 81(1) EC) to be interpreted as meaning that there is such an association only if and in so far as it acts in the undertakings' interest, so that in applying that provision a distinction must be drawn between activities of the association carried out in the public interest and other activities, or is the mere fact that an association can also act in the undertakings' interest sufficient for it to be regarded as an association of undertakings within the meaning of the provision in respect of all its actions? Is the fact that the universally binding rules adopted by the relevant institution are adopted under a statutory power and in its capacity as a special legislature relevant as regards the application of Community competition law?

(b) If the answer to Question 1(a) is that there is an association of undertakings only if and in so far as it acts in the undertakings' interest, is the question of when the public interest is being pursued also governed by Community law?

(c) If the answer to Question 1(b) is that Community law is relevant, can the adoption under a statutory power by an institution such as the Bar of the Netherlands of universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships between members of the Bar and members of other professions be regarded for the purposes of Community law as pursuing the public interest?

2. If the answers to the first question indicate that a rule such as [the 1993 Regulation] is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81(1) EC), is such a decision, in so far as it adopts universally binding rules, designed to safeguard the independence and loyalty to the client of members of the Bar who provide legal assistance, on the formation of multi-disciplinary partnerships such as the one in question to be regarded as having as its object or effect the restriction of competition within the common market and in that respect affecting trade between the Member States? What criteria of Community law are relevant to the determination of that issue?

3. Is the term " undertaking" in Article 86 of the EC Treaty (now Article 82 EC) to be interpreted as meaning that where an institution such as the Bar of the Netherlands must be regarded as an association of undertakings, that institution must also be considered to be an undertaking or group of undertakings for the purposes of that provision, even though it pursues no economic activity itself?

4. If the previous question is answered in the affirmative and it must be held that an institution such as the Bar of the Netherlands enjoys a dominant position, does such an institution abuse that position if it regulates the relationships between its members and others on the market in legal services in a manner which restricts competition?

5. If an institution such as the Bar of the Netherlands is to be regarded in its entirety as an association of undertakings for the purposes of Community competition law, is Article 90(2) of the EC Treaty (now Article 86(2) EC) to be interpreted as extending to an institution such as the Bar of the Netherlands which lays down universally binding rules, designed to safeguard the independence and loyalty to the client of its members who provide legal assistance, on cooperation between its members and members of other professions?

6. If an institution such as the Bar of the Netherlands is to be regarded as an association of undertakings or an undertaking or group of undertakings, do Article 3(g) (now, after amendment, Article 3(1)(g) EC), the second paragraph of Article 5 and Articles 85 and 86 of the EC Treaty (now Articles 10 EC, 81 EC and 82 EC) preclude a Member State from providing that that institution (or one of its agencies) may adopt rules concerning *inter alia* cooperation between its members and members of other professions when review by the relevant public authority of such rules is limited to the power to annul such a rule without the authority's being able to adopt a rule in its stead?

7. Are both the Treaty provisions on the right of establishment and those on the freedom to provide services applicable to a prohibition on cooperation between members of the Bar and accountants such as that in question, or is the EC Treaty to be interpreted as meaning that such a prohibition must comply, depending for example on the way in which those concerned actually wish to model their cooperation, with either the provisions on the right of establishment or with those relating to the freedom to provide services?

8. Does a prohibition on multi-disciplinary partnerships including members of the Bar and accountants such as the one in question constitute a restriction of the right of establishment or the freedom to provide services, or both?

9. If it follows from the answer to the previous question that one or both of the abovementioned restrictions exists, is the restriction in question justified on the ground that it constitutes merely a " selling arrangement" within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, and that therefore there is no discrimination, or on the ground that it satisfies the criteria that have been developed in that respect by the Court of Justice in other judgments, in particular Case C-55/94 *Gebhard* [1995] ECR I-4165?'

Request for reopening of the oral procedure

40.

By document lodged at the Court Registry on 3 December 2001, the appellants in the main proceedings requested the Court to order the reopening of the oral procedure pursuant to Article 61 of the Rules of Procedure.

41.

In support of that request, the appellants in the main proceedings claim that in paragraphs 170 to 201 of his Opinion, delivered on 10 July 2001, the Advocate General gave his opinion on a question which had not been expressly raised by the national court.

42.

The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18).

43.

In the circumstances of this case, however, the Court, after hearing the Advocate General, considers that it is in possession of all the facts necessary for it to answer the questions referred by the national court and observes that those facts were the subject of argument presented to it at the hearing.

Question 1(a)

44.

By Question 1(a) the national court is in substance asking whether a regulation concerning partnerships between members of the Bar and other professionals, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, is to be regarded as a decision taken by an association of undertakings within the meaning of Article 85(1) of the Treaty. It seeks in particular to ascertain whether the fact that power was conferred by statute on the Bar of the Netherlands to adopt rules universally binding both on registered members of the Bar in the Netherlands and lawyers who are authorised to practise in other Member States and come to the Netherlands in order to provide services there has any bearing on the application of Community competition law. It also asks whether the mere fact that the Bar of the Netherlands may act in the interests of its members is sufficient for it to be regarded as an association of undertakings in respect of all its activities or whether, for Article 85(1) of the Treaty to be applicable, special treatment must be reserved for the Bar's public-interest activities.

45.

In order to establish whether a regulation such as the 1993 Regulation is to be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty, the first matter to be considered is whether members of the Bar are undertakings for the purposes of Community competition law.

46.

According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, ' *Job Centre II*' , paragraph 21).

47.

It is also settled case-law that any activity consisting of offering goods and services on a given market is

an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, ' *CNSD*' , paragraph 36).

48.

Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.

49.

That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, to that effect, with regard to medical practitioners, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 77).

50.

The second point to be considered is the extent to which a professional body such as the Bar of the Netherlands is to be regarded as an association of undertakings, within the meaning of Article 85(1) of the Treaty, where it adopts a regulation such as the 1993 Regulation (see, to that effect, with regard to a professional body of customs agents, *CNSD*, paragraph 39).

51.

The respondent in the main proceedings claims that, inasmuch as the Netherlands legislature created the Bar of the Netherlands as a body governed by public law and gave it regulatory powers in order to perform a task in the public interest, the Bar cannot be regarded as an association of undertakings within the meaning of Article 85 of the Treaty, particularly in connection with the exercise of its regulatory powers.

52.

The intervener in the main proceedings and the German, Austrian and Portuguese Governments add that a body such as the Bar of the Netherlands exercises public authority and cannot, in consequence, fall within the scope of Article 85(1) of the Treaty.

53.

According to the intervener in the main proceedings, a body may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State. The Netherlands have made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State.

54.

The German Government, for its part, points out that it is for the competent legislative bodies of a Member State to decide, within the framework of national sovereignty, how they organise the exercise of their rights and powers. Delegation of the power to adopt universally binding rules to a body possessing democratic legitimacy, such as a professional body, falls within the limits of that principle of institutional autonomy.

55.

According to the German Government, were bodies entrusted with such regulatory duties to be treated as associations of undertakings within the meaning of Article 85 of the Treaty, this would frustrate the operation of that principle. The idea that national legislation is valid only if it is exempted by the Commission pursuant to Article 85(3) of the Treaty is a contradiction in terms. The consequence would be that the whole corpus of professional regulations would be called in question.

56.

The question to be determined is whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings or, on the contrary, as a public authority.

57.

According to the case-law of the Court, the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity

(see, to that effect, Joined Cases C-159/91, C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 18 and 19, concerning the management of the public social security system), or which is connected with the exercise of the powers of a public authority (see, to that effect, Case C-364/92 *Sat Fluggesellschaft* [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paragraphs 22 and 23, concerning anti-pollution surveillance of the maritime environment).

58.

When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (*Poucet and Pistre*, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (*Sat Fluggesellschaft*, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

59.

In that respect, the fact that Article 26 of the Advocatenwet also entrusts the General Council with the task of protecting the rights and interests of members of the Bar cannot *a priori* exclude that professional organisation from the scope of application of Article 85 of the Treaty, even where it performs its role of regulating the practice of the profession of the Bar (see, to that effect, with regard to medical practitioners, *Pavlov*, cited above, paragraph 86).

60.

Next, other indications support the conclusion that a professional organisation with regulatory powers, such as the Bar of the Netherlands, cannot escape the application of Article 85 of the Treaty.

61.

First, it is clear from the Advocatenwet that the governing bodies of the Bar are composed exclusively of members of the Bar elected solely by members of the profession. The national authorities may not intervene in the appointment of the members of the Supervisory Boards, College of Delegates or the General Council (see, as regards a professional organisation of customs agents, *CNSD*, cited above, paragraph 42, and as regards a professional organisation of medical practitioners, *Pavlov*, paragraph 88).

62.

Second, when it adopts measures such as the 1993 Regulation, the Bar of the Netherlands is not required to do so by reference to specified public-interest criteria. Article 28 of the Advocatenwet, which authorises it to adopt regulations, does no more than require that they should be in the interest of the ' proper practice of the profession' (see, as regards a professional organisation of customs agents, ' *CNSD*' , paragraph 43).

63.

Lastly, having regard to its influence on the conduct of the members of the Bar of the Netherlands on the market in legal services, as a result of its prohibition of certain multi-disciplinary partnerships, the 1993 Regulation does not fall outside the sphere of economic activity.

64.

In light of the foregoing considerations, it appears that a professional organisation such as the Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 85(1) of the Treaty where it adopts a regulation such as the 1993 Regulation. Such a regulation constitutes the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity.

65.

It is, moreover, immaterial that the constitution of the Bar of the Netherlands is regulated by public law.

66.

According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned (Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 17, and *CNSD*, paragraph 40).

67.

That interpretation of Article 85(1) of the Treaty does not entail any breach of the principle of institutional autonomy as argued by the German Government (see paragraphs 54 and 55 above). On this point a distinction must be drawn between two approaches.

68.

The first is that a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

69.

The second approach is that the rules adopted by the professional association are attributable to it alone. Certainly, in so far as Article 85(1) of the Treaty applies, the association must notify those rules to the Commission. That obligation is not, however, such as unduly to paralyse the regulatory activity of professional associations, as the German Government submits, since it is always open to the Commission *inter alia* to issue a block exemption regulation pursuant to Article 85(3) of the Treaty.

70.

The fact that the two systems described in paragraphs 68 and 69 above produce different results with respect to Community law in no way circumscribes the freedom of the Member States to choose one in preference to the other.

71.

In light of the foregoing considerations, the answer to be given to Question 1(a) must be that a regulation concerning partnerships between members of the Bar and other members of liberal professions, such as the 1993 Regulation, adopted by a body such as the Bar of the Netherlands, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty.

Question 1(b) and (c)

72.

Having regard to the answer given to Question 1(a), there is no need to consider Question 1(b) and (c).

Question 2

73.

By its second question the national court seeks, essentially, to ascertain whether a regulation such as the 1993 Regulation which, in order to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance in conjunction with members of other liberal professions, adopts universally binding rules governing the formation of multi-disciplinary partnerships, has the object or effect of restricting competition within the common market and is likely to affect trade between Member States.

74.

By describing the successive versions of the rules on partnerships, the appellants in the main proceedings have set out to establish that the 1993 Regulation had the object of restricting competition.

75.

Initially, the Samenwerkingsverordening 1972 (' the 1972 Regulation') authorised members of the Bar to enter into multi-disciplinary partnerships subject to three conditions. First, the partners had to be members of other liberal professions with a university education or education of an equivalent standard. Next, they had to belong to an association or group the members of which were subject to disciplinary rules comparable to those applicable to members of the Bar. Finally, the proportion of members of the Bar belonging to that professional partnership and the size of their contributions to it had to be at least equivalent to that of the partners belonging to other professions, so far as both mutual relations between the partners and their relations with third parties were concerned.

76.

In 1973 the General Council accredited the members of both the Netherlands association of patent agents and of the Netherlands association of tax consultants for the purposes of creating multi-

disciplinary professional partnerships with members of the Bar. Subsequently, notaries were also accredited. According to the appellants in the main proceedings, although, at the material time, members of the Netherlands institute of accountants were not formally accredited by the General Council, there was in principle no objection to this.

77.

In 1991, faced for the first time with a request for authorisation of a partnership with an accountant, the Bar of the Netherlands, following an expedited procedure, amended the 1972 Regulation for the sole purpose, according to the appellants, of having a legal basis on which to prohibit professional partnerships between members of the Bar and accountants. Members of the Bar were thenceforth authorised to enter into multi-disciplinary partnerships only where ' the free and independent exercise of their profession, including the defence of their clients' interests, and the corresponding relationship of trust between lawyer and client cannot be jeopardised' .

78.

The refusal to authorise partnerships between members of the Bar and accountants is, in the appellants' submission, based on the finding that firms of accountants had evolved and had in the meantime become gigantic organisations, so that a partnership of a law-firm with a firm of accountants would, as the then Algemene Deken (General Dean) of the Bar expressed it, have more resembled ' the marriage of a mouse and an elephant than a union of partners of equal stature' .

79.

The Bar of the Netherlands then adopted the 1993 Regulation. That measure recapitulated the amendment made in 1991 and added a further requirement to the effect that members of the Bar were no longer authorised to form part of a professional partnership ' unless the primary purpose of each partner's respective profession is the practice of the law' (Article 3 of the 1993 Regulation), which, in the appellants' submission, demonstrates the anticompetitive object of the national rules at issue in the main proceedings.

80.

In the alternative, the appellants in the main proceedings claim that, irrespective of its object, the 1993 Regulation produces effects that are restrictive of competition.

81.

They maintain that multi-disciplinary partnerships of members of the Bar and accountants would make it possible to respond better to the needs of clients operating in an ever more complex and international economic environment.

82.

Members of the Bar, having a reputation as experts in many fields, would be best placed to offer their clients a wide range of legal services and would, as partners in a multi-disciplinary partnership, be especially attractive to other persons active on the market in legal services.

83.

Conversely, accountants would be attractive partners for members of the Bar in a professional partnership. They are experts in fields such as legislation on company accounts, the tax system, the organisation and restructuring of undertakings, and management consultancy. There would be many clients interested in an integrated service, supplied by a single provider and covering the legal as well as financial, tax and accountancy aspects of a particular matter.

84.

The prohibition at issue in the main proceedings prohibits all contractual arrangements between members of the Bar and accountants which provide in any way for shared decision-making, profit-sharing or for the use of a common name, and this makes any form of effective partnership difficult.

85.

By contrast, the Luxembourg Government claimed at the hearing that a prohibition of multi-disciplinary partnerships such as that laid down in the 1993 Regulation had a positive effect on competition. It pointed out that, by forbidding members of the Bar to enter into partnership with accountants, the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market.

86.

It appears to the Court that the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States.

87.

As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the ' one-stop shop' advantage).

88.

Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

89.

Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

90.

A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty.

91.

It is true that the accountancy market is highly concentrated, to the extent that the firms dominating it are at present known as ' the big five' and the proposed merger between two of them, Price Waterhouse and Coopers & Lybrand, gave rise to Commission Decision 1999/152/EC of 20 May 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.1016 - Price Waterhouse/Coopers & Lybrand) (OJ 1999 L 50, p. 27), adopted pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

92.

On the other hand, the prohibition of conflicts of interest with which members of the Bar in all Member States are required to comply may constitute a structural limit to extensive concentration of law-firms and so reduce their opportunities of benefiting from economies of scale or of entering into structural associations with practitioners of highly concentrated professions.

93.

In those circumstances, unreserved and unlimited authorisation of multi-disciplinary partnerships between the legal profession, the generally decentralised nature of which is closely linked to some of its fundamental features, and a profession as concentrated as accountancy, could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market.

94.

Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules such as the 1993 Regulation, which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition.

95.

As regards the question whether intra-Community trade is affected, it is sufficient to observe that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29; Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22; and *CNSD*, paragraph 48).

96.

That effect is all the more appreciable in the present case because the 1993 Regulation applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States.

97.

However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98.

Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

99.

As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83 *Klopp* [1984] ECR 2971, paragraph 17, and *Reisebüro*, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.

100.

The current approach of the Netherlands, where Article 28 of the Advocatenwet entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.

101.

Those obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions which are active on that market.

102.

Thus, they require of members of the Bar that they should be in a situation of independence *vis-à-vis* the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103.

By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

104.

As the Advocate General has rightly pointed out in paragraphs 185 and 186 of his Opinion, there may be a degree of incompatibility between the ' advisory' activities carried out by a member of the Bar and the ' supervisory' activities carried out by an accountant. The written observations submitted by the respondent in the main proceedings show that accountants in the Netherlands perform a task of certification of accounts. They undertake an objective examination and audit of their clients' accounts, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those accounts. It follows that in the Member State concerned accountants are not bound by a rule of professional secrecy comparable to that of members of the Bar, unlike the position under German law, for

example.
105.
The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.
106.
Moreover, the concurrent pursuit of the activities of statutory auditor and of adviser, in particular legal adviser, also raises questions within the accountancy profession itself, as may be seen from the Commission Green Paper 96/C/321/01 ' The role, the position and the liability of the statutory auditor within the European Union' (OJ 1996 C 321, p. 1; see, in particular, paragraphs 4.12 to 4.14).
107.
A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.
108.
Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, *Reisebüro*, paragraph 41).
109.
In light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession (see, to that effect, Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 35).
110.
Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

Question 3

111.
By its third question the national court is asking, essentially, whether a body such as the Bar of the Netherlands is to be treated as an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.
112.
First, since it does not carry on any economic activity, the Bar of the Netherlands is not an undertaking within the meaning of Article 86 of the Treaty.
113.
Second, it cannot be categorised as a group of undertakings for the purposes of that provision, inasmuch as registered members of the Bar of the Netherlands are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated (Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraphs 33 and 34).
114.

The legal profession is not concentrated to any significant degree. It is highly heterogenous and is characterised by a high degree of internal competition. In the absence of sufficient structural links between them, members of the Bar cannot be regarded as occupying a collective dominant position for the purposes of Article 86 of the Treaty (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 227, and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 36 and 42). Furthermore, as is clear from the documents before the Court, members of the Bar account for only 60% of turnover in the legal services sector in the Netherlands, a market share which, having regard to the large number of law firms, cannot of itself constitute conclusive evidence of the existence of a collective dominant position on the part of those undertakings (see, to that effect, *France and Others* v *Commission*, paragraph 226, and *Compagnie maritime belge*, paragraph 42).

115.

In light of the foregoing considerations, the answer to be given to the third question must be that a body such as the Bar of the Netherlands does not constitute either an undertaking or group of undertakings for the purposes of Article 86 of the Treaty.

Question 4

116.

Having regard to the answer given to the third question, there is no need to consider the fourth question.

Question 5

117.

Having regard to the answer given to the second question, there is no need to consider the fifth question.

Question 6

118.

Having regard to the answers given to the second and third questions, there is no need to consider the sixth question.

Questions 7, 8 and 9

119.

By its seventh question, the national court seeks, essentially, to ascertain whether the compatibility with Community law of a prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, must be assessed in light of both the Treaty provisions relating to the right of establishment and those relating to freedom to provide services. By its eighth and ninth questions, that court is asking, essentially, whether such a prohibition constitutes a restriction of the right of establishment and/or freedom to provide services and, if so, whether that restriction is justified.

120.

It should be observed at the outset that compliance with Articles 52 and 59 of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17, 23 and 24; Case 13/76 *Donà* [1976] ECR 1333, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 32).

121.

In those circumstances, the Court may be called upon to determine whether the Treaty provisions concerning the right of establishment and freedom to provide services are applicable to a regulation such as the 1993 Regulation.

122.

On the assumption that the provisions concerning the right of establishment and/or freedom to provide services are applicable to a prohibition of any multi-disciplinary partnerships between members of the Bar and accountants such as that laid down in the 1993 Regulation and that that regulation constitutes a restriction on one or both of those freedoms, that restriction would in any event appear to be justified for the reasons set out in paragraphs 97 to 109 above.

123.

The answer to be given to the seventh, eighth and ninth questions must therefore be that it is not contrary to Articles 52 and 59 of the Treaty for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnership between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

Costs

124.

The costs incurred by the Netherlands, Danish, German, French, Luxembourg, Austrian, Portuguese and Swedish Governments, by the Government of the Principality of Liechtenstein 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 actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Raad van State by judgment of 10 August 1999, hereby rules:

1. A regulation concerning partnerships between members of the Bar and other professionals, such as the Samenwerkingsverordening 1993 (1993 regulation on joint professional activity), adopted by a body such as the Nederlandse Orde van Advocaten (the Bar of the Netherlands), is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 81 EC).

2. A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

3. A body such as the Bar of the Netherlands does not constitute either an undertaking or a group of undertakings for the purposes of Article 86 of the EC Treaty (now Article 82 EC).

4. It is not contrary to Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnerships between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

Case T-193/02: Laurent Piau v Commission of the European Communities

Judgment of the Court of First Instance (Fourth Chamber) of 26 January 2005.
Laurent Piau v Commission of the European Communities.

Fédération Internationale de Football Association (FIFA) Players' Agents Regulations - Decision by an association of undertakings - Articles 49 EC, 81 EC and 82 EC - Complaint -No Community interest - Rejection.

Case T-193/02.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

26 January 2005 (*)

(Fédération internationale de football association (FIFA) Players' Agents Regulations – Decision by an association of undertakings – Articles 49 EC, 81 EC and 82 EC – Complaint –No Community interest – Rejection)

In Case T-193/02,

Laurent Piau, residing in Nantes (France), represented by M. Fauconnet, lawyer,

applicant,

v

Commission of the European Communities, represented by O. Beynet and A. Bouquet, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Fédération internationale de football association (FIFA), established in Zurich (Switzerland), represented by F. Louis and A. Vallery, lawyers,

intervener,

APPLICATION for annulment of the Commission's decision of 15 April 2002 rejecting the complaint lodged by the applicant concerning the Fédération internationale de football association (FIFA) Players' Agents Regulations,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, V. Tiili and M. Vilaras, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 22 April 2004,

gives the following

Judgment

Background to the dispute

1 The Fédération internationale de football association (FIFA) is an association governed by Swiss law founded on 21 May 1904. Under its statutes, in the version which entered into force on 7 October 2001, its members are national associations (Article 1), which are groupings of football clubs classified as amateur or professional, the latter having specific associations known as 'professional leagues'. National associations may also form confederations (Article 9). Players in national associations affiliated to FIFA are either amateur or non-amateur (Article 61).

2 Under its statutes, FIFA's objects are to promote football, to foster friendly relations among national associations, confederations, clubs and players, and to draw up and monitor regulations and methods concerning the laws of the game and the practice of football (Article 2).

3 FIFA's statutes, regulations and decisions are binding on its members (Article 4). FIFA has legislative, executive and administrative bodies, namely the Congress, the Executive Committee and the general secretariat, as well as standing and ad hoc committees (Article 10). FIFA's 'judicial' bodies are the Disciplinary Committee and the Appeal Committee (Article 43). The Arbitration Tribunal for Football, initially envisaged as the sole mandatory body for the settlement of disputes exceeding a value fixed by the Congress (Article 63), has not been set up. Under an agreement between FIFA and the International Council of Arbitration for Sport, the jurisdiction of the Arbitration Tribunal for Football is exercised by the Court of Arbitration for Sport, a body set up by the International Olympic Committee with its seat in Lausanne (Switzerland), which rules on the basis of FIFA rules, the Code of Sports-related Arbitration and, additionally, Swiss law. Actions for annulment may be lodged against its decisions before the Swiss Federal Court.

4 The regulations governing the application of the statutes provide that players' agents must possess an agent's licence issued by FIFA (Article 16) and authorise the Executive Committee to draw up binding rules for agents (Article 17).

5 On 20 May 1994 FIFA adopted the Players' Agents Regulations, which were amended on 11 December 1995 and entered into force on 1 January 1996 ('the original regulations').

6 The original regulations made the exercise of this occupation subject to the possession of a licence issued by the competent national association and reserved the occupation for natural persons (Articles 1 and 2). The procedure prior to obtaining the licence provided for an interview to ascertain the candidate's knowledge (in particular of law and sport) (Articles 6, 7 and 8). The candidate also had to have regard to certain incompatibilities and moral conditions, such as having no criminal record (Articles 2, 3 and 4). They also had to deposit a bank guarantee of 200 000 Swiss francs (CHF) (Article 9). Relations between the agent and the player had to be governed by a contract for maximum period of two years, which was renewable (Article 12).

7 A sanctions mechanism was laid down for agents, players and clubs in the event of infringement of the regulations. Agents could face a caution, censure or warning, a fine of an unspecified amount, or withdrawal of their licence (Article 14). Players and clubs could be fined up to CHF 50 000 and CHF 100 000 respectively. Players could also be liable to disciplinary suspensions (of up to 12 months). Suspension measures or bans on transfers could also be applied to clubs (Articles 16 and 18). A 'Players' Status Committee' was designated as FIFA's supervisory and decision-making body (Article 20).

8 On 23 March 1998 Mr Piau lodged a complaint with the Commission in which he challenged the original regulations. He alleged, first of all, that the regulations were contrary to 'Article [49] et seq. of the [EC] Treaty concerning free competition with regard to services', because of the restrictions on access to the occupation imposed by opaque examination procedures and by the requirement of a guarantee and because of the controls and sanctions provided for. Secondly, he considered that the regulations were likely to give rise to discrimination between citizens of the Member States. Thirdly, he complained that the regulations did not include any legal remedies against decisions or applicable sanctions.

9 Previously, on 20 February 1996, Multiplayers International Denmark had lodged a complaint with the Commission challenging the compatibility of the regulations with Articles 81 EC and 82 EC. The Commission had also been notified of petitions lodged with the European Parliament by German and French nationals, which were declared admissible by the European Parliament on 29 October 1996 and 9 March 1998 respectively and which also concerned these rules.

10 The Commission initiated a procedure under Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and sent FIFA a statement of objections on 19 October 1999. The statement of objections stated that the [original] regulations constituted a decision by an association of undertakings within the meaning of Article 81 EC and called into question the compatibility with that article of the restrictions contained in the regulations relating to the licence requirement, the exclusion of legal persons from the award of a licence, the prohibition on clubs and players using unlicensed agents, the requirement of a bank guarantee and the sanctions.

11 In its reply to the statement of objections, dated 4 January 2000, FIFA disputed that the regulations could be classified as a decision by an association of undertakings. It justified the restrictions contained in the regulations in the interests of raising ethical standards and levels of professional qualification and claimed that they could be exempted under Article 81(3) EC.

12 A hearing was held at the Commission on 24 February 2000 and was attended by the representatives of Mr Piau and of FIFA, as well as representatives of the international professional players' trade union, FIFPro, which expressed the interest of players in the regulation of agents.

13 Following the administrative procedure initiated by the Commission, on 10 December 2000 FIFA adopted new Players' Agents Regulations, which entered into force on 1 March 2001 and were amended again on 3 April 2002.

14 The new FIFA regulations ('the amended regulations') maintain the obligation, in order to exercise the occupation of players' agent, which is still reserved for natural persons, to hold a licence issued by the competent national association for an unlimited period (Articles 1, 2 and 10). The candidate, who must satisfy the requirement of having an 'impeccable reputation' (Article 2), must take a written examination (Articles 4 and 5). The examination consists in a multiple-choice test to verify the candidate's knowledge of the law and sport (Annex A). The agent must also take out a professional liability insurance policy or, failing that, deposit a bank guarantee to the amount of CHF 100 000 (Articles 6 and 7).

15 The relations between the agent and the player must be the subject of a written contract for a maximum period of two years, which may be renewed. The contract must stipulate the agent's remuneration, which is calculated on the basis of the player's basic gross salary and, if the parties cannot reach agreement, is fixed at 5% of the salary. A copy of the contract must be sent to the national association, whose register of contracts must be made available to FIFA (Article 12). Licensed players' agents are required, inter alia, to adhere to FIFA's statutes and regulations and to refrain from approaching a player who is under contract with a club (Article 14).

16 A system of sanctions against clubs, players and agents is set up. They may all be punished, in the event of failure to comply with the above rules, by a caution, censure, or warning, or by a fine (Articles 15, 17 and 19). Players' agents may have their licence suspended or withdrawn (Article 15). Players may be suspended for up to 12 months (Article 17). Clubs may also be punished by suspension measures and bans on transfers of at least three months (Article 19). Fines may also be imposed on players' agents, players and clubs. For players' agents, the amount of the fine is not specified, as in the original regulations, while in the case of players and clubs minimum amounts of CHF 10 000 and CHF 20 000 respectively are now provided for (Articles 15, 17 and 19). All these sanctions are cumulative (Articles 15, 17 and 19). Disputes are dealt with by the competent national association or the 'Players' Status Committee' (Article 22). Transitional measures allow licences granted under the former provisions to be validated (Article 23). A code of professional conduct and a standard representation contract are also annexed to the amended regulations (Annexes B and C).

17 The amendments made on 3 April 2002 state that nationals of the European Union or the European Economic Area (EEA) must make their application for a licence to the national association of their home country or the country of domicile without any condition relating to length of residence and that they may take out the required insurance policy in any country of the European Union or the EEA.

18 On 9 and 10 July 2001 the European Parliament declared that the files opened following the petitions mentioned in paragraph 9 above were closed.

19 On 3 August 2001 the Commission sent Mr Piau a letter under Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18). In that letter, the Commission pointed out that its representation to FIFA had resulted in the elimination of the main restrictive aspects of the Players' Agents Regulations and that there was no longer any Community interest in continuing with the procedure.

20 The Commission sent a similar letter to Multiplayers International Denmark on 12 November 2001, to which that complainant did not reply.

21 In response to the letter of 3 August 2001 mentioned in paragraph 19 above, on 28 September 2001 Mr Piau informed the Commission that he was maintaining his complaint. He claimed that the infringements of Article 81(1) EC still remained in the amended regulations with respect to the examination and professional liability insurance and that new restrictions had been introduced in the form of rules relating to professional conduct, the standard contract and the determination of remuneration. In the view of the complainant, these restrictions could not be covered by an exemption on the basis of Article 81(3) EC. In addition, Mr Piau stated that the Commission had not examined the rules in question having regard to Article 82 EC.

22 By a decision of 15 April 2002 ('the contested decision'), the Commission rejected Mr Piau's complaint. The Commission stated that there was no Community interest in continuing with the procedure in so far as the most important restrictive provisions at issue in the complaint had been repealed, whilst the licence requirement could be justified, the remaining restrictions could enjoy an exemption under Article 81(3) EC, and Article 82 EC was not applicable in the present case.

Procedure and forms of order sought by the parties

23 By an application lodged on 14 June 2002, Mr Piau brought the present action.

24 On 5 November 2002 FIFA applied to intervene in support of the form of order sought by the Commission. By order of the President of the First Chamber of the Court of First Instance of 5 December 2002, that intervention was allowed.

25 By decision of the Court of First Instance of 2 July 2003, the Judge-Rapporteur was assigned, from 1 October 2003, to the Fourth Chamber, to which the case was therefore reassigned.

26 By a measure of organisation of procedure notified on 11 March 2004, the Court of First Instance asked the Commission and FIFA questions about professional liability insurance, remuneration of players' agents and legal remedies provided for under the amended regulations, and asked Mr Piau questions regarding the steps he had taken with a view to carrying on the occupation of players' agent.

27 FIFA, the Commission and Mr Piau answered the questions asked by the Court by letters received on 1, 2 and 5 April 2004 respectively.

28 The parties presented oral argument and replied to the Court's questions at the hearing on 22 April 2004.

29 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

30 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

31 FIFA claims that the Court should:

– declare the action inadmissible and, in any event, unfounded;

– order the applicant to pay the costs.

Admissibility

Arguments of the parties

32 FIFA questions the admissibility of the action. It claims that the applicant does not have a legal interest in bringing proceedings since he has never taken any official steps with a view to carrying on the occupation of players' agent and the French law applicable to his situation is stricter than the FIFA regulations.

33 The Commission states that it did not raise a plea of inadmissibility with regard to the application because it considered that Mr Piau had links with the football world and that he had wished to carry on the occupation of players' agent.

34 Mr Piau contends that his action, which was brought against the Commission's decision rejecting his complaint, is admissible. He asserts that he has wished to carry on the occupation of players' agent since 1997 and that there are inconsistencies between the FIFA rules and the French legislation.

Findings of the Court

35 The Commission has not raised a plea of inadmissibility. An application to intervene must be limited to supporting the form of order sought by one of the parties (Article 40, last paragraph, of the Statute of the Court of Justice, applicable to the Court of First Instance under Article 53 of that Statute).

36 FIFA is not therefore entitled to raise a plea of inadmissibility that is not relied on by the party in support of whose form of order it was granted leave to intervene. The Court is not therefore bound to consider the pleas on which it relies in this regard (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 22).

37 However, under Article 113 of the 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, including any raised by the interveners (Case T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 26).

38 It is common ground that Mr Piau is the person to whom a Commission decision that definitively closes a procedure initiated on the basis of Regulation No 17 was addressed and that he duly brought an action against that decision. The refusal to continue with such a procedure and the rejection of a complaint adversely affect its originator who, according to settled case-law, should be able to institute proceedings in order to protect his legitimate interests (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13, and Case T-37/92 *BEUCandNCC* v *Commission* [1994] ECR II-285, paragraph 36). The Court has also ruled that another undertaking which the Commission has recognised as having a legitimate interest in submitting comments in a procedure pursuant to Regulation No 17 is entitled to bring proceedings (*Metro* v *Commission*, paragraphs 6, 7 and 11 to 13).

Substance

1. The treatment of the complaint

Arguments of the parties

39 Mr Piau claims, first, that the Commission has failed to comply with its obligations in dealing with a complaint lodged under Article 3 of Regulation No 17. Although FIFA had not notified the original regulations, the Commission had refrained from taking a position on the alleged infringement and presumed that the regulations were possibly exempt. Its actions are contrary to the principle of good faith which must govern relations between citizens and the Community and the principle of legal certainty.

40 He submits, second, that the Commission did not conduct an inquiry or state reasons for the contested decision with reference to Article 82 EC, although his complaint also concerned that article, as can be seen inter alia from the letters of 31 January and 30 March 2001 exchanged between the applicant and the Commission. The investigation did not relate to Article 82 EC, which was not mentioned in the statement of objections. The Commission therefore harmed Mr Piau's legitimate expectations by failing to examine his complaint in this regard.

41 The Commission claims, first, that the failure to notify does not mean that the unnotified measure is illegal under Community law.

42 Second, the defendant contends that it was not required to conduct an inquiry or to state reasons for its decision with reference to Article 82 EC, which was not mentioned in the complaint but was relied on belatedly (on 28 September 2001) by the applicant, as there was nothing to suggest that that provision had been infringed.

43 FIFA maintains that the contested decision did not require a statement of reasons with reference to Article 82 EC, which was not mentioned in the complaint and was relied on belatedly by the applicant. In any case, the Commission, which could reject the complaint solely on the ground that there was no Community interest, gave an adequate statement of reasons in the contested decision with reference to Article 82 EC.

Findings of the Court

44 First, as regards the treatment of the complaint under Regulation No 17, it should be pointed out that the Commission has broad discretion in this area (see, to that effect, Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraphs 88 and 89).

45 In the present case, Mr Piau lodged a complaint on 23 March 1998 concerning the FIFA Players' Agents Regulations, drafted as a summary outline, which referred to 'Article [49] et seq. of the [EC] Treaty concerning free competition with regard to services', but did not mention Regulation No 17. The Commission, which had received another complaint concerning the same regulations (see paragraph 9 above), considered that the facts adduced raised certain questions of competition law and considered Mr Piau's complaint to have been lodged under Article 3 of Regulation No 17.

46 The Commission then conducted the administrative procedure laid down for infringements in competition matters, conducting an inquiry, sending a statement of objections to FIFA on 19 October 1999 and holding a hearing of the interested parties on 24 February 2000. It is common ground that this procedure eventually resulted in FIFA adopting amended Players' Agents Regulations on 10 December 2000. Since it was satisfied with the amendments made by FIFA to the rules in question, the Commission then considered that no further steps should be taken in the procedure, and notified Mr Piau of this by sending him a letter on 3 August 2001 under Article 6 of Regulation No 2842/98 and then rejecting his complaint on 15 April 2002.

47 It is apparent that the Commission properly applied, from a procedural point of view, the powers conferred on it by Regulation No 17, which was applicable at that time, to conduct an inquiry into a complaint in a competition matter, having regard to its discretion in this area. The Commission did not therefore fail to comply with its obligations in this regard. The fact that the original regulations had not been notified to the Commission does not affect the lawfulness of the procedure, since the sole effect of the failure to give notification was to deprive the Commission of the opportunity to take a decision concerning, in particular, a possible exemption for the regulations under Article 81(3) EC, in the absence of an application by FIFA to that effect. Lastly, the applicant has not adduced any evidence to show that, in dealing with his complaint, the Commission failed to act in good faith or breached the principle of legal certainty.

48 Second, as regards the inquiry into the complaint and statement of reasons for the contested decision with reference to Article 82 EC, it can be seen from the documents before the Court that the complaint lodged on 23 March 1998 did not mention Article 82 EC. However, Mr Piau did rely on that provision in his letter of 28 September 2001 which stated, in response to the Commission's communication under Article 6 of Regulation No 2842/98, that he was maintaining his complaint (see paragraph 21 above). In that letter, the complainant argued that, in his view, the case had not been investigated with reference to Article 82 EC, even though FIFA was abusing a dominant position, and that, in a letter of 30 March 2001, the Commission had stated that his complaint related primarily to Articles 81 EC and 82 EC.

49 The applicant cannot rely on the principle of protection of legitimate expectations with respect to information contained in the requests for information sent by the Commission to FIFA on 11 November 1998 and 19 July 1999, which envisaged the possibility of infringements of Articles 81 EC and 82 EC. Such information cannot be equated with precise assurances that may give rise to reasonable expectations (see, for example, Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus and Others* v *Commission* [2000] ECR II-3659, paragraph 85). Furthermore, subsequently, in the statement of

objections of 19 October 1999, the Commission did not identify any infringements with reference to Article 82 EC, but only with reference to Article 81 EC.

50 The Commission cannot, for its part, claim that the belated mention by the applicant of Article 82 EC in the course of the administrative procedure relieved it of the obligation to conduct an inquiry and state reasons for the contested decision in this regard. As long as the administrative procedure had not been concluded and a decision had not been taken on Mr Piau's complaint, the Commission could still conduct fresh investigations if new objections, whose relevance it had to assess, were raised.

51 On the other hand, in so far as, after examining the points of fact and of law relating to the application of Article 82 EC, the Commission decided that an investigation of the complaint was unwarranted or unnecessary in this regard, it was not required to pursue the investigation on this point (Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115, paragraph 60).

52 With regard to its statement of reasons having regard to Article 82 EC, the contested decision states that Mr Piau's comments on that provision 'are vague with regard to the market on which FIFA is said to have a dominant position and the alleged abuse'. It explains that FIFA is not active on the market for provision of advice [to players] in which players' agents operate and concludes that 'Article 82 EC does not apply in the present case as described by the complainant'. In the circumstances of the present case, such information satisfies the Commission's obligation to give a statement of reasons (Case T-74/92 *Ladbroke* v *Commission*, cited above, paragraph 60).

53 It follows from the above considerations that Mr Piau is not justified in claiming that the Commission failed to comply with its obligations in dealing with the complaint referred to it. The applicant's pleas pertaining to that claim must therefore be rejected.

2. Community interest

Arguments of the parties

54 Mr Piau claims that his complaint was of Community interest. The market is 'cross-border in nature', the most important restrictive provisions of the original regulations have not been repealed and the amended regulations cannot be the subject of an exemption under Article 81(3) EC. The anti-competitive effects will remain, since agents licensed under the original regulations will retain the market shares that they have acquired. In addition, Article 82 EC is applicable. Lastly, Mr Piau cannot obtain adequate protection before the national courts.

55 He submits, first, that the Commission made an error of assessment with regard to the FIFA Players' Agents Regulations. The obligation, on pain of sanctions, to comply with the FIFA regulations constitutes an obstacle to 'free competition with regard to services' and freedom of establishment and prevents any unlicensed players' agents from gaining market access. The provision contained in the amended regulations relating to remuneration of players' agents amounts to fixing of an imposed price, which restricts competition. The requirement of a standard contract infringes the principle of freedom of contract and the obligation imposed on the national association to send a copy to FIFA does not guarantee the protection of personal data. The code of professional conduct annexed to the regulations leaves scope for arbitrary action. The amended regulations are not compatible with the French legislation governing the occupation; however, the French football federation had given preference to the regulations and awarded licences in contravention of national legislation. The amended regulations also prohibit recourse to the ordinary courts.

56 Second, Mr Piau claims that the amended regulations cannot enjoy an exemption on the basis of Article 81(3) EC, since none of the conditions set out in that provision is satisfied. The restrictions are neither essential, appropriate nor proportionate. On the contrary, those regulations eliminate any competition,

since FIFA alone is authorised to grant a licence. He submits that, behind the declared objective of protecting players and raising ethical standards in the occupation of players' agent, FIFA's real intention is to take complete control of the occupation of players' agent in breach of the freedom to carry on a business and the principle of non-discrimination. Mr Piau also argues that the 'specific nature of sport', which makes it possible to derogate from Community competition law, cannot be relied on in the present case, since the activity in question is not linked directly to sport.

57 Third, Mr Piau submits that FIFA holds a dominant position on the 'football market' and is abusing its dominant position on the related market of services provided by players' agents. FIFA is an association of undertakings and the amended regulations constitute a decision by an association of undertakings. Representing the interests of all buyers, FIFA is acting as a monopsony, a single buyer imposing its conditions on sellers. The abuses of the dominant position are the result of the binding provisions of the regulations. Licensed players' agents also hold, jointly, a collective dominant position which they are abusing through the FIFA rules. The market in the services provided by players' agents is reserved for members of the association of undertakings and unlicensed agents are prohibited from having access.

58 Fourth, Mr Piau submits that, by making access to the occupation of players' agent subject to the possession of a licence, the amended regulations are an obstacle to freedom to provide services and freedom to carry on a business. He argues that FIFA does not have any legitimacy to lay down rules governing an economic activity and that the Commission thus implicitly delegated it a power to regulate an activity of providing services in contravention of the competences conferred on the Member States.

59 The Commission submits, principally, that there was no Community interest to justify continuing with the procedure, that the complaint was rightly rejected on that ground, and that Mr Piau's action is consequently unfounded. The 'cross-border nature' of the market does not necessarily mean that there is a Community interest. The most important restrictions had been removed in the amended regulations. Any persistent effects of the original regulations can be regarded as transitional measures guaranteeing the acquired rights of agents licensed under the old system. The fact that a complaint challenges alleged abuses of a dominant position does not in itself allow the conclusion that there is a Community interest. Contrary to his assertions, the applicant is not prevented from referring the matter to an ordinary law court.

60 In the alternative, the Commission submits, first, that the applicant's arguments, based on provisions not falling within the scope of competition law, are inadmissible or unfounded, since it does not derive from Regulation No 17, or from any other legal basis, the power to act with regard to an association of undertakings on bases other than compliance with rules of Community competition law. The Commission also submits that Community law accepts the recognition of acquired rights and that the applicant's fears over protection of personal data are unfounded. It argues that, while the organisation of the occupation of players' agent has not been harmonised at Community level, the FIFA regulations, which lay down uniform conditions for access at world level, are not liable to restrict the free movement of players' agents.

61 Second, the Commission submits that it did not make an error of assessment with regard to the rules in question, which seek to protect players and to ensure that agents are qualified. In the absence of an internal organisation of the occupation, the licence system imposes justified, essential and proportionate qualitative restrictions. In addition, the main restrictions have been removed, in particular concerning conditions of access to the occupation and examination procedures. The amended regulations are proportionate to the objectives set out and take into account the specific nature of sport. The provision relating to agents' remuneration merely lays down a subsidiary rule, allowing the parties a large degree of freedom. The standard contract does not hamper the parties' freedom and the limitation of its duration to two years promotes competition. The alleged prohibition on having recourse to ordinary law courts is not proven to exist. The rules of professional conduct, which can be justified by the general interest, are proportionate and compatible with Community competition law. Lastly, the binding nature of the regulations and the sanctions provided for therein are inherent in the existence of rules.

62 Third, the Commission submits that the amended regulations satisfy the conditions for an exemption laid down by Article 81(3) EC. The restrictions entailed, which are intended to raise ethical and professional standards, are proportionate. Competition is not eliminated. The very existence of regulations promotes a better operation of the market and therefore contributes to economic progress.

63 Fourth, the Commission submits that Article 82 EC, which concerns only economic activities, is not applicable to the present case, which relates to a purely regulatory activity. FIFA cannot be described as an 'economic power' or a monopsony and no abuse has been shown to exist on a market related to the 'football market'. FIFA does not represent the economic interests of clubs and players. Licensed players' agents are a fairly scattered occupation, without any structural links, and do not therefore abuse a collective dominant position. On the other hand, the Commission submits that FIFA is an association of undertakings and that the regulations at issue constitute a decision by an association of undertakings.

64 FIFA submits, first, that the Commission was right to reject Mr Piau's complaint on grounds of lack of Community interest. The restrictive provisions retained in the amended regulations have a qualitative purpose. They do not include any restrictions prohibited by Article 81(1) EC and are justified under Article 81(3) EC. The anti-competitive effects that allegedly persist do not result from the rules in question, but from the activity of agents. The 'cross-border nature' of the market has no bearing on the likely Community interest of a case.

65 Second, FIFA submits that the amended regulations cannot be classified as a decision by an association of undertakings, since professional clubs, which may be regarded as undertakings, form only a minority of the members of the national associations, which are the members of the international organisation. The regulations adopted by FIFA are not therefore the expression of the will of professional clubs. The amended regulations do not contain any considerable restrictions of competition. The procedures for obtaining a licence are now satisfactory. Professional liability insurance, whose amount is determined objectively, is an appropriate means to settle disputes. The provisions relating to agents' remuneration are not comparable with a price-fixing mechanism. The standard contract contains conventional stipulations and does not in any way violate privacy. The rules of professional conduct, the sanctions mechanism and the dispute settlement system are not contrary to Article 81 EC.

66 Third, FIFA submits that the amended regulations could have been the subject of an exemption under Article 81(3) EC. Those rules are necessary in the absence of organisation of the occupation and of national legislation and because of the global dimension of football. They raise professional and ethical standards for the occupation of players' agent, the increasing number of whom shows that the rules in question are not restrictive.

67 Fourth, FIFA submits that Article 82 EC is not applicable and that it has not abused a dominant position. It states that it is not an association of undertakings and argues that, in exercising its regulatory power, which is at issue in this case, it does not carry on economic activities. It argues that the applicant never mentioned the 'football market' in the course of the administrative procedure and that the fact that it exercises a regulatory power over economic actors in a certain market does not mean that it is active on that market or, a fortiori, that it holds a dominant position. Furthermore, the market for the provision of advice at issue in the present case is not connected with any market where FIFA is active. Its situation cannot be classified as a monopsony either, since FIFA does not represent either clubs or players in their relations with agents. Similarly, licensed agents do not exercise a collective dominant position which they abuse through the FIFA rules.

Findings of the Court

The nature of the FIFA Players' Agents Regulations

68 Without classifying on the basis of Community law either the nature of the Players' Agents Regulations or FIFA as the author of those regulations, in the contested decision the Commission examined Mr Piau's complaint with reference to the Community rules on competition, in particular Article 81 EC. That provision and the powers conferred on the Commission to ensure compliance concern decisions, agreements or practices on the part of undertakings or associations of undertakings, since Community law applies only in so far as the acts or conduct in question and the authors of such acts or conduct fall within the scope of that provision. In the present proceedings, the Commission has pointed out that, in its opinion, FIFA constituted an association of undertakings and the regulations at issue were a decision by an association of undertakings, thereby confirming the view it took in the statement of objections, a view shared by Mr Piau, but contested by FIFA.

69 As regards, first, the concept of an association of undertakings, and without it being necessary to rule on the admissibility of the arguments put forward by an intervener which go against the claims made by the party in support of which it is intervening, it is common ground that FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 81 EC and the national associations grouping them together are associations of undertakings within the meaning of that provision.

70 The fact that the national associations are groupings of 'amateur' clubs, alongside 'professional' clubs, is not capable of calling that assessment into question. In this regard, it should be noted that the mere fact that a sports association or federation unilaterally classifies sportsmen or clubs as 'amateur' does not in itself mean that they do not engage in economic activities within the meaning of Article 2 EC (see, to that effect, Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 46).

71 Furthermore, the national associations, which are required, under FIFA's statutes, to participate in competitions organised by it, must pay back to it a percentage of the gross receipts for each international match and are recognised, by those statutes, with FIFA, as being holders of exclusive broadcasting and transmission rights for the sporting events in question, also carry on an economic activity in this regard (see Case T-46/92 *Scottish Football* v *Commission* [1994] ECR II-1039). They therefore also constitute undertakings within the meaning of Article 81 EC.

72 Since the national associations constitute associations of undertakings and also, by virtue of the economic activities that they pursue, undertakings, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 81 EC. That provision applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers (Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraph 30). The legal framework within which decisions are taken by undertakings and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition is concerned (Case 123/83 *BNIC* [1985] ECR 391, paragraph 17).

73 As regards, second, the concept of a decision by an association of undertakings, it is apparent from the documents before the Court that the purpose of the occupation of players' agent, under the very wording of the amended regulations, is 'for a fee, on a regular basis [to introduce] a player to a club with a view to employment or [to introduce] two clubs to one another with a view to concluding a transfer contract'. This is therefore an economic activity involving the provision of services, which does not fall within the scope of the specific nature of sport, as defined by the case-law (Case 13/76 *Donà* [1976] ECR 1333, paragraphs 14 and 15, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 127, *Deliège*, paragraphs 64 and 69, and Case C-176/96 *LehtonenandCastors Braine* [2000] ECR I-2681, paragraphs 53 to 60).

74 On the one hand, the Players' Agents Regulations were adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (see, by analogy, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraphs 68 and 69). Those regulations do not fall within the scope of the

freedom of internal organisation enjoyed by sports associations either (*Bosman*, paragraph 81, and *Deliège*, paragraph 47).

75 On the other hand, since they are binding on national associations that are members of FIFA, which are required to draw up similar rules that are subsequently approved by FIFA, and on clubs, players and players' agents, those regulations are the reflection of FIFA's resolve to coordinate the conduct of its members with regard to the activity of players' agents. They therefore constitute a decision by an association of undertakings within the meaning of Article 81(1) EC (Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraphs 29 to 32, and *Wouters and Others*, paragraph 71), which must comply with the Community rules on competition, where such a decision has effects in the Community.

76 With regard to FIFA's legitimacy, contested by the applicant, to enact such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football (see paragraph 2 above), is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded.

77 The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.

78 In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. Nevertheless, in the present dispute, the rule-making power exercised by FIFA, in the almost complete absence of national rules, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested decision must be assessed, while considerations relating to the legal basis that allows FIFA to carry on regulatory activity, however important they may be, are not the subject of judicial review in this case.

79 The present action concerns the lawfulness of a decision taken by the Commission following a procedure carried out on the basis of a complaint lodged under Regulation No 17, for the treatment of which the Commission could not apply any powers other than those it holds in this context. Judicial review is necessarily limited to the rules on competition and the assessment made by the Commission of the alleged infringements of those rules by the FIFA regulations. This review can therefore extend to compliance with other provisions of the Treaty only in so far as any infringement of them reveals a concomitant breach of the rules on competition. Moreover, it can relate to a possible breach of fundamental principles only in the event that that breach resulted in an infringement of the rules on competition.

Assessment of the Community interest of the complaint

80 The contested decision rejects Mr Piau's complaint on grounds of lack of Community interest in continuing with the procedure. It should be pointed out, first, that the assessment of the Community interest raised by a complaint in competition matters depends on the factual and legal circumstances of each case, which may differ considerably from case to case, and not on predetermined criteria which must be applied (see, to that effect, *Ufex and Others* v *Commission*, paragraphs 79 and 80). Second, the Commission, entrusted by Article 85(1) EC with the task of ensuring application of Articles 81 EC and 82 EC, is responsible for defining and implementing Community competition policy and for that purpose has a discretion as to how it deals with complaints. That discretion is not unlimited, however, and the Commission must assess in each case the seriousness and duration of the interferences with competition and the persistence of their consequences (see, to that effect, *Ufex and Others* v *Commission*, paragraphs 88, 89, 93 and 95).

81 Furthermore, review by the Community judicature of the exercise, by the Commission, of the discretion conferred on it in this regard must not lead it to substitute its assessment of the Community interest for that of the Commission but focuses on whether or not the contested decision is based on materially incorrect facts, or is vitiated by an error of law, a manifest error of appraisal or misuse of powers (Case T-115/99 *SEP* v *Commission* [2001] ECR II-691, paragraph 34).

82 In the present case, three kinds of considerations form the basis for the Commission's assessment regarding lack of Community interest, namely the repeal of the most restrictive provisions contained in the original regulations, the eligibility of the amended regulations for an exemption under Article 81(3) EC, and the inapplicability of Article 82 EC.

– Repeal of the most restrictive provisions contained in the original regulations

83 The contested decision starts by noting that the most important restrictive provisions that were part of the regulations adopted on 20 May 1994 were deleted in the regulations adopted on 20 December 2000. It examines the provisions of the FIFA regulations under five headings, relating to the examination, insurance, the code of professional conduct, the setting of remuneration for players' agents and the standard contract.

84 First, as regards the examination, the Commission states in the contested decision that candidates must now take a written examination, consisting in a multiple-choice test, the procedures and dates for which, as set out in the annex to the amended regulations, are uniform throughout the world. It notes that a two-stage appeal system is now envisaged and that the two-year residence requirement for European Union nationals was removed by an amendment to the regulations on 3 April 2002. The contested decision states that the requirement of an 'impeccable reputation' for obtaining the licence, which must be interpreted in accordance with national laws, would be construed in France, where Mr Piau is resident, as having no criminal conviction. In the final analysis, the Commission did not consider the applicant's claims of arbitrariness to be well founded.

85 Second, in the contested decision, the Commission notes that a professional liability insurance policy, required of everyone, whose base relates to the objective criterion of the turnover of the players' agent, replaced the requirement of lodging a guarantee and that it can be taken out with various insurance companies in all the countries of the Union. On this point, in response to the Court's questions mentioned in paragraph 26 above, FIFA produced examples of professional liability insurance contracts offered to players' agents by 12 insurance companies within the European Union or the EEA. The contested decision also points out that the required guarantee, which must cover all risks liable to result from the representation activity, does not appear to be disproportionate to the risks covered, for example, by professional insurance in the liberal professions.

86 Third, as far as the code of professional conduct is concerned, in the contested decision the Commission considers that the elementary principles of good professional conduct set out in that code, annexed to the amended regulations, which refer in particular to rules relating to professional conscientiousness, truthfulness, fairness, objectivity, transparency, sincerity, justice and equity, do not impose a disproportionate obligation on players' agents.

87 Fourth, as regards setting the remuneration of players' agents, in the contested decision the Commission examined Article 12 of the regulations, which provides that the agent's salary is calculated on the basis of the player's basic gross salary and will be 5% of the salary if the parties cannot reach agreement. It considers that this provision refers to an objective, transparent criterion (the player's basic gross salary) and is merely a (subsidiary) mechanism for the settlement of disputes.

88 Fifth, the contested decision states that Mr Piau's complaint concerning the breach of privacy stemming from the fact that a copy of the contract signed between a player and an agent is sent to the

relevant national association for registration is not a problem capable of being caught by the Community rules on competition.

89 The contested decision does not therefore show that the principles stemming from the case-law referred to in paragraphs 80 and 81 above regarding the extent of its obligations were breached by the Commission, which closely examined the evidence put forward by the applicant.

90 The Commission did not make a manifest error of assessment with regard to the provisions of the amended regulations examined in paragraphs 84 to 88 above by considering that the examination offered satisfactory guarantees of objectivity and transparency, that the professional liability insurance obligation did not constitute a disproportionate requirement and, with regard to the provisions of the regulations relating to remuneration for players' agents, by implicitly excluding a classification as the fixing of imposed prices from the point of view of competition law (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraphs 158, 159 and 161 to 164).

91 The arguments outlined by Mr Piau in this case relating to the content of the amended regulations, which concern the obligation under the regulations to comply with FIFA rules, the content of the standard contract, the sanctions system and legal remedies, do not call that assessment into question.

92 First, the obligation imposed on players' agents to comply with the FIFA rules concerning, among other things, transfers of players does not appear in itself to be contrary to the rules on competition, as the FIFA rules on transfers of players, which were not the object of Mr Piau's complaint, cannot be examined in the present dispute, since they fall outside its scope. When asked about this point at the hearing, the applicant did not explain, any more than he did in his written pleadings, how the obligation to comply with FIFA rules might affect competition.

93 Second, the provisions on the content of the contract between the agent and the player, under which the contract, in writing, must set out the criteria and details of the agent's remuneration and cannot have a term of longer than two years, although that term is renewable, do not reveal any interference with competition. The limitation of the duration of contracts to two years, which does not preclude the renewal of the commitment, seems likely to encourage the fluidity of the market and, as a result, competition. In fact, this relatively limited framing of contractual relations seems likely to help to make the parties' financial and legal relations more secure, without jeopardising competition.

94 Third, the sanctions system, summarised in paragraph 16 above, in so far as it can affect the rules on competition, does not appear to be open to criticism. The amended regulations provide that the sanctions applicable to agents, players and clubs are caution, censure, warning, suspension or withdrawal of licence for agents, suspension of up to 12 months for players and suspension measures or bans on transfers for at least three months for clubs, which cannot be regarded as manifestly excessive for a system of professional sanctions. Furthermore, the amounts of the fines for players and clubs were reduced from those in the original regulations. In addition, Mr Piau has not produced any evidence to show that this mechanism is applied in an arbitrary and discriminatory manner, thereby interfering with competition.

95 Fourth, with respect to legal remedies available in the ordinary courts, and assuming that the provisions of the amended regulations may have an effect on the rules on competition in this regard, it is apparent from the answers given by FIFA and by the Commission to the questions asked by the Court (see paragraph 26 above) that, irrespective of the system of remedies against decisions by national associations or by the Players' Status Committee, which is competent in matters involving players' agents, before the Court of Arbitration for Sport, interested parties can always have recourse to the ordinary courts, in particular in order to assert their rights under national law or under Community law, and actions for annulment can also be brought before the Swiss Federal Court against decisions by the Court of Arbitration for Sport. The applicant, who, at the hearing, reported difficulties and slow progress affecting national court

proceedings, has not however established that he was deprived of all remedies before the ordinary courts or, a fortiori, that competition was thereby affected.

96 It follows from the above considerations that the pleas in law and arguments put forward by Mr Piau based on competition law do not call into question the conclusion that the Commission was entitled to consider that the most restrictive provisions of the regulations in question had been repealed. The applicant's arguments in this regard must therefore be rejected.

97 The pleas in law and arguments put forward by the applicant which are not related to competition law should also be rejected, since they do not indicate any infringements in this regard. Mr Piau has not shown that his pleas in law and arguments regarding the breach of contractual freedom, the incompatibility of the FIFA regulations with the French legislation and the interference with the protection of personal data disclose an infringement of the rules on competition. His pleas in law and arguments, which are not, moreover, accompanied by corroborative evidence, must therefore be rejected as irrelevant in a competition matter.

98 In addition, the argument put forward by Mr Piau that, since agents licensed under the original regulations retained their licences, anti-competitive effects persisted cannot be accepted. On the one hand, the applicant does not establish that this fact would in itself give rise to anti-competitive effects. On the other hand, it is contrary to the principle of legal certainty to call into question legal positions which are not shown to have been unlawfully acquired (see, by analogy, Case T-498/93 *Dornonville de la Cour* v *Commission* [1994] ECR-SC I-A-257 and II-813, paragraphs 46 to 49 and 58). Moreover, as the Court has held with regard to transitional measures relating to recognition of diplomas – this case-law being applicable to the present case – it is permitted to preserve acquired rights in similar cases (Case C-447/93 *Dreessen* [1994] ECR I-4087, paragraph 10, and Joined Cases C-69/96 to C-79/96 *Garofalo and Others* [1997] ECR I-5603, paragraphs 29 to 33).

99 In the light of all the foregoing considerations, the Commission did not commit a manifest error in its assessment of the rules in question or with regard to the alleged persistence of the anti-competitive effects of the original regulations, the reason for Mr Piau's complaint. The applicant is not therefore justified in claiming that the most restrictive provisions of the original regulations were not abolished and that anti-competitive effects persisted because those provisions were retained in the amended regulations.

– Eligibility of the provisions of the amended regulations for an exemption under Article 81(3) EC

100 In the contested decision, the Commission considers that the compulsory nature of the licence might be justified and that the amended regulations could be eligible for an exemption under Article 81(3) EC. It explains that the licence system, which imposes restrictions that are more qualitative than quantitative, seeks to protect players and clubs and takes into consideration, in particular, the risks incurred by players, who have short careers, in the event of poorly negotiated transfers. It considers that, since there is at present no organisation of the occupation of players' agent and no generalised national rules, the restriction inherent in the licence system is proportionate and essential.

101 The actual principle of the licence, which is required by FIFA and is a condition for carrying on the occupation of players' agent, constitutes a barrier to access to that economic activity and therefore necessarily affects competition. It can therefore be accepted only in so far as the conditions set out in Article 81(3) EC are satisfied, with the result that the amended regulations might enjoy an exemption on the basis of this provision if it were established that they contribute to promoting economic progress, allow consumers a fair share of the resulting benefit, do not impose restrictions which are not indispensable to the attainment of these objectives, and do not eliminate competition.

102 Various legal and factual circumstances have been relied on to justify the adoption of the regulations and the actual principle of the compulsory licence, which lies at the heart of the mechanism in question. It

seems that, first of all, within the Community, France alone has adopted rules governing the occupation of sports agent. Furthermore, it is not contested that, collectively, players' agents do not, at present, constitute a profession with its own internal organisation. It is not contested either that certain practices on the part of players' agents could, in the past, have harmed players and clubs, financially and professionally. FIFA explained that, in laying down the rules in question, it was pursuing a dual objective of raising professional and ethical standards for the occupation of players' agent in order to protect players, who have a short career.

103 Contrary to the claims made by the applicant, competition is not eliminated by the licence system. That system appears to result in a qualitative selection, appropriate for the attainment of the objective of raising professional standards for the occupation of players' agent, rather than a quantitative restriction on access to that occupation. On the contrary, the quantitative opening up of this occupation is corroborated by statistics communicated by FIFA at the hearing. FIFA stated, without being contradicted, that while it recorded 214 players' agents in 1996, when the original regulations entered into force, it estimated that there were 1 500 at the beginning of 2003 and that 300 candidates had passed the examination at sessions held in March and September of that year.

104 In view of the circumstances set out in paragraphs 102 and 103 above and the current conditions governing the exercise of the occupation of players' agent, where there are virtually no national rules and no collective organisation for players' agents, the Commission did not commit a manifest error of assessment by considering that the restrictions stemming from the compulsory nature of the licence might benefit from an exemption on the basis of Article 81(3) EC, and, moreover, by rightly reserving the right to review the rules in question. The arguments put forward by Mr Piau in this regard must therefore be rejected.

105 Similarly, the applicant's argument that the 'specific nature of sport' may not be relied on to justify a derogation from the rules on competition must be rejected as irrelevant. The contested decision is not based on such an exception and envisages the exercise of the occupation of players' agent as an economic activity, without claiming that it should be accepted as falling within the scope of the specific nature of sport, which in fact it does not.

106 Mr Piau's arguments relating to the breaches of freedom to conduct business and freedom to provide services should also be rejected, since the applicant has not shown that they disclose a concomitant infringement of the rules on competition that precludes an exemption for the amended regulations on the basis of Article 81(3) EC.

– Inapplicability of Article 82 EC

107 The contested decision states that Article 82 EC does not apply in the present case, as described by the applicant, since FIFA is not active on the market for the provision of advice to players.

108 Article 82 EC prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it.

109 That provision deals with the conduct of one or more economic operators abusing a position of economic strength and thus hindering the maintenance of effective competition on the relevant market by allowing that operator to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 34).

110 The expression 'one or more undertakings' in Article 82 EC implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic

point of view they present themselves or act together on a particular market as a collective entity (*Compagnie maritime belge transports and Others* v *Commission*, paragraph 36).

111 Three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy (Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 62, and Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-0000, paragraph 121).

112 In the present case, the market affected by the rules in question is a market for the provision of services where the buyers are players and clubs and the sellers are agents. In this market FIFA can be regarded as acting on behalf of football clubs since, as has already been stated (see paragraphs 69 to 72 above), it constitutes an emanation of those clubs as a second-level association of undertakings formed by the clubs.

113 A decision like the FIFA Players' Agents Regulations may, where it is implemented, result in the undertakings operating on the market in question, namely the clubs, being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers (*Compagnie maritime belge transports and Others* v *Commission*, paragraph 44).

114 Because the regulations are binding for national associations that are members of FIFA and the clubs forming them, these bodies appear to be linked in the long term as to their conduct by rules that they accept and that other actors (players and players' agents) cannot break on pain of sanctions that may lead to their exclusion from the market, in particular in the case of players' agents. Within the meaning of the case-law cited in paragraphs 110 and 111 above, such a situation therefore characterises a collective dominant position for clubs on the market for the provision of players' agents' services, since, through the rules to which they adhere, the clubs lay down the conditions under which the services in question are provided.

115 It seems unrealistic to claim that FIFA, which is recognised as holding supervisory powers over the sport-related activity of football and connected economic activities, such as the activity of players' agents in the present case, does not hold a collective dominant position on the market for players' agents' services on the ground that is not an actor on that market.

116 The fact that FIFA is not itself an economic operator that buys players' agents' services on the market in question and that its involvement stems from rule-making activity, which it has assumed the power to exercise in respect of the economic activity of players' agents, is irrelevant as regards the application of Article 82 EC, since FIFA is the emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members.

117 As regards abuse of the alleged dominant position, however, it follows from the above considerations regarding the amended regulations and the possible exemption under Article 81(3) EC that such an abuse has not been established. It has been found that those regulations did not impose quantitative restrictions on access to the occupation of players' agent that could be detrimental to competition, but qualitative restrictions that may be justified in the present circumstances. The abuses of the dominant position that, according to the applicant, stem from the regulations are not therefore established and his arguments in this regard must be rejected.

118 Lastly, Mr Piau's argument that licensed players' agents are abusing their collective dominant position within the meaning of Article 82 EC must also be rejected in the absence of structural links between these

agents, the existence of which Mr Piau has failed to establish. The holding of the same licence, the use of the same standard contract and the fact that agents' remuneration is determined on the basis of the same criteria do not prove the existence of a dominant position for licensed players' agents, and the applicant does not show that the parties concerned adopt an identical approach or that they implicitly divide up the market.

119 Consequently, although the Commission wrongly considered that FIFA did not hold a dominant position on the market for players' agents' services, the other findings contained in the contested decision, namely that the most restrictive provisions of the regulations had been deleted and that the licence system could enjoy an exemption decision under Article 81(3) EC, would accordingly lead to the conclusion that there was no infringement under Article 82 EC and to the rejection of the applicant's arguments in this regard. Therefore, despite the error in law made by the Commission in taking the view that Article 82 EC was not applicable, its application could not, in any event, have resulted in a finding of an abuse of a dominant position based on the other findings that had rightly been made from the examination of the regulations. Thus, the lawfulness of the rejection of the complaint on the ground of lack of Community interest in continuing with the procedure is not affected.

120 In the light of the foregoing considerations, the Commission did not commit a manifest error of assessment in deciding to reject Mr Piau's complaint on the ground of lack of Community interest in continuing with the procedure. The 'cross-border nature' of the market, which is not disputed, is irrelevant in this regard, since this fact alone does not confer a Community interest on a complaint. In view of the fact that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be required to have recourse exclusively to certain criteria (*Ufex and Others* v *Commission*, paragraphs 79 and 80).

121 The action brought by Mr Piau must therefore be dismissed.

Costs

122 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

123 Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to bear his own costs and pay those incurred by the Commission.

124 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than the Member States and the institutions to bear its own costs.

125 In the circumstances of the present case, FIFA must be ordered to bear its own costs in connection with its intervention.

On those grounds, THE COURT OF FIRST INSTANCE (Fourth Chamber) hereby:

1. Dismisses the application;

2. Orders the applicant to bear his own costs and pay those incurred by the Commission;

3. Orders the Fédération internationale de football association to bear its own costs.

Case C-519/04 P: David Meca-Medina and Igor Majcen v Commission of the European Communities

Judgment of the Court (Third Chamber) of 18 July 2006.
David Meca-Medina and Igor Majcen v Commission of the European Communities.
Appeal - Rules adopted by the International Olympic Committee concerning doping control –

Incompatibility with the Community rules on competition and freedom to provide services - Complaint - Rejection.

Case C-519/04 P.

JUDGMENT OF THE COURT (Third Chamber)

18 July 2006 (*)

(Appeal – Rules adopted by the International Olympic Committee concerning doping control – Incompatibility with the Community rules on competition and freedom to provide services – Complaint – Rejection)

In Case C-519/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged on 22 December 2004,

David Meca-Medina, residing in Barcelona (Spain),

Igor Majcen, residing in Ljubljana (Slovenia),

represented by J.-L. Dupont and M.-A. Lucas, avocats,

appellants,

the other parties to the proceedings being:

Commission of the European Communities, represented by O. Beynet and A. Bouquet, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Republic of Finland, represented by T. Pynnä, acting as Agent,

intervener at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský (Rapporteur), J.-P. Puissochet, A. Borg Barthet and A. Ó Caoimh, Judges,

Advocate General: P. Léger,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 March 2006,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2006,

gives the following

Judgment

1 By their appeal, Mr Meca-Medina and Mr Majcen ('the appellants') ask the Court to set aside the judgment of the Court of First Instance of the European Communities of 30 September 2004 in Case T-313/02 *Meca-Medina and Majcen* v *Commission* [2004] ECR II-3291 ('the contested judgment') by which the latter dismissed their action for annulment of the decision of the Commission of the European Communities of 1 August 2002 rejecting the complaint – lodged by them against the International Olympic Committee ('the IOC') – seeking a declaration that certain rules adopted by the IOC and implemented by the Fédération internationale de natation (International Swimming Federation; 'FINA') and certain practices relating to doping control were incompatible with the Community rules on competition and freedom to provide services (Case COMP/38158 – Meca-Medina and Majcen/IOC) ('the decision at issue').

Background to the dispute

2 The Court of First Instance summarised the relevant anti-doping rules ('the anti-doping rules at issue') in paragraphs 1 to 6 of the contested judgment:

'1 The [IOC] is the supreme authority of the Olympic Movement, which brings together the various international sporting federations, among which is [FINA]).

2 FINA implements for swimming, by its Doping Control Rules ("the DCR", cited here in the version in force at the material time), the Olympic Movement's Anti-Doping Code. DCR 1.2(a) states that the offence of doping "occurs when a banned substance is found to be present within a competitor's body tissue or fluids". That definition corresponds to that in Article 2(2) of the abovementioned Anti-Doping Code, where doping is defined as the presence in an athlete's body of a prohibited substance or the finding that such a substance or a prohibited technique has been used.

3 Nandrolone and its metabolites, Norandrosterone (NA) and Norethiocholanolone (NE) (hereinafter together called "Nandrolone"), are prohibited anabolic substances. However, according to the practice of the 27 laboratories accredited by the IOC and FINA, and to take account of the possibility of endogenous, therefore innocent, production of Nandrolone, the presence of that substance in a male athlete's body is defined as doping only if it exceeds a limit of 2 nanogrammes (ng) per millilitre (ml) of urine.

4 For a first offence of doping with an anabolic substance, DCR 9.2(a) requires the suspension of the athlete for a minimum of four years, which may however be reduced, under the final sentence of DCR 9.2, DCR 9.3 and DCR 9.10, if the athlete proves that he did not knowingly take the prohibited substance or establishes how that substance could be present in his body without negligence on his part.

5 The penalties are imposed by FINA's Doping Panel, whose decisions are subject to appeal to the Court of Arbitration for Sport ("the CAS") under DCR 8.9. The CAS, which is based in Lausanne, is financed and administered by an organisation independent of the IOC, the International Council of Arbitration for Sport ("the ICAS").

6 The CAS's rulings are subject to appeal to the Swiss Federal Court, which has jurisdiction to review international arbitration awards made in Switzerland.'

3 The factual background to the dispute was summarised by the Court of First Instance in paragraphs 7 to 20 of the contested judgment:

‘7 The applicants are two professional athletes who compete in long-distance swimming, the aquatic equivalent of the marathon.

8 In an anti-doping test carried out on 31 January 1999 during the World Cup in that discipline at Salvador de Bahia (Brazil), where they had finished first and second respectively, the applicants tested positive for Nandrolone. The level found for Mr D. Meca-Medina was 9.7 ng/ml and that for Mr I. Majcen 3.9 ng/ml.

9 On 8 August 1999, FINA’s Doping Panel suspended the applicants for a period of four years.

10 On the applicants’ appeal, the CAS, by arbitration award of 29 February 2000, confirmed the suspension.

11 In January 2000, certain scientific experiments showed that Nandrolone’s metabolites can be produced endogenously by the human body at a level which may exceed the accepted limit when certain foods, such as boar meat, have been consumed.

12 In view of that development, FINA and the applicants consented, by an arbitration agreement of 20 April 2000, to refer the case anew to the CAS for reconsideration.

13 By arbitration award of 23 May 2001, the CAS reduced the penalty to two years’ suspension.

14 The applicants did not appeal against that award to the Swiss Federal Court.

15 By letter of 30 May 2001, the applicants filed a complaint with the Commission, under Article 3 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), alleging a breach of Article 81 EC and/or Article 82 EC.

16 In their complaint, the applicants challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA and certain practices relating to doping control with the Community rules on competition and freedom to provide services. First of all, the fixing of the limit at 2 ng/ml is a concerted practice between the IOC and the 27 laboratories accredited by it. That limit is scientifically unfounded and can lead to the exclusion of innocent or merely negligent athletes. In the applicants’ case, the excesses could have been the result of the consumption of a dish containing boar meat. Also, the IOC’s adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration (the CAS and the ICAS) which are insufficiently independent of the IOC strengthens the anti-competitive nature of that limit.

17 According to that complaint, the application of those rules (hereinafter “the anti-doping rules at issue”) leads to the infringement of the athletes’ economic freedoms, guaranteed inter alia by Article 49 EC and, from the point of view of competition law, to the infringement of the rights which the athletes can assert under Articles 81 EC and 82 EC.

18 By letter of 8 March 2002, the Commission informed the applicants, in accordance with Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18), of the reasons for which it considered that the complaint should not be upheld.

19 By letter of 11 April 2002, the applicants sent the Commission their observations on the letter of 8 March 2002.

20 By decision of 1 August 2002 ..., the Commission, after analysing the anti-doping rules at issue according to the assessment criteria of competition law and concluding that those rules did not fall foul of the prohibition under Articles 81 EC and 82 EC, rejected the applicants' complaint ...'.

Procedure before the Court of First Instance and the contested judgment

4 On 11 October 2002, the present appellants brought an action before the Court of First Instance to have the decision at issue set aside. They raised three pleas in law in support of their action. First, the Commission made a manifest error of assessment in fact and in law, by deciding that the IOC is not an undertaking within the meaning of the Community case-law. Second, it misapplied the criteria established by the Court of Justice in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, in deciding that the anti-doping rules at issue are not a restriction of competition within the meaning of Article 81 EC. Finally, the Commission made a manifest error of assessment in fact and in law at point 71 of the decision at issue, in rejecting the grounds under Article 49 EC relied upon by the appellants to challenge the anti-doping rules.

5 On 24 January 2003, the Republic of Finland sought leave to intervene in support of the Commission. By order of 25 February 2003, the President of the Fourth Chamber of the Court of First Instance granted leave.

6 By the contested judgment, the Court of First Instance dismissed the action brought by the present appellants.

7 In paragraphs 40 and 41 of the contested judgment, the Court of First Instance held, on the basis of case-law of the Court of Justice, that while the prohibitions laid down by Articles 39 EC and 49 EC apply to the rules adopted in the field of sport that concern the economic aspect which sporting activity can present, on the other hand those prohibitions do not affect purely sporting rules, that is to say rules relating to questions of purely sporting interest and, as such, having nothing to do with economic activity.

8 The Court of First Instance observed, in paragraph 42 of the contested judgment, that the fact that purely sporting rules may have nothing to do with economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC.

9 In paragraphs 44 and 47 of the contested judgment, the Court of First Instance held that the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration. It concluded that the rules to combat doping consequently cannot come within the scope of the Treaty provisions on the economic freedoms and, in particular, of Articles 49 EC, 81 EC and 82 EC.

10 The Court of First Instance held, in paragraph 49 of the contested judgment, that the anti-doping rules at issue, which have no discriminatory aim, are intimately linked to sport as such. It found furthermore, in paragraph 57 of the contested judgment, that the fact that the IOC might possibly, when adopting the anti-doping rules at issue, have had in mind the concern, legitimate according to the present appellants themselves, of safeguarding the economic potential of the Olympic Games is not sufficient to alter the purely sporting nature of those rules.

11 The Court of First Instance further stated, in paragraph 66 of the contested judgment, that since the Commission concluded in the decision at issue that the anti-doping rules at issue fell outside the scope of Articles 81 EC and 82 EC because of their purely sporting nature, the reference in that decision to the method of analysis in *Wouters and Others* cannot, in any event, bring into question that conclusion. The Court held

in addition, in paragraph 67 of the contested judgment, that the challenging of those rules fell within the jurisdiction of the sporting dispute settlement bodies.

12 The Court of First Instance also dismissed the third plea put forward by the present appellants, holding, in paragraph 68 of the contested judgment, that since the anti-doping rules at issue were purely sporting, they did not fall within the scope of Article 49 EC.

Forms of order sought on appeal

13 In their appeal, the appellants claim that the Court should:

– set aside the contested judgment;

– grant the form of order sought before the Court of First Instance;

– order the Commission to pay the costs of both sets of proceedings.

14 The Commission contends that the Court should:

– dismiss the appeal in its entirety;

– in the alternative, grant the form of order sought at first instance and dismiss the action for annulment of the decision at issue;

– order the appellants to pay the costs including those of the proceedings at first instance.

15 The Republic of Finland contends that the Court should:

– dismiss the appeal in its entirety.

The appeal

16 By their arguments, the appellants put forward four pleas in law in support of their appeal. By the first plea, which is in several parts, they submit that the contested judgment is vitiated by an error of law in that the Court of First Instance held that the anti-doping rules at issue did not fall within the scope of Articles 49 EC, 81 EC and 82 EC. By the second plea, they contend that the contested judgment should be annulled because it distorts the clear sense of the decision at issue. By the third plea, they argue that the contested judgment fails to comply with formal requirements because certain of its grounds are contradictory and the reasoning is inadequate. By the fourth plea, they submit that the contested judgment was delivered following flawed proceedings, since the Court of First Instance infringed the rights of the defence.

The first plea

17 The first plea, alleging an error of law, is in three parts. The appellants submit, first, that the Court of First Instance was mistaken as to the interpretation of the Court of Justice's case-law relating to the relationship between sporting rules and the scope of the Treaty provisions. They submit, second, that the Court of First Instance misconstrued the effect, in the light of that case-law, of rules prohibiting doping, generally, and the anti-doping rules at issue, in particular. They contend, third, that the Court of First Instance was wrong in holding that the anti-doping rules at issue could not be likened to market conduct falling within the scope of Articles 81 EC and 82 EC and therefore could not be subject to the method of analysis established by the Court of Justice in *Wouters and Others*.

The first part of the plea

– Arguments of the parties

18 In the appellants' submission, the Court of First Instance misinterpreted the case-law of the Court of Justice according to which sport is subject to Community law only in so far as it constitutes an economic activity. In particular, contrary to what was held by the Court of First Instance, purely sporting rules have never been excluded generally by the Court of Justice from the scope of the provisions of the Treaty. While the Court of Justice has held the formation of national teams to be a question of purely sporting interest and, as such, having nothing to do with economic activity, the Court of First Instance could not infer therefrom that any rule relating to a question of purely sporting interest has, as such, nothing to do with economic activity and thus is not covered by the prohibitions laid down in Articles 39 EC, 49 EC, 81 EC and 82 EC. The concept of a purely sporting rule must therefore be confined solely to rules relating to the composition and formation of national teams.

19 The appellants further contend that the Court of First Instance was wrong in finding that rules of purely sporting interest are necessarily inherent in the organisation and proper conduct of competitive sport, when, according to the case-law of the Court of Justice, they must also relate to the particular nature and context of sporting events. The appellants also submit that, because professional sporting activity is, in practical terms, indivisible in nature, the distinction drawn by the Court of First Instance between the economic and the non-economic aspect of the same sporting activity is entirely artificial.

20 In the Commission's submission, the Court of First Instance applied correctly the case-law of the Court of Justice according to which purely sporting rules are, as such, not covered by the rules on freedom of movement. This does therefore involve an exception of general application for purely sporting rules, which is thus not limited to the composition and formation of national teams. Nor does the Commission see how a rule of purely sporting interest and relating to the specific nature of sporting events could fail to be inherent in the proper conduct of the events.

21 In the Finnish Government's submission, the Court of First Instance's approach is consistent with Community law.

– Findings of the Court

22 It is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4; Case 13/76 *Donà* [1976] ECR 1333, paragraph 12; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 41; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 32).

23 Thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen (see, to this effect, *Walrave and Koch*, paragraph 5, *Donà*, paragraph 12, and *Bosman*, paragraph 73), it falls, more specifically, within the scope of Article 39 EC et seq. or Article 49 EC et seq.

24 These Community provisions on freedom of movement for persons and freedom to provide services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner (*Deliège*, paragraph 47, and *Lehtonen and Castors Braine*, paragraph 35).

25 The Court has, however, held that the prohibitions enacted by those provisions of the Treaty do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity (see, to this effect, *Walrave and Koch*, paragraph 8).

26 With regard to the difficulty of severing the economic aspects from the sporting aspects of a sport, the Court has held (in *Donà*, paragraphs 14 and 15) that the provisions of Community law concerning freedom of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events. It has stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty (*Bosman*, paragraph 76, and *Deliège*, paragraph 43).

27 In light of all of these considerations, it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.

28 If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition.

29 Thus, where engagement in the sporting activity must be assessed in the light of the Treaty provisions relating to freedom of movement for workers or freedom to provide services, it will be necessary to determine whether the rules which govern that activity satisfy the requirements of Articles 39 EC and 49 EC, that is to say do not constitute restrictions prohibited by those articles (*Deliège*, paragraph 60).

30 Likewise, where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.

31 Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (*Walrave and Koch* and *Donà*), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles.

32 However, in paragraph 42 of the contested judgment, the Court of First Instance held that the fact that purely sporting rules may have nothing to do with economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC.

33 In holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law.

34 Accordingly, the appellants are justified in asserting that, in paragraph 68 of the contested judgment, the Court of First Instance erred in dismissing their application on the ground that the anti-doping rules at issue were subject to neither Article 49 EC nor competition law. The contested judgment must therefore be set aside, and there is no need to examine either the remaining parts of the first plea or the other pleas put forward by the appellants.

Substance

35 In accordance with Article 61 of the Statute of the Court of Justice, since the state of the proceedings so permits it is appropriate to give judgment on the substance of the appellants' claims for annulment of the decision at issue.

36 The appellants advanced three pleas in support of their action. They criticised the Commission for having found, first, that the IOC was not an undertaking within the meaning of the Community case-law, second, that the anti-doping rules at issue were not a restriction of competition within the meaning of Article 81 EC and, finally, that their complaint did not contain facts capable of leading to the conclusion that there could have been an infringement of Article 49 EC.

The first plea

37 The appellants contend that the Commission was wrong not to treat the IOC as an undertaking for the purposes of application of Article 81 EC.

38 It is, however, common ground that, in order to rule on the complaint submitted to it by the appellants in the light of Articles 81 EC and 82 EC, the Commission sought, as is explicitly made clear in point 37 of the decision at issue, to proceed on the basis that the IOC was to be treated as an undertaking and, within the Olympic Movement, as an association of international and national associations of undertakings.

39 Since this plea is founded on an incorrect reading of the decision at issue, it is of no consequence and must, for that reason, be dismissed.

The second plea

40 The appellants contend that in rejecting their complaint the Commission wrongly decided that the anti-doping rules at issue were not a restriction of competition within the meaning of Article 81 EC. They submit that the Commission misapplied the criteria established by the Court of Justice in *Woutersand Others* in justifying the restrictive effects of the anti-doping rules on their freedom of action. According to the appellants, first, those rules are, contrary to the Commission's findings, in no way solely inherent in the objectives of safeguarding the integrity of competitive sport and athletes' health, but seek to protect the IOC's own economic interests. Second, in laying down a maximum level of 2 ng/ml of urine which does not correspond to any scientifically safe criterion, those rules are excessive in nature and thus go beyond what is necessary in order to combat doping effectively.

41 It should be stated first of all that, while the appellants contend that the Commission made a manifest error of assessment in treating the overall context in which the IOC adopted the rules at issue like that in which the Netherlands Bar had adopted the regulation upon which the Court was called to rule in *Wouters and Others*, they do not provide any accompanying detail to enable the merits of this submission to be assessed.

42 Next, the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 31). Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (*Wouters and Others*, paragraph 97) and are proportionate to them.

43 As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.

44 In addition, given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules.

45 Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.

46 While the appellants do not dispute the truth of this objective, they nevertheless contend that the anti-doping rules at issue are also intended to protect the IOC's own economic interests and that it is in order to safeguard this objective that excessive rules, such as those contested in the present case, are adopted. The latter cannot therefore, in their submission, be regarded as inherent in the proper conduct of competitive sport and fall outside the prohibitions in Article 81 EC.

47 It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport (see, to this effect, *DLG*, paragraph 35).

48 Rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties.

49 Here, that dividing line is determined in the anti-doping rules at issue by the threshold of 2 ng/ml of urine above which the presence of Nandrolone in an athlete's body constitutes doping. The appellants contest that rule, asserting that the threshold adopted is set at an excessively low level which is not founded on any scientifically safe criterion.

50 However, the appellants fail to establish that the Commission made a manifest error of assessment in finding that rule to be justified.

51 It is common ground that Nandrolone is an anabolic substance the presence of which in athletes' bodies is liable to improve their performance and compromise the fairness of the sporting events in which they participate. The ban on that substance is accordingly in principle justified in light of the objective of anti-doping rules.

52 It is also common ground that that substance may be produced endogenously and that, in order to take account of this phenomenon, sporting bodies, including the IOC by means of the anti-doping rules at issue, have accepted that doping is considered to have occurred only where the substance is present in an amount exceeding a certain threshold. It is therefore only if, having regard to scientific knowledge as it stood when the anti-doping rules at issue were adopted or even when they were applied to punish the appellants, in 1999, the threshold is set at such a low level that it should be regarded as not taking sufficient account of

this phenomenon that those rules should be regarded as not justified in light of the objective which they were intended to achieve.

53 It is apparent from the documents before the Court that at the material time the average endogenous production observed in all studies then published was 20 times lower than 2ng/ml of urine and that the maximum endogenous production value observed was nearly a third lower. While the appellants contend that, from 1993, the IOC could not have been unaware of the risk reported by an expert that merely consuming a limited quantity of boar meat could cause entirely innocent athletes to exceed the threshold in question, it is not in any event established that at the material time this risk had been confirmed by the majority of the scientific community. Moreover, the results of the studies and the experiments carried out on this point subsequent to the decision at issue have no bearing in any event on the legality of that decision.

54 In those circumstances, and as the appellants do not specify at what level the threshold in question should have been set at the material time, it does not appear that the restrictions which that threshold imposes on professional sportsmen go beyond what is necessary in order to ensure that sporting events take place and function properly.

55 Since the appellants have, moreover, not pleaded that the penalties which were applicable and were imposed in the present case are excessive, it has not been established that the anti-doping rules at issue are disproportionate.

56 Accordingly, the second plea must be dismissed.

The third plea

57 The appellants contend that the decision at issue is vitiated by an error of law in that it rejects, at point 71, their argument that the IOC rules infringe Article 49 EC.

58 However, the application made by the appellants to the Court of First Instance relates to the legality of a decision adopted by the Commission following a procedure which was conducted on the basis of a complaint lodged pursuant to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It follows that judicial review of that decision must necessarily be limited to the competition rules as resulting from Articles 81 EC and 82 EC, and consequently cannot extend to compliance with other provisions of the Treaty (see, to this effect, the order of 23 February 2006 in Case C-171/05 P *Piau*, not published in the ECR, paragraph 58).

59 Accordingly, whatever the ground on which the Commission rejected the argument relied upon by the appellants with regard to Article 49 EC, the plea which they now put forward is misplaced and must accordingly also be rejected.

60 In light of all the foregoing considerations, the action brought by the appellants challenging the decision at issue must therefore be dismissed.

Costs

61 The first paragraph of Article 122 of the Rules of Procedure provides that, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(3) of the rules provides, however, that the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances

are exceptional. The first subparagraph of Article 69(4) lays down that Member States which intervene in the proceedings are to bear their own costs.

62 Since the Commission has applied for costs to be awarded against the appellants and the latter have in essence been unsuccessful, they must be ordered to pay the costs relating both to the present proceedings and to the proceedings brought before the Court of First Instance. The Republic of Finland is to be ordered to bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. Sets aside the judgment of the Court of First Instance of the European Communities of 30 September 2004 in Case T-313/02 *Meca-Medina and Majcen* v *Commission*;

2. Dismisses the action under No T-313/02 brought before the Court of First Instance for annulment of the Commission's decision of 1 August 2002 rejecting the complaint lodged by Mr Meca-Medina and Mr Majcen;

3. Orders Mr Meca-Medina and Mr Majcen to pay the costs relating both to the present proceedings and to the proceedings brought before the Court of First Instance;

4. Orders the Republic of Finland to bear its own costs.

Judgment of the Court (Grand Chamber) of 1 July 2008.
Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio.
Reference for a preliminary ruling: Dioikitiko Efeteio Athinon - Greece.
Articles 82 EC and 86 EC - Concept of 'undertaking' - Non-profit-making association representing, in Greece, the International Motorcycling Federation - Concept of 'economic activity' - Special legal right to give consent to applications for authorisation to organise motorcycling events - Exercise in parallel of activities such as the organisation of motorcycling events and the conclusion of sponsorship, advertising and insurance contracts.
Case C-49/07.

JUDGMENT OF THE COURT (Grand Chamber)

1 July 2008 (*)

(Articles 82 EC and 86 EC – Concept of 'undertaking' – Non-profit-making association representing, in Greece, the International Motorcycling Federation – Concept of 'economic activity' – Special legal right to give consent to applications for authorisation to organise motorcycling events – Exercise in parallel of activities such as the organisation of motorcycling events and the conclusion of sponsorship, advertising and insurance contracts)

In Case C-49/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Diikitiko Efetio Athinon (Greece), made by decision of 21 November 2006, received at the Court on 5 February 2007, in the proceedings

Motosykletistiki Omospondia Ellados NPID (MOTOE)

v

Elliniko Dimosio,

THE COURT (Grand Chamber),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, J.N. Cunha Rodrigues, A. Borg Barthet, M. Ilešič, J. Malenovský, J. Klučka (Rapporteur), T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 January 2008,

after considering the observations submitted on behalf of:

– the Motosykletistiki Omospondia Ellados NPID (MOTOE), by A. Pliakos, dikigoros,

– the Greek Government, by S. Spyropoulos, K. Boskovits, S. Trekli and Z. Chatzipavlou, acting as Agents,

– the Commission of the European Communities, by T. Christoforou and F. Amato, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 82 EC and 86 EC.

2 The reference has been made in the course of proceedings between the Motosykletistiki Omospondia Ellados NPID (MOTOE) (Greek Motorcycling Federation; 'MOTOE') and the Elliniko Dimosio (Greek State) regarding financial compensation for the non-material harm which MOTOE claims to have suffered as a result of the implicit refusal by the Greek State to grant it authorisation to organise motorcycling competitions.

Legal context

3 Under Article 49 of the Greek Road Traffic Code, in the version resulting from Law No 2696/1999 (FEK A' 57):

'1. Competitions involving ... motorcycles or mopeds on public or private roads or spaces are allowed to take place only after authorisation has been granted.

2. Authorisation under the previous paragraph shall be given:

...

(c) for all competitions involving ... motorcycles or mopeds, by the Minister for Public Order or the authorities empowered by him, following the consent of the legal person which officially represents in Greece the ... Fédération Internationale de Motocyclisme (International Motorcycling Federation) [("the FIM")]'.

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

4 MOTOE is a non-profit-making association governed by private law whose object is the organisation of motorcycling competitions in Greece. Its members include various regional motorcycling clubs.

5 On 13 February 2000, that association submitted to the competent minister an application for authorisation to organise competitions within the framework of the MOTOE Panhellenic Cup in accordance with a programme appended to that application.

6 In accordance with Article 49(2) of the Greek Road Traffic Code, that programme was sent to Elliniki Leskhi Aftokinitou kai Periigiseon (Automobile and Touring Club of Greece; 'ELPA'), a legal person and a non-profit-making association which represents the FIM in Greece, for it to consent for the purposes of granting the authorisation applied for.

7 By letter of 16 March 2000 ELPA requested MOTOE, first, to communicate to it specific rules for each of the planned events two months before the date upon which it would take place, so as to allow scrutiny of the list of participants, the route or track for the race, the safety measures adopted and, more generally, all the conditions for the safe running of the event. Second, it asked the clubs organising the events to lodge

a copy of their statutes with Ethniki Epitropi Agonon Motosykletas (the National Motorcycle-Racing Committee; 'ETHEAM'), created by ELPA and entrusted with organising and supervising motorcycling events.

8 By application No 28/5.5.2000 sent to the competent ministry, MOTOE restated its request, in respect of six clubs, for authorisation to hold six races on dates from 9 July 2000 to 26 November 2000. It appended to that application the specific rules for the holding of those events as well as copies of those clubs' statutes. That application was also forwarded to ELPA with a view to its giving a declaration of consent for the holding of those events.

9 ELPA and ETHEAM sent MOTOE a document reminding it of certain rules relating to the organisation of motorcycling events in Greece. In particular, it is stated in that document that championships, cups and prizes organised in the framework of motorcycling events are announced by ETHEAM following authorisation from ELPA, which is the only legal representative of the FIM in Greece. If an entity or club which satisfies the necessary requirements for the organising and holding of events wishes a specific cup or prize to be announced, it must, according to that document, submit the announcement to ETHEAM. ETHEAM, after assessing the terms of that announcement, makes a decision in which it also defines the conditions for holding the event, in accordance with the international and national rules. For consent for organisation of an event to be granted, including within the framework of a cup or prize, each organiser who has taken on one of those events must satisfy the requirements laid down in the National Motorcycle Competition Code and ETHEAM's circulars. ELPA and ETHEAM also reminded MOTOE that if, in the course of the year, an organiser requests that additional events be announced, the dates of those events must not affect the dates already scheduled, and this must be in the interests of both the racers and the organisers. For that reason, the programme of events to be organised during 2001 had to be lodged with ELPA and ETHEAM no later than 15 September 2000.

10 In reply to MOTOE's request seeking information on the outcome of its applications for authorisation, the competent ministry indicated to MOTOE, in August 2000, that it had not received a document from ELPA with its consent under Article 49 of the Greek Road Traffic Code.

11 Pleading the unlawfulness of that implicit rejection, MOTOE brought an action before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens), seeking compensation of GRD 5 000 000 for the non-material damage that it claims to have suffered on account of its being unable to hold the events in question.

12 MOTOE claimed that Article 49 of the Greek Road Traffic Code is contrary, first, to the constitutional principle that administrative organs must be impartial and, second, to Articles 82 EC and 86(1) EC, on the ground that the national provision at issue enables ELPA, which itself organises motorcycling competitions, to impose a monopoly in that field and to abuse that position.

13 ELPA intervened before the Diikitiko Protodikio Athinon in support of the Greek State. ELPA annexed to its statement in intervention, amongst other documents, its statutes of association of 1924, and its yearbook for 2000 regarding motorcycling events which was published by ETHEAM. That yearbook includes ETHEAM's circulars for 2000, which relate, inter alia, to the supporting documents that competitors had to provide in order to be entitled to a licence, to the rules for events which had to be lodged, to the determination of fees and to other issues of a financial nature. The yearbook also contains the Ethnikos Athlitikos Kanonismos Motosikletas (National Sporting Rules for Motorcycling; 'the EAKM').

14 As regards EAKM, the following must be mentioned:

– Article 10.7 thereof states that every sports meeting which includes events in respect of ELPA and ETHEAM championships, cups or prizes may be combined with the commercial promotion of a sponsor referred to in the events' title or secondary title, but only after ELPA and ETHEAM have given their consent;

– Article 60.6 of the EAKM states that, during sports meetings, advertising on riders' clothes, helmets (on condition that the advertising does not affect helmets' technical characteristics) and motorcycles is permitted. In speed events and motocross within the framework of ELPA and ETHEAM championships, cups and prizes, the organisers may not require a racer, passenger or motorcycle to advertise any product, unless the competitor has given his consent. However, when a sponsorship agreement concluded by ETHEAM and ELPA is applicable, riders, passengers and motorcycles are obliged to observe the terms of that agreement;

– according to Article 110.1 of the EAKM, '[t]he organiser [of a motorcycling event], either directly or through the supervisory authority [namely ELPA and ETHEAM], must ensure that the sports meeting is covered by insurance which should include his own liability and that of manufacturers, riders, passengers ... in the event of accidents and of loss or injury to third parties during the event and during practice.'

15 The Diikitiko Protodikio Athinon dismissed MOTOE's action on the ground, inter alia, first, that Article 49 of the Greek Road Traffic Code ensures that international rules for the safe running of motorcycling events are observed and, second, that MOTOE did not assert that that provision resulted in a dominant position within the common market, or that that provision might affect trade between Member States, or that ELPA abused such a position.

16 MOTOE lodged an appeal against that judgment with the Diikitiko Efetio Athinon, which states, first of all, that ELPA's activities are not limited to purely sporting matters, namely to the power conferred on ELPA in Article 49 of the Greek Road Traffic Code, given that it also engages in activities classified as 'economic' by the referring court, which consist in entering into sponsorship, advertising and insurance contracts. The Diikitiko Efetio Athinon, therefore, wonders whether ELPA can be classified as an undertaking for the purposes of Community competition law, in particular, for the purposes of Articles 82 EC and 86 EC, so that it would be subject to the prohibition on the abuse of a dominant position. The referring court interprets Article 49 of the Greek Road Traffic Code as meaning that ELPA is the only legal person entitled to give consent to any application for authorisation to organise a motorcycling event. It draws attention to the fact that that association itself takes on, in parallel, the organising of events and the determination of prizes as well as the economic activities referred to above.

17 The Diikitiko Efetio Athinon next observes that the applicants, who have been refused authorisation to hold a motorcycling event since they have failed to obtain ELPA's consent, have no effective remedy under national law against such a decision. First, it is not provided that refusals by ELPA to give consent must contain a statement of reasons and, second, where a refusal of authorisation by the competent ministry is the subject of a legal action alleging failure to state reasons and that action is upheld, Greek law does not provide for authorisation to be granted to the applicant. Further, ELPA is not subject to control or to appraisal of any kind as regards the use that it makes of the power which is conferred on it by Article 49 of the Greek Road Traffic Code. Those circumstances present any person from another Member State of the European Union who wishes to organise motorcycling events in Greece with a *fait accompli*.

18 In these circumstances the Diikitiko Efetio Athinon decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can Articles 82 EC and 86 EC be interpreted so as also to include within their scope the activity of a legal person which has the status of national representative of the [FIM] and engages in economic activity as described above by entering into sponsorship, advertising and insurance contracts, in the context of the organisation of motor sport events by it?

(2) Should the answer [to the first question] be in the affirmative, is Article 49 of [the Greek Road Traffic Code], which, in relation to issue by the competent national public authority (in the present case, the Ministry for Public Order) of permission to organise a motor-vehicle competition, gives the foregoing legal person the power to provide a concurring opinion as to the holding of the competition without that power being made subject to restrictions, obligations and review, compatible with those provisions of the Treaty?'

Examination of the questions referred for a preliminary ruling

19 By its questions, which should be considered together, the referring court essentially asks, first, whether a legal person, which is a non-profit-making association such as ELPA, falls within the scope of Articles 82 EC and 86 EC, given that its activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts and, second, whether those Treaty provisions preclude a rule, such as that laid down in Article 49 of the Greek Road Traffic Code, in so far as it confers on such an association the power to give its consent to applications for authorisation to organise those events, without that power being made subject to restrictions, obligations or review.

20 In this respect, it must be borne in mind, first, that Community competition law refers to the activities of undertakings (Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31, and Case C-280/06 *ETI and Others* [2007] ECR I-0000, paragraph 38 and the case-law cited). More specifically, Article 82 EC applies to undertakings holding a dominant position.

21 Although the Treaty does not define the concept of an undertaking, the Court has consistently held that any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, must be categorised as an undertaking (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46).

22 It should be borne in mind in this regard that any activity consisting in offering goods or services on a given market is an economic activity (see, in particular, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75). Provided that that condition is satisfied, the fact that an activity has a connection with sport does not hinder the application of the rules of the Treaty (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73) including those governing competition law (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraphs 22 and 28).

23 As stated in the order for reference, and as also confirmed at the hearing before the Court, ELPA organises, in cooperation with ETHEAM, motorcycling events in Greece and, enters, in that connection, into sponsorship, advertising and insurance contracts designed to exploit those events commercially. Those activities constitute a source of income for ELPA.

24 According to the case-law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition (see, to that effect, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraphs 30 and 31).

25 As regards the possible effect of the exercise of public powers on the classification of a legal person such as ELPA as an undertaking for the purposes of Community competition law, it must be noted, as the Advocate General did at point 49 of her Opinion, that the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities (Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 74). The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity.

26 In the present case, it is necessary to distinguish the participation of a legal person such as ELPA in the decision-making process of the public authorities from the economic activities engaged in by that same legal person, such as the organisation and commercial exploitation of motorcycling events. It follows that the power of such a legal person to give its consent to applications for authorisation to organise those events

does not prevent its being considered an undertaking for the purposes of Community competition law so far as concerns its economic activities referred to above.

27 As regards the effect that the fact that ELPA does not seek to make a profit may have on that classification, it should be noted that, in Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 122 and 123), the Court stated that the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit.

28 That is the case of activities engaged in by a legal person such as ELPA. The fact that MOTOE, the applicant in the main proceedings, is itself a non-profit-making association has, from that point of view, no effect on the classification as an undertaking of a legal person such as ELPA. First, it is not inconceivable that, in Greece, there exist, in addition to the associations whose activities consist in organising and commercially exploiting motorcycling events without seeking to make a profit, associations which are engaged in that activity and do seek to make a profit and which are thus in competition with ELPA. Second, non-profit-making associations which offer goods or services on a given market may find themselves in competition with one another. The success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the other operators.

29 Consequently, a legal person such as ELPA must be considered an undertaking for the purposes of Community competition law. However, in order for it to fall within the scope of Article 82 EC, it must also occupy a dominant position within the common market or in a substantial part of it.

30 In that regard, it must be observed that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (Case C-450/06 *Varec* [2008] ECR I-0000, paragraph 23). However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary.

31 Before it is possible to assess whether a legal person such as ELPA has a dominant position within the meaning of Article 82 EC, it is necessary to define the relevant market, both from the point of view of the goods or services concerned and from the geographic point of view (Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 10).

32 According to settled case-law, for the purposes of applying Article 82 EC, the relevant product or service market includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and the structure of supply and demand on the market in question (see, to that effect, Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 25; Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission* [1983] ECR 3461, paragraph 37; and Case C-62/86 *AKZO* v *Commissio*n [1991] ECR I-3359, paragraph 51).

33 In that regard, it is clear from the order for reference that the activities in which ELPA is engaged consist, first, in the organisation of motorcycling events and, second, in their commercial exploitation by means of sponsorship, advertising and insurance contracts. Those two types of activities are not interchangeable but are rather functionally complementary.

34 The definition of the relevant geographical market calls, just like the definition of the product or service market, for an economic assessment. The geographical market can thus be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns specifically the relevant

products or services. From that point of view, it is not necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are similar or sufficiently homogeneous (see, to that effect, *United Brands and United Brands Continentaal* v *Commission*, cited above, paragraphs 44 and 53). Furthermore, the market may be confined to a single Member State (see, to that effect, *Nederlandsche Banden Industrie Michelin* v *Commission*, cited above, paragraph 28).

35 As stated in the order for reference, and as was also confirmed at the hearing before the Court, the activities in which ELPA engages are confined to the territory of Greece. However, the territory of a Member State may constitute a substantial part of the common market (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31). It is for the referring court, however, to determine whether the criterion relating to similar or sufficiently homogeneous conditions of competition is satisfied in the main proceedings.

36 It is with reference to the market thus defined that that court will have to assess whether ELPA has a dominant position.

37 It should be recalled in this respect that it is clear from the case-law that the concept of a 'dominant position' under Article 82 EC concerns a position of economic strength held by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (*United Brands and United Brands Continentaal* v *Commission*, cited above, paragraph 65; Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38; and *Nederlandsche Banden-Industrie-Michelin* v *Commission*, cited above, paragraph 30).

38 It should be added that an undertaking can be put in such a position when it is granted special or exclusive rights enabling it to determine whether and, as the case may be, in what conditions, other undertakings may have access to the relevant market and engage in their activities on that market.

39 It should further be observed that Article 82 EC cannot be infringed by a rule such as that laid down in Article 49 of the Greek Road Traffic Code unless trade between Member States is affected by it. As the Advocate General pointed out in points 63 and 64 of her Opinion, such an effect on trade between Member States can be assumed only if it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective legal and factual elements, that the behaviour in question may have an influence, direct or indirect, actual or potential, on trade between Member States in such a way as might hinder the attainment of a single market between Member States (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 48). Purely hypothetical or speculative effects that the conduct of an undertaking in a dominant position may have do not satisfy that criterion. Similarly, the impact on intra-community trade must not be insignificant (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 60, and *Ambulanz Glöckner*, cited above, paragraph 48).

40 Accordingly, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54).

41 Furthermore, the assessment of whether the effect on trade between Member States is appreciable must take account of the conduct of the dominant undertaking in question, in so far as Article 82 EC precludes all conduct which is capable of affecting freedom of trade in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the single market (Case 22/78 *Hugin Kassaregister and Hugin Cash Registers* v *Commission* [1979] ECR 1869, paragraph 17).

42 The fact that the conduct of an undertaking in a dominant position relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected (see, to that effect, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006]

ECR I-11421, paragraph 45). Such conduct may have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (see, by analogy, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 45 and 46).

43 So far as concerns, second, the scope of Article 86 EC, paragraph 1 thereof provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary, in particular, to the rules contained in the Treaty with regard to competition. In this respect, it should be noted that a legal person such as ELPA, to which the power to give consent to applications for authorisation to organise motorcycling events has been granted, must be considered an undertaking which has been granted by the Member State concerned special rights within the meaning of Article 86(1) EC.

44 Article 86(2) EC allows Member States to confer, on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings holding the exclusive rights (Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14).

45 As regards the organisation and commercial exploitation of motorcycling events by a legal person such as ELPA, the Greek Government has not claimed that ELPA has been entrusted with the exercise of those activities through an act of public authority. It is not therefore necessary to examine further whether those activities may constitute a service of general economic interest (see, to that effect, Case 127/73 *BRT and Société belge des auteurs, compositeurs et éditeurs* [1974] ECR 313, paragraph 20, and Case 66/86 *Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 55).

46 As regards the power to give consent to applications for authorisation to organise motorcycling events, that does indeed stem from an act of public authority, namely Article 49 of the Greek Road Traffic Code, but it cannot be classified as an economic activity, as the Advocate General observed at point 110 of her Opinion.

47 A legal person such as ELPA cannot therefore be considered an undertaking entrusted with a service of general economic interest within the meaning of Article 86(2) EC.

48 As regards, third, the question whether Articles 82 EC and 86(1) EC preclude a national rule, such as Article 49 of the Greek Road Traffic Code, which confers on a legal person like ELPA, which can itself take on the organisation of motorcycling events and their commercial exploitation, the power to give consent to applications for authorisation to organise those events, without that power being made subject to restrictions, obligations and review, it should be recalled that the mere creation or reinforcement of a dominant position through the grant of special or exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC.

49 On the other hand, a Member State will be in breach of the prohibitions laid down by those two provisions if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (*Höfner and Elser*, cited above, paragraph 29; *ERT*, cited above, paragraph 37; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraphs 16 and 17; and Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 18). In this respect, it is not necessary that any abuse should actually occur (see, to that effect, Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 36).

50 In any event, Articles 82 EC and 86(1) EC are infringed where a measure imputable to a Member State, and in particular a measure by which a Member State confers special or exclusive rights within the meaning

of Article 86(1) EC, gives rise to a risk of an abuse of a dominant position (see, to that effect, *ERT*, cited above, paragraph 37; *Merci convenzionali porto di Genova*, cited above, paragraph 17; and Case C-380/05 *Centro Europa 7* [2008] ECR I-0000, paragraph 60).

51 A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount *de facto* to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors (see, by analogy, Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51, and Case C-18/88 *GB Inno BM* [1991] ECR I-5941, paragraph 25). Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted by the fact, confirmed at the hearing before the Court, that, when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grant it the required authorisation.

52 Furthermore, such a rule, which gives a legal person such as ELPA the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates.

53 In the light of the foregoing, the answer to the questions referred must be that a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

A legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling competitions and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

C-196/09: Paul Miles and Others v Écoles européennes (Opinion of Advocate General Eleanor Sharpston)

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 16 December 2010 (1)

Case C-196/09

Paul Miles and Others
Robert Watson MacDonald
v
European Schools

(Reference for a preliminary ruling from the Complaints Board of the European Schools)

(Definition of 'national jurisdiction' for the purposes of Article 267 TFEU – Complaints Board of the European Schools – Principles of equal treatment and freedom of movement for workers – System of remuneration of teachers seconded to the European Schools)

1. The European Schools are official educational establishments controlled jointly by the governments of the Member States of the European Union ('EU'). Their purpose is to provide a multilingual and multicultural education for nursery, primary and secondary level children of the staff of the EU institutions. There are currently 14 schools with a total of approximately 22 500 pupils on the registers. (2)

2. The European Schools were founded upon two conventions, the Statute of the European School signed at Luxembourg on 12 April 1957 (3) and the Protocol of 13 April 1962 on the setting-up of European Schools with reference to the Statute of the European School signed at Luxembourg on 12 April 1957. (4) Both conventions were concluded by the six original Member States. They were replaced on 21 June 1994 by the Convention defining the Statute of the European Schools ('the Convention'). (5) It was at this point that the Community institutions became parties to the international agreements. (6) Currently the EU institutions and all 27 Member States are Contracting Parties to the Convention. (7)

3. The Convention lays down provisions concerning the purpose and organisation of the schools. It covers matters such as pedagogy, the institutional structure of the European Schools system, the organs established to administer it and the settlement of disputes concerning the interpretation and application of the Convention.

4. A further objective of the Convention is to ensure adequate legal protection for persons who fall within its scope, thus leading to the creation of a Complaints Board. (8)

5. The present proceedings raise an important institutional question. Is the Complaints Board competent to refer questions of EU law to the Court of Justice? If the Court considers that it has jurisdiction

to entertain such a reference, the substantive issues raised in the main proceedings will require consideration of the principles of equal treatment and freedom of movement for workers within the EU.

Legal framework

The Convention

6. The third recital in the preamble to the Convention states that '... the European School system is "*sui generis*"; ... it constitutes a form of cooperation between the Member States and the European Communities ...'.

7. Article 1 of the Convention provides that the purpose of the Schools is to educate together the children of the staff of the European Communities.

8. Article 3(2) states: 'Instruction shall be provided by teachers seconded or assigned by the Member States in accordance with decisions taken by the Board of Governors under the procedure laid down in Article 12(4).'

9. Under Article 7 the organs common to all European Schools are the Board of Governors, the Secretary-General, the Boards of Inspectors and the Complaints Board.

10. Article 12 states that the Board of Governors is to:

'(1) lay down the Service Regulations for the Secretary-General, the Headteachers, the teaching staff

...

(4)(a) determine each year, on a proposal from the Boards of Inspectors, the teaching staff requirements by creating or eliminating posts. It shall ensure a fair allocation of posts among the Member States. It shall settle with the Governments questions relating to the assignment or secondment of the secondary school teachers, primary school teachers and education counsellors of the School. Staff shall retain promotion and retirement rights guaranteed by their national rules;

...'

11. Article 25 provides: 'The budget of the Schools shall be financed by:

1. contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff and, where appropriate, a financial contribution decided on by the Board of Governors acting unanimously.'

12. Article 26 states: 'The Court of Justice of the European Communities shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of this Convention which have not been resolved by the Board of Governors.'

13. Article 27 deals with the Complaints Board. It provides:

'1. A Complaints Board is hereby established.

2. The Complaints Board shall have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the Board of Governors of the Administrative Board of a school in the exercise of their powers as specified by this

Convention. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction.

The conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the Schools.

3. The members of the Complaints Board shall be persons whose independence is beyond doubt and who are recognised as being competent in law.

Only persons on a list to be compiled by the Court of Justice of the European Communities shall be eligible for membership of the Complaints Board.

4. The Statute of the Complaints Board shall be adopted by the Board of Governors, acting unanimously.

The Statute of the Complaints Board shall determine the number of members of the Board, the procedure for their appointment by the Board of Governors, the duration of their term of office and the financial arrangements applicable to them. The Statute shall specify the manner in which the Board is to operate.

5. The Complaints Board shall adopt its rules of procedure, which shall contain such provisions as are necessary for applying the Statute.

The rules of procedure shall require the unanimous approval of the Board of Governors.

6. The judgments of the Complaints Board shall be binding on the parties and, should the latter fail to implement them, rendered enforceable by the relevant authorities of the Member States in accordance with their respective national laws.

7. Other disputes to which the Schools are party shall fall within national jurisdiction. In particular, national courts' jurisdiction with regard to matters of civil and criminal liability is not affected by this Article.'

Statute of the Complaints Board (9)

14. Article 1 of the Statute provides that the Complaints Board is to be composed of six members appointed for a five year period from the list compiled for that purpose by the Court of Justice. In principle their term of office is tacitly renewable.

15. Article 2 states that each member of the Complaints Board must make the following declaration:

'I hereby swear … that I shall perform my duties honourably, independently and impartially, and that I shall preserve the secrecy of the deliberations.' (10)

16. Article 3 stipulates that members of the Complaints Board may not engage in any political, or administrative activity or any occupation incompatible with their duty to behave independently and impartially.

17. Article 5 provides that a member may be removed from office only if the other members meeting in plenary decide by a two-thirds majority that he has ceased to fulfil the requisite conditions. Before removal from office the member has the right to be heard by the Complaints Board.

The Rules of Procedure for the Complaints Board of the European Schools (11)

18. The Rules of Procedure contain provisions analogous to those governing the written and oral procedure before this Court and the General Court. Thus, Article 9 provides that all communications with a

party must be made in one of the official languages. (12) Articles 11 and 12 make provision for parties who appear before the Complaints Board to be represented by a lawyer. Articles 14 to 19 provide for a written procedure which includes the exchange of an application, a defence, a reply and a rejoinder; and subsequently for an oral procedure to take place.

The Regulations for Members of the Seconded Staff of the European Schools applicable from 1 September 1996 (13)

19. The Staff Regulations lay down the provisions governing the terms and conditions of members of staff seconded to the European Schools.

20. Article 45 provides that the remuneration paid to members of staff is to comprise the basic salary, payment for overtime, family and other allowances.

21. Article 47 states:

'1. A member of staff's remuneration shall be expressed in euro.

....

2. It shall be paid to the member of staff at the place and in the currency of the country where he carries out his duties.

Remuneration paid in a currency other than the euro shall be calculated on the basis of the exchange rate applied for the remuneration of officials of the European Communities.

3. A member of staff's remuneration shall be weighted at a rate above, below or equal to 100%, as laid down and adjusted for officials of the European Communities.'

22. Article 49 provides:

'1. ... [A] member of staff shall be entitled to the remuneration carried by his post and his step in the salary scale for such a post, as laid down in Annex III to these Regulations.' (14)

23. At the time the current dispute arose (April 2008), Article 49(2) provided as follows:

'(a) The competent national authorities shall pay the national emoluments to the member of staff and shall inform the Director of the amounts paid, specifying all the components taken into account for calculation purposes, including compulsory social security deductions and taxes.

(b) The School shall pay the difference between the remuneration provided for in these Regulations and the exchange value of all national emoluments, minus compulsory social security deductions. The exchange value shall be converted into the currency of the country in which the member of staff performs his duties, on the basis of the exchange rates used for the salaries of officials of the European Communities.'

24. Article 49(2) was amended with effect from 1 July 2008 to allow the European Schools to make an adjustment, if necessary, to the exchange rates between the euro and other official currencies of the Member States. The following paragraphs were added to the text of that provision:

'These exchange rates shall be compared with the monthly exchange rates in force for the implementation of the budget. Should there be a difference of 5% or more in one or more currencies compared with the exchange rates used hitherto, an adjustment shall be made from that month. Should the trigger threshold not be reached, the exchange rates shall be updated after six months at the latest.

If the exchange value is higher than the remuneration provided for in these Regulations for a calendar year, the member of staff concerned shall be entitled to the difference between the two sums.'

25. Article 79 of the Staff Regulations provides that an administrative appeal may be lodged with the Secretary-General of the European Schools ('the Secretary-General') against administrative and financial decisions in the administrative and financial areas concerning the legality of an act which adversely affects the person concerned. If the Secretary-General does not reply to an administrative appeal within five months of it having been lodged, that constitutes an implied decision rejecting that administrative appeal. An appeal against such a decision may be brought before the Complaints Board.

26. The relevant provisions of Article 80 are as follows:

'1. The Complaints Board shall have sole jurisdiction in the first and final instance in any dispute between the management organs of the School and members of staff regarding the legality of an act adversely affecting them …'

Paragraph 2 provides that, before an appeal may be lodged with the Complaints Board, an administrative appeal must be lodged with the Secretary-General under Article 79 and an express or implied decision rejecting it must have been taken.

Paragraph 5 states: 'Contentious appeals within the meaning of this article shall be examined and judged subject to the conditions laid down by the Rules of Procedure established by the Complaints Board.

Appeals lodged with the Complaints Board shall not have suspensory effect. However, the Complaints Board may, if it considers that the circumstances so require, order that application of the contested act be suspended. Judgments of the Complaints Board shall be final and enforceable.'

The EC Treaty (15)

27. The first paragraph of Article 12 EC provides: '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.'

28. Article 39 EC states:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3.It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

…'

29. Article 234 EC states:

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

…

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.'

Background, facts and procedure

The salary calculation

30. Article 49(1) of the Staff Regulations provides that all teachers are to receive the monthly salary set out in Annex III, expressed in euro. (16)

31. The salary reflects the structure of the European Schools in so far as responsibility for paying it is shared between the Member States and the Schools. Thus, the seconded teacher continues to receive his national salary (subject to compulsory deductions for tax and social security) whilst seconded to the Schools. (17) The national salary is converted into euro applying the exchange rate identified. The exchange value of the national salary is then deducted from the monthly salary set out in Annex III to the Staff Regulations. The difference between the two is known as the 'European supplement' and is paid directly to the seconded teacher by the European Schools, using money provided by the EU budget. (18) The European supplement and the national salary together constitute the teacher's basic salary for the purposes of the Staff Regulations.

32. On 1 July 2007 EUR 1 was equivalent to GBP 0.67215. However, sterling depreciated significantly against the euro from October 2007 onwards. On 1 December 2007 EUR 1 was equivalent to GBP 0.71475 and on 1 June 2008 to GBP 0.7866. Thus, between 1 July 2007 and 30 June 2008 sterling had lost approximately 7.4% of its value against the euro.

33. The exchange rate applied to calculate the euro exchange value of the teachers' national salaries was set each year on 1 July. Prior to their amendment in July 2008, the Staff Regulations made no provision for intermediate adjustments to be made to the rate set on 1 July to take account of variations in the exchange rate during the year. Thus, there was no adjustment mechanism to compensate for the significant depreciation in the value of sterling against the euro between October 2007 and June 2008.

34. Following the amendment to the Staff Regulations from 1 July 2008, intermediate adjustment may now be made where there is a difference of 5% or more in the exchange rate of a currency as compared to the rate previously applied. (19)

Facts and procedure

35. During the period from April 2008 onwards, Mr Miles and 135 other teachers seconded to the European Schools by the United Kingdom brought administrative appeals pursuant to Article 79 of the Staff

Regulations before the Secretary-General. In those administrative appeals, they sought an adjustment to the calculation of the European supplement element of their salaries so as to compensate for the depreciation of sterling against the euro during the period October 2007 to June 2008. The Secretary-General confirmed by letter dated 7 November 2008 that she had rejected the teachers' administrative appeals. On 15 December 2008, the teachers lodged appeals with the Complaints Board against the Secretary-General's decision.

36. One further claimant, Mr Robert Watson MacDonald, lodged his administrative appeal with the Secretary-General on 9 May 2008. On 9 January 2009 he too lodged an appeal with the Complaints Board against the Secretary-General's decision.

37. All of the appeals lodged by the teachers concern the calculation of the European supplement in respect of British teachers who perform their duties at schools in Member States where the euro is the currency used.

The order seeking to refer questions for a preliminary ruling

38. In its order seeking to refer questions for a preliminary ruling, the Complaints Board observes that Article 26 of the Convention provides that the Court has sole jurisdiction to rule on the interpretation and application of the Convention in disputes between the Contracting Parties which have not been resolved by the Board of Governors. There is, however, no express provision under which the Complaints Board is empowered to seek guidance from the Court in relation to an appeal before it.

39. The Complaints Board emphasises that its task is to ensure that the law is applied in a uniform manner to matters that fall within its jurisdiction. Its judgment in an appeal is binding on the parties. If they fail to implement it, the judgment is enforceable by the competent authorities of the Member States. The Complaints Board takes the view that, taking into account this general legal context (in particular its obligation to ensure the uniform application of EU law to matters that fall within its jurisdiction), it would be a paradox if it were considered not to be competent to refer questions to the Court under Article 234 EC.

40. Accordingly, the Complaints Board wishes to refer the following questions to the Court:

'(1) Is Article 234 EC to be interpreted as meaning that a court or tribunal such as the Complaints Board, which was established by Article 27 of the Convention defining the statute of the European Schools, falls within its scope of application and, since the Complaints Board acts as a tribunal of last instance, is competent to make a reference for a preliminary ruling to the Court of Justice?

(2) If the answer to the first question is in the affirmative, must Articles 12 EC and 39 EC be interpreted as meaning that they prevent the application of a remuneration system such as the system in force within the European Schools in as much as, although that system expressly refers to the system applying to Community officials, it does not allow for the taking into account, even retrospectively, of currency devaluation which leads to a decline in purchasing power for teachers who are seconded by the authorities of the Member State concerned?

(3) If the answer to the second question is in the affirmative, can a difference in situation such as that established between teachers seconded to the European Schools, whose remuneration is funded both by their national authorities and by the European School in which they teach, on the one hand, and officials of the European Community, whose remuneration is funded by the Community alone, on the other hand, justify a situation in which, in the light of the principles laid down in the articles cited above and although the Regulations for Members of the Seconded Staff of the European Schools expressly refer to the Staff Regulations of Officials of the European Communities, the exchange rates applied in order to maintain an equivalent purchasing power are not the same?'

41. Written observations have been submitted, and oral argument was presented at the hearing on 9 June 2010, on behalf of the teachers, the European Schools, and the European Commission.

Assessment

The first question

42. The first question raises a fundamental issue. Does the Court's jurisdiction under Article 234 EC extend to bodies like the Complaints Board? If that question is answered in the negative, there is no need to reply to questions 2 and 3.

Do the questions raised by the Complaints Board concern matters of EU law?

43. It is contended on behalf of the European Schools that those schools are established on the basis of international agreements, and that those agreements, the measures and decisions of the European Schools should not be regarded as an integral part of EU law. Therefore, the system which governs the operation of the European Schools falls outside the scope of the category of measures covered by Article 234 EC.

44. In *Hurd* (20) the question before the Court required consideration of the remuneration system applied to British teachers within the European Schools who were teaching at the school in Culham, England. The Board of Governors of the first European School had decided (at a meeting of 26 and 27 January 1957) that members of staff should pay tax on the salary (or part thereof) corresponding to their national salary. On the other hand, supplements and allowances paid under the Staff Regulations should be exempt from all tax. In the United Kingdom the European supplement and the differential allowances paid by the European School at Culham to teachers who were not United Kingdom nationals were not subject to income tax. The dispute in the main proceedings in *Hurd* concerned the question whether such payments might, on the other hand, be charged to tax when made to United Kingdom nationals. Mr Hurd claimed that the supplements paid by the European School in Culham to teachers seconded by the United Kingdom should be exempt from national taxation as a matter of Community law. He submitted that since the United Kingdom had acceded to the convention defining the statute of the European School as required by Article 3 of the Act of Accession to the European Communities of the United Kingdom of Great Britain and Northern Ireland to the European Communities of 1972, the United Kingdom had accepted the decision of the meeting of 26 and 27 January 1957. The United Kingdom Government contended that although the Court might interpret Article 3 of the Act of Accession, it did however not have jurisdiction to interpret the conventions establishing the European Schools.

45. The Court held that it did not have jurisdiction to interpret Article 3 of the Act of Accession for the purpose of defining the United Kingdom's obligations under the measures and decisions of the organs of the European Schools, because the latter instruments fell outside the scope of the categories of measures covered by Article 234 EC. The fact that such agreements were linked to the Community and the functioning of its institutions did not mean that they were to be regarded as an integral part of Community law. However, the Court considered that – in order to determine the scope of Article 3 of the Act of Accession regarding such instruments – it might be necessary to define the legal status of measures and decisions of organs of the European Schools and therefore to subject them to such scrutiny as was necessary for that purpose. (21)

46. The Court has recently confirmed its ruling in *Hurd* in *Commission* v *Belgium*. (22) It follows from the Court's case-law that the Staff Regulations laid down by the Board of Governors of the European Schools pursuant to Article 12(1) of the Convention are therefore *prima facie* measures which fall outside the scope of Article 234 EC.

47. It seems to me, therefore, that, in the context of the present case, the Staff Regulations have the same status as provisions of national law in a reference from a national court. The Court is not competent to interpret them as such, but may give guidance on the way in which EU law applies to them.

48. Moreover, the European Schools conceded during the hearing that they apply the Treaty and accepted that the substantive questions referred to the Court by the Complaints Board concern its correct interpretation.

49. It therefore seems to me that since questions 2 and 3 make an explicit request concerning the interpretation of the Treaty, the Staff Regulations may be examined in so far as it is necessary to answer the issues of EU law that arise.

Is the Complaints Board a court or tribunal of a Member State for the purposes of Article 234 EC?

50. According to the Court's established case-law, '[i]n order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'. (23) Additionally, a national court may refer a question to the Court only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. (24)

51. The Commission and the teachers contend that the Complaints Board has all the characteristics of a court or tribunal for the purposes of Article 234 EC. The European Schools accept that the Complaints Board is a court or tribunal, but submit that it is not a court or tribunal *of a Member State* as required by the wording of the second paragraph of Article 234 EC. I shall therefore deal only briefly with the aspects which are not in dispute, in order to concentrate on the latter issue.

52. The Complaints Board is formed pursuant to Article 27 of the Convention. It is therefore clearly established by law. Its permanent nature may be inferred from Article 27(1), since it is established without any limit to its duration, with its members serving for a renewable period of five years. Under Article 27(2), the Complaints Board has sole jurisdiction in the disputes concerned and, under Article 27(6) (confirmed by Article 80(5) of the Staff Regulations), its judgments are binding and enforceable; those provisions make it clear that the Complaints Board exercises a judicial function. Article 27(5) empowers the Complaints Board to adopt its rules of procedure in order to apply the Statute, and those which it has adopted provide for an inter partes procedure.

53. In addition, it is clear that the Complaints Board possesses the characteristic of independence, which is inherent to the task of adjudication. (25) Its composition is governed by Article 27(3) of the Convention and Articles 1, 2, 3 and 5 of the Statute. Thus its members must be persons whose independence is beyond doubt, chosen from a list compiled by the Court of Justice. They take an oath to act independently and impartially, and may not engage in any activity incompatible with that obligation. A member may be removed from office only if, after he has been heard, a two-thirds majority of all his colleagues considers that he has ceased to fulfil the requisite conditions. In addition, the Complaints Board plainly acts as a third party in relation to the body that adopted the contested decision, as it is a separate and distinct organ from the Secretary-General.

54. Having confirmed that the Complaints Board meets all the criteria for classification as a court or tribunal, I turn, therefore, to consider the fundamental question whether it can be considered a court or tribunal *of a Member State*.

55. The European Schools contend that the second paragraph of Article 234 EC should be construed literally, as referring to a court or tribunal *of aMember State* – which the Complaints Board plainly is not.

56. The Commission and the teachers submit that the objective of Article 234 EC is to ensure the coherent and uniform application of EU law. Therefore, Article 234 EC should be construed purposively and the words a 'court or tribunal *of a Member State*' (26) should be given a broad interpretation. In *Rheinmühlen* (27) the

Court confirmed that the purpose of the procedure under what was then Article 177 of the EEC Treaty was to ensure that in all circumstances the law is the same throughout the Community's Member States.

57. I agree with the Commission and the teachers.

58. It is nearly 30 years since the Court first adopted an interpretation of what subsequently became Article 234 EC that was broader than the literal sense of the wording of the second paragraph. In *Broekmeulen* (28) the Court held that, when the appeals committee established by the Royal Netherlands Society for the promotion of medicine ('the appeals committee') applied and determined matters of Community law, it must be considered to be a court or tribunal of a Member State. In its judgment the Court observed that there was no right of appeal from the appeals committee's decisions to the ordinary courts.

59. In the present case the Complaints Board, has 'sole jurisdiction in the first and final instance'. (29) Because its remit covers the rights and obligations of teachers many of whom will have exercised rights of free movement as part of accepting secondment to the various European Schools, it will inevitably – as indeed, in the present case – have to apply (and give precedence to) EU law in determining disputes before it. As with the appeals committee in *Broekmeulen*, there is no right of appeal from the Complaints Board's decision to the ordinary courts of any Member State. The analogy with *Broekmeulen* is compelling. (30)

60. In *Christian Dior* (31) the Court examined whether, in proceedings concerning the interpretation of the trade marks directive (32) the highest national court of the Netherlands or the Benelux Court (33) should be regarded as the court or tribunal against whose decisions there was no judicial remedy, and which was therefore required to make a preliminary reference to the Court under Article 234(3) EC. The Court again adopted a purposive interpretation and, referring to the Benelux Court, it stated: 'There is no good reason why such a court, *common to a number of Member States*, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.' In reaching that conclusion, the Court placed weight upon two factors. First, the Benelux Court had the task of ensuring that the legal rules common to the three Benelux countries were applied uniformly; and the procedure before it was a step in proceedings before national courts leading to a definitive interpretation of common Benelux rules. Second, recognising that the Benelux Court was entitled to refer questions to the Court served the purpose of Article 234 EC, because it ensured the uniform interpretation of Community law. (34)

61. Advocate General Jacobs considered the issue briefly in his Opinion. He emphasised that 'the rationale of the Treaty provisions is that a court of a Member State whose decisions are final should not decide a question of Community law in the absence of a ruling from this Court'.

62. The European Schools contend that *Christian Dior* is distinguishable from the present matter, because the issue in the main proceedings in that case initially arose before a national court (the Rechtbank te Haarlem; the reference was subsequently made by the Netherlands Supreme Court). In the present instance, there was never an issue before a national court and accordingly, there is no question arising from a national court or tribunal.

63. I disagree. In my view the Court should also adopt a purposive construction of Article 234 EC here, for the following reasons.

64. First, the Member States collectively established the Complaints Board as a judicial body of first and last resort to determine all matters relating to the European Schools that are regulated by the Convention (or by measures, such as the Staff Regulations, adopted thereunder). (35) The Complaints Board has a duty to ensure that the legal rules laid down in the Convention are applied uniformly. Its rulings are final and definitive. The Convention provides that judgments of the Complaints Board are to be enforced by the relevant Member State's authorities in accordance with their laws. (36)

65. It follows that the Complaints Board should be regarded as a jurisdiction that is 'common to a number of Member States'. Indeed, since it is common to all the Member States, it is the ultimate expression of that concept. It would be paradoxical if, when applying EU law, the Complaints Board were unable to refer questions to the Court when the Member States are then obliged, through their national courts, to enforce its decisions.

66. In that connection, I note that, under Article 26 of the Convention, this Court has sole jurisdiction in disputes between the Contracting Parties relating to the interpretation and application of the Convention that have not been resolved by the Board of Governors. (37) It would be anomalous if an equivalent question arising in a challenge brought by individuals against a decision taken by the Secretary-General could not also be referred by the Complaints Board to this Court for an authoritative ruling when it raises issues involving the interpretation of EU law.

67. Here it seems to me that a parallel may appropriately be drawn with the normal system under the Treaties, where direct actions are complemented by references for preliminary rulings and where the Court has tended to be generous in its interpretation so as to preserve uniformity of interpretation and guarantee effective protection.

68. In *Zwartveld*, (38) the Court was faced with a 'request for judicial cooperation' emanating from a national court that did not fit neatly into the procedural system established by the Treaties, literally interpreted. The rechter-commissaris at the Arrondissementsrechtbank Groningen (the Netherlands) was investigating serious irregularities relating to the management of the fish market in Lauwersoog, including allegations of breaches of the national provisions adopted to implement the Community rules on fishing quotas. He regarded it as essential to his investigation to obtain copies of, inter alia, the reports drawn up by EEC fisheries inspectors and indicated that it might also be necessary, after considering those documents, to take evidence from the inspectors concerned. The Commission had refused disclosure, claiming that the documents formed part of a file on legal matters pending at the Commission. The rechter-commissaris therefore applied to the Court and requested assistance on the basis of the Protocol on Privileges and Immunities of the European Communities and the European Convention or conventions on mutual assistance (to which the Community was not a party, but which he regarded as being incorporated in the Community legal order, and therefore, to be regarded as an integral part of Community law).

69. The Court did *not* reject the case as inadmissible. On the contrary: sitting as the full court, it held (39) that, in a Community based on the rule of law, the Community institutions were required to respect the duty of sincere cooperation (which was of particular importance vis-à-vis judicial authorities responsible for ensuring that Community law was applied and respected). As a necessary corollary, the Court must have the power to review whether that duty had been complied with and, consequently, had jurisdiction to examine whether the Community institutions' refusal to cooperate with the national authorities was justified. (40)

70. The Court therefore exercised that jurisdiction and ordered the Commission to produce the necessary documents and authorise its inspectors to be examined as witnesses, unless it presented 'imperative reasons relating to the need to safeguard the interests of the Communities' which justified its refusal to do so. (41)

71. I respectfully applaud the Court's willingness, in *Zwartveld*, to have regard to the teleology of the Treaties and to insist on its jurisdiction to uphold important principles of Community law, thereby ensuring that the European Communities continued to be a 'Community based on the rule of law'. In the 20 years that have elapsed since *Zwartveld*, the European Communities has become the European Union and much else has changed; but the central importance of guaranteeing respect for rules laid down by the Treaties and associated instruments and upholding the rule of law remains unaltered.

Right to a judicial remedy

72. The unimpeachable reason for adopting a teleological interpretation of Article 234 EC is that it is necessary in order to ensure the uniform and consistent interpretation of EU law. Thus, the Complaints Board should be able to refer questions to the Court when it considers that a decision on an issue of EU law is necessary to enable it to give judgment.

73. The uniformity and coherence of EU law is the prime objective of the reference procedure. It would be bizarre to have a body established by the Member States and the EU institutions that rules definitively on issues of EU law, but that – on a narrow view of the Court's jurisdiction under Article 234 EC – cannot refer questions for a preliminary ruling.

74. As Advocate General Ruiz-Jarabo Colomer put it in his Opinion in *Umweltanwalt von Kärnten*: (42)

'Article 234 EC provides for a dialogue between courts for the purpose of ensuring the uniform application of Community law in all the Member States. The Court has allowed highly disparate bodies to participate in that dialogue … Despite the difficulties referred to above, there is a certain amount of justification for that situation. The judicial system in a Union composed of 27 Member States reflects a wide variety of criteria and objectives. It is difficult to conceive of a blueprint setting out a common description of the judiciary in so many countries, a factor which has led to such a generic and broad interpretation of the criteria laid down in the *Vaassen-Goebbels* judgment.'

75. Furthermore, a narrow interpretation would run counter to the purpose and the ethos of the reference procedure. It would be the antithesis of the spirit of judicial cooperation that the Court has so consistently emphasised in its case-law. (43)

76. In my view, if the Complaints Board is unable to make a reference to the Court to obtain an authoritative ruling on a point of EU law that is pertinent to the appeal before it, that would undermine the uniformity and coherence of EU law. It would also deprive the applicants in that appeal of their right to a judicial remedy, as the European Schools acknowledged during the hearing.

77. Taking account of all these factors, I am of the view that, on a purposive construction, the Complaints Board falls within the scope of Article 234 EC.

If this reference is declared admissible, could there be an unacceptable increase in the Court's caseload?

78. It may be objected that, if the Complaints Board of the European Schools is considered to be competent to refer questions of EU law to the Court under Article 234 EC, the Court might be inundated by similar requests from other bodies that would hitherto have been assumed to fall outside the scope of Article 234 EC.

79. The Commission has submitted, first, that in weighing the risk of a potential increase in the number of references against the need to ensure the uniform application of EU law, the latter should take precedence. Second, it has pointed out that the Complaints Board is a very specific institution. There are unlikely to be many other bodies that display the same characteristics, and that are therefore competent to refer questions under Article 234 EC.

80. I agree.

81. The argument that admitting references from the Complaints Board to the Court under Article 234 EC would overload the Court is not a position based upon legal principles. If, on a correct view of the law, the Complaints Board ought to be able to refer questions for a preliminary ruling, the fact that there might be some (potential and hypothetical) increase in the Court's workload is not a proper reason for reaching a different conclusion.

82. At the recent major enlargement of the EU in 2004 (from 15 Member States to 25), it would have been unthinkable to suggest that although courts and tribunals in the new Member States were qualified to submit references for a preliminary ruling, it would be expedient and therefore better not to let them do so, lest the Court be overwhelmed with work. Expediency, however seductive, is not a valid legal argument.

83. Furthermore, it is difficult, if not impossible, to find institutions similar to the Complaints Board elsewhere within the EU system.

84. First, all the Contracting Parties to the Convention establishing the European Schools (the 27 Member States and the EU institutions) are within the EU. The situation thus differs from the agreements on which courts such as the European Court of Human Rights (44) and the WTO panels (45) are founded, or under which the potential new European Patent Court might be established. (46) It is reasonable to take the view that there would need to be a specific provision allowing such international courts to make references to this Court. In contrast, disputes before the Complaints Board arise solely within the EU and concern only parties who are subject to EU law.

85. Second, the members of the Complaints Board are appointed from a list compiled by the Court of Justice and the criteria for their appointment are not dissimilar to those applicable to members of the Civil Service Tribunal. Both elements underline the judicial function of the Complaints Board and its structural links with the EU legal system.

86. The European University Institute ('the EUI') may afford the closest parallel. It was formed pursuant to an international convention ('the EUI convention') in 1972 between the six original Member States. Its staff regulations provide for a complaints procedure, from whose decisions an appeal lies to an Appeals Board. However, that Appeals Board appears to differ from the Complaints Board in that, for example, it is not established by the EUI convention to deal with disputes. It does not therefore necessarily follow that, if the Complaints Board of the European Schools is competent to make a reference under Article 234 EC, the Court would automatically have to accept a reference proposed by the Appeals Board of the EUI.

87. In short, the Complaints Board and the Convention which created it appear to be, if not unique, then part of a rare species within the European Union. It is highly unlikely that the Court would be inundated with references from bodies such as the Complaints Board. Moreover, as I have pointed out, where the applicable rules do not form part of EU law, the Court's duty is only to provide guidance on the interpretation of EU law in so far as it affects the application of those rules.

88. Accordingly, in my view the answer to the first question should be that the Complaints Board of the European Schools falls within the scope of application of Article 234 EC and, since the Complaints Board acts as a tribunal of last instance, it is both competent to make a reference for a preliminary ruling to the Court of Justice when considering issues of EU law and, in principle, required to do so under the same conditions as any other court or tribunal from whose decision there is no judicial remedy.

Question 2

89. By its second question, the Complaints Board wishes to know whether Article 12 EC (prohibiting discrimination on grounds of nationality) or Article 39 EC (securing freedom of movement for workers) precluded the remuneration system in force in the European Schools at the material time, in so far as that system did not allow for any adjustment to take account of currency devaluations which could reduce the purchasing power of some seconded teachers. In that regard, the Complaints Board notes that the system in question 'expressly refers to the system applying to Community officials'.

90. The question arises because, between 1 July 2007 and 1 July 2008, sterling fell appreciably against the euro. The exchange rate used for the salaries of officials of the European Communities, however, did not change during that period and nor did the value (calculated and expressed in euro as at 1 July 2007) of the

European supplement to which any particular teacher was entitled. (47) As a result of those two factors, the national salary of teachers seconded from the United Kingdom to a post in which they were paid in euro fell in value (in euro), so that the value in euro of their entire salary (national portion plus European supplement) fell concomitantly.

91. The teachers submit that the salary system failed to guarantee uniform purchasing power to all seconded teachers. They argue that it discriminated against British teachers in Brussels as compared to (i) teachers seconded to Brussels who received their national salary in a currency other than euro or sterling, (ii) British teachers who taught at the European School in Culham who had not exercised their right to freedom of movement and (iii) teachers who received their national salary in euro.

92. Furthermore, the teachers submit that Article 49(2)(b) of the Staff Regulations was incompatible with Articles 12 EC and 39 EC in that it made no provision for a sterling depreciation to be taken into account in determining the European supplement, thus placing British teachers at a disadvantage. Moreover, in order to conform with the Treaty, the modification of Article 49(2)(b) should have had retroactive effect, allowing an adjustment to the European supplement covering the entire period of the teachers' claim (October 2007 to June 2008).

93. The European Schools contend that British teachers were not discriminated against. First, there was no true comparator – the situation of teachers whose national salary was in sterling was different from that of their colleagues whose national salary was in euro. Second, the salary system did not distinguish on grounds of nationality; it applied objectively, and in the same way, to all teachers whose national salary was in a currency other than euro.

94. The European Schools accept that the version of Article 49(2)(b) which applied until 1 July 2008 could be considered indirectly discriminatory in that it made no provision for a significant depreciation in the exchange rate of a currency other than euro to be taken into account in determining the European supplement. However, they submit that any such discrimination was justified, because the exchange rate was applied by reference to objective criteria.

Preliminary remarks

95. The prohibition of discrimination on grounds of nationality in Article 12 EC is a specific expression of the general principle of equal treatment, and is itself given concrete form in, inter alia, Article 39 EC with regard to workers' rights of freedom of movement. (48) Those rights are also protected within the framework of an international organisation, and Articles 12 EC and 39 EC apply specifically to teachers in the European Schools. (49) The Court has also made it clear that provisions which preclude or deter freedom of movement for workers constitute an obstacle even if they apply without regard to the nationality of the workers concerned. (50)

96. I shall therefore examine, first, whether the contested system discriminated on grounds of nationality or otherwise infringed the principle of equal treatment; second, whether it precluded or deterred freedom of movement for any category of teachers; and finally, to the extent necessary, whether the system was nevertheless justified.

Did the contested system discriminate on grounds of nationality or otherwise infringe the principle of equal treatment?

97. The prohibition of discrimination on grounds of nationality covers

'... not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

Unless objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage.' (51)

98. More generally, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. (52)

99. It is clear from a reading of the Staff Regulations that there was no direct discrimination on grounds of nationality.

100. Nor are the Staff Regulations provisions of national law that are intrinsically liable to affect nationals of 'other' Member States more than nationals of the 'host' Member State in the classic sense, since they apply to teachers from any Member State seconded to any of the schools in one of the seven host Member States.

101. However, two groups of teachers can be distinguished within the system, and it can be seen that they were – at least at the material time – subject to different treatment as regards the way in which the value in euro of their overall salary could evolve over a period of a year. The first group comprised teachers seconded from a Member State in the euro zone, the value of whose national salary did not vary in euro and whose overall salary therefore remained equal throughout the relevant period to the amount specified in Annex III to the Staff Regulations. The second group comprised teachers seconded from a Member State outside the euro zone, the value of whose national salary in euro could – and indeed did – vary to a greater or lesser extent according to exchange rate fluctuations, so that their overall salary (national salary of varying value in euro plus European supplement of constant value in euro) could – and indeed did – diverge from the amount specified in Annex III to the Staff Regulations. I shall refer to those groups, respectively, as 'group 1' and 'group 2'.

102. It should be noted that the difference in treatment which I have identified concerns teachers' entitlement, guaranteed by Article 49(1) of the Staff Regulations, to an overall salary whose value in euro is that specified, for the relevant step in the salary scale, in Annex III to those Regulations. It does not concern the purchasing power of that salary, which is not guaranteed by the Staff Regulations and which will vary according to, inter alia, the extent to which the teacher is able, and wishes, to receive, bank and use part of his remuneration in his Member State of origin in the currency of that State.

103. It should also be noted that, if the contested arrangements infringed the principle of equal treatment because comparable situations were treated differently, there must also have been an infringement of the specific prohibition of discrimination on grounds of nationality because teachers in group 1 were inherently likely to be nationals of Member States in the euro zone and those in group 2 were inherently likely to be nationals of other Member States.

104. However, since the two groups which I have identified do not correspond exactly to those which have been proposed as comparators in the course of the proceedings, a brief explanation is necessary.

105. First, are the two groups in comparable situations from the point of view of the principle of equal treatment?

106. It seems to me that the answer must be yes. The Staff Regulations lay down pay scales in euro and provide that staff members are 'entitled' to that remuneration. All teachers having the same entitlement are thus in a comparable position. It is true that a certain objective distinction can be drawn between teachers whose places of origin and secondment are in different currency zones and those whose places of origin and secondment are in the same zone, because they will be subject to different conditions when transferring any part of their remuneration between the two. However, those differences – whose effects will be to a

large extent dependent on individual volition – have no bearing on the value in euro of the remuneration to which they are entitled.

107. Second, are other comparisons relevant?

108. The Complaints Board and the Commission have invited the Court to compare the teachers' position with that of officials of the European institutions. However, on appointment such officials become employees of their respective institutions and are entirely independent of the authorities of their Member State of origin. By contrast, while they are seconded to the European School system, the teachers remain linked to their national administration, which remains responsible for paying their national salary. It is true that Article 49(2)(b) of the Staff Regulations refers to the 'exchange rates used for the salaries of officials of the European Communities'. However, that does no more than identify the exchange rate which is to be applied to the calculation (namely, the rate used for the implementation of the general EU budget). (53) It does not render the system of remuneration of teachers in the European Schools comparable to that of EU officials.

109. The Commission also refers to the position of detached national experts seconded to work with the institutions. Again, however, the situations do not appear comparable. The entire salary of detached national experts is borne by their national administrations, of which they remain a part, while the institutions merely pay a daily and monthly allowance. (54) By contrast, for teachers at the European Schools, the remuneration to which they are entitled is composed of their national salary plus the European supplement. Crucially, therefore, the rules applicable to detached national experts make no attempt to guarantee that those from different Member States will receive the same total payment while on secondment. The Staff Regulations applicable to teachers at the European Schools, in contrast, state that every teacher 'shall be entitled to' the remuneration for the appropriate step in the salary scale specified, in euro, in Annex III.

110. The teachers, for their part, have suggested that those seconded from the United Kingdom to the European Schools in Brussels may be compared with (a) other teachers from the United Kingdom assigned to the European School at Culham, in their home Member State, and/or (b) teachers seconded to Brussels who received their national salary in a currency other than euro or sterling. However, both of those groups in fact fall within my 'group 2', all of whose members received the same treatment in terms of the way in which the value in euro of their overall salary could – and in all cases, to a greater or lesser extent, did – diverge from the amount specified in Annex III to the Staff Regulations. Whether further subgroups could be identified in terms of the effect on purchasing power is, as I have explained, irrelevant.

111. The relevant difference in treatment between teachers in group 1 and those in group 2 is therefore that the former received, throughout the contested period, a salary whose value in euro was exactly that guaranteed by Article 49(1) of, and Annex III to, the Staff Regulations, whereas the latter were necessarily exposed to a risk that their remuneration would diverge from that amount. Whether that risk materialised to the benefit or to the detriment of teachers from a particular Member State does not appear to me to be relevant. Whether British teachers in fact 'lost out' during the relevant period while those from other Member States outside the euro zone may have 'gained' was dependent on exchange rate fluctuations which were entirely objective external factors. What matters is that, for teachers in group 2, there was a tangible risk of receiving less than the guaranteed value of their remuneration in euro, which could have been addressed in the context of the remuneration system laid down in the Staff Regulations, while for those in group 1 there was no such risk.

112. I am therefore of the view that, at the material time, the contested system infringed the principle of equal treatment and thereby discriminated on grounds of nationality, contrary to Article 12 EC.

Did the contested system preclude or deter freedom of movement?

113. I cannot, however, reach the view that the defect I have identified constitutes any kind of obstacle or deterrent to the exercise of rights of freedom of movement.

114. The system of remuneration for teachers seconded to the European Schools involves continuing receipt of the salary to which they are already entitled, plus a European supplement. It appears therefore that they will in all cases receive a higher remuneration on secondment than they would have received if they had remained in their previous post.

115. That prospect seems unlikely to deter any teacher from seeking or accepting secondment, unless the overall salary falls below that which is necessary both to maintain his living standards on secondment and to cover whatever continuing obligations he may have in his Member State of origin and whatever costs may be involved in moving between Member States. No risk of any such situation has been argued in the present case, nor does such a risk seem obviously plausible. The risk of finding that the value in euro of one's actual overall remuneration diverges from that of another teacher on the same step in the salary scale – which is, by contrast, a real, indeed inevitable, risk – is unlikely to be a consideration of any importance whatever in deciding whether to seek or accept secondment. It may, in the event, prove an irritation or a delight depending on the direction of the divergence but, in a system involving teachers from 27 Member States with widely diverging national salaries, classified at different points in a system which has nine salary scales of 12 steps each, it will almost certainly never have the slightest effect on a teacher's ability or willingness to exercise his right to freedom of movement by seeking or accepting secondment to a European School in another Member State.

Could the contested system be justified?

116. According to established case-law, a difference in treatment which constitutes indirect discrimination on grounds of nationality is prohibited unless it is objectively justified, is appropriate for securing the attainment of the legitimate objective it pursues and does not go beyond what is necessary to attain it. (55)

117. The Commission submits that it is impossible to institute a salary system that provides for exact equality of purchasing power between teachers seconded from 27 national administrations to the European Schools. Moreover, between 1995 and 2008, drops and increases in the value of sterling as against the euro cancelled each other out.

118. However, as I have pointed out, the point of comparison cannot be purchasing power, but must be confined to the value in euro of the overall salary, which is guaranteed in the Staff Regulations. And it is irrelevant whether exchange rate variations cancelled each other out over a period of years, since the defect in the system concerns the maintenance of a static exchange rate, for the purpose of calculating the amount of the European supplement, over a period of one year.

119. For their part, the European Schools contend that both the system in place at the material time and the modification introduced from 1 July 2008 were justified. First, the salary system must take account of the fact that seconded teachers continue to receive their national salaries from 27 national administrations. Second, the system must not be subject to excessive administrative burdens, but must seek to operate in the general interests of all seconded teachers. Third, although some seconded teachers may bear a disadvantage where their national currency depreciates against the euro, they also benefit if it appreciates, so that the system is roughly even handed.

120. The first point, it seems to me, is not pertinent. If the contested salary system was able to take account of the fact that seconded teachers receive national salaries from 27 administrations when calculating the European supplement once a year, it could also have done so for each salary payment.

121. As regards the second and third points, the judgment in *Terhoeve* seems relevant. The issue was whether a more onerous contributions burden borne by a worker who transferred his residence from one

Member State to another in order to take up employment there was justified. The Court held that it was not. In particular, neither the objective of simplifying and coordinating national rules for levying tax and social security contributions nor considerations of an administrative nature could justify undermining a fundamental freedom. (56)

122. Accordingly, I am of the view that the salary system as laid down in Article 49(2) of the Staff Regulations at the material time was contrary to the principle of equal treatment, in particular as expressed in Article 12 EC, and could not be justified on objective grounds.

Question 3

123. By its third question, the Complaints Board asks whether, if the second question is answered in the affirmative (as I propose it should be, to the extent that there is an infringement of the principle of equal treatment which entails indirect discrimination on grounds of nationality), the difference in situation between teachers seconded to the European Schools and EU officials can justify a situation in which the exchange rates applied in order to maintain an equivalent purchasing power are not the same.

124. First of all, that question appears to be inadequately framed, inasmuch as the exchange rates used when calculating the European supplement for teachers at the European Schools were, at the material time, exactly the same as those used for the calculation of the payment, in a currency other than euro, of the salaries of EU officials – and were explicitly stated to be so in Article 49(2)(b) of the Staff Regulations.

125. However, it seems from the content of the order for reference that the intention may have been to refer to the fact that, for EU officials, equality of purchasing power is ensured by weightings for each place of employment, which are fixed each year at the same time as the exchange rates, but can be adjusted in the event of a substantial change in the cost of living. (57) Nevertheless, even then the question is puzzling, as Article 47(3) of the Staff Regulations states: 'A member of staff's remuneration shall be WEIGHTED at a rate above, below or equal to 100%, as laid down and adjusted for officials of the European Communities.'

126. I do not think, therefore, that the Court is in a position to answer the question as it is posed.

127. From a reading of the teachers' submissions to the Court, it appears plausible that the question which the teachers' wished the Complaints Board to ask concerned rather the fact that, although the same weightings and adjustments apply to both EU officials and European School teachers, they do not affect the teachers remuneration in the same way as that of the officials because an adjustment to the weighting cannot take account of exchange rate fluctuations. In that case, the intended question might have been whether *treating the different situations* of the officials and the teachers *in the same way* might not offend against the principle of equal treatment.

128. That is, however, merely a hypothesis, which does not correspond to the wording of the question as referred, and which would require much fuller information as to the application of the weighting system to teachers' salaries if it were to be addressed. In those circumstances, I do not think that the Court would be justified in answering the hypothetical question. I would merely say that – as I have already indicated (58) – in my view the respective positions of teachers seconded to the European School system and EU officials cannot be considered comparable.

Conclusion

129. Accordingly, I am of the opinion that the questions referred by the Complaints Board of the European Schools should be answered as follows:

(1) The Complaints Board of the European Schools falls within the scope of application of Article 234 EC.

(2) The principle of equal treatment and its expression in the prohibition of discrimination on grounds of nationality in Article 12 EC preclude the application of the system of remuneration prescribed in Articles 45 to 49 of the Regulations for members of the seconded staff of the European Schools.

(3) The Court is not in a position to answer question 3.

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1 – Original language: English.

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2 – The schools are situated as follows: five in Belgium, three in Germany, one in Italy, two in Luxembourg, one in the Netherlands, one in Spain and one in the United Kingdom.

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3 – *United Nations Treaties Series*, volume 443, p. 129.

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4 – *United Nations Treaties Series*, volume 752, p. 267.

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5 – OJ 1994 L 212, p. 3.

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6 – Following the adoption of EC, Euratom: Council Decision 94/557/EC of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 1). See also 94/558/ECSC: Commission Decision of 17 June 1994 on the conclusion of the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 15).

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7 – The Convention entered into force on 1 October 2002.

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8 – See Article 27 of the Convention, at point 13 below.

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9 – Adopted pursuant to Article 27(4) of the Convention and approved by the Board of Governors by written procedure of 22 April 2004 ('the Statute'), available on the European Schools' website.

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10 – See also Article 2 and Annex I, Article 5 of the Statute of the Court of Justice (OJ 2008 C 115, p. 210).

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11 – Approved by the Board of Governors at the meetings of 1 and 2 February 2005 ('the Rules of Procedure'), available on the European Schools' website.

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12 – Namely the languages listed in Annex II to the Convention: Danish, Dutch, English, French, German, Greek, Italian, Portuguese and Spanish.

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13 – Approved by the Board of Governors at its meetings of 20 and 21 January 2009 ('the Staff Regulations'), available on the European Schools' website.

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14 – Under the current version of the Staff Regulations, the salary scales are set out in Annex IV. However, at the relevant time the monthly salary scales in euro of the seconded staff of the European schools were contained in Annex III. I have therefore referred to Annex III in this Opinion.

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15 – Since the main proceedings arose at a time before the Lisbon Treaty entered into force, I refer to the Treaty provisions as they then stood. The provisions of Article 12 EC are now to be found in Article 18 TFEU; those of Articles 39 and 234 EC in Articles 45 and 267 TFEU respectively. Prior to the entry into force of the Amsterdam Treaty in 1999, the provisions of Article 234 EC were to be found (subject to variation that is not material to the present case) in Article 177 of the EEC Treaty and, subsequently, in Article 177 EC. To assist the reader, I have adjusted such references so that they refer to the Treaty articles by the numbering applicable at the time when the main proceedings arose. References to the Community in older case-law and legislation should obviously now be interpreted as references to the European Union.

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16 – All references are to Annex III as it was at the material time: see footnote 14 above.

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17 – Article 25 of the Convention and Article 49(2)(a) of the Staff Regulations: see respectively points 11 and 23 above.

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18 – The arrangements are explained in Case 44/84 *Hurd* [1986] ECR 29, paragraph 5.

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19 – See point 24 above.

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20 – Cited above in footnote 18.

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21 – *Hurd,* cited in footnote 18 above, paragraphs 20 and 21.

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22 – Case C-132/09 [2010] ECR I-0000 (judgment was delivered on 30 September 2010), paragraphs 43 and 44.

23 – Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 22 and the case-law cited there; see also Case C-195/06 *Rundfunk* [2000] ECR I-8817, paragraph 19, and Case C-205/08 *Umweltanwaltvon Kärnten* [2009] ECR I-0000, point 35 of the Opinion, where Advocate General Ruiz-Jarabo cites Case 61/65 *Vaassen-Goebbels* [1966] ECR 261.

24 – Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14.

25 – See in particular Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 49 to 53.

26 – My emphasis.

27 – Case 166/73 [1974] ECR 33, paragraph 2. See more recently Case C-458/06 *Gourmet Classic* [2008] ECR I-4207, paragraph 20.

28 – Case 246/80 [1981] ECR 2311, paragraphs 16 and 17.

29 – See Article 27(2) of the Convention, set out in point 13 above.

30 – See further point 43 et seq. above, where I have addressed the European Schools' argument that the interpretation of the Staff Regulations is not a matter governed by EU law.

31 – Case C-337/95 [1997] ECR I-6013.

32 – First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

33 – The Benelux Court was established by a treaty signed in Brussels on 31 March 1965 between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands and is composed of judges of the supreme courts of each of those three States: see *Christian Dior*, cited in footnote 31 above, paragraph 15.

34 – See *Christian Dior*, cited in footnote 31 above, paragraph 21, emphasis added; see also paragraphs 22 and 23.

35 – Article 27 of the Convention. Any matters *not* governed by the Convention fall within the jurisdiction of the national courts: see Article 27(7).

36 – Article 27(6) of the Convention.

37 – The Commission lodged the first application under Article 26 of the Convention in late 2009 in Case C-545/09 *Commission* v *United Kingdom*, currently pending before the Court.

38 – Case 2/88 Imm. [1990] ECR I-3365 and I-4405.

39 – In its first order of 13 July 1990, [1990] ECR I-3365, after receiving observations from eight Member States, the Council, the European Parliament and the Commission.

40 – See paragraphs 15 to 24 of the order of 13 July 1990.

41 – See paragraphs 25 and 26 of the order of 13 July 1990. In a second order of 6 December 1990, [1990] ECR I-4405, the Court ordered the Commission to produce four relevant reports and to permit its fisheries inspectors to be examined as witnesses.

42 – Cited in footnote 23 above, point 35 of the Opinion.

43 – See for example, Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41 and the case-law cited there.

44 – Both EU Member States and numerous third countries are signatories to the European Convention on Human Rights ('ECHR'). Following the adoption of the Lisbon Treaty, the EU is to accede to the ECHR pursuant to Article 6(2) of the EU Treaty.

45 – The Member States, the EU and third countries are signatories to the WTO Agreements.

46 – The Member States, the EU and certain third countries would be signatories to the proposed Agreement for the new European Patent Court.

47 – See Article 1 of, respectively, Council Regulation (EC, Euratom) No 1558/2007 of 17 December 2007 adjusting with effect from 1 July 2007 the remuneration and pensions of officials and other servants of the European Communities and the correction coefficients applied thereto (OJ 2007 L 340, p. 1) and Council Regulation (EC, Euratom) No 1323/2008 of 18 December 2008 adjusting with effect

from 1 July 2008 the remuneration and pensions of officials and other servants of the European Communities and the correction coefficients applied thereto (OJ 2008 L 345, p. 10).

48 – See, for example, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48, and Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 21.

49 – See Case C-411/98 *Ferlini* [2000] ECR I-8081, paragraph 42, and *Hurd,* cited in footnote 18 above, paragraphs 54 and 55.

50 – See, for example, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 39, and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 34.

51 – Case C-73/08 *Bressol and Chaverot and Others* [2010] ECR I-0000, paragraphs 40 and 41.

52 – See, most recently, Case C-149/10 *Chatzi* [2010] ECR I-0000, paragraph 64.

53 – Article 63 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of officials and conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition 1968(I), p. 30), as amended.

54 – See Commission Decision of 12 November 2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training (C(2008) 6866 final). Chapter III, in particular Article 17, deals with remuneration.

55 – *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 50 above, paragraph 55.

56 – *Terhoeve*, cited in footnote 50 above, paragraphs 44 and 45.

57 – See Articles 64 and 65 of the Staff Regulations of officials of the European Union, in Regulation No 259/68, as amended

Case C-196/09: Paul Miles and Others v Écoles européennes

Judgment of the Court (Grand Chamber) of 14 June 2011.
Paul Miles and Others v Écoles européennes.
Reference for a preliminary ruling: Chambre de recours des écoles européennes.
Reference for a preliminary ruling - Concept of 'court or tribunal of a Member State' within the meaning of Article 267 TFEU - Complaints Board of the European Schools - System of remuneration of teachers seconded to the European Schools - No adjustment of remuneration following depreciation in sterling - Compatibility with Articles 18 TFEU and 45 TFEU.
Case C-196/09.

JUDGMENT OF THE COURT (Grand Chamber)

14 June 2011 (*)

(Reference for a preliminary ruling – Concept of 'court or tribunal of a Member State' within the meaning of Article 267 TFEU – Complaints Board of the European Schools – System of remuneration of teachers seconded to the European Schools – No adjustment of remuneration following depreciation in sterling – Compatibility with Articles 18 TFEU and 45 TFEU)

In Case C-196/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Chambre de recours des écoles européennes, made by decision of 25 May 2009, received at the Court on 29 May 2009, in the proceedings

Paul Miles and Others

v

European Schools,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, Presidents of Chambers, A. Borg Barthet, M. Ilešič (Rapporteur), J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh, L. Bay Larsen, and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2010,

after considering the observations submitted on behalf of:

– Mr Miles and Others, by S. Orlandi and J.-N. Louis, avocats,

– the European Schools, by M. Gillet, avocate,

– the European Commission, by B. Eggers and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18 TFEU, 45 TFEU and 267 TFEU.

2 The reference was made in proceedings brought by 137 teachers on secondment from the United Kingdom of Great Britain and Northern Ireland to the European Schools against those schools concerning, first, the refusal by the latter to adjust their remuneration in respect of the period prior to 1 July 2008 following the depreciation of the pound sterling and, second, the method of calculation applicable since that date for the adjustment of remuneration in line with fluctuations in exchange rates for currencies other than the euro.

Legal context

The Convention defining the Statute of the European Schools

3 The European Schools were originally set up by two instruments: the Statute of the European School, signed at Luxembourg on 12 April 1957 (*United Nations Treaty Series*, Volume 443, p. 129), and the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed at Luxembourg on 13 April 1962 (*United Nations Treaty Series*, Volume 752, p. 267).

4 Those instruments were replaced by the Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994 (OJ 1994 L 212, p. 3, 'the European Schools' Convention'), which entered into force on 1 October 2002 and is the instrument currently applicable. Unlike the original instruments, to which only the Member States were parties, the European Schools' Convention was also concluded by the European Communities, which were empowered to do so by Council Decision 94/557/EC, Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 1).

5 Recitals 1 to 4 in the preamble to the European Schools' Convention state:

'considering that, for the education together of children of the staff of the European Communities in order to ensure the proper functioning of the European Institutions, establishments bearing the name "European School", have been set up from 1957 onwards;

considering that the European Communities are anxious to ensure the education together of these children and, for this purpose, make a contribution to the budget of the European Schools;

considering that the European School system is "sui generis"; considering that it constitutes a form of cooperation between the Member States and between them and the European Communities while fully acknowledging the Member States' responsibility for the content of teaching and the organisation of their educational system, and for their cultural and linguistic diversity;

considering that:

...

– adequate legal protection against acts of the Board of Governors or the Administrative Boards should be provided to the teaching staff as well as other persons covered by it; to this end a Complaints Board should be created, with strictly limited jurisdiction;

– the jurisdiction of the Complaints Board will be without prejudice to national courts' jurisdiction in relation to civil and criminal liability'.

6 According to Article 7 of the European Schools' Convention, the Chambre de recours des écoles européennes (the Complaints Board of the European Schools, 'the Complaints Board') is, along with the Board of Governors, the Secretary-General and the Boards of Inspectors, one of the organs common to all the Schools.

7 Under Article 26 of the 1994 Convention, 'the Court of Justice shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of the convention which have not been resolved by the Board of Governors'.

8 Article 27 of the European Schools' Convention provides:

'1. A Complaints Board is hereby established.

2. The Complaints Board shall have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the Board of Governors of the Administrative Board of a school in the exercise of their powers as specified by this Convention. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction.

The conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the Schools.

3. The members of the Complaints Board shall be persons whose independence is beyond doubt and who are recognised as being competent in law.

Only persons on a list to be compiled by the Court of Justice of the European Communities shall be eligible for membership of the Complaints Board.

4. The Statute of the Complaints Board shall be adopted by the Board of Governors, acting unanimously.

The Statute of the Complaints Board shall determine the number of members of the Board, the procedure for their appointment by the Board of Governors, the duration of their term of office and the financial arrangements applicable to them. The Statute shall specify the manner in which the Board is to operate.

5. The Complaints Board shall adopt its rules of procedure, which shall contain such provisions as are necessary for applying the Statute.

The rules of procedure shall require the unanimous approval of the Board of Governors.

6. The judgments of the Complaints Board shall be binding on the parties and, should the latter fail to implement them, rendered enforceable by the relevant authorities of the Member States in accordance with their respective national laws.

7. Other disputes to which the Schools are party shall fall within national jurisdiction. In particular, national courts' jurisdiction with regard to matters of civil and criminal liability is not affected by this Article.'

The Statute of the Complaints Board of the European Schools

9 Article 1 of the Statute of the Complaints Board of the European Schools ('the Statute of the Complaints Board') provides:

'1. The Complaints Board ... shall be composed of six members, appointed for a period of five years.

2. The Board of Governors, acting by a two-thirds majority, shall appoint them from the list compiled for this purpose by the Court of Justice of the European Communities.

3. Their term of office shall be tacitly renewable for the same period, unless the Board of Governors, acting by a two-thirds majority, expressly decides otherwise.

...'

10 Under Article 3 of that Statute '[d]uring their term of office, members of the Complaints Board may not engage in any political or administrative activity or any occupation incompatible with their duty to behave with independence and impartiality'.

11 Article 5 of that Statute provides that '[a] member of the Complaints Board may be relieved of his office only if the other members, meeting in plenary session, decide, by a two-thirds majority of the serving members, that he has ceased to fulfil the requisite conditions'.

12 Article 15 of the Statute provides:

'...

2. No member may take part in the investigation of a case in which he has a personal interest or in which he has been involved beforehand, either as the agent, counsel or adviser of a party or of a person with an interest in the case, or as a member of a court or of a commission of inquiry, or in any other capacity.

3. Where a member abstains for one of the above reasons or for a special reason, he shall inform the Chairman of the Complaints Board thereof, who shall, if necessary, arrange for his replacement by another member.

4. If the Chairman of the Complaints Board or of the section considers that there are, in the personal circumstances of a member, grounds for his abstention, he shall conduct an exchange of views with the person concerned; in the event of disagreement, the Board or section shall decide. After having heard the member concerned, the Board or section shall deliberate and take a vote in his absence. Should the panel concerned decide that the member must withdraw, the Chairman of the Complaints Board may arrange for his replacement.'

The Regulations for Members of the Seconded Staff of the European Schools

13 The Regulations for Members of the Seconded Staff of the European Schools ('Regulations for seconded staff') are adopted by the Board of Governors by virtue of the power granted to it in that regard by the European Schools' Convention.

14 In the version applicable from October 2004 to 30 June 2008, Article 49 of the Regulations for seconded staff provided:

‘1. In accordance with this chapter and save as expressly provided otherwise, a member of staff shall be entitled to the remuneration carried by his post and his step in the salary scale for such a post, as laid down in Annex III to these Regulations.

2.(a) The competent national authorities shall pay the national emoluments to the member of staff and shall inform the Director of the amounts paid, specifying all the components taken into account for calculation purposes, including compulsory social security deductions and taxes.

(b) The School shall pay the difference between the remuneration provided for in these Regulations and the exchange value of all national emoluments, minus compulsory social security deductions.

The exchange value shall be converted into the currency of the country in which the member of staff performs his duties, on the basis of the exchange rates used for the salaries of officials of the European Communities.

If the exchange value is higher than the remuneration provided for in these Regulations for a calendar year, the member of staff concerned shall be entitled to the difference between the two sums.

…’

15 The commentary on Article 49(2)(b) of the Regulations for seconded staff stated:

‘The provisions of the Staff Regulations of Officials of the European Communities envisage the adoption as a reference rate for currencies other than the Euro of the budget rate in force on 1 July of the year concerned. That is the reference rate which is used for the conversion into euros of salaries.’

16 In October 2008, the Board of Governors decided to amend Article 49(2)(b) of the Regulations for seconded staff, with effect from 1 July 2008, by inserting the following subparagraph between the second and third subparagraphs of that article:

‘These exchange rates shall be compared with the monthly exchange rates in force for the implementation of the budget. Should there be a difference of 5% or more in one or more currencies compared with the exchange rates used hitherto, an adjustment shall be made from that month. Should the trigger threshold not be reached, the exchange rates shall be updated after six months at the latest.’

17 Under Article 79 of the Regulations for seconded staff, administrative and financial decisions may be the subject of an administrative appeal to the Secretary-General. A contentious appeal may be brought against the express or implied decision rejecting the administrative appeal pursuant to Article 80 of those regulations, paragraph 1 of which provides:

‘The Complaints Board shall have sole jurisdiction in the first and final instance in any dispute between the management organs of the School and members of staff regarding the legality of an act adversely affecting them. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction.’

18 Under Article 86 of the Regulations for seconded staff, ‘[t]he articles in these Regulations which are analogous to articles in the Staff Regulations of Officials of the European Communities shall be interpreted according to the criteria applied by the Commission’.

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

19 Mr Miles and the 136 other applicants in the main proceedings are teachers on secondment from the United Kingdom to one of the European Schools. In accordance with Article 49 of the Regulations for

seconded staff, they receive the national emoluments paid by the United Kingdom authorities together with a supplement equal to the difference between the remuneration provided for in the Regulations and the exchange value of all national emoluments, minus compulsory social security deductions, which is paid by the European School ('the European supplement').

20 For the period from 1 July 2007 to 30 June 2008 the European supplement was calculated – pursuant to Article 49(2)(b) of the Regulations for seconded staff in the version applicable at that time – on the basis of the difference between the remuneration provided for by the Regulations, on the one hand, and the exchange rate for all national emoluments expressed in pounds sterling and converted on the basis of the budget rate applied by the European Community as at 1 July 2007, on the other.

21 Sterling depreciated significantly against the euro from October 2007 onwards. However, that depreciation was not taken into account in calculating the European supplement paid to the applicants in the main proceedings before 1 July 2008, as the exchange rate applied to salaries of officials of the European Communities, to which that provision refers, was adjusted only once a year.

22 Between 15 April and 20 May 2008, Mr Miles and the other applicants in the main proceedings lodged administrative appeals with the Secretary-General of the European Schools, seeking to have the conversion rate for sterling revised and the European supplements recalculated from November 2007. As those appeals were implicitly rejected by the Secretary-General, the applicants in the main proceedings lodged appeals with the Complaints Board on 15 December 2008 and 9 January 2009 respectively, seeking annulment and in addition, compensation for the period from November 2007 to June 2008. In those appeals, the applicants in the main proceedings raised, inter alia, a plea of the illegality of Article 49(2)(b) of the Regulations for seconded staff in the light of Articles 12 EC and 39 EC.

23 In October 2008 the Board of Governors of the European Schools amended Article 49(2)(b) of the Regulations for seconded staff so that the conversion rate could be revised in a more flexible way in the event of extreme variations in exchange rates for currencies of Member States outside the Euro zone. The entry into force of that amendment was set for 1 July 2008 on the ground that retrospective application would have given rise to significant costs and would have meant that members of staff seconded from Member States whose currencies had increased in value would have been asked to repay the amount of the European supplement which had been overpaid.

24 The Complaints Board observed that the legal system of the European Schools is a sui generis system which is distinct both from that of the European Communities and Union and from that of the Member States, while at the same time constituting a form of cooperation between them. It points out that it may be inferred from that that, although the national or international instruments to which the European Schools are not themselves party cannot legally bind them as such, the fundamental principles which they contain or to which they refer, since they are generally accepted both in the European Union ('EU') legal order and in the legal systems of the Member States, must at least serve as a reference for the action of the Schools' organs. Furthermore, the rules of EU law to which the provisions adopted in implementation of the Convention specifically refer are directly applicable in the system of those schools.

25 The Complaints Board found that, in those circumstances, the applicants in the main proceedings were entitled to rely on a plea of illegality of Article 49(2)(b) of the Regulations for seconded staff in the light of Articles 12 EC and 39 EC.

26 The Complaints Board observed that the European Schools' Convention expressly provided only that the Court of Justice is to have jurisdiction in disputes between contracting parties. However, the question arises whether, in interpreting and applying the principles of EU law which may be relied on before it, and the rules of that law to which the provisions adopted pursuant to that convention refer, the Complaints Board may, even though it belongs to a sui generis system distinct both from the European Union system and that of the Member States, be regarded as a court or tribunal falling within the scope of Article 234 EC.

27 The Complaints Board points out, in that connection, that it was set up by means of a convention which exclusively concerns the Community and its Member States, in order to provide uniform judicial protection in the area of the powers conferred on it. That convention also provides that the judgments of the Complaints Board are, if necessary, to be rendered enforceable by the relevant authorities of the Member States and that disputes which do not fall within its jurisdiction are to fall within national jurisdiction. It would be paradoxical, therefore, if only the national courts could make a reference to the Court of Justice of the European Union in connection with a dispute concerning the European Schools. Finally, an option for the Complaints Board to refer questions to the Court of Justice for a preliminary ruling is consistent with the objective of Article 234 EC of ensuring a uniform interpretation of EU law.

28 The Complaints Board considers that there is some difficulty over the answer to the question whether Article 49(2)(b) of the Regulations for seconded staff is compatible with Articles 12 EC and 39 EC. It observes that, since the contested provision was only amended as of 1 July 2008, that is to say, eight months after the sharp depreciation in sterling, the teachers on secondment from the United Kingdom were thus placed at a disadvantage by the calculation of their remuneration before that date. The fact that teachers seconded by other Member States were placed at an advantage by the fact that their remuneration was not adjusted before that date because of the appreciation of the currencies of those States was all the less capable of justifying the position of the European Schools in that it had the effect of exacerbating the unequal treatment between the teachers concerned. According to the Complaints Board, such a situation appears not only contrary to the principle of equal treatment and non-discrimination on the ground of nationality, but also seems liable to constitute an obstacle to freedom of movement for workers.

29 Under those circumstances, the Complaints Board decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 234 EC to be interpreted as meaning that a court or tribunal such as the Complaints Board, which was established by Article 27 of the [European Schools’ Convention], falls within its scope of application and, since the Complaints Board acts as a tribunal of last instance, is competent to make a reference for a preliminary ruling to the Court of Justice?

(2) If the answer to the first question is in the affirmative, must Articles 12 EC and 39 EC be interpreted as meaning that they prevent the application of a remuneration system such as the system in force within the European Schools in as much as, although that system expressly refers to the system applying to Community officials, it does not allow for the taking into account, even retrospectively, of currency devaluation which leads to a decline in purchasing power for teachers who are seconded by the authorities of the Member State concerned?

(3) If the answer to the second question is in the affirmative, can a difference in situation such as that established between teachers seconded to the European Schools, whose remuneration is funded both by their national authorities and by the European School in which they teach, on the one hand, and officials of the European Community, whose remuneration is funded by the Community alone, on the other hand, justify a situation in which, in the light of the principles laid down in the articles cited above and although the Regulations for Members of the Seconded Staff of the European Schools expressly refer to the Staff Regulations of Officials of the European Communities, the exchange rates applied in order to maintain an equivalent purchasing power are not the same?’

The jurisdiction of the Court of Justice

Observations put before the Court

30 The applicants in the main proceedings and the Commission consider that the Court of Justice has jurisdiction to rule on a request for a preliminary ruling put before it by the Complaints Board and that that Board is not only empowered to make a reference for a preliminary ruling to the Court under the third

paragraph of Article 234 EC but is obliged to make such a reference. The European Schools, on the other hand, take the opposite view and, therefore, propose that the first question should be answered in the negative.

31 The applicants in the main proceedings and the Commission assert that the Complaints Board meets all the criteria on the basis of which a body is to be treated as a 'court or tribunal' within the meaning of Article 234 EC, as established by the case-law of the Court of Justice. For instance, the Complaints Board is established by law, it is established on a permanent basis, its members offer guarantees of full independence, its jurisdiction is compulsory, it applies rules of law and a procedure comparable to that followed in the ordinary courts, which meets the requirement that its procedure should be inter partes. The Commission adds that the Complaints Board, in this case, exercises a judicial function in ruling in a dispute between the applicants in the main proceedings and the European Schools as employer.

32 The applicants in the main proceedings and the Commission consider that even if the Complaints Board does not fall directly within the authority of any Member State in particular, it must be treated as 'a court or tribunal of a Member State' within the meaning of Article 234 EC. The Court of Justice has indeed already accepted, in its judgment in Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraphs 20 to 26), that a court common to a number of Member States could refer questions to it for a preliminary ruling. It based that solution on a teleological interpretation of Article 234 EC, taking account of the objective underlying that provision of ensuring a uniform interpretation of EU law. That solution ought also to be applicable as regards the Complaints Board, which should be considered to be a court common to all the Member States and to the Union and which is called upon to apply EU law like the national courts. Allowing the Complaints Board to refer a question to the Court of Justice when it is called upon to interpret the rules of EU law meets, inter alia, the objective of ensuring the uniform interpretation of that law.

33 The Commission accepts that any international court may not refer a question to the Court of Justice for a preliminary ruling solely on the ground that it applies rules of EU law. However, these proceedings concern the particular case of a court common to all the Member States which takes the place of the national courts which would otherwise have had jurisdiction. The applicants in the main proceedings argue that it is not acceptable that the Member States should escape their obligations under the Treaties by concluding the European Schools' Convention, which, moreover is manifestly not intended to restrict the scope of EU law.

34 The Commission and the applicants in the main proceedings consider that, in so far as the Union is a party to the European Schools' Convention, that convention and all the law derived from it are part of EU law in their entirety. The applicants infer from that that the Court of Justice has jurisdiction to give a preliminary ruling both on that convention and on the Regulations for seconded staff.

35 The European Schools consider that it is apparent from Article 27 of the European Schools' Convention that the Complaints Board is a court or tribunal. Clearly, however, it is not a national court. If the Court of Justice was able, inter alia in *Parfums Christian Dior*, to extend the notion of national court or tribunal to cover the Benelux Court of Justice, that was because, in the area of intellectual property there is EU legislation in existence. However the Regulations for seconded staff might be considered not so much a matter on which EU legislation is in existence as simply an expression of the relinquishment of powers by the Member States in favour of the bodies of the European Schools so that they can organise their relationships with the teachers available to them. Moreover, referral to the Benelux Court of Justice on a trade mark matter was a step in the proceedings pending before the national courts, whereas there is no link between the judicial function exercised by the Complaints Board and that exercised by the national courts. The mere fact that the national courts can be requested to enforce the decisions of the Complaints Board is, in that respect, of no relevance.

36 The European Schools take the view that the admittedly close links they have with the Union are not sufficient for the Regulations for seconded staff to be considered to be governed by EU law. Although it is clear from the case-law of the Complaints Board that the principles of equal treatment and freedom of

movement for workers are fundamental principles with which the bodies of the European Schools, including the Complaints Board, must comply, it cannot be inferred from that that the legislative texts adopted by the Board of Governors of the European Schools must be treated as EU law. The questions which arise concern only the relationships which the European Schools have with their seconded staff, without there being any direct link with EU law. In those circumstances, the Court of Justice has no jurisdiction to reply to a request for a preliminary ruling brought by the Complaints Board since there is not a sufficient link with that law.

The Court's response

37 According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16; and Case C-118/09 *Koller* [2010] ECR I-0000, paragraph 22).

38 Although, as all the parties intervening in this case observed, the Complaints Board meets all those criteria and must, therefore, be deemed to be a 'court or tribunal' within the meaning of Article 267 TFEU, it must none the less be pointed out that the wording of that provision refers to 'a court or tribunal of a Member State'.

39 However, it must be held that the Complaints Board falls within the remit, not of 'a Member State' but of the European Schools, which constitute, as the first and second recitals of the European Schools' Convention state a 'sui generis' system, which achieves, by means of an international agreement, a form of cooperation between the Member States and between those States and the European Union, for the education together of children of the staff of the European Communities in order to ensure the proper functioning of the European institutions.

40 It is true that the Court of Justice has held, in paragraph 21 of *Parfums Christian Dior*, that there is no good reason why a court common to a number of Member States, such as the Benelux Court of Justice, should not be able to submit questions to the Court of Justice, in the same way as courts or tribunals of any of those Member States.

41 However, the Complaints Board is not such a court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and, moreover, the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules (see *Parfums Christian Dior*, paragraph 22), the Complaints Board does not have any such links with the judicial systems of the Member States.

42 Moreover, although the Complaints Board was created by all the Member States and by the Union, the fact remains that it is a body of an international organisation which, despite the functional links which it has with the Union, remains formally distinct from it and from those Member States.

43 In those circumstances, the mere fact that the Complaints Board is required to apply the general principles of EU law when it has a dispute before it is not sufficient to make the Board fall within the definition of 'court or tribunal of a Member State' and thus within the scope of Article 267 TFEU.

44 The applicants in the main proceedings and the Commission, however, consider that the possibility, or indeed the obligation, which the Complaints Board has of referring a question to the Court of Justice in the course of such a dispute is vital to ensure that those principles are applied uniformly and that the rights which seconded teachers derive from them are effectively protected.

45 In that regard, it must be observed that while it is possible to envisage a development, along the lines described in the previous paragraph, of the system of judicial protection established by the European Schools' Convention, it is for the Member States to reform the system currently in force (see, by analogy, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 44 and 45).

46 It follows from the foregoing that the Court of Justice has no jurisdiction to rule on a reference for a preliminary ruling from the Complaints Board of the European Schools.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The Court of Justice has no jurisdiction to rule on a reference for a preliminary ruling from the Complaints Board of the European Schools.

Judgment of the Court (Second Chamber), 28 February 2013
Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência

Request for a preliminary ruling from the Tribunal da Relação de Lisboa
Association of chartered accountants — Rules relating to a system of compulsory training for chartered accountants — Article 101 TFEU — Association of undertakings — Restriction of competition — Justifications — Article 106(2) TFEU

Case C-1/12

JUDGMENT OF THE COURT (Second Chamber)

28 February 2013 (*)

(Association of chartered accountants – Rules relating to a system of compulsory training for chartered accountants – Article 101 TFEU –Association of undertakings – Restriction of competition – Justifications – Article 106(2) TFEU)

In Case C-1/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Lisboa (Portugal), made by decision of 15 November 2011, received at the Court on 3 January 2012, in the proceedings

Ordem dos Técnicos Oficiais de Contas

v

Autoridade da Concorrência,

intervening party:

Ministério Público,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 December 2012,

after considering the observations submitted on behalf of:

– Ordem dos Técnicos Oficiais de Contas, by D. Abecassis, L. Vilhena de Freitas and R. Leandro Vasconcelos, advogados,

– the Ministério Público, by F. de Jesus Marques de Oliveira, procuradora-geral adjunta,

– the Portuguese Government, by L. Inez Fernandes, acting as Agent, and by M. Caldeira, advogada,

– the Italian Government, by G. Palmieri acting as Agent, and by F. Varrone, avvocato dello Stato,

– the Netherlands Government, by C. Wissels, acting as Agent,

– the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

– the European Commission, by N. Khan, L. Parpala and P. Guerra e Andrade, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 TFEU, 101 TFEU, 102 TFEU and 106 TFEU.

2 The request has been made in the course of proceedings between the Ordem dos Técnicos Oficiais de Contas (Order of Chartered Accountants; 'the OTOC') and the Autoridade da Concorrência (Competition Authority; 'the AdC') concerning, in particular, the compatibility with Article 101 TFEU of the Training Credits Regulation (Regulamento da Formação de Créditos, *Diário da República*, 2nd series, No 133, of 12 July 2007; 'the contested regulation'). That regulation was adopted on 18 May 2007 by the Chamber of Chartered Accountants, to which the OTOC is the successor.

Legal context

The Statute of the OTOC

3 Article 1 of the Statute of the Order of Chartered Accountants ('the Statute of the OTOC'), which appears in Annex I to Decree-Law No 310/2009 of 26 October 2009, reads as follows:

'The [OTOC] is a public legal person, organised to include a professional membership, which is responsible, on the basis of mandatory registration, for representing the professional interests of chartered accountants and overseeing all matters relating to the exercise of their functions.'

4 Article 3(1) of that Statute provides:

'1. The powers of the Order shall be as follows:

(a) granting the professional title of chartered accountant and issuing the related professional identity card;

(b) protect the dignity and prestige of the profession, ensure compliance with the rules of ethical and professional conduct and defend the interests, rights and prerogatives of its members;

(c) promote its members' continued training and professional training and contribute thereto, in particular by the organisation of professional training sessions and programmes, courses and conferences;

…

(n) exercise disciplinary powers over chartered accountants;

(o) establish ethical and professional principles and rules;

…

(r) implement, organise and operate systems to monitor the quality of services provided by chartered accountants;

(s) plan, organise and provide compulsory training schemes for its members;

…'

5 Under Article 6 of the Statute:

'1. Chartered accountants carry out the following activities:

(a) planning, organising and coordinating the accounts of the entities which have or must have duly organised accounts in accordance with the officially applicable accounting plans or, as the case may be, the accounts standardisation system, complying with the legal provisions, the accounting rules in force and the guidance of the bodies competent in accounts standardisation;

(b) assuming responsibility for the technical conformity of the entities referred to in the preceding paragraph in accounting and taxation matters;

(c) signing, together with the legal representative of the entities referred to under (a), the financial statements and taxation declarations, testifying to their accuracy, on the terms and conditions defined by the Order , without prejudice to the power and responsibilities conferred by the commercial and taxation law on the bodies concerned;

(d) on the basis of details supplied by the taxpayers whose accounting they perform, assuming responsibility for verifying the social security declarations and the declarations made for taxation purposes in connection with the management of salaries.

2 In addition, chartered accountants shall:

(a) act as consultants in the fields of accounting, taxation and social security;

(b) intervene, as representatives of the taxpayers whose accounting they perform, at the administrative stage of the taxation procedure, in the context of questions concerning their specific competencies;

(c) perform any other function defined by the law connected to the exercise of their functions, in particular that of expert designated by the courts or by other public or private entities.

…'

6 In accordance with Article 57(1)(a) of the Statute of the OTOC, chartered accountants are to comply with all the rules and execute all the acts of the OTOC.

7 Under Article 59(2) thereof, it is a disciplinary offence 'for a chartered accountant to fail, by act, by omission or by negligence, to perform one of the general or specific duties laid down in the … Statute … or in other provisions or acts adopted by the Order'.

8 Such infringements are, pursuant to Articles 63 and 64 of the Statute of the OTOC, subject to one of the following disciplinary sanctions: a warning, a fine, suspension of up to three years or removal from the Order.

The Quality Control Regulation

9 On 30 March 2004, the Chamber of Chartered Accountants adopted the Quality Control Regulation (Regulamento do Controlo de Qualidade, *Diário da República*, 2nd series, No 175, of 27 July 2004). Article 4 of that regulation provides:

'1. The assessment of the horizontal control is made by verification of the following factors:

...

(e) obtaining, over the two previous years, an annual average of 35 credits for training provided by the [OTOC] or approved by [it];

...'

The contested regulation

10 Article 3 of the contested regulation provides:

'Types of training provided by the [OTOC]

1. The [OTOC] promotes the following types of training:

(a) institutional training;

(b) professional training.

2. Institutional training shall consist of events organised by the [OTOC] for its members, of a maximum duration of 16 hours, the objective of which is in particular to make the professionals aware of legislative initiatives and amendments and of questions of ethical and professional conduct.

3. Professional training shall consist of study and consolidation sessions on topics central to the profession, of a minimum duration of more than 16 hours.'

11 Under Article 5(1) of that regulation, the OTOC may offer all types of training relevant to the exercise of the profession concerned. In accordance with Article 5(2) thereof, institutional training may be provided only by the OTOC.

12 It is apparent from Articles 6 and 7 of that regulation that the higher education establishments and bodies authorised by law to provide training and the bodies registered with the OTOC may provide courses as part of the professional training of chartered accountants.

13 The conditions with which training bodies must comply in order to be authorised by the OTOC to provide courses giving an entitlement to training credits are, pursuant to Article 8(1) of the contested regulation, as follows:

'(a) proven ability to provide training;

(b) possession of the necessary means (financial, equipment and staff) to provide quality training;

(c) proven aptitude of the members of the managing organs of the body in question and of the persons responsible for organising the training;

(d) contributions from university professors and/or persons having recognised ability in the profession and/or professionals having recognised ability in the fields connected to the exercise of the profession.'

14 In accordance with Article 9 of that regulation, the decision accepting or rejecting the registration of training bodies for the purposes of providing training giving an entitlement to training credits is to be taken by the management of the OTOC within three months from the date on which the application was made.

15 Articles 10 to 12 of that regulation govern the approval procedure for training giving an entitlement to training credits provided by bodies other than the OTOC. The decision on approval of training is to be taken by the OTOC.

16 By virtue of Article 15(1) of the contested regulation, chartered accountants taking part in institutional or professional training, provided that the training is given by the OTOC or approved by it, are awarded 1.5 credits per hour of training. In accordance with Article 15(2) thereof, all chartered accountants are required to earn 12 institutional training credits per year.

17 Article 16 of the contested regulation provides that the training bodies falling within the scope of Article 8 thereof must pay a fee to the OTOC when applying for registration as a training body and when making each application for approval of the training which they intend to provide. Under Article 17 of that regulation, the amount of that fee is to correspond to the total costs borne by the OTOC for those procedures, without their having been fixed in the contested regulation.

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

18 In 2006 and 2009, the AdC received two complaints about the system of compulsory training for chartered accountants put in place by the OTOC.

19 During that period, a number of training bodies applied for registration with the OTOC in order to be able to provide professional training for chartered accountants, paying a fee of EUR 200. During the same period, those bodies also applied for approval of the training which they intended to provide, paying a fee of EUR 100 per potential training event.

20 Although the OTOC granted most of those applications, it is apparent from the file before the Court that, in certain cases, the OTOC refused to approve training sessions.

21 In addition, two training bodies expressly refused to register with the OTOC on the ground that the contested regulation unduly restricted their freedom to provide training for chartered accountants.

22 It is also apparent from the file submitted to the Court that, in certain cases, the OTOC did not take a decision, despite the fact that more than five months had passed since the application for approval was made, or responded to such applications after more than one year had elapsed.

23 By a decision of 7 May 2010 ('the contested decision'), the AdC found, having defined the relevant market as being that of compulsory training for chartered accountants throughout national territory, that, by adopting the contested regulation, the OTOC had infringed Articles 101 TFEU and 102 TFEU and imposed a fine on it.

24 The OTOC sought the annulment of that decision before the tribunal do comércio de Lisboa (Lisbon Commercial Court).

25 That court first held that, by requiring all chartered accountants to earn an average of 35 training credits per year for the previous two years through training provided by the OTOC or approved by it, including 12 credits earned from training provided exclusively by the OTOC itself, and by deciding which training bodies are authorised to provide training and which training sessions give an entitlement to training credits, the OTOC has distorted competition on the market of compulsory training for chartered accountants. It also held that the contested regulation was likely to hinder trade between the Member States.

26 Next, the tribunal do comércio de Lisboa rejected the argument that the restrictions on competition resulting from that regulation were necessary in order to ensure the proper exercise of the profession of chartered accountant.

27 Next, that court considered that the OTOC had not abused its dominant position on the relevant market. It therefore annulled the contested decision in that regard.

28 The OTOC sought the annulment of the decision of the tribunal do comércio de Lisboa before the referring court, arguing that it has a public service mission derived directly from the law, consisting of the promotion and contribution to training of its members. Its training activity therefore falls outside the sphere of economic activity and therefore is outside the scope of Article 101 TFEU. In any event, that article does not apply to the present case, as follows from paragraphs 97 et seq. of Case C-309/99 *Wouters and Others* [2002] ECR I-1577, since any restrictive effects of the OTOC's conduct are justified by the need to ensure proper exercise of the profession of chartered accountant. Furthermore, the contested regulation contributes to improving the provision, distribution and promotion of technical or economic progress and gives users a fair share of the benefit within the meaning of Article 101(3) TFEU. In addition, the creation of a system of compulsory training for chartered accountants is a service of general economic interest within the meaning of Article 106(2) TFEU.

29 In those circumstances the Tribunal da Relação de Lisboa (Lisbon Court of Appeal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must an institution such as the [OTOC] be regarded in its entirety as an association of undertakings for the purposes of applying the Community competition law rules (training market)? If so, is … Article 101(2) TFEU to be interpreted as also rendering subject to those rules an entity which, like the OTOC, lays down binding rules of general application and does so in compliance with legal requirements concerning compulsory training of chartered accountants with a view to providing citizens with a quality service that can be relied on?

2. If an entity such as the OTOC is required by law to implement a system of compulsory training for its members, may … Article 101 TFEU be interpreted as allowing the possibility of challenging the setting up of a training system legally imposed by the OTOC and by the regulation governing that system, in so far as the latter strictly confines itself to giving effect to the legal requirement? Or, on the contrary, does this matter fall outside the scope of Article 101 TFEU and must it be examined under … Article 56 TFEU et seq.?

3. Having regard to the fact that the [*Wouters and Others*] judgment, and similar judgments, were concerned with rules having an impact on the economic activity of the professional members of the professional association in question, do Articles 101 TFEU and 102 TFEU preclude rules on the training of chartered accountants which have no direct influence on their economic activity?

4. In the light of European Union competition law (in the training market), may a professional association impose the requirement, for the practice of the profession, of particular training provided only by it?'

Consideration of the questions referred

The first to third questions

Preliminary observations

30 It is apparent from the file before the Court that the AdC found, in the contested decision, that, by adopting the contested regulation, the OTOC infringed both Article 101 TFEU and Article 102 TFEU. That decision was then annulled by the tribunal do comércio de Lisboa in so far as that authority found that it constituted an infringement of Article 102 TFEU. Before the referring court, the OTOC sought the annulment of the decision of the Commercial Court only in so far as it confirmed the finding of an infringement of Article 101 TFEU.

31 It is thus manifest that, as the main proceedings stand, the interpretation requested of Article 56 TFEU et seq. and 102 TFEU bears no relation to the subject-matter of the dispute, such that it is irrelevant to its resolution. Firstly, the compatibility of the contested regulation with Article 56 TFEU et seq. is not the subject-matter of the contested decision and, secondly, the annulment in part thereof by the tribunal do comércio de Lisboa, in that it found an infringement of Article 102 TFEU, has not been disputed before the referring court.

32 Consequently, the view must be taken that the first to third questions referred relate only to the interpretation of Article 101(1) TFEU.

The questions referred

33 By its first to third questions, which it is appropriate to consider together within the limits set out in paragraph 32 of this judgment, the referring court asks, in essence, whether a regulation such as that at issue in the main proceedings, adopted by a professional association such as the OTOC, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU. It wishes to know, in particular, whether the fact, firstly, that the OTOC is required by law to adopt binding rules of general application in order to put into place a system of compulsory training for its members with a view to providing citizens with a quality service that can be relied on and, secondly, that those rules do not directly affect the economic activity of chartered accountants is relevant to the application of Article 101 TFEU.

34 In order to ascertain whether a regulation such as the contested regulation must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU, it is appropriate to examine, firstly, whether chartered accountants are undertakings within the meaning of European Union competition law.

35 In accordance with settled case-law, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, inter alia, *Wouters and Others*, paragraph 46 and the case-law cited).

36 In that regard, in accordance with settled case-law, any activity consisting in offering goods and services on a given market is an economic activity (see, inter alia, *Wouters and Others*, paragraph 47 and the case-law cited).

37 In the present case, it is apparent from the file before the Court that the chartered accountants offer, for remuneration, accounting services consisting in particular, pursuant to Article 6 of the Statute of the OTOC, of planning, organising and coordinating the accounts of entities, signing their financial statements and tax declarations, acting as consultants in the fields of accounting, taxation and social security and representing the taxpayers whose accounting they perform at the administrative stage of the taxation procedure. In addition, it is common ground that chartered accountants assume, as members of a liberal profession, the financial risks related to the exercise of those activities, since, where there is an imbalance between outgoings and revenue, a chartered accountant is required to bear the deficit personally.

38 That being so, chartered accountants, having regard to the manner in which their profession is regulated in Portugal, carry on an economic activity and are, therefore, undertakings for the purposes of Article 101 TFEU. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, by analogy, *Wouters and Others*, paragraph 49).

39 Secondly, it is appropriate to examine whether a professional association such as the OTOC must be regarded as an association of undertakings within the meaning of Article 101(1) TFEU when it adopts a regulation such as the contested regulation or, on the contrary, as a public authority.

40 In accordance with the case-law of the Court, the FEU Treaty rules on competition do not apply to an activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity, or which is connected with the exercise of the powers of a public authority (see, inter alia, *Wouters and Others*, paragraph 57 and the case-law cited).

41 Firstly, rules such as those at issue in the main proceedings cannot be regarded as not belonging to the sphere of economic activity.

42 It is common ground in that regard, on the one hand, that the OTOC itself provides training for chartered accountants and, on the other, that the access of other providers wishing to offer such training is subject to the standards set out in the contested regulation. Consequently, such a regulation has a direct impact on economic activity on the market of compulsory training for chartered accountants.

43 In addition, the obligation on chartered accountants to undertake training in accordance with the rules laid down by that regulation is closely linked to the practice of their profession, as the Polish Government and the European Commission point out. Failure to comply with that obligation can therefore lead to disciplinary sanctions under Articles 57(1)(a), 59(2), 63 and 64 of the Statute of the OTOC, such as suspension for a maximum period of three years or expulsion from that professional association.

44 Even if that regulation did not directly affect the economic activity of the chartered accountants themselves, as the referring court appears to suggest in its third question, that fact cannot, of itself, remove a decision of an association of undertakings from the scope of Article 101 TFEU.

45 Such a decision can be such as to prevent, restrict or distort competition within the meaning of Article 101(1) TFEU, not only on the market on which the members of a professional association practice their profession, but also on another market on which that professional association itself has an economic activity.

46 Secondly, when it adopts rules such as the contested regulation, a professional association such as the OTOC does not exercise powers which are typically those of a public authority but appears rather as a regulatory body of a profession the practice of which constitutes, moreover, an economic activity.

47 On the one hand, it is not in dispute that the managing bodies of the OTOC are exclusively composed of members of that association. In addition, the national authorities play no part in the nomination of the members of those bodies.

48 It is immaterial in that regard that the OTOC is regulated by public law. According to its very wording, Article 101 TFEU applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the European Union rules on competition, and in particular Article 101 TFEU, are concerned (*Wouters and Others*, paragraph 66 and the case-law cited).

49 On the other, the regulatory power invested in the OTOC is not subject to any conditions or criteria which that professional association is required to meet when adopting measures such as the contested regulation. In that regard, Article 3(1)(c) and (s) of the Statute of the OTOC merely allocates to the OTOC the tasks of '[promoting] its members' continued training and professional training and [contributing] thereto, in particular by the organisation of professional training sessions and programmes, courses and conferences' and '[planning, organising and providing] compulsory training schemes for its members'.

50 Those provisions therefore allow the OTOC a wide discretion as to the principles, the conditions and methods which the compulsory training scheme for chartered accountants must follow.

51 In particular, the Statute of the OTOC does not give it the exclusive right to provide training for chartered accountants and does not lay down the conditions for access by training bodies to the market of compulsory training for chartered accountants. The rules concerning those questions appear, however, in the contested regulation.

52 Furthermore, it is not in dispute that that regulation was adopted by the OTOC without any input from the State.

53 The fact, referred to by the referring court in its second question, that the OTOC is legally required to put into place a system of compulsory training for its members does not call into question the foregoing considerations.

54 It is true that, when a Member State grants regulatory powers to a professional association, whilst defining the public-interest criteria and the essential principles with which its rules must comply and retaining its power to adopt decisions in the last resort, the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings (see, to that effect, *Wouters and Others*, paragraph 68).

55 However, that does not appear to be the case in the main proceedings, as is apparent from paragraphs 49 to 52 of the present judgment.

56 In such circumstances, the rules governing the earning of training credits drawn up by the professional association at issue in the main proceedings are a matter for it alone.

57 As regards the effect on the application of Article 101 TFEU of the fact that the OTOC does not seek to make a profit, it should be noted that that does not prevent an entity which carries out operations on the market from being considered an undertaking, where the corresponding offer of services exists in competition with that of other operators which do seek to make a profit (see, to that effect, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 122 and 123, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 27).

58 This is exactly the case in the main proceedings. It is clear from the file before the Court that the OTOC offers professional training for chartered accountants in competition with other training bodies which seek to make a profit.

59 In the light of the foregoing considerations, the answer to the first to third questions is:

– A regulation such as that at issue in the main proceedings, adopted by a professional association such as the OTOC, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU.

– The fact that a professional association, such as the OTOC, is legally required to put into place a system of compulsory training for its members cannot remove from the scope of Article 101 TFEU the rules drawn up by that professional association, in so far as those rules are a matter for it alone.

– The fact that those rules do not have any direct effect on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, where the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity.

The fourth question

60 By its fourth question, the referring court asks, in essence, whether European Union competition law precludes a professional association from requiring its members to undertaking training provided exclusively by that association in circumstances such as those in the main proceedings.

61 The Portuguese Government points out that the infringement of Article 101 TFEU found in the contested decision and forming the subject-matter of the dispute in the main proceedings is not restricted to the fact of requiring the members of the OTOC to undertake training provided by the OTOC alone.

62 In that regard, it appears clear from the file before the Court and, in particular, from the contested decision and that of the Tribunal do comércio de Lisboa, and as has been confirmed by the OTOC and the Portuguese Government at the hearing before the Court, that the infringement of Article 101 TFEU of which the OTOC is accused consists of the adoption of the contested regulation, by virtue of which the market of compulsory training for chartered accountants has, in essence, been artificially segmented, a third of it being reserved to the OTOC itself, and, on the other segment of that market, discriminatory conditions being imposed to the detriment of the OTOC's competitors.

63 Article 101(1) TFEU prohibits as incompatible with the internal market all decisions by associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

64 Accordingly, it must be examined whether those conditions are met in the main proceedings.

65 In that regard, it is settled case-law that, for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that influence must not be insignificant (see, inter alia, Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited).

66 Since they apply to the whole territory of the Member State in question, rules such as the contested regulation are liable to affect trade between Member States, within the meaning of Article 101(1) TFEU (see, by analogy, inter alia, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 45 and the case-law cited).

67 In the light of the considerations in paragraphs 73 to 92 of the present judgment, the conditions for access to the market of compulsory training for chartered accountants laid down in the contested regulation appear liable to be of significant importance in the choice of undertakings established in Member States other than the Portuguese Republic whether or not to exercise their activities in that Member State.

68 As regards whether rules such as the contested regulation have as their object or effect the prevention, restriction or distortion of competition within the internal market, it must be noted, as is

apparent from the decision for reference, that that regulation seeks to guarantee the quality of the services offered by chartered accountants by putting into place a system of compulsory training.

69 Even if that regulation does not have as its object the prevention, restriction or distortion of competition, it is necessary to examine its effects on competition in the internal market.

70 In accordance with settled case-law, when assessing the effects of a decision of an association of undertakings in the light of Article 101 TFEU it is necessary to take into consideration the actual context in which it is situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, inter alia, *Asnef-Equifax and Administración del Estado*, paragraph 49 and the case-law cited).

71 Article 101(1) TFEU does not restrict such an assessment to actual effects alone, as that assessment must also take account of the potential effects of the decision in question on competition within the internal market (*Asnef-Equifax and Administración del Estado*, paragraph 50 and the case-law cited).

72 Although it is for the referring court to examine whether the contested regulation has had or is likely to have harmful effects on competition in the internal market, it is for the Court to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see, to that effect, Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419, paragraph 42).

73 In that regard, the referring court must, firstly, take into consideration the structure of the market of compulsory training for chartered accountants, as it appears from that regulation.

74 It must be pointed out in that regard that that regulation provides for two types of training, the first called 'institutional' and the second 'professional', which differ as to their aim, the bodies authorised to provide them and the duration of the training sessions which can be offered.

75 As regards, firstly, the subject-matter of institutional training, as it is defined in Article 3(2) of the contested regulation, it consists of training sessions designed to raise the awareness of chartered accountants of issues of ethics and rules of professional conduct and also as regards 'legislative changes and initiatives'. It is also possible for the relevant legislative developments to be the subject-matter of professional training, which consists, in accordance with Article 3(3) of that regulation, of 'study and consolidation sessions on topics central to the profession'. In addition, in accordance with Article 15(1) of that regulation, each training session, whether institutional or professional – provided that it is offered by the OTOC or approved by it – gives an entitlement to 1.5 credits per hour.

76 Those factors are liable to show that those two types of training could be regarded, at least in part, as being interchangeable, which is a matter for the referring court to establish.

77 Should that be the case, the distinction drawn in the contested regulation between institutional training and professional training on the basis of their subject-matter is not justified. In that regard, it must be borne in mind that, as is apparent from paragraph 7 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, their prices and their intended use.

78 The division of the market of compulsory training for chartered accountants, as made in the contested regulation, leads, secondly, to the designation of bodies authorised to provide each of those two types of training. In that regard, it is apparent from Article 5(2) of that regulation that institutional training can be provided only by the OTOC. Moreover, of the average of 35 credits per year which chartered accountants are required to earn during the previous two years pursuant to Article 4(1)(e) of the Quality Control

Regulation, 12 credits must compulsorily be obtained from institutional training, as follows from Article 15(2) of the contested regulation.

79 It follows that that regulation reserves for the OTOC a significant part of the market of compulsory training for chartered accountants.

80 Thirdly, those two types of training differ as regards the duration of the sessions which can be provided for each of them respectively. Thus, Article 3(2) and (3) of that regulation provides that institutional training is of a maximum duration of 16 hours, while professional training must last longer than 16 hours.

81 That situation can have the result, which is for the referring court to ascertain, that training bodies other than the OTOC, which wish to offer short training programmes, may be prevented from so doing.

82 Such a rule therefore appears likely to distort competition on the market of compulsory training for chartered accountants by affecting the normal play of supply and demand.

83 Fourthly, while the contested regulation compulsorily requires chartered accountants to earn a minimum of 12 institutional training credits per year, there is no analogous requirement as regards professional training. It follows, as the Portuguese Government submits, that chartered accountants may choose to earn the remaining 23 credits either from professional training or from institutional training. That fact is also liable to confer a competitive advantage on the sessions of institutional training provided by the OTOC, having regard, in particular, to the shorter duration of those sessions, as has been noted in paragraphs 80 and 81 of this judgment, which it is for the referring court to ascertain.

84 Secondly, the referring court must examine the conditions of access to the market in question for bodies other than the OTOC.

85 In that regard, it is appropriate to note that the training bodies, with the exception of higher education establishments and bodies authorised by law to provide training, which wish to provide training giving an entitlement to training credits must first register with the OTOC. It is for the OTOC's management to accept or reject an application for registration, as is clear from Article 9 of the contested regulation.

86 Furthermore, if those bodies wish the training they seek to provide to carry an entitlement to training credits, they must, under Article 12 of that regulation, make an application to the OTOC for approval of each training session. That application must be made at least three months before the start of the training session concerned and must contain a certain amount of information such as the price and the detailed programme of the training session in question. The applicant must also pay a fee for each session proposed, which goes to the OTOC. The approval or rejection decision is taken by the management of that professional association.

87 Moreover, it is common ground that, firstly, the OTOC also provides professional training in competition with other training bodies and, secondly, the professional training provided by the OTOC is not subject to any approval procedure.

88 A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (*MOTOE*, paragraph 51).

89 The elements noted in paragraphs 85 to 87 of the present judgment are liable to have the consequence that the contested regulation does not ensure equality of opportunity between the various economic operators.

90 Firstly, the conditions which must be met by the training bodies in order, on the one hand, to register with the OTOC and, on the other, to have professional training approved, in Articles 8 and 12 of the contested regulation respectively, are drafted in vague terms.

91 Such rules, which grant a legal person such as the OTOC the power to rule unilaterally on applications for registration or approval submitted with a view to the organisation of training sessions, without that power being made subject by those rules to limits, obligations or a review, could lead the legal person holding such power to distort competition by favouring the training which it organises itself (see, by analogy, *MOTOE*, paragraph 52).

92 Secondly, the manner in which the approval procedure is organised by the contested regulation is liable to restrict the offer of training proposed by bodies other than the OTOC. The fact that they have to apply in advance for approval of each training session they propose, three months before the start of that session, may be to the detriment of competitors of the OTOC, since that procedure prevents them from offering, in the near future, training on current issues giving entitlement to those credits, while requiring them systematically to reveal detailed information about all training proposed.

93 However, not every decision of an association of undertakings which restricts the freedom of action of the parties necessarily falls within the prohibition laid down in Article 101(1) TFEU. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives (see, to that effect, *Wouters and Others*, paragraph 97).

94 In the present case, it is apparent from the decision for reference, as has been pointed out in paragraph 68 of this judgment, that that regulation seeks to guarantee the quality of the services offered by chartered accountants.

95 In as much as it puts into place a system of compulsory training for chartered accountants, which is likely to ensure the necessary guarantee of further training and continued professional education, thus contributing to the sound administration of undertakings' accounting and taxation matters, the regulation does effectively contribute to the pursuit of that objective.

96 Next, it is necessary to examine whether the restrictive effects which follow from the contested regulation can reasonably be regarded as necessary to guarantee the quality of the services offered by chartered accountants and whether those effects do not go beyond what is necessary to ensure the pursuit of that objective (see, to that effect, *Wouters and Others*, paragraphs 97, 107 and 109).

97 It must be pointed out in that regard that the restrictive effects on competition which are likely to ensue from that regulation consist, in essence, as follows from the considerations in paragraphs 73 to 92 of this judgment, of the elimination of competition on a substantial part of the relevant market and the fixing of discriminatory conditions on the other part of the market.

98 Elimination of competition as regards training sessions lasting less than 16 hours cannot in any event be regarded as necessary to guarantee the quality of the services offered by chartered accountants.

99 Similarly, as regards the conditions for access to the market of compulsory training for chartered accountants, the objective of guaranteeing the quality of the services offered by them could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question.

100 It follows that such restrictions appear to go beyond what is necessary to guarantee the quality of the services offered by chartered accountants.

101 The applicant in the main proceedings submits that the contested regulation is covered, in any event, by the exemption provided for in Article 101(3) TFEU or falls within the scope of Article 106(2) TFEU.

102 It must be borne in mind, in that regard, that the applicability of the exemption provided for in Article 101(3) TFEU is subject to the four cumulative conditions laid down in that provision. Firstly, the decision concerned must contribute to improving the production or distribution of the goods or services in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; thirdly, it must not impose any non-essential restrictions on the participating undertakings; and, fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products or services in question (see, to that effect, *Asnef-Equifax and Administración del Estado*, paragraph 65).

103 Since, firstly, the contested regulation is liable to make it possible for the OTOC to eliminate competition on a substantial part of the training services for chartered accountants, as has been found in paragraph 97 of the present judgment and, secondly, for the reasons referred to in paragraphs 98 to 100 of this judgment, the restrictions imposed by that regulation cannot be regarded as essential, Article 101(3) TFEU does not apply to a situation such as that in the main proceedings.

104 As regards the reference to Article 106(2) TFEU, it is important to bear in mind that that provision provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

105 Clearly, in that regard, it is not apparent from either the documents in the file sent by the referring court or from the observations lodged before the Court that the compulsory training of chartered accountants is of general economic interest exhibiting special characteristics as compared with that of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to competition, would be such as to obstruct the performance of such a task (see, by analogy, Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27).

106 In any event, undertakings falling within the scope of Article 106(2) TFEU may rely on that provision of the Treaty to justify a measure contrary to Article 101 TFEU only if the restrictions on competition, or even the exclusion of all competition, are necessary in order to ensure the performance of the particular tasks assigned to them (see, to that effect, Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 65; Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14; and Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 46).

107 For the reasons set out in paragraphs 98 to 100 of the present judgment, the restrictions on competition imposed by the contested regulation appear to go beyond what is necessary to ensure the performance of the particular tasks assigned to the OTOC, so that Article 106(2) TFEU does not apply.

108 Having regard to all the foregoing considerations, the answer to the fourth question is that a regulation which puts into place a system of compulsory training for chartered accountants in order to guarantee the quality of the services offered by them, such as the contested regulation, adopted by a professional association such as the OTOC, constitutes a restriction on competition prohibited by Article 101 TFEU to the extent, which it is for the referring court to ascertain, that it eliminates competition on a substantial part of the relevant market, to the benefit of that professional association, and that it imposes, on the other part of that market, discriminatory conditions to the detriment of competitors of that professional association.

Costs

109 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. A regulation such as the Training Credits Regulation (Regulamento da Formação de Créditos), adopted by a professional association such as the Ordem dos Técnicos Oficiais de Contas (Order of Chartered Accountants), must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU.

The fact that a professional association, such as the Ordem dos Técnicos Oficiais de Contas, is legally required to put into place a system of compulsory training for its members cannot remove from the scope of Article 101 TFEU the rules drawn up by that professional association, in so far as those rules are a matter for it alone.

The fact that those rules do not have any direct effect on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, where the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity.

2. A regulation which puts into place a system of compulsory training for chartered accountants in order to guarantee the quality of the services offered by them, such as the Training Credits Regulation, adopted by a professional association such as the Ordem dos Técnicos Oficiais de Contas, constitutes a restriction on competition prohibited by Article 101 TFEU to the extent, which it is for the referring court to ascertain, that it eliminates competition on a substantial part of the relevant market, to the benefit of that professional association, and that it imposes, on the other part of that market, discriminatory conditions to the detriment of competitors of that professional association.

Judgment of the Court (Third Chamber), 25 April 2013
Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării

Request for a preliminary ruling from the Curtea de Apel Bucureşti

Social policy — Equal treatment in employment and occupation — Directive 2000/78/EC — Articles 2(2)(a), 10(1) and 17 — Prohibition of discrimination on grounds of sexual orientation —

Concept of 'facts from which it may be presumed that there has been discrimination' — Modified burden of proof — Effective, proportionate and dissuasive sanctions — Person presenting himself and being perceived by public opinion as playing a leading role in a professional football club —

Public statements ruling out the recruitment of a footballer presented as being homosexual

Case C-81/12

JUDGMENT OF THE COURT (Third Chamber)

25 April 2013 (*)

(Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Articles 2(2)(a), 10(1) and 17 – Prohibition of discrimination on grounds of sexual orientation – Concept of 'facts from which it may be presumed that there has been discrimination' – Modified burden of proof – Effective, proportionate and dissuasive sanctions – Person presenting himself and being perceived by public opinion as playing a leading role in a professional football club – Public statements ruling out the recruitment of a footballer presented as being homosexual)

In Case C-81/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Romania), made by decision of 12 October 2011, received at the Court on 14 February 2012, in the proceedings

Asociaţia Accept

v

Consiliul Naţional pentru Combaterea Discriminării,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, V. Skouris, President of the Court, acting as Judge in the Third Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 23 January 2013,

after considering the observations submitted on behalf of:

– Asociaţia Accept, by R.-I. Ionescu, avocat,

– the Consiliul Naţional pentru Combaterea Discriminării, by C. Asztalos, C. Nuică and C. Vlad, acting as Agents,

– the Romanian Government, by R.H. Radu, E. Gane and A. Voicu, acting as Agents,

– the European Commission, by J. Enegren and C. Gheorghiu, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(2)(a), 10(1) and 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The reference has been made in proceedings between Asociaţia Accept ('Accept') and the Consiliul Naţional pentru Combaterea Discriminării (National Council for Combatting Discrimination) ('CNCD'), concerning its decision partially dismissing a complaint lodged following public statements, made by a person who presents himself as and is considered by public opinion to play a leading role in a professional football club, ruling out the recruitment by that club of a footballer presented as being a homosexual.

Legal context

European Union law

3 According to Article 1 of Directive 2000/78, that directive's 'purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

4 Recitals 15, 28, 31 and 35 of that directive are worded as follows:

'(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice ...

...

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. ...

...

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

...

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.'

5 Entitled 'Concept of discrimination', Article 2(1) to (3) provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

6 Article 3(1) of Directive 2000/78 is worded as follows:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy ...

...'

7 Article 8(1) of Directive 2000/78 states that 'the Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive'.

8 Under Article 9 of that directive:

'1. Member States shall ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them ...

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.'

9 Article 10 of that directive, entitled 'Burden of proof', provides in subparagraphs 1 to 4:

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal

treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).'

10 Article 17 of Directive 2000/78 provides:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive …'

Romanian law

11 Government Decree No 137 of 31 August 2000 on the prevention and suppression of all forms of discrimination, as amended and subsequently supplemented, in particular by Law No 324 of 14 July 2006, and republished on 8 February 2007 (*Monitorul Oficial al României*, Part I, No 99, of 8 February 2007 ('GD No 137/2000'), is intended to transpose, inter alia, Directive 2000/78.

12 According to Article 2(11) of GD No 137/2000, discrimination gives rise to civil liability, administrative offences or criminal offences, as the case may be, under the conditions laid down by law.

13 Under Article 5 of GD No 137/2000 making the participation of a person in an economic activity dependent on his sexual orientation is classified as an administrative offence.

14 Article 7(1) of GD No 137/2000 provides that the refusal by a natural or legal person to employ a person by reason, in particular, of his sexual orientation, with the exception of cases provided by law constitutes an administrative offence.

15 Article 15 of GD No 137/2000 provides:

'Any conduct intended to violate the dignity of or to create an intimidating, hostile, degrading, humiliating or offensive environment with respect to a person, group of persons or a community by reason of their sexual orientation shall constitute an administrative offence … if the facts do not fall within the scope of criminal law.'

16 Under Article 20 of GD No 137/2000:

'(1) A person who considers that he has suffered discrimination may make a complaint to the [CNCD] within one year from the date on which the facts occurred or the date from which he could have been aware that they had occurred.

(2) The [CNCD] shall decide the application by decision of the Director of the Board …

…

(6) The person concerned is required to prove the existence of the facts from which the existence of direct or indirect discrimination may be presumed, while the person against whom a complaint has been lodged has the burden of proving that the facts do not constitute such discrimination. …

(7) The Director of the Board shall give a decision on the claim within 90 days of the date on which it is lodged and [that decision] shall include … the methods of payment of the fine …

…'

17 Article 26(1) and (2) of GD No 137/2000 states:

'(1) The administrative offence provided for in Articles … 5 to 8 … and 15 shall be sanctioned by a fine of RON 400 to 4 000 if the discrimination targets a natural person, or a fine of RON 600 to 8 000 if the discrimination is directed against a group of persons or a community.

(2) Sanctions may also be applied to legal persons. …'

18 Article 27(1) of GD No 137/2000 provides:

'Persons who considers themselves the victim of discrimination may seek before the court compensation and the restoration of the status quo ante or the elimination of the situation to which the discrimination gave rise, in accordance with the provisions of general law. To make such a claim it is not necessary to lodge a complaint before the [CNCD] …'

19 Article 28(1) of GD No 137/2000 is worded as follows:

'Non-governmental organisations whose aim is to protect human rights or who have a legitimate interest in combatting discrimination have locus standi where there is discrimination in their sphere of activity and which is detrimental to a community or group of persons.'

20 Article 5(2) of Governmental Decree No 2 of 12 July 2001 on the legal regime for sanctions, amended and subsequently supplemented (*Monitorul Oficial al României*, Part I, No 410 of 25 July 2001) ('GD No 2/2001'), provides:

'Administrative offences shall be punishable principally by: (a) a warning; (b) a fine; (c) community service.'

21 Under Article 7(1) of GD No 2/2001, a 'warning is a communication orally or in writing to the person responsible for committing the administrative offence regarding the social undesirability of the acts which took place together with a recommendation to comply with the law'.

22 Under Article 13(1) of GD No 2/2001, the limitation period for imposing a fine for administrative offences is six months from the date on which the events took place.

23 Article 13(4) of GD No 2/2001 provides for the possibility, by means of special laws, to lay down other limitation periods for imposing penalties for administrative offences.

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

24 On 3 March 2010, Accept, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights lodged a complaint against Mr Becali and SC Fotbal Club Steaua București SA ('FC Steaua'), claiming that the principle of equal treatment had been breached in recruitment matters.

25 In support of its complaint, Accept maintained that, in an interview concerning the possible transfer of a professional footballer, X, and the supposed sexual orientation of that player, Mr Becali had made statements, on 13 February 2010, the content of which is reproduced in the first question in this request for a preliminary ruling. It emerges from those statements that, in particular, rather than hiring a footballer presented as being homosexual, Mr Becali would have preferred to hire a player from the junior team. According to Accept, the journalists' suppositions – which Mr Becali made his own – that X was homosexual prevented the conclusion of a contract of employment with that player.

26 Accept submitted that Mr Becali directly discriminated on grounds of sexual orientation, breaching the principle of equal treatment in employment and violating the dignity of homosexuals.

27 As regards the other defendant before the CNCD, FC Steaua, Accept claimed that despite the fact that Mr Becali's statements were broadcast in the media the football club never distanced itself from them. To the contrary, FC Steaua's lawyer was said to have confirmed that that policy had been adopted at club level for hiring players because 'the team is a family' and the presence of a homosexual on the team 'would create tensions in the team and among spectators'. Furthermore, in Accept's view, when Mr Becali made the statements at issue he was still a shareholder in FC Steaua.

28 By decision of 13 October 2010, the CNCD held, in particular, that the circumstances at issue in the main proceedings did not fall within the scope of a possible employment relationship. It considered that Mr Becali's statements could not be regarded as emanating from an employer, its legal representative, or a person responsible for recruitment, notwithstanding the fact that Mr Becali, when he made those statements, was a shareholder of FC Steaua.

29 However, the CNCD held that Mr Becali's statements constituted discrimination in the form of harassment. Therefore, the penalty imposed on him was a warning, the only penalty possible in accordance with Article 13(1) of GD No 2/2001, since the CNCD's decision was given more than six months after the date on which the relevant facts occurred.

30 Accept brought an action before the referring court against that decision, seeking, in essence, its annulment, as well as a declaration that the relevant facts fall within the scope of employment matters and that it may be assumed from proven facts that there has been discrimination and, finally, the imposition of a fine instead of a warning.

31 The referring court considers that the judgment in Case C-54/07 *Feryn* [2008] ECR I-5187 does not provide it with sufficient clarification where the discriminatory statements come from a person who, in law, cannot bind the company which recruits employees, but who, given his close links with that company, may exert a decisive influence on its decision or, at least, may be perceived as being capable of exerting a decisive influence on that decision.

32 The referring court considers, in any event, that the relationship between FC Steaua and Mr Becali is atypical. As a matter of law, the latter sold his shares in FC Steaua on 8 February 2010, that sale being entered in the register of companies on 23 February 2010, while the discriminatory statements were made on 13 February 2010. Yet it is apparent from the file before the Court that, in Romanian law, the sale of shares may be relied on against third parties only from the date on which it was made public by means of its entry in the register of companies. According to the referring court, after selling his shares, Mr Becali did not change his attitude in his public appearances and continued to describe himself as FC Steaua's 'banker'. In those circumstances, at least in the mind of the public, he maintained the same relationship he had with FC Steaua as before the sale of his shares.

33 Furthermore, the referring court wonders, in essence, whether, in the context of the modified burden of proof laid down in Article 10 of Directive 2000/78, the requirement for a professional football club to prove the absence of discrimination on grounds of sexual orientation might be impossible to satisfy in

practice, since proving that such a club hired players without taking account of their sexual orientation might, according to that court, interfere with the right to privacy.

34 That court also observes that, under Article 13(1) of GD No 2/2001, whatever the gravity of any discrimination found by the CNCD, where it adopts a decision after the expiry of the limitation period of six months from the date on which the relevant facts occurred, it is unable to impose a fine, but may only give a warning, within the meaning of Article 7(1) of GD No 2/2001, for which there is no limitation period.

35 In those circumstances the Curtea de Apel Bucureşti decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of Article 2(2)(a) of [Directive 2000/78] apply where a shareholder of a football club who presents himself as, and is considered in the mass media as, playing the leading role (or "patron") of that football club makes a statement to the mass media in the following terms:

"Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that and, what's more, put it on the front page … Maybe he's [the football player X] not a homosexual … But what if he is? I said to an uncle of mine who didn't believe in Satan or in Christ. I said to him: "Let's say God doesn't exist. But suppose he does? What do you lose by taking communion? Wouldn't it be good to go to Heaven?" He said I was right. A month before he died he took communion. May God forgive him. There's no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose."

"Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Maybe he's not a homosexual. But what if he is? There's no room for gays in my family, and [FC Steaua] is my family. Rather than having a homosexual on the side it would be better to have a junior player. This isn't discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn't a homosexual I still wouldn't take him. Too much has been written in the papers about his being a homosexual. Even if [player X's current club] gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drinker … but if he's a homosexual I don't want to know about him."

(2) To what extent may the abovementioned statements be regarded as "facts from which it may be presumed that there has been direct or indirect discrimination" within the meaning of Article 10(1) of Directive 2000/78 … as regards the defendant [FC Steaua]?

(3) To what extent would there be probatio diabolica if the burden of proof referred to in Article 10(1) of [Directive 2000/78] were to be reversed in this case and the defendant [FC Steaua] were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?

(4) Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of [GD No 2/200]1 on the legal regime for sanctions, conflict with Article 17 of [Directive 2000/78] given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?'

Consideration of the questions referred

Preliminary considerations

36 It is apparent from the case-law of the Court that direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 does not mean that there must be an identifiable complainant who claims

to have been the victim of such discrimination (see, with regard to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), *Feryn*, paragraphs 23 to 25).

37 Furthermore, taking account, in particular, of Article 8(1) of Directive 2000/78, Article 9(2) of that directive in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant (see also *Feryn*, paragraph 27).

38 Where a Member State provides for such a right, it follows from a combined reading of Articles 8(1), 9(2) and 10(1), (2) and (4) of Directive 2000/78 that that directive does not preclude the modification of the burden of proof, as provided for in Article 10(1), in situations in which such an association brings proceedings without acting on behalf of or in support of a specific complainant or with the latter's approval. In the present case, it follows from the very wording of the second and third questions that, in the view of the referring court, the modified burden of proof laid down in Article 10(1) of that directive is, where appropriate and subject to the answers provided by the Court to those questions, capable of applying in the dispute in the main proceedings.

39 It is not disputed before the Court that Accept is an association of the kind referred to in Article 9(2) of Directive 2000/78, that Article 28(1) of GD No 137/2000 provides for the possibility of bringing legal or administrative proceedings to enforce the obligations arising under that directive without acting in the name of a specific complainant, or that Accept may be regarded as a 'person concerned' within the meaning of Article 20(6) of GD No 137/2000.

The first and second questions

40 The first two questions seek to determine, in essence, whether Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to 'facts from which it may be presumed that there has been … discrimination' as regards a professional football club, even though the statements at issue come from a person presenting himself and being perceived in the media and by the public as playing a leading role in that club, without, however, necessarily having the legal capacity to bind it or to represent it in recruitment matters.

41 It should be noted at the outset that, in proceedings brought pursuant to Article 267 TFEU, the Court has no jurisdiction to give a ruling on the facts in an individual case or to apply the rules which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 69 and the case-law cited). Thus, it is not for the Court to take a view on whether the facts on which the dispute in the main proceedings is based, such as those set out in the order for reference, establish discrimination on grounds of sexual orientation.

42 As is clear in particular from recital 15 in the preamble to Directive 2000/78, the assessment of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice (see Case C-415/10 *Meister* [2012] ECR, paragraph 37). In accordance with the mechanism laid down in Article 10(1) thereof, if such facts are established, it is for the respondent to prove that there has been no breach of the principle of equal treatment within the meaning of Article 2(1).

43 That said, the Court may provide the national court with all guidance on the interpretation of EU law that could be useful for its decision (see, in particular, *Feryn*, paragraph 19 and the case-law cited, as well as Case C-163/10 *Patriciello* [2011] ECR I-7565, paragraph 21).

44 In that connection, it follows from Articles 1 and 3(1)(a) of Directive 2000/78 that that directive applies in circumstances, such as those from which the dispute in the main proceedings arises, that involve, in employment and occupation, statements concerning 'conditions for access to employment … including … recruitment conditions'.

45 It is irrelevant in that regard that, as was stressed in the main proceedings, the system of recruitment of professional footballers is not based on a public tender or direct negotiation following a selection procedure requiring the submission of applications and pre-selection of players having regard to their interest for the employer. Indeed, it is clear from well-established case-law that, having regard to the objectives of the European Union, sport is subject to European Union law to the extent that it constitutes an economic activity (see, in particular, Case 13/76 *Donà* [1976] ECR 1333, paragraph 12, and Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 27). That is the case as regards the activities of professional or semi-professional footballers where they are in gainful employment or provide a remunerated service (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73).

46 As the referring court, in substance, points out, in the specific dispute which gave rise to the judgment in *Feryn*, at issue were statements by one of the directors of Feryn NV who, as is apparent in particular from the formulation of the questions referred for a preliminary ruling in the case which gave rise to that judgment, had legal capacity to determine the recruitment policy of that company (see *Feryn*, paragraphs 2, 16, 18 and 20).

47 However, *Feryn* does not suggest that, in order to establish the existence of 'facts from which it may be presumed that there has been … discrimination', in accordance with Article 10(1) of Directive 2000/78, the person who made the statements concerning the recruitment policy of a particular entity must necessarily have legal capacity directly to define that policy or to bind or represent that entity in recruitment matters.

48 The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar to establishing, with respect to that defendant, the existence of 'facts from which it may be presumed that there has been … discrimination' within the meaning of Article 10(1) of that directive.

49 It follows that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.

50 In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.

51 In that connection, it should be recalled that the perception of the public or social groups concerned may be relevant for the overall assessment of the statements at issue in the main proceedings (see, to that effect, Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraphs 55 to 58).

52 Furthermore, contrary to the CNCD's assertions in both its written and oral submissions to the Court, the fact that a professional football club such as that at issue in the main proceedings might not have started any negotiations with a view to recruiting a player presented as being homosexual does not preclude the possibility of establishing facts from which it may be inferred that that club has been guilty of discrimination.

53 In light of the foregoing, the answer to the first and second questions is that Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those from which the dispute in the

main proceedings arises are capable of amounting to 'facts from which it may be presumed that there has been … discrimination' as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.

The third question

54 By its third question, the referring court asks, in essence, whether, if facts such as those from which the dispute in the main proceedings arises were considered to be 'facts from which it may be presumed that there has been direct or indirect discrimination' based on sexual orientation in the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.

55 In that connection, it is apparent from the case-law of the Court that, where facts from which it may be inferred that there has been discrimination within the meaning of that directive have been established, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the defendants concerned, who must prove that there has been no breach of that principle (see, to that effect, Case C-303/06 *Coleman* [2008] ECR I-5603, paragraph 54).

56 In that context, defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.

57 In order to rebut the non-conclusive presumption that may arise under the application of Article 10(1) of Directive 2000/78, it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.

58 In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.

59 Having regard to the foregoing, the answer to the third question is that Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be 'facts from which it may be presumed that there has been … discrimination' based on sexual orientation in the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.

The fourth question

60 By its fourth question, the referring court asks, in essence, whether Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred.

61 Article 17 of Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions applicable to infringements of the national provisions adopted pursuant to that directive and for

taking all measures necessary to ensure that they are applied. Although it does not call for the adoption of specific sanctions, that article requires that the sanctions applicable to infringements of national provisions adopted to implement that directive must be effective, proportional and dissuasive.

62 In proceedings in which an association empowered by law to that effect seeks a finding of discrimination, within the meaning of Article 2(2) of Directive 2000/78, and the imposition of a sanction, the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must also be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim (see, by analogy, *Feryn*, paragraphs 38 and 40).

63 It follows that the rules on sanctions put in place in order to transpose Article 17 of Directive 2000/78 into the national law of a Member State must in particular ensure, in parallel with measures taken to implement Article 9 of that directive, real and effective legal protection of the rights deriving from it (see, by analogy, in particular, Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraphs 24, 39 and 40). The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect (see, to that effect, in particular, Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 42, and *Draehmpaehl*, paragraph 40), while respecting the general principle of proportionality (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraphs 87 and 88, and Case C-430/05 *Ntionik and Pikoulas* [2007] ECR I-5835, paragraph 53).

64 In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.

65 In the present case, it is apparent from the file before the Court that the limitation period of six months laid down in Article 13(1) of GD No 2/2001 starts to run from the date on which the relevant facts occurred, while the limitation period for bringing action laid down in Article 20 of GD No 137/2000, which is one year, starts to run at the same time. It follows that it is possible for a complainant to bring an action before the CNCD for discrimination within the meaning of Directive 2000/78 between 6 and 12 months after the facts on which that complaint is based occurred even though, according to the interpretation of national law favoured by the CNCD, the sanction provided for in Article 26(1) of GD No 137/2000 is no longer available. In any event, it emerges from the observations submitted to the Court that, even where a complaint is lodged well before the expiry of that six-month period, and notwithstanding the provisions of Article 20(7) of GD No 137/2000, a decision of the CNCD concerning an allegation of discrimination on grounds of sexual orientation might not be delivered until after the expiry of that six-month limitation period.

66 In such situations, as can be seen in particular from paragraphs 17, 21 and 34 of the present judgment, the CNCD's practice, whatever the seriousness of discrimination found, is not to impose the fine provided for by GD No 137/2000, which is intended in particular to transpose Directive 2000/78, but to apply a non-pecuniary sanction, laid down by general provisions of national law, consisting, essentially, in a verbal or written warning together with a 'recommendation to comply with the law'.

67 It is for the referring court to ascertain in particular whether, in circumstances such as those set out in the preceding paragraph, those with legal standing to bring proceedings might be so reluctant to assert their rights under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive (see, by analogy, *Draehmpaehl*, paragraph 40). Regarding the dissuasive effect of the sanction, the referring court may also take account, where appropriate, of any repeat offences of the defendant concerned.

68 It is true that the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic (see, to that effect, *Feryn*, paragraph 39), particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages.

69 However, in the present case it is for the referring court to ascertain whether a sanction such as a simple warning is appropriate for a situation such as that at issue in the main proceedings (see, by analogy Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 25). In that connection, the mere existence of an action for damages under Article 27 of GD No 137/2000, for which the limitation period for bringing proceedings is three years, cannot, as such, make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified by that court with regard to the situation set out in paragraph 66 of the present judgment. As Accept maintained at the hearing before the Court, where an association of the type referred to in Article 9(2) of Directive 2000/78 does not act on behalf of specific victims of discrimination, it could be difficult to prove the existence of harm suffered by such an association for the purpose of the relevant rules of national law.

70 Furthermore, if it were the case that, as Accept argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of that directive.

71 In any event, it should be recalled that, according to settled case-law, where a situation falls within the scope of a directive, national courts are obliged, when applying national law, to interpret the latter as far as possible in light of the wording and the purpose of the directive concerned in order to achieve the result envisaged by it (see, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraphs 26 and 28; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 73; and Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, paragraphs 45 and 46).

72 Thus, if the issue arose, it would be for the national court to determine in the dispute in the main proceedings in particular whether, as Accept suggests, Article 26(1) of GD No 137/2000 may be interpreted as meaning that the six-month limitation period laid down in Article 13(1) of GD No 2/2001 does not apply to the sanctions laid down in Article 26(1) thereof.

73 Having regard to the foregoing considerations, the answer to the fourth question is that Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that facts such as those from which the dispute in the main proceedings are capable of amounting to 'facts from which it may be presumed that there has been … discrimination' as regards

a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.

2. Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be 'facts from which it may be presumed that there has been direct or indirect discrimination' based on sexual orientation during the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.

3. Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

Case C-555/13: Merck Canada Inc. v Accord Healthcare Ltd and Others

Order of the Court (Eighth Chamber), 13 February 2014
Merck Canada Inc. v Accord Healthcare Ltd and Others
Request for a preliminary ruling from the Tribunal Arbitral necessário
Reference for a preliminary ruling — 'Court or tribunal' for the purposes of Article 267 TFEU — Tribunal Arbitral necessário — Admissibility — Regulation (EC) No 469/2009 — Article 13 — Supplementary protection certificate for medicinal products — Period of validity of a certificate — Maximum period of exclusivity
Case C-555/13

ORDER OF THE COURT (Eighth Chamber)

13 February 2014 (*)

(Request for a preliminary ruling — 'Court or tribunal' for the purposes of Article 267 TFEU — Tribunal Arbitral necessário — Admissibility — Regulation (EC) No 469/2009 — Article 13 — Supplementary protection certificate for medicinal products — Period of validity of a certificate — Maximum period of exclusivity)

In Case C-555/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral necessário (Portugal), made by decision of 17 October 2013, received at the Court on 28 October 2013, in the proceedings

Merck Canada Inc.

v

Accord Healthcare Ltd,

Alter SA,

Labochem Ltd,

Synthon BV,

Ranbaxy Portugal — Comércio e Desenvolvimento de Produtos Farmacêuticos, Unipessoal Lda,

THE COURT (Eighth Chamber),

composed of C.G. Fernlund, President of the Chamber, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Article 13 of Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (OJ 2009 L 152, p. 1).

2 The request has been made in proceedings between Merck Canada Inc. ('Merck Canada') and Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV and Ranbaxy Portugal — Comércio e Desenvolvimento de Produtos Farmacêuticos, Unipessoal Lda, concerning the maximum period of exclusivity granted by both the basic patent and the supplementary protection certificate ('the certificate') held by Merck Canada.

Legal context

3 Recital 9 to Regulation No 469/2009 is worded as follows:

'The duration of the protection granted by the certificate should be such as to provide adequate effective protection. For this purpose, the holder of both a patent and a certificate should be able to enjoy an overall maximum of 15 years of exclusivity from the time the medicinal product in question first obtains authorisation to be placed on the market ["MA"] in the [European Union].'

4 Article 2 of the regulation provides:

'Any product protected by a patent in the territory of a Member State and subject, prior to being placed on the market as a medicinal product, to an administrative authorisation procedure as laid down in Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [OJ 2001 L 311, p. 67] ... may, under the terms and conditions provided for in this Regulation, be the subject of a certificate.'

5 Article 3 of the regulation states:

'A certificate shall be granted if, in the Member State in which the application referred to in Article 7 is submitted and at the date of that application:

(a) the product is protected by a basic patent in force;

(b) a valid [MA] as a medicinal product has been granted in accordance with Directive 2001/83/EC ...;

(c) the product has not already been the subject of a certificate;

(d) the authorisation referred to in point (b) is the first [MA] as a medicinal product.'

6 With regard to the period of validity of the certificate, Article 13(1) to (3) of Regulation No 469/2009 provides:

'1. The certificate shall take effect at the end of the lawful term of the basic patent for a period equal to the period which elapsed between the date on which the application for a basic patent was lodged and the date of the first [MA] in the [European Union], reduced by a period of five years.

2. Notwithstanding paragraph 1, the duration of the certificate may not exceed five years from the date on which it takes effect.

3. The periods laid down in paragraphs 1 and 2 shall be extended by six months in the case where Article 36 of Regulation (EC) No 1901/2006 applies. In that case, the duration of the period laid down in paragraph 1 of this Article may be extended only once.'

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

7 According to the order for reference, on 11 October 1991, Merck Canada lodged an application in Portugal for a patent for the active ingredient montelukast sodium, present in particular in the medicinal products Singulair and Singulair junior. Following that application, Patent No 99 213 was granted to that company, on 2 October 1998, in Portugal.

8 Within the European Union, the first MA for a medicinal product containing that active ingredient was obtained in Finland on 25 August 1997.

9 On 3 February 1999, Merck Canada applied for a certificate with the Instituto Nacional da Propriedade Industrial (National Institute of Intellectual Property) for a medicinal product relating to Patent No 99 213. Following that application, Certificate No 35 was granted to that company on 10 January 2000 for the active ingredient montelukast sodium.

10 According to the documents before the Court, on 6 November 2012, Merck Canada brought an action before the Tribunal Arbitral necessário seeking to compel, inter alia, the defendants in the main proceedings to abstain from producing, importing and/or launching on the Portuguese market generic drugs containing the abovementioned active ingredient.

11 In support of its action, Merck Canada relies, pursuant to Article 13 of Regulation No 469/2009, on the full period of validity of Certificate No 35, which is to run until 17 August 2014. It bases its reasoning on the fact that, under Article 13, the certificate is to take effect at the end of the lawful term of the basic patent, which was to expire on 2 October 2013, being 15 years after the date on which that patent was granted in Portugal. According to Merck Canada, the certificate was to take effect on 3 October 2013, for a period of 10 months and 15 days, until 17 August 2014, even if, under such a period which falls to be added to that of the patent it holds, that company may enjoy a period of exclusivity over the abovementioned active ingredient for a period which is greater than 15 years. As a result, the generic drugs produced by the defendants in the main proceedings should not be placed on the Portuguese market before the expiry date of that certificate.

12 By contrast, the defendants in the main proceedings claim that the aim of Regulation No 469/2009 is to guarantee the holder of both a patent and a certificate a maximum period of 15 years of exclusivity from the first MA, in the European Union, for the medicinal product in question.

13 Considering that the nature of the case required that it be processed within the shortest period possible, the Tribunal Arbitral necessário requests the application of the provision of Article 105 of the Rules of Procedure of the Court on the expedited procedure.

14 In those circumstances, the Tribunal Arbitral necessário decided to stay the proceedings and to refer the following question to the Court:

'Is Article 13 of Regulation No 469/2009 to be interpreted as permitting, by means of a [certificate] for medicinal products, the period for exclusive exploitation of the patented invention to be more than 15 years from the date of the first authorisation to place the medicinal product in question on the market within the Community (not including the extension provided for in Article 13(3) of that regulation)?'

The question referred for a preliminary ruling

Admissibility

15 First, it is must be examined whether the Tribunal Arbitral necessário should be considered to be a court or tribunal for the purposes of Article 267 TFEU.

16 In that regard, it should be noted that, according to settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see C-394/11 *Belov* [2013] ECR, paragraph 38 and the case-law cited).

17 It should also be stated that a conventional arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923, paragraph 13 and the case-law cited).

18 However, the Court has held admissible preliminary questions referred to it by an arbitral tribunal, where that tribunal had been established by law, whose decisions were binding on the parties and whose jurisdiction did not depend on their agreement (see, to that effect, Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 7 to 9).

19 In the main proceedings, it is clear from the order for reference that the jurisdiction of the Tribunal Arbitral necessário does not stem from the will of the parties, but from Law No 62/2011 of 12 December 2011. That law confers upon that tribunal compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs. In addition, if the arbitral decision handed down by such a body is not subject to an appeal before the competent appellate court, it becomes definitive and has the same effects as a judgment handed down by an ordinary court.

20 The Member State at issue has therefore chosen, in the context of its procedure autonomy and with a view to implementing Regulation No 469/2009, to confer the jurisdiction for this type of dispute upon another body rather than an ordinary court (see, to that effect, Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311, paragraph 16).

21 It is, moreover, apparent from the order for reference that the conditions laid down in the case-law of the Court referred to in paragraph 16 of the present order, relating to whether the body is established by law, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent, are met.

22 It is clear from the order for reference that Article 209(2) of the Constitution of the Portuguese Republic lists the arbitral tribunals among those entities capable of exercising an adjudicative function and that the Tribunal Arbitral necessário was established by Law No 62/2011 of 12 December 2011.

23 Furthermore, according to the order for reference, the arbitrators are subject to the same obligations of independence and impartiality as judges belonging to the ordinary courts and the Tribunal Arbitral necessário observes the principle of equal treatment and the adversarial principle in the treatment of parties and gives its rulings on the basis of the Portuguese law on industrial property.

24 The Tribunal Arbitral necessário may vary in form, composition and rules of procedure, according to the choice of the parties. Moreover, it is dissolved after making its decision. It is true that, those factors may raise certain doubts as to its permanence. However, given that that tribunal was established on a legislative basis, that it has permanent compulsory jurisdiction and, in addition, that national legislation defines and frames the applicable procedural rules, it should be found that, in the present case, the requirement of permanence is also met.

25 Taking all of those considerations into account, it must be held that, in circumstances such as those of the main proceedings, the Tribunal Arbitral necessário fulfils all of the conditions laid down by the case-law of the Court, as set out in paragraphs 16 to 19 of the present order, and must be considered to be a court or tribunal for the purposes of Article 267 TFEU.

Substance

26 Pursuant to Article 99 of its Rules of Procedure, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

27 The Court considers that to be the case in the present proceedings and holds that, taking into account the making of the present order, it is not necessary to rule on the application for an expedited procedure made by the referring court (see, to that effect, order in C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 45). The answer to the question referred by the Tribunal Arbitral necessário leaves no room for reasonable doubt and may, in addition, be clearly deduced from existing case-law, inter alia from the order in Case C-617/12 *Astrazeneca* [2013] ECR.

28 By its question, the Tribunal Arbitral necessário essentially asks whether Article 13 of Regulation No 469/2009, when read in conjunction with recital 9 thereto, must be interpreted as meaning that it precludes the holder of both a patent and a certificate from relying on the entire period of validity of the certificate, calculated in accordance with Article 13, in a situation where, pursuant to such a period, it would enjoy a period of exclusivity as regards an active ingredient, of more than 15 years from the first MA, in the European Union, of a medicinal product consisting of that active ingredient, or containing it.

29 An affirmative answer to that question follows from a literal interpretation of Article 13 of Regulation No 469/2009, read in conjunction with recital 9 thereto.

30 That interpretation was also confirmed most recently in the order in *Astrazeneca*, paragraph 42 of which provides that the holder of both a patent and a supplementary protection certificate should not be able to enjoy more than 15 years of exclusivity from the time the first MA, in the European Union, of the medicinal product concerned.

31 Furthermore, it should be recalled that the wording ‘first authorisation to place the product on the market in the [European Union]’, for the purposes of Article 13(1) of Regulation No 469/2009, make reference to the first MA granted in any Member State and not to the first authorisation granted in the Member State of the application. Only that interpretation ensures that the extension of protection of the product covered by the certificate will expire at the same time in all of the Member States in which the certificate was granted (see, to that effect, Case C-127/00 *Hässle* [2003] ECR I-14781, paragraphs 74, 77 and 78).

32 In the main proceedings, it is not in dispute that the first MA, in the European Union, of medicinal products containing the active ingredient protected by the basic patent of which Merck Canada is the holder was granted on 25 August 1997 in Finland.

33 As a result, irrespective of the date on which the basic patent was granted in Portugal and the theoretical validity period of the certificate resulting from the application of Article 13 of Regulation No 469/2009, the maximum period of exclusivity conferred by both Patent No 99 213 and Certificate No 35 cannot exceed a total duration of 15 years, calculated from 25 August 1997.

34 In the light of the foregoing considerations, the answer to the question referred is that Article 13 of Regulation No 469/2009, when read in conjunction with recital 9 thereto, must be interpreted as meaning that it precludes the holder of both a patent and a certificate from relying on the entire period of validity of the certificate, calculated in accordance with Article 13, in a situation where, pursuant to such a period, it would enjoy a period of exclusivity as regards an active ingredient, of more than 15 years from the first MA, in the European Union, of a medicinal product consisting of that active ingredient, or containing it.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 13 of Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, read in conjunction with recital 9 to the same regulation, must be interpreted as meaning that it precludes the holder of both a patent and a supplementary protection certificate from relying on the entire period of validity of such a certificate, calculated in accordance with Article 13, in a situation where, pursuant to such a period, it would enjoy a period of exclusivity as regards an active ingredient, of more than 15 years from the first authorisation to be placed on the market, in the European Union, of a medicinal product consisting of that active ingredient, or containing it.

Case C-377/13: Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira

Judgment of the Court (Second Chamber), 12 June 2014
Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira

Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD)

Reference for a preliminary ruling — Concept of 'court or tribunal of a Member State' — Tribunal Arbitral Tributário — Directive 69/335/EEC — Articles 4 and 7 — Increase of the share capital of a capital company — Stamp duty in force on 1 July 1984 — That stamp duty subsequently abolished, and then re-introduced

Case C-377/13

JUDGMENT OF THE COURT (Second Chamber)

12 June 2014 (*)

(Request for a preliminary ruling — Concept of 'court or tribunal of a Member State' — Tribunal Arbitral Tributário — Directive 69/335/EEC –Articles 4 and 7 — Increase of the share capital of a capital company — Stamp duty in force on 1 July 1984 — That stamp duty subsequently abolished, and then re-introduced)

In Case C-377/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Portugal), made by decision of 31 May 2013, received at the Court on 3 July 2013, in the proceedings

Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA, by F. Fernandes Lourenço, advogado,

– the Portuguese Government, by L. Inez Fernandes, J. Menezes Leitão and A. Cunha, acting as Agents,

– the European Commission, by P. Guerra e Andrade and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4, 7 and 10(a) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

2 The request was made in proceedings between Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA ('Ascendi') and the Autoridade Tributária e Aduaneira (Portuguese Tax and Customs Authority), concerning its decision, of 6 August 2012, refusing to refund Ascendi the stamp duty it had paid in respect of four capital increases it carried out between December 2004 and November 2006 ('the contested decision').

Legal context

EU law

3 According to the first recital of its preamble, Directive 69/335 sought to promote the free movement of capital, which is considered to be a fundamental freedom essential to the creation of an internal market. To that end, as is apparent from the sixth, seventh and eighth recitals, that directive aimed to harmonise duty on capital contributions to companies within the European Union by introducing a single duty on the raising of capital that could be charged only once within the internal market and by abolishing all other indirect taxes with the same characteristics as that single capital duty.

4 To that effect, Article 1 of Directive 69/335 provided that 'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9 and hereinafter called capital duty'.

5 Directive 85/303 made certain substantive changes to Directive 69/335, in particular to Articles 4(2) and 7 of that directive. The second to fourth recitals to Directive 85/303 set out:

'... the economic effects of capital duty are detrimental to the regrouping and development of undertakings; ... such effects are particularly harmful in the present economic situation in which there is a paramount need for priority to be given to stimulating investment;

... the best solution for attaining these objectives would be to abolish capital duty; ... however, the losses of revenue which would result from such a measure are unacceptable for certain Member States; ... the Member States must therefore be given the opportunity to exempt from or subject to capital duty all or part of the transactions coming within its scope ...;

... there should be mandatory exemption for the transactions currently subject to the reduced rate of capital duty'.

6 Article 4 of Directive 69/335, in the version resulting from Directive 85/303 ('Directive 69/335'), provided:

'1. The following transactions shall be subject to capital duty:

...

(c) an increase in the capital of a capital company by contribution of assets of any kind;

...

2. The following transactions may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty:

(a) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;

...'

7 According to Article 7 of Directive 69/335:

'1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.50% or less.

...

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.

...'

8 Article 10(a) of Directive 69/335 provided:

'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

(a) in respect of the transactions referred to in Article 4;

...'

9 The time-limit for transposition of Directive 85/303 had been set at 1 January 1986.

10 Directive 69/335 was repealed by Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11). However, that repeal took place after the events giving rise to the dispute in the main proceedings.

National law

11 Article 145 of the Schedule of Stamp Duties (Tabela Geral do Imposto de Selo; 'TGIS'), approved by Decree-Law No 21196 of 28 November 1932, in the version in force on 1 July 1984, provided:

'Strengthening or increase of companies' capital, on the amount of the increase:

(a) civil law partnerships — 5‰ (stamp duty);

(b) capital companies … — 2% (stamp duty);

(c) other companies — 7‰ (stamp duty).

1. As regards those undertakings referred to in paragraphs (a) and (c), the stamp duty under Article 93 shall be added.

2. Where the strengthening or increase of capital is in cash, it is exempt from the duty.'

12 Subsequently, Decree-Law No 223/91 of 18 June 1991, amending Article 145(2)(a) TGIS, exempted from the duty 'the strengthening or increase of the capital of capital companies', thus exempting from stamp duty any increases in the capital of capital companies, regardless of how that increase is achieved.

13 Pursuant to Decree-Law No 322-B/2001 of 14 December 2001, by the addition of Article 26.3 to the TGIS, all increases in the capital of capital companies, regardless of how those increases were achieved, were made subject to stamp duty at the rate of 0.40% on the amount of the increase.

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

14 Between 15 December 2004 and 29 November 2006, Ascendi, a capital company, increased its share capital four times through the conversion into capital of the claims of shareholders owing to their provision, before those share capital increases, of ancillary services to that company. In respect of those share capital increases, Ascendi paid a total amount of EUR 205 381.95 in stamp duty and also registration and notary charges.

15 On 28 March 2008, Ascendi claimed from the Autoridade Tributária e Aduaneira refund of the sums paid in stamp duty at the time of the share capital increases. That claim was refused by the contested decision.

16 Ascendi brought the matter before the Tribunal Arbitral Tributário (arbitration tribunal dealing with taxation).

17 In the order for reference, the Tribunal Arbitral Tributário considers, first of all, that it meets the conditions provided for under Article 267 TFEU, for the purpose of being considered a court or tribunal of a Member State within the meaning of that article.

18 Next, the Tribunal Arbitral Tributário questions whether Decree-Law No 322-B/2001, on which the contested decision is based, is compatible with Articles 4, 7 and 10(a) of Directive 69/335. To that effect, it refers first to Ascendi's argument, which notes that, in Portugal, share capital increases have been exempt from stamp duty since 1991, pursuant to Decree-Law No 223/91, and that in the specific case of share capital increases carried out in cash, the exemption went back as far as May 1984. The reintroduction, in 2001, by Decree-Law No 322-B/2001, of a stamp duty infringes, in Ascendi's view, the provisions of the directive.

19 The Tribunal Arbitral Tributário notes that that argument is disputed by the Autoridade Tributária e Aduaneira. According to that authority, with regard to share capital increases, Article 7(1) of Directive 69/335 requires the Member States to exempt from capital duty only those transactions that, as at 1 July 1984, were

exempt or subject to a tax rate equal to or lower than 0.50%. That provision did not relate to the share capital increases at issue in the main proceedings, carried out other than by cash contribution. In fact, as at 1 July 1984, national law provided, in respect of such transactions, for the levying of a stamp duty at a rate higher than 0.50%.

20 The Tribunal Arbitral Tributário considers, lastly, that an answer cannot be clearly deduced from the case-law of the Court. In the case giving rise to the judgment in Case C-366/05 *Optimus — Telecomunicações* EU:C:2007:366, the share capital increase had been carried out by means of contributions in cash. Indeed, that increase, contrary to those at issue in the main proceedings, was exempt from stamp duty on 1 July 1984.

21 In those circumstances, the Tribunal Arbitral Tributário decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Article 4(1)(c) and (2)(a), Article 7(1) and Article 10(a) of [Directive 69/335] preclude national legislation, such as Decree-Law No 322-B/2001 of 14 December 2001, which subjected to stamp duty any increases in the capital of capital companies through the conversion into capital of the claims of shareholders in respect of ancillary services provided previously to the company, even if those ancillary services had been provided in cash, bearing in mind that, as at 1 July 1984, national legislation subjected those increases in capital, made in that way, to stamp duty at the rate of 2%, and that, at the same date, it exempted from stamp duty capital increases made in cash?'

The jurisdiction of the Court

22 As a preliminary matter, it is necessary to examine whether the Tribunal Arbitral Tributário is to be considered a court or tribunal of a Member State for the purposes of Article 267 TFEU.

23 In that regard, it must be recalled that, according to settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see Case C-394/11 *Belov* EU:C:2013:48, paragraph 38 and the case-law cited). In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, Case C-53/03 *Syfait and Others* EU:C:2005:333, paragraph 29, and *Belov* EU:C:2013:48, paragraph 39).

24 In the main proceedings, it appears from the information provided in the order for reference that the arbitration tribunals dealing with taxation have been established by law. The arbitration tribunals are included in the list of national courts in Article 209 of the Constitution of the Portuguese Republic. Moreover, Article 1 of Decree-Law No 10/2011, of 20 January 2011, on the legal rules governing tax arbitration, provides that tax arbitration constitutes an alternative means of judicial resolution of tax disputes and Article 2 of the same decree-law confers general jurisdiction on arbitration tribunals dealing with taxation for assessing the legality of the payment of any tax.

25 In addition, as an element of the system of judicial resolution of tax disputes, arbitration tribunals dealing with taxation meet the requirement of permanence.

26 As stated by the Advocate General in paragraph 37 of his Opinion, even though the composition of the trial formations of the Tribunal Arbitral Tributário is ephemeral and their activity ends once they have made their ruling, the fact remains that, as a whole, the Tribunal Arbitral Tributário, as an element of the system referred to, is permanent in nature.

27 With regard to compulsory jurisdiction, it must be recalled that this element is lacking in contractual arbitration, since the contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case C-125/04 *Denuit and Cordenier* EU:C:2005:69, paragraph 13 and the case-law cited, and order in C-555/13 *Merck Canada* EU:C:2014:92, paragraph 17).

28 However, the Court has held admissible preliminary questions referred to it by an arbitration tribunal, where that tribunal had been established by law, its decisions were binding on the parties and its jurisdiction did not depend on their agreement (order in *Merck Canada* EU:C:2014:92, paragraph 18 and the case-law cited).

29 As stated by the Advocate General in paragraphs 28 and 40 of his Opinion, the Tribunal Arbitral Tributário, whose decisions are binding on parties under Article 24(1) of Decree-Law No 10/2011, must be distinguished from an arbitration tribunal in the strict sense. Its jurisdiction stems directly from the provisions of Decree-Law No 10/2011 and is not, as a result, subject to the prior expression of the parties' will to submit their dispute to arbitration (see, by analogy, Case 109/88 *Danfoss* EU:C:1989:383, paragraph 7). Thus, where the taxpayer applicant submits its dispute to tax arbitration, the Tribunal Arbitral Tributário has, in accordance with Article 4(1) of Decree-Law No 10/2011, compulsory jurisdiction as regards taxation and customs matters.

30 The requirement of *inter partes* procedure before the arbitration tribunals dealing with taxation, meanwhile, is guaranteed by Articles 16 and 28 of Decree-Law No 10/2011. Moreover, in accordance with Article 2(2) of that decree-law, the arbitration tribunals dealing with taxation 'are to adjudicate on the basis of statutory law and recourse to equity is prohibited'.

31 With regard to the independence of the arbitration tribunals dealing with taxation, it is apparent, first, from the order for reference that the arbitrators comprising the Tribunal Arbitral Tributário before which the dispute in the main proceedings was brought were appointed, pursuant to Article 6 of Decree-Law No 10/2011, by the Conselho Deontológico do Centro de Arbitragem Administrativa (Ethics Board of the Centre for Administrative Arbitration) from among the list drawn up by that institution.

32 Secondly, Article 9 of Decree-Law No 10/2011 provides that arbitrators are to be subject to the principles of impartiality and independence. Moreover, Article 8(1) of that decree-law specifies, as an impediment to the exercise of the function of arbitrator, the existence of any personal or professional relationship between the arbitrator and one of the parties to the dispute. It is thus ensured that the relevant arbitration tribunal acts as a third party in relation to the authority which adopted the impugned decision (see Case C-517/09 *RTL Belgium* EU:C:2010:821, paragraph 38 and the case-law cited, and order in Case C-167/13 *Devillers* EU:C:2013:804, paragraph 15).

33 Lastly, as is apparent from Article 1 of Decree-Law No 10/2011, the arbitration tribunals dealing with taxation give judgment in proceedings that give rise to a decision of a judicial nature.

34 It is clear from all the foregoing considerations that the referring body possesses all the characteristics necessary in order to be regarded as a court or tribunal of a Member State for the purposes of Article 267 TFEU.

35 The Court therefore has jurisdiction to reply to the question referred by the referring court.

The question referred for a preliminary ruling

36 By its question, the referring court is essentially asking whether Articles 4, 7 and 10(a) of Directive 69/335 preclude legislation of a Member State which reintroduces stamp duty on increases of share capital of a capital company, which were subject to such duty on 1 July 1984, but which later were exempted from it.

37 According to Ascendi, transactions such as those at issue in the main proceedings were already exempt from stamp duty on 1 July 1984, pursuant to the applicable national law.

38 In that regard, it must be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or on the assessment of the factual context of the main proceedings, which is a task reserved exclusively to the referring court (see, to that effect, Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* EU:C:2009:250, paragraph 48, and Case C-345/09 *van Delft and Others* EU:C:2010:610, paragraph 114).

39 It is clear from the wording of the question referred for a preliminary ruling that, on 1 July 1984, national legislation subjected share capital increases, such as those at issue in the main proceedings, to a stamp duty at the rate of 2%.

40 With regard to whether the provisions of Directive 69/335 preclude national legislation such as that at issue in the main proceedings, it must be recalled, first, that that legislation subjects to stamp duty the share capital increases of a capital company. In so far as it affects the raising of capital as such, that stamp duty constitutes a capital duty, within the meaning of Article 1 of Directive 69/335.

41 In those circumstances, the interpretation of Article 10 of Directive 69/335, which covers only indirect taxes other than capital duty, is irrelevant to the outcome of the dispute in the main proceedings.

42 It must be stated, next, that the transactions at issue in the main proceedings fall under Article 4(1)(c) of Directive 69/335. The various share capital increases of the capital company in question were carried out 'by contribution of assets of any kind', for the purposes of that provision, that is to say, through the conversion into capital of the claims of shareholders owing to the provision, before those share capital increases, of ancillary services to that company.

43 With regard to the transactions referred to in Article 4(1) of Directive 69/335, that provision provides that they 'shall be subject to capital duty'.

44 However, despite the wording of Article 4(1), it is apparent from Article 7 of that directive that there is no obligation to subject to capital duty transactions falling under the former provision.

45 On the contrary, the Court has held that Article 7(1) of Directive 69/335 sets out a clear and unconditional obligation, on the part of Member States, to exempt from capital duty transactions falling within the scope of that directive which, on 1 July 1984, were exempted or taxed at a rate of 0.50% or less (see *Optimus — Telecomunicações* EU:C:2007:366, paragraph 30, and Case C-372/10 *Pak-Holdco* EU:C:2012:86, paragraph 28). That obligation as well as the other obligations flowing from Directive 69/335 has been binding on the Portuguese Republic since 1 January 1986, the date of that State's accession to the European Union.

46 However, in so far as transactions such as those at issue in the main proceedings, falling under Article 4(1) of Directive 69/335 were, on 1 July 1984, subject to capital duty, at a rate higher than 0.50%, the Republic of Portugal could, in accordance with Article 7(2) of that directive, decide to continue to make transactions of that type subject to capital duty at the time of its accession to the Union, on 1 January 1986 (see, to that effect, Case C-212/10 *Logstor ROR Polska* EU:C:2011:404, paragraph 34).

47 Lastly, it remains to be assessed whether a Member State, after waiving, in 1991, the levying of capital duty on transactions falling under Article 4(1) of Directive 69/335, could decide to reintroduce such a duty in 2001.

48 Since Articles 4(1) and 7(1) and (2) of Directive 69/335 do not refer expressly to the case of a tax, abolished and later reintroduced from 1 July 1984, it is necessary to have recourse to a teleological interpretation of the provisions concerned, by examining the objective pursued by them.

49 It is apparent from the second and third recitals of Directive 85/303 that Directive 69/335 has the objective of limiting or abolishing capital duty. In the light of that objective, it is clear from the third recital that it was only by reason of the budgetary difficulties they would be faced with if capital duty were abolished that Member States which had not waived the levying of that duty could maintain such a duty (see, to that effect, *Logstor ROR Polska* EU:C:2011:401, paragraph 36).

50 The reference to the date of 1 July 1984, made in the first subparagraph of Article 7(1) of Directive 69/335, cannot constitute for Member States which, at that date, made the transactions in question subject to capital duty, at a rate higher than 0.50%, an authorisation to reintroduce such a duty after waiving it, which would go against the wording of that provision and the objective of limiting or abolishing capital duty pursued by that directive. The intention of the Union legislature was in fact to abolish capital duty, the possibility of maintaining it only being an exception motivated by the fear of loss of revenue by Member States. Therefore, even if the loss of budget revenue could justify maintaining capital duty beyond 1 July 1984, within the limits set in Article 7(2) of the directive, it could not justify reintroducing such duty (see, to that effect, *Logstor ROR Polska* EU:C:2011:404, paragraphs 37 to 39).

51 By contrast to what the Portuguese Government maintains, the 'standstill' obligation stemming from Directive 69/335 concerns both the transactions referred to in Article 4(2) of that directive and those mentioned in Article 4(1) of the same directive. In a situation such as that at issue in the main proceedings, that obligation stems from Article 7(1) and (2) of Directive 69/335, interpreted in the light of that directive's objective. As is clear from paragraph 45 of the present judgment, the obligations stemming, for Member States, from Article 7 of Directive 69/335 concern every transaction falling within the scope of that directive and, consequently, every transaction falling within Article 4 of the same directive, regardless of whether it is mentioned in the first or second paragraph of that article.

52 Accordingly, the answer to the question referred is that Articles 4(1)(c) and 7(1) and (2) must be interpreted as precluding the reintroduction by a Member State of capital duty on increases of share capital of a company falling under the first of those provisions, which were subject to such duty on 1 July 1984, but which were later exempted from that duty.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 4(1)(c) and 7(1) and (2) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as precluding the reintroduction by a Member State of capital duty on increases of share capital of a company falling under the first of those provisions, which were subject to such duty on 1 July 1984, but which were later exempted from that duty.

Case C-172/14: ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurenței

Judgment of the Court (Second Chamber) of 16 July 2015
ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurenței

Request for a preliminary ruling from the Înalta Curte de Casaţie şi Justiţie

Reference for a preliminary ruling — Agreements, decisions and concerted practices — Arrangement for sharing clients on a private pension fund market — Whether there is a restriction of competition within the meaning of Article 101 TFEU — Effect on trade between Member States

Case C-172/14

JUDGMENT OF THE COURT (Second Chamber)

16 July 2015 (*)

(Reference for a preliminary ruling — Agreements, decisions and concerted practices — Arrangement for sharing clients on a private pension fund market — Whether there is a restriction of competition within the meaning of Article 101 TFUE — Effect on trade between Member States)

In Case C-172/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casaţie şi Justiţie (Romania), made by decision of 13 February 2014, received at the Court on 7 April 2014, in the proceedings

ING Pensii — Societate de Administrare a unui Fond de Pensii Administrat Privat SA

v

Consiliul Concurenței,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.-C. Bonichot, A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2015,

after considering the observations submitted on behalf of:

– ING Pensii — Societate de Administrare a unui Fond de Pensii Administrat Privat SA, by I. Hrisafi and R. Vasilache, avocați,

– the Consiliul Concurenței, by B. Chirițoiu, A. Atomi and A. Gunescu, acting as Agents,

– the Romanian Government, by R.-H. Radu, A. Buzoianu and A.-G. Văcaru, acting as Agents,

– the European Commission, by A. Biolan, M. Kellerbauer and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1)(c) TFEU.

2 The request has been made in proceedings between ING Pensii — Societate de Administrare a unui Fond de Pensii Administrat Privat SA ('ING Pensii'), a company administering a private pension fund, and the Consiliul Concurenței (Competition Authority) concerning an application for annulment of a decision of the Competition Authority imposing a fine on that company for its participation in an agreement to restrict competition on the Romanian private pension fund market.

Legal context

3 Article 5 of Law No 21/1996 on competition, as amended (*Monitorul Oficial al României*, Part I, No 240 of 3 April 2014) ('Law No 21/1996') provides as follows:

'(1) Express or tacit agreements between economic operators or associations of economic operators, decisions adopted by associations of economic operators and concerted practices shall be prohibited where they have as their object or effect the restriction, prevention or distortion of competition on the Romanian market or any part thereof and, in particular, where they are directed towards:

...

(c) the sharing of markets or sources of supply ...'

4 Law No 411/2004 on private pension funds, as amended (*Monitorul Oficial al României*, Part I, No 482 of 18 July 2007) ('Law No 411/2004'), governs the establishment, organisation, operation and monitoring of such pension funds. Where it is obligatory, affiliation to a private pension fund is subject to the supervision of the Casa Națională de Pensii și alte Drepturi de Asigurări Sociale (National fund for pensions and other welfare benefits) ('the CNPAS').

5 Eighteen private pension fund management companies were approved under Law No 411/2004 by the Comisia de Supraveghere a Sistemului de Pensii Private (Private Pensions Board) during the period from 25 July 2007 to 9 October 2007, each of those companies being entitled to manage a single private pension fund in Romania.

6 Article 30 of Law No 411/2004 states as follows:

'(1) Persons aged 35 years or under ... who pay contributions to the public pension system, must belong to a pension fund.

...'

7 Paragraph 31 of that law states as follows:

'A person may not belong at the same time to more than one pension fund governed by the present Law and may have only one account with the pension fund to which he belongs …'

8 Article 32 of Law No 411/2004 provides as follows:

'(1) A person shall be recognised as registered with a pension fund upon signing an individual affiliation application, on his own initiative or following his allocation to the fund by the census authority.

(2) Upon signing the affiliation application, participants shall be informed of the conditions of the private pension scheme, in particular as regards the rights and obligations of the parties covered by the private pension scheme, the financial, technical and other risks, and the nature and allocation of those risks.

…'

9 Article 33 of Law No 411/2004 is worded as follows:

'(1) Any person who has not become affiliated to a pension fund within 4 months of the date on which the statutory obligation to do so arose shall be allocated on a random basis to a pension fund by the census authority.

(2) The random allocation of persons shall be carried out on a basis directly proportional to the number of participants in a pension fund as at the date of the allocation.

…'

10 Article 5 of Order No 18/2007 of the Committee for the Supervision of private pension schemes, concerning the initial affiliation and registration of participants in private pension funds, as amended (*Monitorul Oficial al României*, Part I, No 746 of 2 November 2007) ('Order No 18/2007'), provides as follows:

'(1) The choice of a private pension fund shall be an individual matter for the participant.

(2) Affiliation to a private pension fund shall be at the initiative of the individual participant or as a result of that person's random allocation to a fund by the CNPAS, where affiliation to a private pension fund is obligatory.

…

(6) The initial procedure for affiliation to private pension funds shall commence on 17 September 2007 and end on 17 January 2008.'

11 Article 21 of Order No 18/2007 states as follows:

'(1) Where a person is named in a bi-monthly report by one or more administrators as having signed more than one individual affiliation document or it is ascertained that the validity of his application is deemed in an earlier report to be temporary, the CNPAS shall enter the name of that person in the electronic table of duplications.

(2) The CNPAS shall forward the electronic table of duplications to the administrators and the committee within three working days of receipt of the bi-monthly report.

…'

12 Article 23 of Order No 18/2007 provides as follows:

'...

(3) The persons who, when the initial affiliation process is completed, appear to the CNPAS to have signed more than one individual affiliation document shall be registered as "invalid" participants and shall be allocated on a random basis in accordance with the provisions of this regulation.'

13 Article 29 of Order No18/2007 states as follows:

'On completion of the random allocation procedure, the CNPAS shall declare the affiliation of persons with each private pension fund to be valid and update the information in the register of participants.'

14 Article 30 of Order No 18/2007 is worded as follows:

'(1) Within 5 working days of the entry in the register of participants of the persons allocated on a random basis, the CNPAS shall notify separately to each management company a list of persons allocated on a random basis and declared by it to be validly affiliated to the private pension fund.

...'

15 Article 31 of Order No 18/2007 provides as follows:

'The management company to which participants are allocated by the CNPAS on a random basis shall be required to notify to those persons, within 15 calendar days of the date of their registration as participants in a private pension fund, the name of the private pension fund and of the company managing it.'

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

16 ING Pensii is a company which administers a private pension fund, inter alia on the obligatory private pensions market in Romania. In that capacity, it was the subject of an investigation carried out by the Consiliul Concurenţei concerning possible infringement of Article 5(1) of Law No 21/1996 and Article 101 TFEU.

17 By Decision No 39/2010 of 7 September 2010, the Consiliul Concurenței imposed fines on 14 companies managing private pension funds, including ING Pensii, on the ground that agreements to share clients had been concluded between those companies. Those agreements related to persons who had signed two different private pension fund affiliation applications during the initial affiliation period. According to the Consiliul Concurenței, in concluding those agreements, the pension funds concerned shared those persons ('duplications') equally between them and thereby sought to avoid allocation of duplications by the CNPAS.

18 On 4 October 2010, before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest), ING Pensii sought the annulment of Decision No 39/2010 or, in the alternative, the partial annulment of that decision with a view to securing a reduction of the amount of the fine imposed. That company maintained that the agreements in question were not contrary to Article 5(1) of Law No 21/1996 and that the conditions for the application of Article 101 TFEU were not fulfilled.

19 ING Pensii argued in particular that the sharing of participants registered as duplications falls outside the definition of 'agreements, decisions and concerted practices'. Thus, it had not been possible to establish that there has been any effect amounting to the restriction, prevention or distortion of competition on the Romanian obligatory private pension fund market or on any significant part of that market. ING Pensii also claimed that competition between those pension funds had not been eliminated, since the funds were in competition with each other during the initial affiliation period.

20 The Consiliul Concurenței observed that, in order to establish that the arrangements agreed between the pension funds concerned, which include ING Pensii, are anti-competitive, account must be taken of the legal framework used as the basis for the establishment and operation of the obligatory private pension fund management market and the specific features of the market on which those arrangements were agreed upon.

21 By judgment of 6 February 2012, the Curtea de Apel Bucureşti dismissed ING Pensii's appeal. ING Pensii lodged an appeal in cassation before the referring court. It contended, inter alia, that choosing an algorithm for the calculation of duplications other than that provided for by the rules applicable did not constitute an infringement of Law No 21/1996 but, at most, an infringement of the specific legislation applicable to obligatory private pensions. Moreover, as the agreement in question was limited to the sharing of duplications, it could not have affected competition on the market in question, since duplications, which accounted for less than 1.5% of that market, were not the subject of competition between the pension funds.

22 ING Pensii also observed before the referring court that it had no practical or economic interest in the allocation of the duplications in equal shares, given that it already had, as at 15 October 2007, the greatest share of the market. Furthermore, the agreements at issue in the main proceedings had a positive outcome in that they made the obligatory private pension fund affiliation procedure more efficient by giving the participants a greater chance of being granted their choice than would have been the case with random allocation.

23 Lastly, ING Pensii argues that, in the present case, there is no evidence of any partitioning of the national market for obligatory private pension funds as a result of a different algorithm being chosen for the calculation of duplications. It is clear that the actual or potential effects of agreements affecting a marginal percentage of the Romanian market in question are negligible and not at all of the kind to have any impact on the market at EU level.

24 The Consiliul Concurenței contends that ING Pensii's appeal should be dismissed, submitting that the agreements for the sharing of duplications are capable of distorting competition on the obligatory private pensions market and, as such, pursued an anti-competitive object. The ability of an agreement to produce negative effects and the finding of an infringement consisting in the sharing of markets and sources of supply are not dependent on the number of clients actually shared, which is a factor relevant to the actual effects of an agreement.

25 In those circumstances, the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In relation to a practice by virtue of which clients are shared out, is the specific and definitive number of those clients relevant in deciding whether the condition of a significant distortion of competition for the purposes of Article 101(1)(c) TFEU is fulfilled?'

Consideration of the question referred

26 It should be noted, first, that the referring court has asked a question concerning the relevance of the number of persons affected by agreements to share clients in the light of one of the conditions laid down in Article 101(1) TFEU, whereby, in order to fall within the scope of that provision, an agreement must, inter alia, be capable of restricting competition in the internal market.

27 Having regard to the facts of the main proceedings, the question referred is to be understood as seeking to ascertain whether Article 101(1) TFEU must be interpreted as meaning that agreements to share clients, such as the agreements concluded between the private pension funds in the main proceedings, constitute an agreement, decision or concerted practice having an anti-competitive object and whether the number of

clients affected by such agreements is relevant in the light of the condition relating to the existence of a restriction of competition on the internal market.

28 It should be noted in that regard that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must be capable of affecting trade between Member States and have as its 'object or effect' the prevention, restriction or distortion of competition within the internal market.

29 With regard to the distinction to be made between concerted practices having an 'anti-competitive object' and those having an 'anti-competitive effect', it should be recalled that those are not cumulative, but alternative, requirements.

30 According to settled case-law established by the judgment in *LTM* (56/65, EU:C:1966:38), the alternative nature of those requirements, indicated by the conjunction 'or', leads to the need to consider, in the first place, the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, an analysis of the terms on which the concerted practice is conducted does not reveal a sufficient degree of harm to competition, the effects of the concerted practice should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see judgments in *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 15, and *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 28).

31 With regard to the concept of restriction 'by object', it should be noted that certain types of coordination between undertakings reveal, by their very nature, a sufficient degree of harm to the proper functioning of normal competition so that there is no need to examine their effects (see, to that effect, judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49 and 50 and the case-law cited).

32 It is established case-law that agreements whose object, as will be apparent from the very nature of such agreements, is to share customers for services constitute forms of collusion that are particularly injurious to the proper functioning of normal competition. Accordingly, agreements to share customers, like agreements on prices, clearly form part of the category of the most serious restrictions of competition (see, to that effect, judgment in *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraphs 95 and 111).

33 The Court has also stated that, in order to determine whether an agreement between undertakings or a decision by an association of undertakings has those characteristics, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question (see judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53 and the case-law cited).

34 It follows that, in order to determine whether, in the main proceedings, the practices in question were capable of constituting, by their 'object', such a restriction, they must be assessed in the light of the case-law cited above.

35 In so far as concerns, first, the terms of the agreement at issue in the main proceedings, it is common ground that ING Pensii colluded with other companies on the basis that an indeterminate number of persons concerned, that is, the duplications, was to be shared on an equal basis between the private pension funds participating in that collusive conduct.

36 As observed by the Consiliul Concurenței and as is apparent from the documents before the Court, the agreements at issue in the main proceedings were conceived and concluded even before the procedure for the affiliation of the persons concerned to one of the private pension funds had been implemented. Those

companies had anticipated that a great number of people would affiliate themselves, not to one, but to several pension funds.

37 As regards, in the second place, the objective pursued by the private pension funds concerned, it should be noted that the purpose of the bi-lateral agreements to share duplications was to affiliate the persons concerned to a limited group of operators, contrary to the statutory rules applicable, and thus to the detriment of other companies operating in the economic sector concerned in the main proceedings.

38 The purpose of the agreement established was, therefore, to strengthen the position, on the market concerned, of each of those private pension funds by comparison with that of their competitors not participating in the collusive conduct in question.

39 Accordingly, in line with the considerations set out at paragraph 32 above, those agreements pursued an objective that was clearly at odds with the proper functioning of normal competition.

40 In the third place, with regard to the economic and legal context of the agreements at issue in the main proceedings, it should be observed, first, that the new obligatory private pension fund market was established during a relatively short period, namely four months, at the end of which the market share of each of the funds was determined.

41 Next, it should be observed that the national legislation in question made it obligatory for the persons concerned to be affiliated to one of the 18 private pension funds approved for that purpose and their affiliation was recognised as valid in law only when registered with the CNPAS.

42 Moreover, under that legislation, persons who had registered with more than one private pension fund manager were regarded as not validly affiliated and had to be allocated among those funds in direct proportion to the number of persons whose affiliation had been validated for each of those funds.

43 Furthermore, that legislation provided that a person whose affiliation to one of the approved private pension funds had been validated could not, without having to pay significant charges, alter his affiliation until a period of two years had expired.

44 Lastly, as a result of their collusion, the private pension funds concerned deliberately circumvented statutory rules which provided for duplications to be affiliated, following intervention by the competent national authorities, and to be allocated on a random basis.

45 In those circumstances, in determining the economic and legal context of an agreement in accordance with the case-law cited at paragraph 33 above, it is necessary to take account of the nature of the services affected, as well as the actual conditions of the functioning and the structure of the market concerned.

46 In the present case, the nature of the service concerned, which is characterised in particular by the statutory obligation the persons in question are under to affiliate themselves to a private pension fund, was defined by national law. Thus, the insurance product in question in the main proceedings could be easily identified by potential customers and there was therefore strong competition for their custom between the various private pension funds authorised to offer that product.

47 It follows that the purpose of such collusion on the part of the private pension funds concerned was to enable them to influence the structure and actual conditions of the functioning of the new obligatory private insurance market at a key stage in the formation of that market.

48 Lastly, in order for the condition that an agreement within the meaning of Article 101(1) TFEU must be capable of affecting trade between Member States to be fulfilled, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law and of fact, that the

agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (see judgments in *Javico*, C-306/96, EU:C:1998:173, paragraph 16; *Bagnasco and Others*, C-215/96 and C-216/96, EU:C:1999:12, paragraph 47; and *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 90).

49 As regards the ability of an agreement, decision or concerted practice extending over the whole of the territory of a Member State to affect trade between Member States, it is settled case-law that such an agreement, decision or concerted practice has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the FEU Treaty is designed to bring about (see judgments in *Vereeniging van Cementhandelaren* v *Commission*, 8/72, EU:C:1972:84, paragraph 29; *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 48; and *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 95).

50 In the present case, it is apparent from the documents submitted to the Court that the services in question could be cross-border in nature as the persons under an obligation to affiliate themselves to one of the approved funds and their employers might be established in other Member States and the pension funds established in Romania might belong to companies situated in other Member States.

51 While it is true that access to that new obligatory private pension fund market was restricted to companies authorised for that purpose in Romania, the agreement at issue in the main proceedings made it more difficult for companies established outside Romania which were also seeking to offer services in the economic sector concerned to penetrate the Romanian market.

52 That situation must be regarded as capable of affecting trade within the EU internal market.

53 It follows that the agreements at issue in the main proceedings may be classified as restricting competition by reason of the very object of those agreements within the meaning of Article 101(1) TFEU.

54 Accordingly, the number of persons actually affected by the agreements to share clients at issue in the main proceedings is irrelevant for the purpose of determining whether there is such a restriction of competition.

55 Indeed, as the Advocate General observed at point 83 of his Opinion, a finding that an agreement to share clients has an anti-competitive object — in particular a finding that the agreement may have a negative impact on the market — does not depend on the actual number of clients who are in fact shared out but simply on the terms and the objective aims of the agreement, considered in the light of the economic and legal context in which the agreement was concluded.

56 It follows from all the foregoing considerations that Article 101(1) TFEU must be interpreted as meaning that agreements to share clients, such as those concluded between the private pensions funds in the main proceedings, constitute agreements with an anti-competitive object, the number of clients affected by such an agreement being irrelevant for the purpose of assessing the requirement relating to the restriction of competition within the internal market.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that agreements to share clients, such as those concluded between the private pensions funds in the main proceedings, constitute agreements with an anti-competitive object, the number of clients affected by such an agreement being irrelevant for the purpose of assessing the requirement relating to the restriction of competition within the internal market.

Judgment of the Court (Grand Chamber) of 6 March 2018
Slowakische Republik v Achmea BV

Request for a preliminary ruling from the Bundesgerichtshof
Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic — Provision enabling an investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party — Compatibility with Articles 18, 267 and 344 TFEU —

Concept of 'court or tribunal' — Autonomy of EU law

Case C-284/16

JUDGMENT OF THE COURT (Grand Chamber)

6 March 2018 (*)

(Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic — Provision enabling an investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party — Compatibility with Articles 18, 267 and 344 TFEU — Concept of 'court or tribunal' — Autonomy of EU law)

In Case C-284/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 3 March 2016, received at the Court on 23 May 2016, in the proceedings

Slowakische Republik (Slovak Republic)

v

Achmea BV,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano (Rapporteur), Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, J.-C. Bonichot, F. Biltgen, K. Jürimäe, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2017,

after considering the observations submitted on behalf of:

– the Slovak Republic, by M. Burgstaller, Solicitor, and K. Pörnbacher, Rechtsanwalt,

– Achmea BV, by M. Leijten, D. Maláčová, H. Bälz and R. Willer, Rechtsanwälte, and A. Marsman, advocaat,

– the German Government, by T. Henze, acting as Agent,

– the Czech Government, by M. Smolek, J. Vláčil and M. Hedvábná, acting as Agents,

– the Estonian Government, by K. Kraavi-Käerdi and N. Grünberg, acting as Agents,

– the Greek Government, by S. Charitaki, S. Papaioannou and G. Karipsiadis, acting as Agents,

– the Spanish Government, by S. Centeno Huerta and A. Rubio González, acting as Agents,

– the French Government, by D. Colas and D. Segoin, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

– the Cypriot Government, by E. Symeonidou and E. Zachariadou, acting as Agents,

– the Latvian Government, by I. Kucina and G. Bambāne, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the Austrian Government, by C. Pesendorfer and M. Klamert, acting as Agents,

– the Polish Government, by B. Majczyna, L. Bosek, R. Szczęch and M. Cichomska, acting as Agents,

– the Romanian Government, by R.H. Radu, acting as Agent, and R. Mangu and E. Gane, consilieri,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by T. Maxian Rusche, J. Baquero Cruz, L. Malferrari and F. Erlbacher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 267 and 344 TFEU.

2 The request has been made in proceedings between the Slovak Republic and Achmea BV concerning an arbitral award of 7 December 2012 made by the arbitral tribunal provided for by the Agreement on

encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic ('the BIT').

Legal context

The BIT

3 The BIT, concluded in 1991, entered into force on 1 January 1992. In accordance with Article 3(1) of the BIT, the contracting parties undertook to ensure fair and equitable treatment to the investments of investors of the other contracting party and not to impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of those investments. In accordance with Article 4 of the BIT, each contracting party guaranteed the free transfer in a freely convertible currency without undue restriction or delay of payments relating to an investment, such as profits, interest and dividends.

4 Article 8 of the BIT provides:

'1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably.

2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement.

3. The arbitral tribunal referred to in paragraph 2 of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.

4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

– the law in force of the Contracting Party concerned;

– the provisions of this Agreement, and other relevant agreements between the Contracting Parties;

– the provisions of special agreements relating to the investment;

– the general principles of international law.

7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.'

German law

5 Under Paragraph 1059(2) of the Zivilprozessordnung (Code of Civil Procedure), an arbitral award can be set aside only if one of the grounds set out in that provision is present, which include the arbitration agreement being invalid under the law to which the parties have subjected it, and the recognition or enforcement of the arbitral award being contrary to public policy.

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

6 On 1 January 1993 the Slovak Republic, as a successor State to the Czech and Slovak Federative Republic, succeeded to the rights and obligations of that State under the BIT, and on 1 May 2004 it acceded to the European Union.

7 As part of a reform of its health system, the Slovak Republic opened the Slovak market in 2004 to national operators and those of other Member States offering private sickness insurance services. Achmea, an undertaking belonging to a Netherlands insurance group, after obtaining authorisation as a sickness insurance institution, set up a subsidiary in Slovakia to which it contributed capital and through which it offered private sickness insurance services on the Slovak market.

8 In 2006 the Slovak Republic partly reversed the liberalisation of the private sickness insurance market. In particular, by a law of 25 October 2007, it prohibited the distribution of profits generated by private sickness insurance activities. Subsequently, after the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) held in a judgment of 26 January 2011 that the prohibition was contrary to the Slovak constitution, the Slovak Republic, by a law which entered into force on 1 August 2011, once more allowed the distribution of the profits in question.

9 Since it considered that the legislative measures of the Slovak Republic had caused it damage, Achmea brought arbitration proceedings against the Slovak Republic in October 2008 pursuant to Article 8 of the BIT.

10 As Frankfurt am Main (Germany) was chosen as the place of arbitration, German law applies to the arbitration proceedings concerned.

11 In those arbitration proceedings the Slovak Republic raised an objection of lack of jurisdiction of the arbitral tribunal. It submitted in that respect that, as a result of its accession to the European Union, recourse to an arbitral tribunal provided for in Article 8(2) of the BIT was incompatible with EU law. By an interlocutory arbitral award of 26 October 2010, the arbitral tribunal dismissed the objection. The applications for that award to be set aside brought by the Slovak Republic before the German courts were unsuccessful at first instance and on appeal.

12 By arbitral award of 7 December 2012, the arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of EUR 22.1 million. The Slovak Republic brought an action to set aside that arbitral award before the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany). When that court dismissed the action, the Slovak Republic appealed on a point of law against the dismissal to the Bundesgerichtshof (Federal Court of Justice, Germany).

13 The referring court notes that, since the accession of the Slovak Republic to the European Union on 1 May 2004, the BIT has constituted an agreement between Member States, so that in the event of conflict the provisions of EU law take precedence, in the matters governed by them, over the provisions of the BIT.

14 The Slovak Republic expressed doubts as to the compatibility of the arbitration clause in Article 8 of the BIT with Articles 18, 267 and 344 TFEU. Although the referring court does not share those doubts, it nonetheless considered that, since the Court has not yet ruled on those questions and the questions are of considerable importance because of the numerous bilateral investment treaties still in force between Member States which contain similar arbitration clauses, it was necessary to make the present reference to the Court in order to decide the case before it.

15 In the first place, the referring court doubts that Article 344 TFEU is even applicable. To begin with, the subject matter and purpose of that provision show that, even if its wording does not make this clearly apparent, it does not concern disputes between an individual and a Member State.

16 Next, the subject matter of Article 344 TFEU is confined to disputes relating to the interpretation and application of the Treaties. The dispute in the main proceedings is not such a case, however, as the arbitral award of 7 December 2012 was made on the basis of the BIT alone.

17 Finally, the purpose of Article 344 TFEU is to safeguard the allocation of powers laid down by the Treaties, and hence the autonomy of the EU legal system, observance of which is ensured by the Court, and at the same time it is a specific manifestation of the duty of the Member States to cooperate with the Court within the meaning of Article 4(3) TEU. It cannot, however, be concluded from that that Article 344 TFEU safeguards the jurisdiction of the Court with respect to any dispute in which EU law may be applied or interpreted. That provision in fact protects the exclusive jurisdiction of the Court only to the extent that the Member States have to make use of the procedures before the Court laid down by the Treaties. Yet a dispute such as that in the main proceedings cannot be resolved in proceedings before the EU judicature. The Treaties make no provision for any judicial procedure in which an investor such as Achmea can bring a claim, before the EU judicature, for compensation from a Member State under a bilateral investment treaty such as the BIT.

18 In the second place, the referring court questions whether Article 267 TFEU precludes an arbitration clause such as that at issue in the main proceedings.

19 It observes, first, that the arbitration procedure is not in itself capable of ensuring the uniform application of EU law that Article 267 TFEU aims to guarantee. Even though, under Article 8(6) of the BIT, the arbitral tribunal had to comply with EU law and, in the event of conflict, apply it in priority, it would not have the possibility of making a reference to the Court for a preliminary ruling, however, since it could not be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU.

20 The referring court considers, next, that the uniform interpretation of EU law could nonetheless be regarded as being ensured in the present case, in that, prior to enforcement of the arbitral award, a court of the State may be called on to review the compatibility of the arbitral award with EU law, and can make a reference to the Court if need be. Further, in accordance with Paragraph 1059(2)(2)(b) of the Code of Civil Procedure, one of the grounds for setting aside an arbitral award is that its recognition or enforcement would be contrary to public policy. In line with the Court's rulings on arbitral awards deciding disputes between individuals, the national courts' power of review of an arbitral award concerning a dispute between an individual and a Member State can validly be limited solely to breaches of fundamental provisions of EU law. That circumstance should not lead to an arbitration clause such as that at issue in the main proceedings being contrary to Article 267 TFEU.

21 The referring court adds, finally, that the Court has previously held that an international agreement providing for the establishment outside the institutional and judicial framework of the EU of a special court responsible for the interpretation and application of the provisions of that agreement is compatible with EU law in so far as there is no adverse effect on the autonomy of the EU legal order. The Court has not expressed reservations as to the creation of a judicial system that is designed, in essence, to resolve disputes relating to the interpretation or application of the actual provisions of the international agreement concerned and

does not affect the powers of the courts and tribunals of the Member States in relation to the interpretation and application of EU law, nor the power, or indeed the obligation, of those courts and tribunals to request a preliminary ruling from the Court. The arbitral tribunal at issue in the main proceedings is called on precisely to rule on an infringement of the provisions of the BIT, which it must interpret in the light of EU law, in particular the provisions governing the free movement of capital.

22 In the third place, the referring court notes that, unlike Netherlands or Slovak investors, those from Member States other than the Kingdom of the Netherlands and the Slovak Republic are unable to bring proceedings before an arbitral tribunal instead of a court of the State, which represents a considerable disadvantage which may constitute discrimination contrary to Article 18 TFEU. However, the restriction by an intra-EU bilateral agreement of an advantage to nationals of the contracting Member States is discriminatory only if the nationals of other Member States who do not enjoy that advantage are in an objectively comparable situation. That is not so in the present case, since the fact that the reciprocal rights and obligations apply only to nationals of the two contracting Member States is a consequence that is inherent in the bilateral agreements concluded between them.

23 Having regard to the above considerations, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

(2) Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?'

The requests to have the written procedure reopened

24 Following the delivery of the Opinion of the Advocate General on 19 September 2017, the Czech, Hungarian and Polish Governments, by documents lodged at the Court Registry on 3 November, 19 and 16 October respectively, requested the reopening of the oral procedure pursuant to Article 83 of the Court's Rules of Procedure.

25 In support of their requests, those governments express their disagreement with the Advocate General's Opinion.

26 However, first, the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 30).

27 Secondly, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's

involvement. The Court is not bound either by the Advocate General's conclusion or by the reasoning which led to that conclusion. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 24 and the case-law cited).

28 Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the interested persons (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 33 and the case-law cited).

29 In the present case, since the requests confine themselves to expressing the disagreement of the Czech, Hungarian and Polish Governments with the Opinion of the Advocate General and do not mention any new argument on the basis of which the present case should be decided, the Court considers, after hearing the Advocate General, that it has before it all the necessary elements to give judgment and that they need not be debated between the interested persons.

30 Having regard to the foregoing, the requests for the oral procedure to be reopened must be rejected.

Consideration of the questions referred

Questions 1 and 2

31 By its first and second questions, which should be taken together, the referring court essentially asks whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

32 In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited).

33 Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).

34 EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the

Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).

35 In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).

36 In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 68; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 175; and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 33).

37 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).

38 The first and second questions referred for a preliminary ruling must be answered in the light of those considerations.

39 It must be ascertained, first, whether the disputes which the arbitral tribunal mentioned in Article 8 of the BIT is called on to resolve are liable to relate to the interpretation or application of EU law.

40 Even if, as Achmea in particular contends, that tribunal, despite the very broad wording of Article 8(1) of the BIT, is called on to rule only on possible infringements of the BIT, the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties.

41 Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.

42 It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

43 It must therefore be ascertained, secondly, whether an arbitral tribunal such as that referred to in Article 8 of the BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 82 and the case-law cited).

44 In the case in which judgment was given on 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754), the Court derived the status of 'court or tribunal of a Member State' of the tribunal in question from the fact that the tribunal as a whole was part of the system of judicial resolution of tax disputes provided for by the Portuguese constitution itself (see, to that effect, judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754), paragraphs 25 and 26).

45 In the case in the main proceedings, the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia. Indeed, it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.

46 That characteristic of the arbitral tribunal at issue in the main proceedings means that it cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU.

47 The Court has indeed held that there is no good reason why a court common to a number of Member States, such as the Benelux Court of Justice, should not be able to submit questions to the Court for a preliminary ruling in the same way as the courts or tribunals of any one of the Member States (see, to that effect, judgments of 4 November 1997, *Parfums Christian Dior*, C-337/95, EU:C:1997:517, paragraph 21, and of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 40).

48 However, the arbitral tribunal at issue in the main proceedings is not such a court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly, and the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules, the arbitral tribunal at issue in the main proceedings does not have any such links with the judicial systems of the Member States (see, to that effect, judgment of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 41).

49 It follows that a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.

50 In those circumstances, it remains to be ascertained, thirdly, whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling.

51 It should be noted that under Article 8(7) of the BIT the decision of the arbitral tribunal provided for in that article is final. Moreover, pursuant to Article 8(5) of the BIT, the arbitral tribunal is to determine its own procedure applying the UNCITRAL arbitration rules and, in particular, is itself to choose its seat and consequently the law applicable to the procedure governing judicial review of the validity of the award by which it puts an end to the dispute before it.

52 In the present case, the arbitral tribunal applied to by Achmea chose to sit in Frankfurt am Main, which made German law applicable to the procedure governing judicial review of the validity of the arbitral award made by the tribunal on 7 December 2012. It was thus that choice which enabled the Slovak Republic, as a party to the dispute, to seek judicial review of the arbitral award, in accordance with German law, by bringing proceedings to that end before the competent German court.

53 However, such judicial review can be exercised by that court only to the extent that national law permits. Moreover, Paragraph 1059(2) of the Code of Civil Procedure provides only for limited review,

concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award.

54 It is true that, in relation to commercial arbitration, the Court has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 35, 36 and 40, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraphs 34 to 39).

55 However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34), disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.

56 Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

57 It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected (see, to that effect, Opinion 1/91 (EEA Agreement — I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183).

58 In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.

59 In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.

60 Consequently, the answer to Questions 1 and 2 is that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Question 3

61 In view of the answer to Questions 1 and 2, there is no need to answer Question 3.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Case C-414/16: Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (Opinion of Advocate General Tanchev)

Judgment of the Court (Grand Chamber) of 17 April 2018
Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.

Request for a preliminary ruling from the Bundesarbeitsgericht
Reference for a preliminary ruling — Social policy — Directive 2000/78/CE — Equal treatment —

Difference of treatment on grounds of religion or belief — Occupational activities within churches and other organisations the ethos of which is based on religion or belief — Religion or belief constituting a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos — Concept — Nature and context of the activities — Article 17 TFEU — Articles 10, 21 and 47 of the Charter of Fundamental Rights of the European Union

Case C-414/16

OPINION OF ADVOCATE GENERAL TANCHEV

delivered on 9 November 2017(1)

Case C-414/16

Vera Egenberger

v

Evangelisches Werk für Diakonie und Entwicklung e.V.

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Equal treatment in matters of employment — Article 4(2) of Directive 2000/78/EC — Genuine, legitimate and justified occupational requirements of organisations the ethos of which is based on religion or belief — Difference in treatment based on religion in matters of employment by an auxiliary organisation to a church — Article 17 TFEU — Ecclesiastical privilege of self-determination — Limited judicial review under Member State constitutional law of 'self-conception' of religious groups — Primacy, unity, and effectiveness of EU equal treatment law — Articles 52(3) and 53 of the Charter of Fundamental Rights of the European Union — Balancing of competing rights — Horizontal effects of the Charter)

I. Introduction

1. After reading an advertisement for a job that was published in November of 2012, Vera Egenberger applied unsuccessfully for a fixed term post of 18 months with the Evangelisches Werk für Diakonie und Entwicklung e.V., ('the defendant'). This is an association which exclusively pursues charitable, benevolent and religious purposes, is governed by private law, and which is an auxilliary organisation of the Evangelische Kirche in Deutschland (the Protestant Church in Germany). The post advertised entailed preparing a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination ('the race discrimination report'). Vera Egenberger ('the applicant') had many years of experience in this field and was the author of a range of relevant publications. (2)

2. The applicant claims that she was not appointed to the post because of her lack of confessional faith, and that this was in breach of her right to belief as reflected in Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter') and that she has been discriminated against on the basis of this belief in breach of Article 21 of the Charter and Articles 1 and 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Directive 2000/78'). (3)

3. Given that the defendant's case is based on Article 4(2) of Directive 2000/78, this dispute is essentially concerned with difference of treatment on the basis of belief with respect to 'occupational activities within churches and other private or public oganisations the ethos of which is based on religion or belief' pursuant to that provision. However, it is also the first occasion on which the Court has been called on to interpret Article 4(2) of Directive 2000/78, (4) thereby generating complex questions on the interaction of this provision with various provisions of the Charter, including Article 22, which provides that the 'Union shall respect cultural, religious and linguistic diversity', along with Article 17 TFEU, which preserves the 'status' under Member State law of churches and religious associations or communities, and philosophical and non-confessional organisations. (5)

4. Moreover, church related institutions are reported to be the second largest employer in Germany, and as occupying a quasi-monopolistic position in some regions and fields of work. (6) It would therefore be difficult to overstate the delicacy of balancing preservation of the right of the EU's religious organisations to autonomy and self-determination (7) (this being the primary plank of the arguments of the defendant with respect to the unequal treatment in issue) against the need for effective application of the prohibition on discrimination with respect to religion and belief on the EU's ethnically and religiously diverse labour market, when equal access to employment and professional development are of fundamental significance to everyone, not merely as a means of earning a living and securing an autonomous life, but also for achieving self-fulfilment and realisation of personal potential. (8)

II. Legal framework

A. European Convention for the Protection of Human Rights and Fundamental Freedoms

5. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') states:

> '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

B. Treaty on European Union

6. Article 4(2) TEU states:

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

C. Treaty on the Functioning of the European Union

7. Article 10 TFEU states:

> 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

8. Article 17 TFEU states:

'1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.'

D. Charter of Fundamental Rights of the European Union

9. Article 10 of the Charter is entitled 'Freedom of thought, conscience and religion'. Article 10(1) states:

'Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.'

10. Article 22 of the Charter is entitled 'Cultural, religious and linguistic diversity' and states:

'The Union shall respect cultural, religious and linguistic diversity.'

11. Article 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

12. Article 53 of the Charter, entitled 'Levels of protection', states:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and … the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

E. Directive 2000/78

13. Recital 24 of Directive 2000/78 states:

'The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.'

14. Article 1 of Directive 2000/78, entitled 'Purpose', states;

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

15. Article 2 of Directive 2000/78 is entitled 'Concept of discrimination'. Article 2(1) states:

'For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.'

16. Article 2(2)(a) states:

'For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1',

17. Article 4 of Directive 2000/78 is entitled 'Occupational requirements'. The first paragraph of Article 4(2) of Directive 2000/78 states:

'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.'

F. German law

18. Article 4(1) and (2) of the Grundgesetz (Basic Law of the Federal Republic of Germany, 'the GG') states:

'(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.'

19. Article 140 of the GG provides that Articles 136 to 139 and 141 of the Verfassung des Deutschen Reiches (Constitution of the German State, 'the WRV') form an integral part of the Basic Law. The salient provisions of Article 137 of the WRV state as follows:

"(1) There shall be no State church.

(2) The freedom to form religious societies shall be guaranteed. ...

(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the involvement of central government or local authorities.

...

(7) Associations whose purpose is to foster a philosophical belief in the community shall have the same status as religious societies.

...'

20. Paragraph 1 of the Allgemeine Gleichbehandlungsgesetz (General Law on equal treatment; 'the AGG') states:

'The objective of the present law is to prevent or eliminate all discrimination on the basis of race, ethnic origin, sex, religion or belief, handicap, age, or sexual orientation.'

21. Paragraph 7(1) of the AGG states:

'Workers must not be subjected to discrimination on any of the grounds listed in Paragraph 1. This prohibition applies equally when the author of the discrimination only assumes the existence of one of the forms of discrimination listed in Paragraph 1.' (9)

22. Paragraph 9(1) of the AGG states:

> 'Without prejudice to the provisions of Paragraph 8 [hereof], a difference in treatment based on religion or belief shall also be admitted in the case of employment by religious societies, by institutions affiliated therewith, regardless of legal form, or by associations whose purpose is to foster a religion or belief in the community, where a given religion or belief constitutes a justified occupational requirement, having regard to the employer's own perception, in view of the employer's right of autonomy or by reason of the nature of its activities.'

III. The facts in the main proceedings and the questions referred for a preliminary ruling

23. The advertisement in issue in the main proceedings stated as follows:

> 'We require membership of a Protestant church, or of a church which is a member of the Arbeitsgemeinschaft Christlicher Kirchen in Deutschland (Cooperative of Christian Churches in Germany), and identification with the welfare mission. Please state your membership in your *curriculum vitae*.'

24. The tasks specified in the same advertisement included personally representing, within the framework of the project, the Diaconie of Germany to the outside political world, the public, and organisations for the protection of human rights, and cooperating with relevant authorities. It also entailed provision of information to the Diaconie of Germany and coordinating the process of forming opinions within that organisation.

25. As mentioned above, the applicant, who does not belong to any religious community, unsuccessfully applied for the advertised post. The person ultimately appointed was someone who had stated his religious membership as being 'a Protestant Christian socialised in the Berlin regional church'.

26. The applicant lodged a claim with the Arbeitsgericht Berlin (Labour Court, Berlin) for payment of damages to a minimum of EUR 9 788.65. The Arbeitsgericht (Labour Court) declared that the applicant had suffered discrimination, but awarded damages only to the level of EUR 1 957.73. The case was appealed to the Landesarbeitsgericht Berlin-Brandenburg (Regional Labour Court, Berlin-Brandenburg) and then to the Bundesarbeitsgericht (Federal Labour Court).

27. Since that court is uncertain of the correct interpretation of EU law in the circumstances of the case, it has referred the following questions to the Court under Article 267 TFEU.

> '(1) Is Article 4(2) of Directive 2000/78/EC to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos?
>
> (2) If the first question is answered in the negative:
>
> In a case such as the present, is it necessary to disapply a provision of national law — such as, in the present case, the first alternative of Paragraph 9(1) of the AGG (Allgemeines Gleichbehandlungsgesetz, General Law on equal treatment) — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them is also lawful where adherence to a specific religion, in accordance with the self-conception of the religious body, having regard to its right of self-determination, constitutes a justified occupational requirement?
>
> (3) If the first question is answered in the negative, further:
>
> What requirements are there as regards the nature of the activities or of the context in which they are carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive 2000/78/EC?'

28. Written observations have been submitted to the Court by the applicant, the defendant, the German Government and Ireland, and the European Commission. All except Ireland participated at the hearing that took place on 18 July 2017.

IV. The order for reference

29. It has not been contested in the main proceedings that, via the relevant provisions of the AGG, Germany has exercised the option in the first paragraph of Article 4(2) of Directive 2000/78 to either 'maintain national legislation in force at the date of the adoption of Directive 2000/78' or 'provide for future legislation incorporating national practices' existing at the same date with respect to 'genuine, legitimate and justified' occupational requirements.(10) According to the order for reference, the applicant claims that it is not compatible with the prohibition on discrimination under Paragraph 7(1) of the AGG, at least when interpreted in conformity with EU law, to take into account religion in the appointment process in issue, it being clear from the advertisement that this is what had been done. Paragraph 9(1) of the AGG could not justify the discrimination that had occurred. It was also apparent that the defendant did not consistently make adherence to a confessional faith a requirement of all posts it advertised, and that the advertised post had been financed, inter alia, by project-related funds provided by non-church third parties.

30. The defendant considers that the difference in treatment on the ground of religion here in issue is justified under Paragraph 9(1) of the AGG. The rules governing the Protestant Church in Germany provide that membership of a Christian church is an essential requirement for the creation of an employment relationship. The right to put in place such a requirement forms part of the right of self-determination of churches, which is protected by German constitutional law, flowing from Article 140 of the GG in conjunction with Article 137(3) of the WRV. This is compatible with EU law, in particular having regard to Article 17 TFEU. In addition, religious adherence, in accordance with the self-conception of the defendant organisation, is a justified occupational requirement by reason of the nature of the activities in issue.

31. With respect to question 1, the order for reference says that it was the express will of the German legislature that Article 4(2) of Directive 2000/78 be transposed in such a way that existing legal provisions and practices were maintained; the national legislature made this decision having regard to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), and made express reference to Article 140 of the GG in conjunction with Article 137(3) of the WRV as regards the 'privilege of self-determination'. Thus, under German law, judicial review in the context of Article 4(2) of the Directive 2000/78 is limited to plausibility review, on the basis of a religion's self-conception defined by belief. However, the national referring court queries whether such an interpretation of Paragraph 9(1) of the AGG is consistent with EU law.

32. With regard to question 2, the referring court notes that the established case-law of the Court compels reflection on whether the prohibition on discrimination on the basis of religion is a subjective right that requires disapplication of inconsistent Member State provisions, even in disputes between two private parties. (11) However, it has not yet been decided whether this applies when an employer relies on primary EU law, such as Article 17 TFEU, to justify disadvantage grounded in religion.

33. As for question 3, clarification is sought of how criteria established under the case-law of the European Court of Human Rights with respect to what the order for reference refers to as conflicts of loyalty concerning belief in established employment relations, might relate to the interpretation of Article 4(2) of Directive 2000/78. These criteria include, in particular, the nature of the post concerned, (12) the proximity of the activity in question to the proclamatory mission, (13) and the protection of the rights of others, for example the interest of a Catholic university in its teaching being characterised by Catholic beliefs. (14) The European Court of Human Rights also undertakes an exercise in balancing competing rights and interests. (15)

V. Assessment

A. Overview

34. I will commence my analysis by addressing three preliminary issues.

35. First, I will consider whether answering the questions referred requires reflection on whether or not the defendant engaged in 'economic activities' when it advertised for members of identified Christian churches to prepare the race discrimination report and represent it professionally, and ultimately selected such a person.

36. Second, I will detail how and why Articles 52(3) and 53 of the Charter are central to the resolution of the legal problems arising in the main proceedings. Article 52(3) of the Charter states that, in so far as rights contained in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same. Article 52(3) adds that this provision 'shall not prevent Union law providing more extensive protection'. The part of Article 53 that is of primary relevance concerns the statement, as interpreted by the Court in its ruling in *Melloni*, (16) that nothing 'in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and … the Member State's constitutions'.

37. Third, I will detail the inconsistencies in the material that has been put to the Court on the precise content of German law, as elaborated in the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), with regard to the limits on judicial review of religious organisations invoking the ecclesiastical privilege of self-determination in the context of employment law.

38. I will then turn to answering the questions referred. I will first answer questions 1 and 3, since they essentially call for an interpretation of Article 4(2) of Directive 2000/78 in the light of primary EU law, including Article 17 TFEU, and pertinent case-law of this Court and of the European Court of Human Rights.

39. In answering question 1, consideration will be given to whether the reference in Article 17 TFEU to the 'status' of religious organisations under Member State law, combined with an allusion to Member State constitutional provisions and principles that is made in the first paragraph of Article 4(2) of Directive 2000/78, (17) are enough to create a *renvoi* to the law of the Member States, and in the main proceedings Germany, with respect to the scale and intensity of judicial review when an employee or prospective employee (18) challenges reliance by a religious organisation on Article 4(2) of Directive 2000/78 to justify unequal treatment with respect to religion or belief in employment relations.

40. I will draw on the analysis prepared in the answer to question 1, in identifying the 'requirements', as mentioned in question 3 (which I prefer to refer to as relevant 'factors' for the purpose of analysis) as regards the nature of the activities or of the context in which they are carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive 2000/78.

41. Question 2, which I will consider last, is concerned with the consequences that will follow, in terms of remedies, if the interpretation afforded to the provisions of EU law relevant to resolving the dispute to hand are inconsistent with the text of the relevant provisions of German law, to the degree that it is not possible to interpret the latter in conformity with EU law.

42. This issue arises because the fundamental right under EU law not to be discriminated against on the basis of belief is given concrete expression in an EU directive, (19) and the main proceedings concern a horizontal situation in which that EU directive is being relied on by both parties to the dispute as against each other; the applicant is an individual private party and the defendant is an association governed by private law. (20) The applicant relies on Articles 1 and 2 of Directive 2000/78 as against the defendant, and the defendant relies on Article 4(2) of Directive 2000/78 as against the applicant. Yet the Court has consistently held that a directive cannot in and of itself impose an obligation on an individual and cannot be relied upon as such against an individual. (21)

43. The obligation on Member State courts to interpret Member State law compatibly with EU law has further limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem*. (22)

44. In consequence, this manifestation of the classical prohibition on the horizontal direct effect of directives collides with another rule developed in the case-law of the Court. That is, while the fundamental right not to be discriminated against on the basis of age has been given specific expression in an EU directive, it is nonetheless horizontally directly effective to the degree that *all* national measures are to be disapplied that are inconsistent with it, even *contra legem* measures, and even in disputes in which one private party is pitted against another. (23)

45. Therefore, by virtue of question 2, the national referring court wishes to know if the prohibition on discrimination on the basis of religion and belief belongs to the same *cadre* of right as the prohibition on discrimination on the basis of age, so that the national referring court will be bound to disapply *all* national measures that are inconsistent with EU law (and in particular Article 4(2) of Directive 2000/78), notwithstanding the horizontal nature of the dispute before it. (24) Further, it is clear from the order for reference, if not the text of question 2 itself, that the national referring court also seeks guidance on whether Article 17 TFEU is in any way relevant to this determination.

B. Preliminary observations

1. The activities of religious organisations and the field of application of EU law

46. Religion had no place in any of the three treaties founding the European Economic Community, the European Coal and Steel Community, or the European Atomic Energy Community. Moreover, because of the, what may now seem, modest aims of the Treaty of Rome, prescribed as it essentially was to the end of achieving economic integration, (25) the early case-law of the Court determined the circumstances in which participation in a community based on religion or another form of philosophy fell within the field of application of Community law on economic bases alone.

47. The Court held in its 1988 ruling in *Steymann* that the field of application of EEC law encapsulated participation in a community based on religion or another form of philosophy to the extent that such participation could 'be regarded as an economic activity within the meaning of Article 2 of the Treaty', (26) with Advocate General Slynn observing in an opinion issued in the same year in *Humbel and Edel* that religious orders 'employ people and pay for heat and light' and that they 'may also make a charge for certain services'. Yet Advocate General Slynn underscored that 'the real test is whether the services are provided as part of an economic activity'. (27)

48. However, dependence on economic integration to ground EU competence receded under subsequent Treaty amendments, (28) so that whether or not a religious organisation is engaged in an 'economic activity' will not always be pertinent to the substantive tranche of EU law in issue. For example, such organisations have fought restrictions on free movement affecting their interests that Member States have sought to justify on the basis of public policy, (29) an exercise which can entail consideration of policies 'of a moral and philosophical nature'. (30) Under the current constitutional framework of the European Union, both religious organisations (31) and individual applicants (32) can call on the protection afforded by Article 10 of the Charter to contest their right to freedom of religion with respect to acts of the institutions, bodies, offices and agencies of the EU, (33) and those of the Member States when they are implementing EU law, (34) irrespective of whether or not such measures are aimed at regulation of economic activities. The same applies in disputes of a horizontal nature, such as that arising in the main proceedings, which entail interpreting Member State law in conformity with a directive, in so far as it is possible to do so. (35)

49. Therefore, notwithstanding arguments made by the representative of the Commission at the hearing, I have formed the view that it is irrelevant for the purposes of the questions referred in the main proceedings whether or not the defendant was engaged in an economic activity when it advertised for help in preparing the race discrimination report, directed only to prospective applicants who belonged to a defined category of Christian faiths, and selected a candidate from one of those categories.

50. The approach advocated by the Commission might indeed result in undue diminution of the scope *ratione materiae* of Article 17 TFEU to recognition of the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations only when they undertake economic activities. It might also diminish more widely the scope *ratione materiae* of EU law with respect to these organisations in a manner inconsistent with the modern paradigm of EU competences as prescribed in the EU and FEU Treaties.

51. For example, should a religious organisation constructing a large-scale centre for worship be exempt from the requirements of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, (36) simply because the facility will have no commercial purpose and will be used exclusively for worship, so the religious organisation concerned might not be viewed as engaging in economic activities? This question must necessarily be answered in the negative. (37)

2. Rules on the application of the Charter and the main proceedings

52. The Charter is to be applied in the main proceedings in accordance with the following rules.

53. First, as established in the Court's settled case-law, the rules of secondary legislation of the Union must be interpreted and applied in compliance with fundamental rights. (38) This Court has also held that 'the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.' (39) Article 52(3) of the Charter is intended to ensure consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union. (40) Consequently, the right of religious communities such as the defendant to an autonomous existence is guaranteed to 'the minimum threshold of protection' (41) set in the case-law of the European Court of Human Rights. This *forum externum* of freedom of religionmust be considered in interpreting Article 4(2) of Directive 2000/78 and Article 17 TFEU.

54. Second, at the same time, given that Article 9 of the ECHR also guarantees the *forum internum* of freedom of religion and belief, (42) which includes freedom not be part of a religion, (43) due account must equally be given, in interpreting Articles 1 and 2 of Directive 2000/78, to the case-law of the European Court of Human Rights that is pertinent to this limb of Article 9 of the ECHR, in determining whether, as a matter of EU law, the applicant has suffered unlawful discrimination or rather been subjected to justified unequal treatment. (44) Both applicant and defendant are, of course, entitled to an effective remedy to enforce their respective rights pursuant to Article 47 of the Charter. (45)

55. This brings me to the third way in which the Charter is pertinent to the main proceedings. It is embedded in both the case-law of this Court, and of the European Court of Human Rights, that in the event of a collision between, or competition among, rights, it is the essential function of courts to undertake a thorough balancing exercise between the competing interests at stake. (46) The same approach must necessarily be deployed in resolving the dispute in the main proceedings, in which there is no direct conflict between an individual and the State over fundamental rights protection, but in which the latter is a protector of conflicting rights. (47)

56. Thus, Article 4(2) of Directive 2000/78 might be viewed as the legislative manifestation within the EU of the defendant's right to autonomy and self-determination, as protected under Articles 9 and 11 of the ECHR with the phrase 'having regard to the organisation's ethos' being the core element of Article 4(2) of Directive 2000/78 that is to be interpreted in the light of the relevant case-law of the European Court of Human Rights. Articles 1 and 2 of Directive 2000/78 are the legislative manifestation of the applicant's right not to be discriminated against on the basis of religion or belief as protected by Articles 9 and 14 of the ECHR, with Article 2(5) of Directive 2000/78, and its mandate for Member States to maintain measures necessary for, inter alia, 'the protection of the rights and freedoms of others' flagging the balancing exercise courts are bound to undertake when confronted with a competition among rights. (48)

57. Fourth, another element of Article 52(3) of the Charter, along with the text of Article 53 of the Charter, is central to the approach to be employed to the questions arising in the main proceedings. Article 52(3) further states that this provision 'shall not prevent Union law providing more extensive protection', while Article 53 entitled '[l]evel of protection' provides, inter alia,that nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and … by the Member States constitutions.' (49)

58. With regard to the 'more extensive protection' that the Union may provide pursuant to Article 52(3) of the Charter, as will be illustrated in section V(C) below in the answer to question 1, this requires due consideration to be given as to whether or not Article 17 TFEU and Article 4(2) of Directive 2000/78 amount to incidences in which the Union has elected to provide 'more extensive protection' than that supplied under the ECHR, with respect to the scale and intensity of judicial review of decisions in which religious organisations such as the defendant purport to exercise their right to autonomy and self-determination, while question 3 requires elaboration of the factors to be applied by a court when balancing the right not to be discriminated against on the basis of religion or belief, protected by Articles 1 and 2 of Directive 2000/78, (50) and the right to self-determination and autonomy of religions organisations, recognised in Article 4(2) of Directive 2000/78.

59. With regard to Article 53 of the Charter, this Court held in *Melloni* that this provision is to be interpreted as meaning that the application of fundamental rights standards arising from a Member State's constitutional order is precluded when it compromises the 'primacy, unity and effectiveness of EU law' over the territory of that State. (51)

60. Yet, this is what the defendant is asking of the national referring court, so that a compromised impact of the prohibition on discrimination on the basis of belief, guaranteed by Articles 1 and 2 of Directive 2000/78, along with the ample and firmly worded remedial rules contained in that directive, (52) would necessarily seem to arise due to limitations imposed by German constitutional law, as described in the order for reference, on the intensity of judicial review of justifications proffered by organisations like the defendant for unequal treatment on the basis of religion or belief in the context of employment relations. It therefore needs to be decided whether this arrangement is rendered compatible with EU law through the combined effects of Article 17 TFEU and Article 4(2) of Directive 2000/78.

3. Judicial review of employment relations and religious organisations in Germany

61. Finally, it is important to note that inconsistent descriptions have been put to the Court of the content of case-law of the Bundesverfassungsgericht (Federal Constitutional Court), and the extent to which it places restrictions on judicial review of religious organisations acting as employers, to the end of preserving the latter's ecclesiastical right to self-determination under Article 137 of the WRV, and particularly the first sentence of Article 137(3).

62. According to the order for reference, in the context of a damages claim based on discrimination in an appointment/application process, plausibility review means that the standard laid down by the church itself is not to be reviewed, but instead is simply to be assumed to the extent that the church employer is able to plausibly submit that the appointment requirement of a particular religion is the expression of the church's self-conception as defined by its belief.

63. However, at the hearing the representative of Germany underscored that the Bundesverfassungsgericht (Federal Constitutional Court) had not absolved church employers from any kind of judicial review and contested, in this regard, the analysis contained in the order for reference. (53) The representative of Germany said that the Constitutional Court had in fact developed a two stage review for conflicts of the type arising in the main proceedings. (54)

64. The representative of Germany said that the point of departure is that church employers may decide for themselves which activities require membership of the religion concerned for employment recruitment, and plausibility review comes in at the first stage. Here German labour courts can assess the classification decided upon by the church employer, albeit to the exclusion of doctrinal matters such as the interpretation of holy scripts. Then, at the second stage, labour courts can make an overall assessment, weighing up the interests of the church and their freedom of religion with any competing fundamental rights of the employee on the other. (55)

65. It is not for this Court to interpret the relevant provisions of Member State law in the context of orders for reference. (56) The Court is constrained by the division of jurisdiction between the EU courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. (57) Once the Court has interpreted Article 17 TFEU and Article 4(2) of Directive 2000/78 as requested in questions 1 and 3, it will then be for the national referring court to determine whether Article 137 of the WRV and Article 9(1) of the AGG can be interpreted in conformity with EU law, and apply the Court's answer to question 2 in the event that it cannot.

C. Question 1

66. By its first question, the national referring court asks if Article 4(2) of Directive 2000/78 is to be interpreted as meaning that an employer such as the defendant in the main proceedings, or the church on its behalf, may itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the defendant's's ethos.

67. An analysis will first be made of the case-law of the European Court of Human Rights that is relevant to limitations on judicial review when there is a competition between the right of religious organisations to autonomy, as protected under Articles 9 and 11 of the ECHR, and some other right equally guaranteed by the ECHR, such as the Article 8 right to privacy. Next, Article 4(2) of Directive 2000/78 will be analysed, to determine whether it provides more extensive protection of the right of religious organisations to autonomy and self-determination, within the meaning of Article 52(3) of the Charter, with respect to the scale and intensity of judicial review of religious organisations relying on this right in employment relations. Third, Article 17 TFEU will be examined to the same end.

1. Restrictions on judicial review of religious organisations acting as employers under the case-law of the European Court of Human Rights

68. I have formed the view that the case-law of the European Court of Human Rights does not support a restriction on judicial review of the breadth described in the first question.

69. In rulings in which judicial review of an alleged breach of a right under the ECHR has been limited under the law of a contracting party for reasons linked with the autonomy of religious organisations, be that by a constitutional provision or otherwise, the European Court of Human Rights has confirmed that the parameters of judicial review provided by a State party must nonetheless be sufficient to determine whether other rights protected by the ECHR have been respected. The balancing exercise that is applicable in this regard is not predicated on whether the dispute concerns recruitment or dismissal, in much the same way that Article 3 of Directive 2000/78, delimiting the directive's scope, makes no such distinction.

70. For example, *Fernández Martínez v. Spain* (58) concerned assertion of the right to private and family life under Article 8 of the ECHR by a secondary school teacher of the Catholic religion of seven years standing, who had been employed and paid by a Spanish State authority, when his contract was not renewed after publicity was given to his personal status as a married priest. In a case in which the approach of the Tribunal Constitucional (Spanish Constitutional Court) to judicial review when the Catholic church's fundamental right to freedom of religion in its collective or community dimension was in the frame, the European Court of Human Rights held as follows, in a paragraph entitled 'Limits to autonomy [of religious organisations]':

> 'a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. *The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.*' (59)

71. I therefore agree with the view that if a religious community or organisation fails to convincingly demonstrate that the State's interference, which in the main proceedings would take the form of judicial application of EU equal treatment law, poses a real threat to its autonomy, it cannot demand that the State refrain from regulating, by means of that State's law, the relevant activities of that community. In this regard, religious communities cannot be immune from State jurisdiction. (60)

72. Indeed, in *Schüth v. Germany*, (61) in which both Article 9(1) of the AGG and Article 137 of the WRV were pertinent to the dispute under consideration, the European Court of Human Rights found that Germany had failed to uphold its positive obligations with respect to the Article 8 of the ECHR right to private and family life toward an organist and choir master of the Catholic Parish Church of Saint Lambertus in Essen who was dismissed from his post for having had an extra-marital affair which produced a child. Germany was found to be in breach of Article 8 of the ECHR due to the quality of the judicial review provided by the national employment tribunal.

73. The European Court of Human Rights in *Schüth* noted the brevity of the reasoning of the national employment appeal tribunal with respect to conclusions to be drawn from the applicant's conduct, (62) and that the interests of the employing Church were thus not balanced against the applicant's right to respect for his private and family life guaranteed by Article 8 of the ECHR. (63)

74. The European Court of Human Rights noted that the employment appeal tribunal did not examine the question of the proximity between the applicant's activity and the Church's proclamatory mission, but appears to have reproduced the opinion of the employing Church on this point without further verification. The European Court of Human Rights concluded that whilst it was true that, under the ECHR, an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees, a decision to dismiss based on a breach of such duty cannot be subjected, on the basis of the employer's right of autonomy, only to a limited judicial scrutiny exercised by the relevant domestic employment tribunal without having regard to the nature of the post in question and without properly balancing the interests involved in accordance with the principle of proportionality. (64)

75. In consequence, there had been a violation of Article 8 of the ECHR, for failure of Germany to uphold its aforementioned positive obligation.

2. Article 4(2) of Directive 2000/78

(a) Introductory remarks

76. In this regard I would like to make two preliminary comments.

77. First, the situation in the main proceedings is one concerning direct discrimination on the basis of the applicant's belief, or lack of confessional faith. Direct discrimination occurs where one person is treated less favourably than another is, has or would be treated in a comparable situation due to their belief. (65) Thus, direct discrimination arises when an allegedly discriminatory measure is 'inseparably linked to the relevant reason for the difference of treatment.' (66)

78. Therefore, in contrast with recent cases in which the Court was asked to assess a horizontal competition between freedom of religion, in the context of indirect discrimination, and another fundamental right, and notably freedom to conduct a business, (67) Article 2(2)(b)(i) of Directive 2000/78 is not available to the defendant as a justification for unequal treatment. It provides that indirect discrimination will not be taken to have occurred if the relevant provision, criteria or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and nececesary. Because the main proceedings concern direct discrimination, the only justifications open to the defendant lie in so far as Directive 2000/78 provides for them. (68) The justifications pertinent to the main proceedings are Articles 4(2) and 2(5) of Directive 2000/78,(69) as interpreted in the light of primary EU law, and notably Article 17 TFEU and Article 47 of the Charter. (70)

79. Second, while I accept that Article 4(2) of Directive 2000/78, like Articles 4(1) and 2(5) of the same directive, is a derogation from the principle of non-discrimination that is to be interpreted strictly, (71) the case-law of the Court on the interpretation of the text of Article 4(1) of Directive 2000/78 cannot be applied to the interpretation of the text of Article 4(2) of Directive 2000/78. The latter is a special rule that was developed to deal with the specific situation of the circumstances in which religious organisations falling within the scope of Article 3 of Directive 2000/78 can lawfully engage in unequal treatment. This resulted in the promulgation of a paragraph that bears little resemblance to Article 4(1) of Directive 2000/78 and in consequence a body of case-law that does not lend itself to informing the interpretation of the text of Article 4(2) of Directive 2000/78.

80. For example, Article 4(2) of Directive 2000/78 makes no reference to 'characteristics' related to religious belief, and focus on 'characteristics' has been essential to the interpretation of Article 4(1) of Directive 2000/78. (72) Article 4(1) of Directive 2000/78 refers to 'genuine and determining' occupational requirements and expressly subjects limitation on difference in treatment on the grounds listed in Article 1 of Directive 2000/78 to legitimate objectives and proportionate requirements. Article 4(2), however, refers to 'genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos' while making no direct reference to the principle of proportionality (see further below section V(D)).

(b) Does Article 4(2) of Directive 2000/78 support Member State constitutional restrictions on judicial review?

(1) Wording

81. I acknowledge that the first paragraph of Article 4(2) of Directive 2000/78 refers to Member State law in two respects. (73) First, it refers to the maintenance of legislation and adoption of legislation incorporating national practices existing at the time of the adoption of Directive 2000/78.

82. While this encapsulates both Article 137 of the WRV and Article 9(1) of the AGG, I cannot accept that this means that the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) interpreting these measures is frozen at the time of the adoption of the Directive 2000/78. Such an interpretation would be inconsistent with the wording of Article 4(2) of Directive 2000/78, confined as it is to *legislation*,and the obligation on Member State courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of the directive. (74)

83. Second, the first paragraph of Article 4(2) of Directive 2000/78 states that the difference of treatment addressed in that provision shall be implemented *taking account* of Member States' constitutional provisions and principles (see also Article 52(4) of the Charter with respect to the constitutional traditions *common to the Member States*)(75). However, the wording of Article 4(2) of Directive 2000/78 falls short of supporting contraction of the role of courts in reviewing reliance by a religious organisation on Article 4(2) of Directive 2000/78, especially in the absence of any express reference in that provision to Member State law 'for the purpose of determining its meaning and scope'. (76) As such, the limitation provided in Article 4(2) of Directive 2000/78 is to be given an autonomous meaning, which must take into account the context of that provision and the objective pursued by Directive 2000/78. (77)

(2) Context and purpose

84. In addition to this, Article 2(5) of Directive 2000/78 is indicative of a role for courts to undertake a balancing exercise, and one which is to be undertaken in the light of the fact that the objective of Directive 2000/78, as set out in recital 37 thereof, is the creation within the EU of 'a level playing field as regards equality in employment and occupation', and with due regard to the 'status' under Member State law of religious organisations, as elaborated in recital 24 of Directive 2000/78 and Article 17 TFEU (see further below at section V(C)(3)).

(3) Origins

85. Finally, I have been unable to identify anything in the *travaux préparatoires* to Article 4(2) to support a role for Member State constitutional law on the scale argued by the defendant. For example, there is no specific proposal for, let alone agreement to, contraction of any provisions in Directive 2000/78 aimed at securing rigorous judicial enforcement of Directive 2000/78 (78) out of deference to standards of judicial review set out in national constitutional law. (79) There is no indication that the important rules on burden of proof contained in Article 10 of Directive 2000/78 are not to apply when Article 4(2) of the same directive is in issue. (80) There is no suggestion of the adoption of special rules of the kind that apply under Article 15 of Directive 2000/78 with respect to Northern Ireland and discrimination on the basis of religion, or Article 6 of Directive 2000/78 on justification for differences of treatment on grounds of age, or Article 3(4) of Directive 2000/78 and its preclusion of discrimination on the basis of disability and age with respect to the armed forces from the scope of Directive 2000/78. (81)

86. However, I acknowledge that, in the process of drafting, Article 4(2) of Directive 2000/78 was the subject of numerous amendments, (82) in much the same way as the discord over the text of Article 17 TFEU which took place in the course of the Convention that led to the adoption of the Treaty establishing a Constitution for Europe (83) (see further Part V(C)(3) below). From this it might be inferred that Member States have a wide margin of appreciation under Article 4(2) of Directive 2000/78 with respect to occupational activities for which religion or belief amount to genuine, legitimate, and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out, (84) but subject always to the interpretation afforded to the provision by the Court. Yet I am unable to draw anything more than this from the *travaux preparatoires*, reflecting as they do the difficult negotiations that led in the end to the adoption of a compromise text, due in part to disagreements over the content of Article 4(2) of Directive 2000/78. (85)

87. Thus, I have come to the conclusion that Article 4(2) of Directive 2000/78 itself sets the parameters in its first paragraph for the standard of judicial review to apply when a religious organisation is challenged for having taken the position that unequal treatment on the basis of belief does not amount to unlawful discrimination. That is, by reason of the nature of the activities in question or the context in which they are carried out, does a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos? I will set out the requirements of this provision in my answer to question 3.

3. Article 17 TFEU

88. Where it is necessary to interpret a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaties and the general principles of EU law. (86) Article 17(1) and (2) TFEU therefore has direct relevance to the interpretation to be accorded to Article 4(2) of Directive 2000/78. That said, in my view the impact of Article 17 TFEU on the constitutional fabric of the EU is more muted than as argued by the defendant.

89. The broader constitutional architecture of the EU, and in particular the depth of its commitment to upholding fundamental rights, precludes an interpretation of Article 17(1) TFEU in which the Union 'respects and does not

prejudice the status under national law of churches and religious associations or communities in the Member States' in all conceivable circumstances, and particularly if the status furnished to such organisations under Member State law fails to guarantee their fundamental rights.

90. This is in accordance with the settled case-law of the Court. For the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. (87)

91. Indeed, the minimal level of protection guaranteed by Article 52(3) of the Charter, by reference to the case-law of the European Court of Human Rights with respect to the right of religious organisations to autonomy and self-determination, has a consequence of fundamental importance to the interpretation of Article 17 TFEU. Although Article 17(1) TFEU states that the Union 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States', this cannot mean that rules concerned with the protection of the autonomy of churches and other religious organisations that have been developed under the auspices of Articles 9 and 11 of the ECHR (and which will be detailed below in section V(D)) could simply be set aside in the event of a *diminution* under the law of a Member State of the status of churches, religious associations and communities, or philosophical and non-confessional organisations, although the text of Article 17(1) and (2) TFEU, read in isolation, might suggest this to be the case.

92. In that event, both this Court and the Member State courts, pursuant to the obligations incumbent on them under Article 47 of the Charter and by virtue of Article 19 TEU and the duty it imposes on Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law', (88) would be bound, within the scope of application of EU law, to continue to enforce freedom of thought, conscience and religion, as provided for in Article 10 of the Charter, and indeed freedom of association under Article 12 of the Charter, (89) in conformity with EU fundamental rights, and the level of protection provided under the case-law of the European Court of Human Rights with respect to the autonomy of religious organisations. As mentioned in the written observations of the Commission, in 'a European Union based on the rule of law, it is for the courts thereof to ensure compliance' with EU law. (90)

93. In other words, it would be a mistake, in my view, for Article 17(1) and (2) TFEU to be interpreted as some kind of *meta* principle of constitutional law (91) that binds the Union to respect the status under Member State law of churches, religious associations and communities, and philosophical and non-confessional organisations, whatever the circumstances. Such an approach would be inconsistent with other provisions of primary EU law, such as the mechanism provided in Article 7 TEU to deal with 'a clear risk of a serious breach by a Member State' of the values on which the EU is founded, as set out in Article 2 TEU. Account should also be taken of Article 10 TFEU and the EU's aims in defining and implementing its policies and activities, and Articles 22 and 47 of the Charter, the former supporting pluralism and the latter reflecting the general principle of the right to an effective judicial remedy in the event of violation of the rights and freedoms guaranteed by EU law. This rule was incorporated into the corpus of EU fundamental rights in the first place through a dispute concerning breach of EU equal treatment law. (92)

94. I acknowledge that it might be argued that Article 5 TEU and its reference to 'subsidiarity' supports an exclusive competence in the hands of the Member States with respect to the scale and intensity of judicial review of the acts of religious organisations that discriminate on the basis of religion and belief with respect to employment relations, and that Article 4(2) TEU underscores the European Union's obligation to respect the national identities of the Member States and their fundamental political and constitutional structures.

95. However, I also agree that, while Article 17 TFEU complements and gives specific effect to Article 4(2) TEU, (93) the latter provision 'does not in itself support the inference that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78. It requires rather that the *application* of that directive must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the directive as such, but must be duly taken into account in the interpretation of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment.' (94) The protection inherent in Article 4(2) TEU encapsulates matters such as division of competences among the constituent organs of government within Member States, such as *Länder*. (95)

96. Thus, there are insufficient imperatively worded provisions of primary law in the Treaties to either put to one side the balancing exercise undertaken by both the European Court of Human Rights and this Court in the event of a competition arising between or among fundamental rights, (96) or to cut away at the competence of the EU with

respect to the judicial protection of the prohibition on discrimination on the basis of religion, when a religious organisation relies on Article 4(2) of Directive 2000/78. (97)

97. Nor do the objectives of Article 17 TFEU, as discerned through its origins, (98) afford direct support for such a development. The text of Article 17 TFEU was discussed in the Convention to the Treaty Establishing a Constitution for Europe, (99) in which reportedly vigorous lobbying for reference in the text to the religious and in particular Christian heritage of Europe (100) was pushed back with equal vigour by secular groups and Member States with a strong separation of church and state. (101) The tensions generated are reflected in the fact that a reference to 'spiritual impulse' proposed during the Convention, objected to in any event by some religious groups for failing to refer expressly to Christianity, was not included in the final version of the Treaty Establishing a Constitution for Europe. (102) In the end, the text of Declaration No 11 that had been appended to the Treaty of Amsterdam, (103) (the same revision that expanded the EU's powers to combat discrimination on the basis of, inter alia, religion and belief) (104) was adopted as paragraphs 1 and 2 of Article 17 TFEU, (105) and Article 17(3) TFEU was added to structure an already existing dialogue between the EU institutions and communities of faith and religion. (106) Indeed, the preamble to the EU Treaty draws inspiration from a range of sources 'cultural, religious, and humanist'.

98. Conspicuous in its absence is any evidence of an intention under Article 17 TFEU for a kind of wholesale transfer to Member State law of judicial review of the justification for unequal treatment on the basis of religion of belief, when such unequal treatment is at the hands of religious organisations falling within the scope of Article 3 of Directive 2000/78. Rather, I read Article 17 TFEU as linked more closely to Article 5(2) TEU which, as pointed out in the written observations of the defendant, serves to place the status of churches within the exclusive competence of the Member States.

99. Thus, Article 17(1) and (2) TFEU mean that Member States have an absolute discretion in selecting a model for their relations with religious organisations and communities and that the Union is obliged to remain in a neutral position with respect to this. (107) So interpreting 'status' under Member State law in Article 17 TFEU is consistent with the scope of the EU's obligation under Article 4(2) TEU to respect the fundamental political and constitutional structures of the Member States. (108)

100. In conclusion, Article 17 TFEU illustrates that the EU's constitutional imperatives reflect what one scholar has referred to as 'value pluralism'. Pursuant to this, conflicts between differing rights, or approaches thereto, are considered to be normal and are resolved through balancing conflicting elements rather than according priority to one over another in a hierarchical fashion. (109) This is echoed in Article 2 TEU, Article 22 of the Charter, and Article 2(5) of Directive 2000/78.

4. Conclusion with respect to Question 1

101. I therefore propose the following answer to question 1.

> Article 4(2) of Directive 2000/78/EC is to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos.

D. Question 3

102. Not all acts are protected by law just because they spring from some kind of religious conviction. (110) By question 3, the national referring Court asks about the requirements as regards genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive 2000/78.

103. As can be seen from the preceding analysis concerning the answer to question 1, Article 4(2) of Directive 2000/78 holds the tension between the right of religious organisations to autonomy and self-determination, *forum externum*, on the one hand, and the right of employees and prospective employees to the *forum internum* of freedom of belief, and to be free from discrimination on the basis of those beliefs.

104. In addition to laying the foundations for the answer to question 1, this analysis has identified the following factors, or requirements as they are referred to in question 3, that are relevant to whether occupational requirements concerning religion or belief, by reason of the nature of the activities or of the context in which they are carried out, are genuine, legitimate and justified, having regard to the organisation's ethos:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out; (111)

(iii) the reference to 'Member States constitutional provisions and principles', in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced. (112)

105. Given that Articles 10 and 12 of the Charter 'correspond' to Articles 9 and 11 of the ECHR, within the meaning of Article 52(3) of the Charter, the right of religious organisations to self determination and autonomy encapsulates, at minimum, the following protection under EU law.

106. The European Court of Human Rights has held that, but for very exceptional cases, the right to freedom of religion as guaranteed under the ECHR excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. (113) The right of a religious community to an autonomous existence is at the very heart of the guarantees in Article 9 of the ECHR, which is equally indispensable to pluralism in a democratic society. (114) State interference in the internal organisation of churches is precluded under the case-law of the European Court of Human Rights, (115) and determining the religious affiliation of a religious community is a task for its highest spiritual authorities alone and not for the State. (116) Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable. (117)

107. The State is prohibited from obliging a religious community to admit new members or to exclude existing ones. (118) Nor can the State oblige a religious community to entrust someone with a particular religious duty. (119) Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image, or unity. (120) Only the most serious and compelling reasons can possibly justify State intervention, (121) so that States are entitled, for example, to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety. (122) Generally the protection afforded by Article 9 of the ECHR is subject only to adherence by members of the religious organisation to views that attain a certain level of cogency, seriousness, cohesion and importance. (123)

108. Where the organisation of the religious Community is at issue, Article 9 must be interpreted in the light of Article 11, which safeguards associations against unjustified State interference. (124) In this sense, the European Court of Human Rights has repeatedly held that religious freedom implies freedom to manifest one's religion 'within the circle of those whose faith one shares.' (125)

109. The European Court of Human Rights has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, while holding that this role is conducive to public order, religious harmony, and tolerance in a democratic society. (126) Attempts by the State to act as arbiter between religious communities and the various dissident factions that may exist or emerge within them can put the autonomy of the churches in issue at risk. (127) Arbitrary State interference in an internal leadership dispute within a church, and thus its internal organisation has been held to be disproportionate in breach of Article 9 of the ECHR. (128)

110. That said, I disagree with submissions made by the defendant that the prohibition on State authorities probing the legitimacy of religious beliefs or interfering with the internal organisation of religious bodies necessarily means that the latter are also the only entities, to the exclusion of courts, that can decide whether an occupational requirement is genuine, legitimate, and justified, having regard to the nature of the activities and the context in which they are carried out, under Article 4(2) of Directive 2000/78. Rather, I accept arguments made in the written observations of Ireland and by the Commission at the hearing that the ethos of a religion is subjective, and quite separate and distinct from the activities entailed in sustaining it, the latter being an objective matter to be reviewed by courts. In other words, the defendant has conflated two different concepts. While judicial review of the ethos of the church is to be limited, as is reflected in the case-law of the European Court of Human Rights, and for that matter the constitutional traditions of the Member States, (129) this does not mean that a Member State court is excused from assessing the *activities in question*, as against the, nearly unreviewable, ethos of a religion, to determine if unequal treatment on the basis of belief is genuine, legitimate and justified.

111. Three further factors are to be taken into account when the national referring court decides whether adherence to the Christian faith is a genuine, legitimate and justified occupational requirement, for a post entailing the preparation of the race discrimination report, which includes public and professional representation of the defendant and coordination of the process of forming opinions within that organisation: (130)

(iv) the word 'justified' in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words 'genuine, legitimate' require analysis of the proximity of the activities in question to the defendant's proclamatory mission;(131)

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with 'general principles of law', and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self determination produces effects disproportionate with respect to other rights protected by the ECHR, (132) the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief under Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, (133) with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal. (134)

112. Point (iv) and (v) merit further elaboration.

113. The rules on the interpretation of EU measures have been detailed at points 81 to 85 above. With respect to point (iv), it is decisive in my view that the *travaux préparatoires* feature a change, proposed by the Luxembourg delegation, to the word 'justified', from the word 'necessary', in the light of a proposal tabled by the United Kingdom Government for 'necessary' to be replaced with 'appropriate' or 'relevant'. (135) This represents in my view evolution toward acceptance by the EU legislator, by recourse to the word 'justified', of the application of the first arm of the general principle of proportionality. This entails considering the suitability of the measure concerned to secure a legitimate aim. (136)

114. With regard to point (v), I have reached this conclusion by reference to the context of the words 'genuine, legitimate', tied as they are to both 'the organisation's ethos' and 'the nature of' the relevant activities 'or of the context in which they are carried out'. Moreover, there is a discrepancy in the language versions. The word 'genuine' is reflected in the Swedish ('*verkligt')*, Maltese ('*ġenwin*'), Latvian ('*īstu*'), Finnish ('*todellinen'),* Danish, ('*regulœrt*'), Croatian ('*stvarni*'), and Hungarian ('*valódi*') language versions, while the French version refers to '*essentielle, légitime'* which is equally reflected in the Spanish ('*esencial*'), Italien ('*essenziale*'), Portugese ('*essencial*'), Romanian ('*esențială'),* Dutch ('*wezenlijke*'), German ('*wesentliche*'), Estonian ('*oluline'),* Bulgarian *('*основно'), Slovakian ('*základnú*'), Czech ('*podstatný*'), Polish ('*podstawowy*'), Slovenian ('*bistveno'*) and Greek ('ουσιώδης') language versions. Meanwhile the Lithuanian version might be taken to refer to an English equivalent of common, usual or regular ('*įprastas*').

115. Under the established case-law of the Court, in the event of difference in language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms

part. (137) Given that the term 'genuine, legitimate' does not, due to linguistic discrepancies, 'lend itself to a clear and uniform interpretation', (138) I have reached the conclusion that, on the basis of a schematic approach and the objective inherent in Article 4(2) of Directive 2000/78 of preserving the autonomy and self-determination of religious organisations, (139) the proximity of the occupational activities in issue to the religious organisations proclamatory mission is central to this determination. This is reflected in EU law by recourse to the words 'genuine, legitimate' in Article 4(2) of Directive 2000/78.

116. I therefore propose the following answer to the third question:

'Pursuant to Article 4(2) of Directive 2000/78, in assessing genuine, legitimate and justified occupational requirements, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation's ethos, the national referring court is to take account of the following:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out;

(iii) the reference to 'Member States constitutional provisions and principles', in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;

(iv) the word 'justified' in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words 'genuine, legitimate' require analysis of the proximity of the activities in question to the defendant's proclamatory mission;

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with 'general principles of law', and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self-determination produces effects disproportionate with respect to other rights protected by the ECHR, the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief under Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal.

E. Question 2

117. Question 2 addresses the unusual circumstance in which a general principle of EU law, like the right to equal treatment on the basis of belief, (140) is given concrete expression in a directive, and here Directive 2000/78, but it is impossible for a Member State court to interpret national law in conformity with the directive because this would entail *contra legem* interpretation of national law, the latter being precluded under the case-law of the Court in disputes of a horizontal nature between two private parties. (141) If the national referring court finds it impossible to interpret Article 137(3) of the WRV and Article 9(1) of the AGG in conformity with Article 4(2) of Directive 2000/78, and Article 17 TFEU, as interpreted by the Court's judgment in the main proceedings, must Article 137(3) of the WRV and Article 9(1) of the AGG be disapplied?

118. In applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. (142) As I have already mentioned, this includes modifying their established case-law if it is based on an interpretation of national law that is incompatible with the objectives of a directive. (143)

119. However, I have come to the conclusion that the prohibition on discrimination based on religion or belief, as reflected in Article 21 of the Charter, is not a subjective right that has horizontal application between private parties in circumstances in which it is in competition with the right of religious organisations to autonomy and self-determination and Member State legal provisions cannot be interpreted in conformity with Article 4(2) of Directive 2000/78. (144) If this is what results from the main proceedings once they are returned to the national referring Court, the remedy available to the applicant under EU law would be an action in State liability for damages against Germany. (145)

120. I reach this conclusion for the following reasons.

121. First, as discussed above, pursuant to Article 17(1) and (2) TFEU, it is the exclusive province of the Member States to establish the model of their choosing for church-State relations. If, in the course of so doing, legislative arrangements fail to comply with the Member State's parallel obligations under EU law with respect to securing the *effet utile* of the Directive 2000/78, it is for that Member State to assume responsibility for the wrong that has occurred.

122. Second, as pointed out in the written observations of Ireland, it would be inconsistent with the broad margin of appreciation for Member States that is inherent in Article 4(2) of Directive 2000/78 with respect to what constitutes a genuine, legitimate and justified occupational requirement, by reason of the nature of the activities or of the context in which they are carried out, for the prohibition on discrimination on the basis of religion to have horizontal direct effect.

123. Third, as is equally pointed out in the written observations of Ireland, by contrast with the other grounds of discrimination listed in Article 19 TFEU, there is no sufficient consensus between national constitutional traditions on the circumstances in which differences in treatment on religious grounds may be genuine, legitimate and justified. Indeed, this is demonstrated by the very promulgation of Article 17 TFEU and Article 4(2) of Directive 2000/78.

124. I therefore propose the following answer to question 2:

> In the circumstances of the main proceedings, it is not necessary to disapply a provision of national law — such as, in the present case, the first alternative of Paragraph 9(1) of the AGG (Allgemeines Gleichbehandlungsgesetz, General Law on equal treatment) — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them is also lawful where adherence to a specific religion, in accordance with the self-conception of the religious body, having regard to its right of self-determination, constitutes a justified occupational requirement if it is impossible to interpret that provision in conformity with Article 4(2) of Directive 2000/78.

F. Closing remarks

125. Article 9 of the AGG is a problematic provision. It has attracted criticism before the relevant United Nations Human Rights Committee with respect to its compliance with the United Nations Convention on the Elimination of all froms of Racial Discrimination. (146) It once formed the subject of infringement proceedings instituted by the Commission against Germany, (147) and has been called into question by a German Government body that monitors compliance with anti-discrimination law within that Member State. (148)

126. It is apparent from the fact that religious organisations in Germany employ around 1.3 million people (149) that there is considerable engagement in the public sphere by churches and their affiliates in that Member State. (150) I nevertheless take the view that the tensions generated by this situation, as exemplified by the main proceedings, have been accommodated through promulgation of Article 17 TFEU, Article 4(2) of Directive 2000/78, and acknowledgment

of the right of religious organisations to autonomy and self-determination as a fundamental right that is protected under EU law, through the combined effects of Articles 10, 12, and 52(3) of the Charter.

VI. Answers to the questions referred

127. I therefore propose the following answers to the questions referred by the Bundesarbeitsgericht (Federal Labour Court, Germany):

(1) Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos.

(2) In the circumstances of the main proceedings, it is not necessary to disapply a provision of national law — such as, in the present case, the first alternative of Paragraph 9(1) of the AGG (Allgemeines Gleichbehandlungsgesetz,General Law on equal treatment) — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them is also lawful where adherence to a specific religion, in accordance with the self-conception of the religious body, having regard to its right of self-determination, constitutes a justified occupational requirement if it is impossible to interpret that provision in conformity with Article 4(2) of Directive 2000/78.

(3) 'Pursuant to Article 4(2) of Directive 2000/78, in assessing genuine, legitimate and justified occupational requirements, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation's ethos, the national referring court is to take account of the following:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out;

(iii) the reference to 'Member States constitutional provisions and principles', in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;

(iv) the word 'justified' in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words 'genuine, legitimate' require analysis of the proximity of the activities in question to the defendant's proclamatory mission;

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with 'general principles of law', and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self-determination produces effects disproportionate with respect to other rights protected by the ECHR, the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief under

Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal.

1 Original language: English.

2 Written observations of the applicant.

3 OJ 2000 L 303, p. 16. The main proceedings concern 'conditions for access to employment … including selection criteria and recruitment conditions' under Article 3(1)(a) of Directive 2000/78.

4 The Court had occasion to interpret Article 4(1) of Directive 2000/78 in the judgment of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204; of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371; of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573; of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3;and of 15 November 2016, *Sorondo*, C-258/15, EU:C:2016:873.

5 Robbers, G., *Religion and Law in Germany*, second edition, Wolters Kluwer, 2013; Zucca, L., and Ungureanu, C., *Law,State and Religion in the New Europe*, Cambridge University Press, 2012; Doe, N., *Law and Religion in Europe: a Comparative Introduction*, Oxford University Press, 2011; McCrea, R., *Religion and the Public Order of the European Union*, Oxford University Press, 2010; Lustean, L.N., and Madeley, J.T.S. (eds), *Religion, Politics and Law in the European Union*, Routledge, 2010.; de Charentenay, P., 'Les relations entre l'Union européenne et les religions', *Revue du Marché commun et de l'Union européenne*,465 (2003), p. 904*;* Massignon, B., 'Les relations entre les institutions religieuses et l'Union européenne: un laboratoire de gestion et de la pluralité religieuses et philosophique?' in Armogathe, J.-R., and Willaime, J.-P. (eds), *Les mutations contemporaines du religieux*, Brepols, 2003, p. 25.

6 *Parallel Report on the 19th-22nd Report submitted by the Federal Republic of Germany to the UN Committee on the Elimination of all forms of Racial Discrimination* (2015), p. 42. The report is available at http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICERD/icerd_state_report_germany_19-22_2013_parallel_FMR_Diakonie_2015_en.pdf. According to the case file, this is the race discrimination report published by the defendant.

7 In Germany the right to self-determination extends to both religious associations and their affiliates. See paragraph 91, BVerfG of 22 October 2014, 2 BvR 661/12.

8 See the Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553, point 71, citing point 11 of the Opinion of Advocate General Poiares Maduro in *Coleman*,C-303/06,EU:C:2008:61. See also recital 9 of Directive 2000/78.

9 Article 6(1), sentence two, of the AGG provides, *inter alia*, that candidates for posts are workers for the purposes of Article 7 of the AGG.

10 Although the AGG bears a publication date of 14 August 2006, see BGB1. I, p. 1897, and the date of entry into force of Directive 2000/78 is 2 December 2000, according to the German Government's proposal for the promulgation of the AGG, it reflects national practices existing at the date of entry into force of Directive 2000/78. See Deutscher Bundestag, Drucksache 16/1780, 8 June 2006, p. 35.

11 See judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 36and the case-law cited; and of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 51.

12 ECtHR, 12 June 2014, *Fernández Martínez v. Spain*, CE:ECHR:2014:0612JUD005603007, paragraph 131; ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503, paragraphs 48 to 51; and ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69.

13 ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69. See also the credibility of the church in both the public mind and its own clientele, ECtHR, 3 February 2011, *Siebenhaar v. Germany*, CE:ECHR:2011:0203JUD001813602, paragraph 46, and whether the position in issue was a prominent one, ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503, paragraph 51.

14 ECtHR, 20 October 2009, *Lombardi Vallauri v. Italy*, CE:ECHR:2009:1020JUD003912805, paragraph 41.

15 ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69.

16 Judgment of 26 February 2013, C-399/11, EU:C:2013:107, paragraph 59. See also the Opinion of Advocate General Bot in *M.A.S and M.B.*,C-42/17, EU:C:2017:564, points 157 and 158 (judgment pending).

17 Given that the main proceedings concern the applicant's beliefs, and not her behaviour, the requirement to '*act* in good faith and with loyalty to the organisation's ethos' (my emphasis) set out in the second paragraph of Article 4(2) of Directive 2000/78 is not relevant to the main proceedings.

18 Article 3 of Directive 2000/78 encapsulates, *inter alia*, both recruitment (Article 3(1)(a)) and dismissal (Article 3(1)(c)).

19 Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 35. Given that the rules on enforcement of directives in Member State law are irrelevant when a fundamental right being enforced horizontally is reflected in a Treaty article, the legal position is more straightforward. See e.g. judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140; of 15 June 1978, *Defrenne*, 149/77, EU:C:1978:130;and of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296. See generally Tridimas, T., 'Horizontal effect of general principles: bold rulings and fine distinctions' in Bernitz, U., Groussot, X., and Schulyok, F., *General Principles of EU Law and European Private Law*, Wolters Kluwer, 2013, p. 213.

20 There is nothing in the case file to suggest that the defendant has been required to perform a task in the public service and been given, for that purpose, special powers by the German Government, or that the defendant is a legal person governed by public law, in which case it would be 'comparable to the state' and subject to the doctrine of direct effect with respect to Directive 2000/78. See judgment of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraph 34.

21 See, most recently *Farrell, ibid.,* paragraph 31 and the case-law cited. See also notably judgments of 24 January 2012, *Dominguez*,C-282/10, EU:C:2012:33, paragraph 37, and of 15 January 2014, *Association de médiation sociale*,C-176/12, EU:C:2014:2, paragraph 36, of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 46, and of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 108.

22 Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 32 and the case-law cited. Cf. the Opinion of Advocate General Sharpston in *Farrell*, C-413/15, EU:C:2017:492, at point 150, where the Advocate General asked the Court to revisit and review the justifications advanced in the judgment of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, for rejecting horizontal direct effect of directives.

23 For a thorough discussion of the limits of the horizontal effects of directives see the Opinion of Advocate General Bot in *DI*, C-441/14, EU:C:2015:776.

24 At point 62 of the Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553, it is suggested that the principle of non-discrimination on the basis of religion, like the prohibition on age discrimination, is a general principle of law given specific expression in Directive 2000/78. At points 144 to 146 of the Opinion of Advocate General Kokott in *CHEZ Razpredelenie Bulgaria*,C-83/14, EU:C:2015:170, it is argued that the principle of non-discrimination on the basis of ethnic origin and race, which is given specific expression in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), has the same status, at least in legal relationships that 'are characterised by a structural imbalance between the parties'.

25 See Article 2 of the EEC Treaty. This provision became Article 2 EC and is to be compared with the list of competences now appearing in Article 3 TEU, which 'focuses on non-economic goals to a far greater extent than the EC Treaty'. See Lenaerts, K., and van Nuffel, P., *European Union Law*, Sweet and Maxwell, 2011, p. 107.

26 Judgment of 5 October 1988, *Steymann*, 196/87, EU:C:1988:475, paragraph 9. See also judgment of 23 October 1986, *van Roosmalen*, 300/84, EU:C:1986:402.

27 *Humbel and Edel*, 263/86, EU:C:1988:151, at p. 5379. The same approach applies to participation in sport and with respect to educational establishments. See recently the Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:135, point 32 and the case-law cited.

28 For an account see e.g. Konstadinides, T., *Division of Powers in European Union Law*, Wolters Kluwer, 2009, particularly chapter 1, and at p. 12. Lenaerts and van Nuffel, op. cit., pp. 106 to 111.

29 E.g. judgment of 14 March 2000, *Église de scientologie*, C-54/99, EU:C:2000:124. For criticism of the lack of discussion of freedom of religion in this case see McCrea, op. cit., pp. 188 to 190. See also the judgment of 4 December 1974, *Van Duyn*, 41/74, EU:C:1974:133.

30 Opinion of Advocate General Van Gerven in *Society for the Protection of Unborn Children Ireland*, C-159/90, EU:C:1991:249, point 26. E.g. judgment of 24 March 1994, *Schindler*, C-275/92, EU:C:1994:119, paragraph 60.

31 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*,C-426/16 (pending).

32 Judgments of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204, and *G4S Secure Solutions*, C-157/15, EU:C:2017:203. See further *IR*, C-68/17 (pending).

33 E.g. judgment of 27 October 1976, *Prais* v *Council*, 130/75, EU:C:1976:142.

34 Judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, and of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 50.

35 Established in the judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395. See above, points 42 to 44.

36 OJ 2012 L 26, p. 1.

37 Here the problem considered by the Court in its judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, can be distinguished from the main proceedings. In that case, whether or not the applicant religious organisation was engaged in 'economic activities' was essential to determining whether a tax exemption it was seeking from the Spanish Government amounted to State aid within the meaning of Article 107(1) TFEU, pursuant to the Court's case-law in that substantive field. See the Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:135, points 36 to 60.

38 Judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 60.

39 Judgments of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204, paragraph 29, and *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 27. See also Explanations to Article 10 of the Charter (OJ 2007 C 303, p. 17).

40 Judgment of 28 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 50 and the case-law cited. See also Article 6(1) TEU.

41 Judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 37.

42 Judgment of 14 March 2017, *GS4 Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 28.

43 See e.g. ECtHR, 6 April 2017, *Klein and Others v. Germany*,CE:ECHR:2017:0406JUD001013811, paragraph 77 and the case-law cited. A request for referral of this case to the Grand Chamber is pending.

44 See the Opinion of Advocate General Kokott in *GS4 Secure Solutions*, C-157/15, EU:C:2016:382, point 25. The approach of the European Court of Human Rights to justified limitations under Article 9(2) of the ECHR entails considering whether the impugned measure is 'necessary in a democratic society'. In so doing the European Court of Human Rights will determine whether the reasons adduced to justify the difference in treatment on the basis of religion or belief are relevant and sufficient and proportionate to the legitimate aim pursued, with the latter entailing an exercise in the weighing of the rights and interests of others against the challenged conduct. See point 47 of the Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553, citing ECtHR, 15 February 2001, *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

45 See also Article 19, second paragraph TEU. According to the explanations accompanying the Charter (OJ 2007 C 303, p. 17), the first paragraph of Article 47 of the Charter is based on Article 13 of the ECHR, although under EU law the protection afforded is more extensive. The second paragraph of Article 47 corresponds to Article 6(1) of the ECHR. For detailed and recent analyses see the Opinion of Advocate General Wathelet in *Berlioz Investment Fund*, C-682/15, EU:C:2017:2, and Prechal, S., 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in Paulussen, C., Takács, T., Lazic, V., and Van Rompuy, B. (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspective*, Springer, Berlin, 2016, p. 143. The Court has recently reaffirmed that the characteristics of remedies provided in a directive 'must be determined in a manner that is consistent with Article 47 of the Charter.' See judgment of 27 September 2017, Puškár, C-73/16, EU:C:2017:725, paragraph 60 and the case-law cited. See also ECtHR, 20 October 2009, *Lombardi Vallauri v. Italy*, CE:ECHR:2009:1020JUD003912805, paragraphs 66 to 72.

46 An analysis entailing the balancing of competing rights was particularly notable in the judgment of this Court of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203. See also e.g. judgment of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614. Before the European Court of Human Rights see below points 68 to 75.

47 Jellinek, G., *System der subjektiven öffentlichen Rechte*,Mohr Siebeck**,** 1905, p. 125.

48 See notably in this regard judgment of 13 September 2011, *Prigge and others*, C-447/09, EU:C:2011:573, paragraphs 52 to 64.

49 See also Article 52(4) of the Charter.

50 At points 60 to 67 of her Opinion in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553, Advocate General Sharpston contends that freedom from direct discrimination on the basis of religion has stronger protection under EU law than the ECHR.

51 Judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 60. See also the Opinion of Advocate General Bot in *M.A.S and M.B.*, C-42/17, EU:C:2017:564, point 157 (judgment pending).

52 See Chapter II of Directive 2000/78 entitled 'Remedies and enforcement', encapsulating, inter alia,Article 9 on the defence of rights and Article 10 on the burden of proof. Also relevant are two provisions contained in Chapter IV and entitled 'Final provisions', namely Article 16 on compliance and Article 17 on sanctions. See also recitals 30 to 32, and 35 of Directive 2000/78. The Court has held, in the context of Directive 2000/78, that all persons who consider themselves wronged because the principle of equal treatment has not been applied to them are to be able to 'have their rights asserted by judicial process'. See judgment of 19 April 2012, *Meister*, C-415/10, EU:C:2012:217, paragraph 38.

53 The judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 22 October 2014, 2 BvR 661/12, in particular at paragraph 125, was mentioned as being pertinent in this regard.

54 A two stage judicial review process is mentioned in the order for reference as a form of judicial review that has been developed by the Bundesverfassungsgericht (Federal Constitutional Court) in the context of dismissals and discrimination on the basis of religion and belief, but it has not yet decided if these rules are to apply to recruitment.

55 A balancing exercise is also evident in ECtHR, 3 February 2011, *Siebenhaar v. Germany,* CE:ECHR:2011:0203JUD001813602, see in particular paragraphs 42 to 47, and ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503. Arguments made by Robbers, op. cit., at p. 136 accord with those made by the representative of Germany at the hearing; Robbers cites BVerfG of 25 March 1980, BVerfGE 53, 366, 400 et seq.; BVerfG of 13 December 1983, BVerfGE 66, 1, 22; BVerfG of 4 June 1985, BVerfGE 70, 138, 167; and BVerfG of 14 May 1986, BVerfGE 72, 278, 289. See also Freiherr von Campenhausen, A., and de Wall, H., *Staatskirchenrecht* (4th edition, Munich, C.H.Beck 2006) p. 107 to 111.

56 Judgment of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391, paragraph 24.

57 Ibid., paragraph 25 and the case-law cited.

58 ECtHR, 12 June 2014, CE:ECHR:2014:0612JUD005603007.

59 Ibid., paragraph 132 (my emphasis) and the case-law cited.

60 ECtHR, 1 December 2015, *Károly Nagy v. Hungary*, CE:ECHR:2015:1201JUD005666509, paragraph 15 of the joint dissenting opinions of judges Sajó, Vučinić and Kūris. On 14 September 2017 the application in this case was declared inadmissible by the Grand Chamber of the European Court of Human Rights for factual reasons of no pertinence to the main proceedings. See CE:ECHR:2017:0914JUD005666509.

61 ECtHR, 23 September 2010, CE:ECHR:2010:0923JUD000162003.

62 Ibid., paragraph 66.

63 Ibid., paragraph 67.

64 Ibid., paragraph 69.

65 Article 2(2)(a) in conjunction with Article 1 of Directive 2000/78.

66 Point 44 of the Opinion of Advocate General Kokott in *G4S Secure Solutions*, C-157/15, EU:C:2016:382, and cases cited at footnote 25 of that Opinion. Direct discrimination was held by the Court to have occurred in the context of public statements made by a recruiting employer in the judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397.

67 Judgments of 14 March 2017 *G4S Secure Solutions*, C-157/15, EU:C:2017:203, and *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204.

68 Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553, point 63. See also judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraphs 41 and 42.

69 Article 52(1) of the Charter is inapplicable to the main proceedings, because it would broaden the justifications available for direct discrimination on the basis of religion and belief beyond those available under Directive 2000/78, namely in Articles 2(5) and 4(2). This would be inconsistent with Article 53 of the Charter, which states that nothing 'in the Charter shall be interpreted as restricting or adversely affection human rights and fundamental freedoms as recognised…by Union law'.

70 It is therefore unnecessary for me to consider, as was argued in the written observations of Ireland, whether Article 4(2) of Directive 2000/78 furnishes the justification applicable to both direct and indirect discrimination on the basis of religion and belief with respect to 'occupational activities within … organisations the ethos of which is based on religion or belief'.

71 See e.g. the judgments of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 72 with respect to Article 4(1) of Directive 2000/78 and paragraph 56 with respect to Article 2(5) of Directive 2000/78; and of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 47, with respect to Article 4(1) of Directive 2000/78. See generally judgment of 11 January 2000, *Kreil*, C-285/98, EU:C:2000:2, paragraph 20 and the case-law cited, to the effect that derogations from individual rights laid down in equal treatment directives are to be interpreted strictly.

72 As underscored at point 68 of the Opinion of Advocate General Kokott in *GS4 Secure Solutions*, C-157/15, EU:C:2016:382, and cases cited at footnote 35 of that Opinion.

73 On principles for the interpretation of EU measures see my Opinion in *Pinckernelle*, C-535/15, EU:C:2016:996, points 34 to 70.

74 Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278,paragraph 33 and the case-law cited.

75 My emphasis.

76 Judgment of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, paragraph 50 and the case-law cited.

77 Ibid.

78 See above, footnote 52.

79 A proposal by Germany concerning Article 4(2) of Directive 2000/78 for a reference to churches that enjoy special protection under the German Constitution was not adopted. See Council of the European Union, Outcome of the Proceedings of the Working Party on Social Questions of 18 July 2000, 10254/00 (27 July 2000), SOC 250 JAI 77, p. 14, footnote 19.

80 On the shift of the burden of proof to the defendant once a Member State court concludes that there is a presumption of discrimination see e.g. judgment of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, paragraph 63.

81 Cf. the judgment of 3 June 2010,*Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paragraph 40, in which the Court held that Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) could not be interpreted as preventing Member States from adopting more stringent rules than those provided by the directive itself, on the condition that they are designed to afford consumers a higher level of protection.

82 For a record of the proposals and counter-proposals considered in the Council go to http://www.consilium.europa.eu/register/en/content/int/?lang=EN&typ=ADV, Interinstitutional File: 1999/0225 (CNS). While Article 4(2) of Directive 2000/78 did form part of the Commission's initial proposal for legislation (COM (1999) 0565 final, OJ 2000 C 177E, p. 42), once tabled it was the subject of no less than nine drafts and numerous scrutiny reservations and proposals for amendment. All drafts, however, concerned occupational activities related to religious activities. Yet cf. the report of the European Parliament on the Commission's proposal, A5-0264/2000 of 21 September 2000 at p. 24. 'The intention is to widen the text to cover the wider "social" activities of religious organisations while restricting it to personnel directly involved in ideological guidance (i.e. not receptionists or janitors). It also makes it clear that the dispensation will apply only to religious beliefs and not, for example, to sexual orientation.'

83 Signed at Rome on 29 October 2004 (OJ 2004 C 310, p. 1).

84 See by way of analogy the judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 33 and the case-law cited, in which the Court noted, in the context of a dispute concerning age discrimination, that Member States enjoy a broad discretion in the choice of measures capable of achieving their objectives in the field of social and employment policy, but that that discretion cannot have the effect of frustrating the principle of discrimination on grounds of age.

85 Draft minutes (published on 1 February 2001) of the 2296th Council meeting (Employment and Social Policy) held in Luxembourg on 17 October 2000, 12458/00, PV/CONS 61 SOC 363, p. 4, and press release of 17 October 2000 concerning the 2296th Council meeting, 12125/00 (Press 378).

86 Judgment of 1 April 2004, *Borgmann*, C-1/02, EU:C:2004:202, paragraph 30.

87 Judgment of 27 April 2017, *Pinckernelle*, C-535/15, EU:C:2017:315, paragraph 31 and the case-law cited.

88 The Court held recently that 'the obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to' Article 47 of the Charter. See point 70 of the Opinion of Advocate General Bobek in *El Hassani*, C-403/16, EU:C:2017:659 (judgment pending), citing the judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 44.

89 The parallel provision to Article 12 of the Charter is Article 11 of the ECHR. The European Court of Human Rights has held that when the organisation of a religious community is in issue, Article 9 of the ECHR must be interpreted in the light of Article 11 of the ECHR on freedom of association. See e.g. ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania,* CE:ECHR:2013:0709JUD000233009, paragraph 136.

90 Judgment of 21 September 2016, *Commission* v *Spain*, C-140/15 P, EU:C:2016:708, paragraph 117.

91 See 'Introduction' by Larry Alexander in Alexander, L. (ed), *Constitutionalism:Philosophical Foundations* (Cambridge University Press, 1998) p. 1, and his discussion at pp. 2 to 4 of the distinction between the metaconstitution, the elements of which are relatively fixed (e.g. the separation of powers) and the symbolic constitution, the content of which may change without alteration to the metaconstitution.

92 Judgment of 15 May 1986, *Johnston*, 222/84, EU:C:1986:206. See more recently e.g. judgment of 27 June 2013, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 59.

93 Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:135, point 31.

94 See the Opinion of Advocate General Kokott in *GS4 Security Solutions*, C-157/15, EU:C:2016:382, point 32 and the case-law cited. See generally on Article 4(2) TEU, judgments of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 40, and of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 73 and case-law cited.

95 Judgment of 12 June 2014, *Digibet*, C-156/13, EU:C:2014:1756, paragraph 34.

96 See above, points 55, 56, and 68 to 75.

97 See by analogy paragraph 16 of the judgment of 11 January 2000, *Kreil*, C-285/98, EU:C:2000:2. It was 'not possible to infer' from the Treaty articles in issue, 'that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security'.

98 See e.g. judgment of 27 October 2016, *Commission* v *Germany,* C-220/15, EU:C:2016:815, paragraph 39. For detailed discussion of the origins of Article 17 TFEU and relevant parts of the preamble to the TEU see e.g. McCrea, op. cit., pp. 53 to 74, and Oanta, G.A., 'The Status of Churches and Philosophical and Non-Confessional Organizations within the Framework of the European Union Reform', *Lex et Scientia International Journal*, Bucharest (Romania), nº XV, vol. 2, 2008, p. 121.

99 Article 17 appeared as Article I-52 of the Treaty on a Constitution for Europe (OJ 2004 C 310, p. 1).

100 See 'Post-Synodal Apostolic Exhortation Ecclesia in Europe of His Holiness Pope John Paul II to the Bishops, Men and Women in the Consecrated Life and All the Lay Faithful on Jesus Christ Alive in His Church the Source of Hope for Europe', 28 June 2003. Quoted in COMECE, *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation*, 11 March 2005, available at http://www.comece.eu/dl/pmnrJKJOmKkJqx4KJK/20050311PUBCONV_EN.pdf, p. 3.

101 McCrea, op. cit., p. 54. During the Intergovernmental Conference of 1996 the German delegation reportedly proposed without success the following article: 'The Union considers that the constitutional positions of religious communities in the Member States is both an expression of the identity of the Member States and their culture, as part of their common legal heritage.' See Oanta, op. cit., p. 123.

102 OJ 2003 C 169, p. 1.

103 Declaration No 11 in the Final Act of the Inter-governmental Conference on the Treaty of Amsterdam signed on 2 October 1997 (OJ 1997 C 340, p. 133).

104 Article 13 EC was adopted under the Amsterdam revision. Now Article 19 TEU.

105 Working document of the Conference of the Representatives of the Governments of the Member States, Presidency of the IGC, 23 July 2007, CIG 1/07, p. 49.

106 Ibid. See e.g. Houston, K., 'The Logic of Structured Dialogue between Religious Associations and the Institutions of the European Union' in Leustean, L.N., and Madeley, J.T.S. (eds), *Religion, Politics and Law in the European Union* (Routledge, 2010), p. 201; Mudrov, S. A., 'The European Union and Christian Churches: The Patterns of Interaction", Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, No 3/14.

107 Oanta, op. cit., p. 127. One study identifies no less than five models for the management of relations between church and State. See Mancini, S., and Rosenfeld, M., 'Unveiling the limits of tolerance; comparing the treatment of majority and minority religious symbols in the public sphere' in Zucca and Ungureanu, op. cit., 160 at 162.

108 Above point 95.

109 McCrea, op. cit., pp. 60 and 61, citing Bengoetxea, J., MacCormick, N., and Moral Soriano, L., 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in de Búrca, G., and Weiler, J.H.H. (eds), *The European Court of Justice* (Oxford University Press, 2001), p. 64.

110 Opinion of Advocate General Kokott in *GS4 Security Solutions*, C-157/15, EU:C:2016:382, point 37, citing judgments of the ECtHR, 10 November 2005, *Leyla Şahin v. Turkey,* CE:ECHR:2005:1110JUD004477498, 1 July 2014, *S.A.S. v. France,* CE:ECHR:2014:0701JUD004383511, and 26 November 2015, *Ebrahimian v. France,* CE:ECHR:2015:1126JUD006484611.

111 Above, point 86.

112 Above, point 99.

113 E.g. ECtHR, 8 April 2014, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, CE:ECHR:2014:0408JUD007094511, paragraph 76 and the case-law cited. For example, promotion of an inhuman ideology would blatantly be at odds with the fundamental values of the EU under Article 2 TEU. See Opinion of Advocate General Kokott in *GS4 Secure Solutions*, C-157/15, EU:C:2016:382, point 89.

114 Judgment of ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey*, CE:ECHR:2016:0426JUD006264910, paragraph 93 and the case-law cited.

115 ECtHR, 16 September 2010, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Othersv.Bulgaria,* CE:ECHR:2010:0916JUD000041203, paragraph 26.

116 ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey*, CE:ECHR:2016:0426JUD006264910, paragraphs 110 and 121 and the case-law cited.

117 ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania*, CE:ECHR:2013:0709JUD000233009, paragraph 136.

118 Ibid., paragraph 137.

119 ECtHR, 12 June 2014, *Fernández Martínez v. Spain*, CE:ECHR:2014:0612JUD005603007, paragraph 129 and the case-law cited.

120 Ibid., paragraph 128.

121 ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey,* CE:ECHR:2016:0426JUD006264910, paragraph 110.

122 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova,* CE:ECHR:2001:1213JUD004570199, paragraph 113.

123 ECtHR, 15 January 2013, *Eweida and Others v. The United Kingdom,* CE:ECHR:2013:0115JUD004842010,paragraph 81.

124 ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania,* CE:ECHR:2013:0709JUD000233009,paragraph 136.

125 ECtHR, 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria,* CE:ECHR:2008:0731JUD004082598, paragraph 61.

126 ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey,* CE:ECHR:2016:0426JUD006264910, paragraph 107 and the case-law cited.

127 ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania*,CE:ECHR:2013:0709JUD000233009, paragraphs 165 and 166.

128 ECtHR, 22 January 2009, *Holy Synod of the Bulgarian Orothodox Church (Metropolitan Inokentiy) and Others v. Bulgaria,* CE:ECHR:2009:0122JUD000041203.

129 For a comprehensive survey of the Member States see Doe, op. cit., chapter 5, pp. 114 to 138. At p. 120 the author asserts that in this respect the case-law of the Konstitutsionen sad (Bulgarian Constitutional Court) is typical, which he quotes as follows: 'State interference and governmental interference in the internal organisational life of religious communities and institutions as well as in their public manifestation are inadmissible save for those performed on the grounds of [the] Constitution.' See Decision No 5, 11 June 1992, Case No 11/92, SG No 49, 16 June 1992.

130 Above, point 24.

131 See eg. ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69. This 'proximity' is also inherent in assessing the credibility of the church in both the public mind and its own clientele, ECtHR, 3 February 2011, *Siebenhaar v. Germany*, CE:ECHR:2011:0203JUD001813602, paragraph 46, and in assessing whether the position in issue is a prominent one, ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503, paragraph 51. Designation of occupational requirements with respect to activities that are close to a religious organisations proclamatory mission is also relevant to maintaining legitimacy.

132 See notably ECtHR, 4 October 2016, *Travaš v. Croatia,* CE:ECHR:2016:1004JUD007558113, paragraph 109 and the case-law cited.

133 See similarly judgment of 11 January 2000, *Kreil*, C-285/98, EU:C:2000:2, paragraph 23.

134 Above point 69.

135 See Addendum amending 12269/00 SOC 344 JAI 112, Council of the European Union SOC 345 JAI 113 of 12 October 2000, p. 2.

136 E.g. judgment of 26 June 1997, *Familiapress*, C-368/95, EU:C:1997:325, paragraph 28.

137 Judgment of 21 September 2016, *Commission* v *Spain*, C-140/15 P, EU:C:2016:708, paragraph 80.

138 Judgment of 15 May 2014, *Timmel*, C-359/12, EU:C:2014:325, paragraph 62.

139 Above points 106 to 109.

140 Article 6(3) TEU confirms, inter alia, that fundamental rights as guaranteed by the ECHR, constitute general principles of EU law. Judgment of 15 February 2016, *JN*, C-601/15 PPU, EU:C:2016:84, paragraph 45.

141 The defendant is an entity governed by private law and the applicant is an individual private party. See further above points 41 to 45.

142 Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278,paragraph 31 and the case-law cited.

143 Ibid., paragraph 33.

144 Advocate General Kokott has proposed that the horizontal effect of the prohibition on discrimination on the basis of ethnic origin and race can vary by reference to the circumstances in which the right is invoked. See above, footnote 24.

145 Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 50 and case-law cited.

146 CERD/C/DEU/C0/19-22, 30 June 2015, eighty-sixth session, point 15. See also the race discrimination report, p. 43.

147 On 29 October 2009 the European Commission sent a reasoned opinion to Germany in this respect. See IP/09/1620. See europa.eu/rapid/press-release_IP-09-1620_en.htm. The proceedings were subsequently discontinued.

148 Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages, 13 August 2013, Bundestags-Drucksache (publication of the Bundestag) 17/14400.

149 Ibid p. 238.

150 McColgan, A., ‘Religion and (in)equality in the European framework’ in Zucca and Ungereanu, op. cit., p. 215 at p. 230. On the complexities arising when ‘the public and private spheres collapse into one another’ in the context of religion see Mancini and Rosenfeld, op. cit., p. 162. One commentator has argued that the judgments of the Court of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204 and *G4S Secure Solutions*, C-157/15, EU:C:2017:203 are indicative of a reluctance of a return of religion to civil society. See Robin-Olivier, S., “Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C157/15 et C188/15) *RTDEur.*, 2, (2017), p. 229.

Judgment of the Court (Grand Chamber) of 17 April 2018
Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.

Request for a preliminary ruling from the Bundesarbeitsgericht
Reference for a preliminary ruling — Social policy — Directive 2000/78/CE — Equal treatment —

Difference of treatment on grounds of religion or belief — Occupational activities within churches and other organisations the ethos of which is based on religion or belief — Religion or belief constituting a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos — Concept — Nature and context of the activities — Article 17 TFEU — Articles 10, 21 and 47 of the Charter of Fundamental Rights of the European Union

Case C-414/16

JUDGMENT OF THE COURT (Grand Chamber)

17 April 2018 (*)

(Reference for a preliminary ruling — Social policy — Directive 2000/78/CE — Equal treatment — Difference of treatment on grounds of religion or belief — Occupational activities within churches and other organisations the ethos of which is based on religion or belief — Religion or belief constituting a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos — Concept — Nature and context of the activities — Article 17 TFEU — Articles 10, 21 and 47 of the Charter of Fundamental Rights of the European Union)

In Case C-414/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 17 March 2016, received at the Court on 27 July 2016, in the proceedings

Vera Egenberger

v

Evangelisches Werk für Diakonie und Entwicklung eV,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça and A. Rosas, Presidents of Chambers, E. Juhász, M. Safjan, D. Šváby, M. Berger, A. Prechal, E. Jarašiūnas, F. Biltgen (Rapporteur), M. Vilaras and E. Regan, Judges,

Advocate General: E. Tanchev,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 18 July 2017,

after considering the observations submitted on behalf of:

– Ms Egenberger, by K. Bertelsmann, Rechtsanwalt, and P. Stein,

– Evangelisches Werk für Diakonie und Entwicklung eV, by M. Sandmaier, Rechtsanwalt, M. Ruffert and G. Thüsing,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– Ireland, by E. Creedon, M. Browne, L. Williams and A. Joyce, acting as Agents, and C. Toland SC and S. Kingston BL,

– the European Commission, by D. Martin and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between Ms Vera Egenberger and Evangelisches Werk für Diakonie und Entwicklung eV ('Evangelisches Werk') concerning a claim by Ms Egenberger for compensation for discrimination on grounds of religion allegedly suffered by her in a recruitment procedure.

Legal context

EU law

3 Recitals 4, 23, 24 and 29 of Directive 2000/78 state:

'(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

...

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects

and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

…

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.'

4 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Article 2(1), (2) and (5) of Directive 2000/78 provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

6 Article 4 of that directive reads as follows:

'1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

7 Article 9(1) of the directive provides:

'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'

8 Article 10(1) of the directive provides:

'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

German law

The GG

9 Article 4(1) and (2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, 'the GG') provides:

'(1) Freedom of belief and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.'

10 In accordance with Article 140 of the GG, the provisions of Articles 136 to 139 and 141 of the Weimar Constitution of 11 August 1919 ('the WRV') are an integral part of the GG.

11 Article 137 of the WRV provides:

'1. There shall be no State church.

2. Freedom of association to form religious societies shall be guaranteed. There shall be no restrictions on the combination of religious societies within the territory of the State.

3. Each religious society shall arrange and administer its affairs independently within the limits of the law that applies to everyone. It shall confer its offices without the involvement of the State or the civil municipality.

...

7. Associations which devote themselves to the communal nurture of a philosophical belief shall be equated with religious societies.'

12 According to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), the holders of the churches' right of self-determination guaranteed by Article 140 of the GG in conjunction with Article 137(3) of the WRV are not only the churches themselves as religious communities but also all

institutions affiliated to them in a particular way, if and to the extent that they are called on, in accordance with the churches' faith-defined self-perception and with their own purpose or task, to undertake and fulfil the churches' mandate and mission.

The AGG

13 The Allgemeines Gleichbehandlungsgesetz (General Law on equal treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897, 'the AGG') aims to transpose Directive 2000/78 into German law.

14 Paragraph 1 of the AGG, defining the objective of the law, states:

'The objective of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual identity.'

15 Paragraph 7(1) of the AGG provides:

'Workers must not be discriminated against on any of the grounds mentioned in Paragraph 1; this applies also where the person responsible for the discrimination merely assumes in the course of the discrimination that one of the grounds mentioned in Paragraph 1 exists.'

16 Under Paragraph 9 of the AGG:

'1. Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity.

2. The prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief, mentioned in subparagraph 1, to be able to require their employees to act in good faith and loyalty in accordance with their self-perception.'

17 Paragraph 15 of the AGG reads as follows:

'1. Where there is an infringement of the prohibition of discrimination, the employer shall be required to make good the damage caused thereby. This shall not apply if the employer is not responsible for the breach of duty.

2. For damage which is not pecuniary damage, the employee may claim appropriate compensation in money. In the case of non-recruitment, the compensation may not exceed three months' pay if the employee would not have been recruited even if the selection had been free from discrimination.

...'

Ecclesiastical law of the Evangelische Kirche in Deutschland

18 The Grundordnung der Evangelischen Kirche in Deutschland (Basic Code of the Protestant Church in Germany) of 13 July 1948, as last amended by Kirchengesetz (church law) of 12 November 2013, is the basis of the ecclesiastical law of the Evangelische Kirche in Deutschland (Protestant Church in Germany, 'the EKD').

19 Adopted pursuant to Article 9(b) of that basic code, the Richtlinie des Rates der Evangelischen Kirche in Deutschland über die Anforderungen der privatrechtlichen beruflichen Mitarbeit in der Evangelischen

Kirche in Deutschland und des Diakonischen Werkes (Guidelines of the Council of the Protestant Church in Germany on the requirements for occupational work under private law in the EKD and for the Diaconal Work, 'the EKD Employment Guidelines') of 1 July 2005, as amended, provides in Paragraph 2(1):

'The service of the Church is defined by the mission to bear witness to the Gospel in word and deed. All women and men who work in employment relationships in the Church and Diaconate contribute in different ways to making it possible to fulfil that mission. That mission is the basis of the rights and duties of employers and workers.'

20 Paragraph 3 of the EKD Employment Guidelines provides:

'1. Occupational work in the Protestant Church and its Diaconate presupposes in principle membership of a member church of the [EKD] or of a church with which the [EKD] is in communion.

2. For tasks which are not to be regarded as proclamation [of the Gospel], pastoral care, instruction or direction, an exception may be made to subparagraph 1 where other suitable workers cannot be found. In that case persons who belong to another member church of the Working Group of Christian Churches in Germany or the Association of Protestant Free Churches may also be recruited. Recruitment of persons who do not meet the requirements of subparagraph 1 must be examined in each individual case having regard to the size of the workplace or institution and its other workers and the duties to be performed in the particular environment. This is without prejudice to the second sentence of Paragraph 2(1).'

21 Entitled 'Ecclesio-diaconal mission', Paragraph 2 of the Dienstvertragsordnung der Evangelischen Kirche in Deutschland (EKD Regulation on contracts of employment) of 25 August 2008, which governs the general conditions of work of employees of the EKD under private law, issued by the Central Office of the Diaconal Work and other works and institutions, provides:

'Service in the Church is defined by the mission to proclaim the gospel of Jesus Christ in word and deed. Diaconal service is an expression of the life and essence of the Protestant Church.'

22 Under Paragraph 4 of the EKD Regulation on contracts of employment, 'General duties':

'Workers contribute according to their gifts, tasks and areas of responsibility to the fulfilment of their ecclesial and diaconal mission. Their whole conduct in service and outside service must correspond to the responsibility which they have accepted as workers in the service of the Church.'

23 The EKD Employment Guidelines and the EKD Regulation on contracts of employment both apply to Evangelisches Werk.

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

24 In November 2012 Evangelisches Werk published an offer of fixed-term employment for a project for producing a parallel report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. According to the offer of employment, the work to be done extended to accompanying the process for drawing up the country reports on that convention for 2012 to 2014; drawing up the parallel report to the country report on Germany, and observations and specialist contributions; project-related representation of the diaconate of Germany vis-à-vis the political world, the general public and human rights organisations, and collaboration in certain bodies; providing information and coordinating the opinion-forming process in relation to the association; and organisation, administration and reporting in relation to the work.

25 The offer of employment also specified the conditions to be satisfied by candidates. One of these read as follows:

‘We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and identification with the diaconal mission. Please state your church membership in your curriculum vitae.’

26 Ms Egenberger, of no denomination, applied for the post offered. Although her application was shortlisted after a preliminary selection by Evangelisches Werk, she was not invited to an interview. The candidate who was eventually successful had stated with respect to his church membership that he was a ‘Protestant Christian active in the Berlin regional church’.

27 Since she considered that her application had been rejected because she did not belong to any denomination, Ms Egenberger brought an action before the Arbeitsgericht Berlin (Labour Court, Berlin, Germany), seeking for Evangelisches Werk to be ordered to pay her EUR 9 788.65 in accordance with Paragraph 15(2) of the AGG. She argued that the taking of religion into account in the recruitment procedure, as was apparent from the advertisement of the post in question, was not compatible with the prohibition of discrimination in the AGG, if interpreted in accordance with EU law, and that Paragraph 9(1) of the AGG could not justify the discrimination of which she had been the victim.

28 Evangelisches Werk submitted that in the present case a difference of treatment on grounds of religion was justified under Paragraph 9(1) of the AGG. The right to require membership of a Christian church was, in the view of Evangelisches Werk, covered by the churches’ right of self-determination protected by Article 140 of the GG in conjunction with Article 137(3) of the WRV. Such a right was consistent with EU law, by reason in particular of the provisions of Article 17 TFEU. Moreover, because of the nature of the activity to which the offer of employment at issue in the main proceedings related, membership of a church constituted a justified occupational requirement, having regard to the ecclesial self-perception of Evangelisches Werk.

29 The Arbeitsgericht Berlin (Labour Court, Berlin) allowed Ms Egenberger’s action in part. It held that she had been the victim of discrimination, but limited the compensation to EUR 1 957.73. After her appeal against that decision was dismissed by the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court for Berlin and Brandenburg, Germany), Ms Egenberger brought an appeal on a point of law before the referring court, seeking payment of appropriate compensation.

30 The Bundesarbeitsgericht (Federal Labour Court, Germany) considers that the outcome of the dispute in the main proceedings depends on whether the differentiation according to church membership by Evangelisches Werk was lawful under Paragraph 9(1) of the AGG. However, that provision must be interpreted in conformity with EU law. The outcome of the dispute therefore depends on the interpretation of Article 4(2) of Directive 2000/78, which Paragraph 9 of the AGG was intended to transpose into national law. The referring court observes that the difference of treatment must also comply with the constitutional provisions and principles of the Member States and with the general provisions of EU law and Article 17 TFEU.

31 In the first place, the referring court observes that, according to the express intention of the German legislature, Article 4(2) of Directive 2000/78 was transposed into German law in Paragraph 9 of the AGG in such a way that the legal provisions and practices in force at the time of adoption of the directive were maintained. The legislature took that decision in the light of the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) on the churches’ privilege of self-determination. In accordance with that case-law, judicial review should be limited to a review of plausibility on the basis of the church’s self-perception. It follows that, where the church’s self-perception itself distinguishes between activities ‘close to’ and activities ‘remote from’ proclamation of the church’s message, the courts should not review whether and to what extent that distinction is justified. Even if a church’s self-perception meant that all posts were to be filled by reference to religious affiliation, whatever the nature of the posts, that would have to be accepted without more extensive judicial review. The question arises, however, of whether that interpretation of Paragraph 9(1) of the AGG is consistent with EU law.

32 According to the referring court, neither from the wording of Article 4(2) of Directive 2000/78 nor from the recitals of that directive does it follow that an employer such as Evangelisches Werk can itself determine authoritatively that religion, regardless of the nature of the activity concerned, is a justified occupational requirement, having regard to the employer's ethos, and that the national courts can carry out only a review of plausibility in that respect. On the contrary, the statement in that provision that religion must constitute a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos' could speak in favour of the national courts having the jurisdiction and the obligation to carry out a review going beyond a mere review of plausibility.

33 The referring court observes, however, that, in the opinion of some German legal writers, Article 4(2) of Directive 2000/78 must be interpreted in accordance with primary law, more particularly Declaration No 11 on the status of churches and non-confessional organisations annexed to the Final Act of the Treaty of Amsterdam ('Declaration No 11') or Article 17 TFEU.

34 In the second place, the referring court observes that it will have to decide, if need be, taking into account the whole body of national law and the methods of interpretation recognised by that law, whether and to what extent Paragraph 9(1) of the AGG can be interpreted consistently with Article 4(2) of Directive 2000/78, as interpreted by the Court, without requiring an interpretation *contra legem*, or whether that provision of the AGG must be disapplied.

35 The referring court asks whether the prohibition of discrimination on grounds of religion or belief in Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter') confers a subjective right on an individual which can be enforced by that person before the national courts and which, in disputes between private persons, requires those courts to disapply national provisions which are not compatible with that prohibition.

36 The referring court further notes that the Court has not yet stated whether the obligation to disapply national provisions that are incompatible with the prohibition of discrimination on grounds of religion or belief in Article 21(1) of the Charter also applies where an employer such as Evangelisches Werk, in order to justify a difference of treatment on grounds of religion, relies not only on provisions of national constitutional law but also on those of primary law of the EU, in this case Article 17 TFEU.

37 In the third place, the referring court observes that it will also have to answer the question, if need be, of what requirements related to religion may, in a case such as that at issue in the main proceedings, by reason of the nature of the activity or the context in which it is carried out, be regarded as constituting a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos, within the meaning of Article 4(2) of Directive 2000/78.

38 The European Court of Human Rights has indeed identified individual criteria in cases concerning conflicts of loyalty, referring inter alia to Directive 2000/78, but those criteria concerned existing employment relationships and were essentially specific to the individual cases.

39 In those circumstances, the referring court is uncertain whether such criteria are relevant for the interpretation of Article 4(2) of Directive 2000/78 where the difference of treatment on grounds of religion takes place at the recruitment stage, and whether Article 17 TFEU has an effect on the interpretation of that provision.

40 The question also arises of whether the national courts must carry out a comprehensive review, or merely a review of plausibility, or simply a review as to abuse, where they are required to ascertain whether, taking into account the nature of the activity concerned or the context in which it is carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos, within the meaning of Article 4(2) of Directive 2000/78.

41 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 4(2) of Directive [2000/78] to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church’s ethos?

(2) If the answer to Question 1 is in the negative:

In a case such as the present, is it necessary to disapply a provision of national law — such as, in this case, the first alternative of Paragraph 9(1) of the AGG — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations affiliated to them is also lawful where a particular religion, in accordance with the self-perception of the religious community, having regard to its right of self-determination, constitutes a justified occupational requirement?

(3) If the answer to Question 1 is in the negative:

What requirements are there as regards the nature of the activity or the context in which it is carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation’s ethos, in accordance with Article 4(2) of Directive [2000/78]?’

Consideration of the questions referred

Question 1

42 By its first question, the referring court essentially asks whether Article 4(2) of Directive 2000/78 must be interpreted as meaning that a church or other organisation whose ethos is based on religion or belief intending to recruit an employee may itself determine authoritatively the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation.

43 It should be noted, as a preliminary point, that it is not disputed between the parties to the main proceedings that the rejection of Ms Egenberger’s application on the ground that she was of no denomination constitutes a difference of treatment on grounds of religion within the meaning of Article 4(2) of Directive 2000/78.

44 That said, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part, and in particular the origin of that legislation (see, to that effect, judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 30).

45 As regards, first, the wording of the first subparagraph of Article 4(2) of Directive 2000/78, it follows from that provision that a church or other organisation the ethos of which is based on religion or belief may lay down a requirement related to religion or belief if, having regard to the nature of the activity concerned or the context in which it is carried out, ‘religion or belief constitute[s] a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos’.

46 Clearly, if review of compliance with those criteria were, in the event of doubt as to that compliance, the task not of an independent authority such as a national court but of the church or organisation intending to practise a difference of treatment on grounds of religion or belief, it would be deprived of effect.

47 As regards, secondly, the objective of Directive 2000/78 and the context of Article 4(2) of the directive, it must be recalled that that directive's objective, as stated in Article 1, is to lay down a general framework for combating discrimination on the grounds inter alia of religion or belief as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. The directive is thus a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter.

48 In order to ensure that that general principle is observed, Article 9 of Directive 2000/78, read in the light of recital 29 of the directive, requires the Member States to provide procedures, including judicial procedures, for enforcement of the obligations under the directive. Moreover, Article 10 of the directive requires the Member States to take the necessary measures, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of that principle.

49 Furthermore, Article 47 of the Charter, which applies to a dispute such as that in the main proceedings, given that the AGG implements Directive 2000/78 in German law for the purposes of Article 51(1) of the Charter and that the dispute concerns a person who was the subject of a difference of treatment on grounds of religion in connection with access to employment, lays down the right of individuals to effective judicial protection of their rights under EU law (see, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 50).

50 While Directive 2000/78 thus aims to protect the fundamental right of workers not to be discriminated against on grounds of their religion or belief, the fact remains that, by means of Article 4(2), that directive also aims to take into account the right of autonomy of churches and other public or private organisations whose ethos is based on religion or belief, as recognised by Article 17 TFEU and Article 10 of the Charter, which corresponds to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.

51 The objective of Article 4(2) of Directive 2000/78 is thus to ensure a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief, in situations where those rights may clash.

52 To that end, that provision sets out the criteria to be taken into account in the balancing exercise which must be performed in order to ensure a fair balance between those competing fundamental rights.

53 In the event of a dispute, however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court.

54 In this context, the fact that Article 4(2) of Directive 2000/78 refers to national legislation in force at the date of adoption of the directive and national practices existing at that date cannot be interpreted as authorising the Member States to withdraw compliance with the criteria set out in that provision from the scope of effective judicial review.

55 In the light of the foregoing, it must be concluded that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in

which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case.

56 Article 17 TFEU cannot invalidate that conclusion.

57 To begin with, the wording of that provision corresponds in substance to that of Declaration No 11. The fact that Declaration No 11 is expressly mentioned in recital 24 of Directive 2000/78 shows that the EU legislature must have taken that declaration into account when adopting the directive, especially Article 4(2), since that provision refers precisely to the national legislation and practices in force on the date of adoption of the directive.

58 Next, it must be stated that Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities. On the other hand, that article is not such as to exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78 from effective judicial review.

59 Having regard to all the above considerations, the answer to Question 1 is that Article 4(2) of Directive 2000/78, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.

Question 3

60 By its third question, which should be considered before the second question, the referring court essentially asks what the criteria should be for ascertaining in the particular case whether, having regard to the ethos of the church or organisation in question, religion or belief constitutes, in view of the nature of the activity concerned or the context in which it is carried out, a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of Directive 2000/78.

61 In this respect, it is true that in the balancing exercise provided for in Article 4(2) of Directive 2000/78, recalled in paragraphs 51 and 52 above, the Member States and their authorities, including judicial authorities, must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate (see, to that effect, ECtHR, 12 June 2014, *Fernández Martínez v. Spain*, CE:ECHR:2014:0612JUD005603007, § 129). They must nonetheless ensure that there is no infringement of the right of workers not to be discriminated against on grounds inter alia of religion or belief. Thus, by virtue of Article 4(2), the purpose of the examination is to ascertain whether the occupational requirement imposed by the church or organisation, by reason of the nature of the activities concerned or the context in which they are carried out, is genuine, legitimate and justified, having regard to that ethos.

62 As regards the interpretation of the concept of 'genuine, legitimate and justified occupational requirement' in Article 4(2) of Directive 2000/78, it follows expressly from that provision that it is by reference to the 'nature' of the activities concerned or the 'context' in which they are carried out that religion or belief may constitute such an occupational requirement.

63 Thus the lawfulness from the point of view of that provision of a difference of treatment on grounds of religion or belief depends on the objectively verifiable existence of a direct link between the occupational

requirement imposed by the employer and the activity concerned. Such a link may follow either from the nature of the activity, for example where it involves taking part in the determination of the ethos of the church or organisation in question or contributing to its mission of proclamation, or else from the circumstances in which the activity is to be carried out, such as the need to ensure a credible presentation of the church or organisation to the outside world.

64 Furthermore, the occupational requirement must, as required by Article 4(2) of Directive 2000/78, be 'genuine, legitimate and justified', having regard to the ethos of the church or organisation. Although in principle, as stated in paragraph 61 above, it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is founded, they are nevertheless called on to decide on a case-by-case basis whether those three criteria are satisfied from the point of view of that ethos.

65 With respect to those criteria, it should be stated, first, as regards the 'genuine' nature of the requirement, that the use of that adjective means that, in the mind of the EU legislature, professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy.

66 Secondly, as regards the 'legitimate' nature of the requirement, the use of that term shows that the EU legislature wished to ensure that the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy.

67 Thirdly, as regards the 'justified' nature of the requirement, that term implies not only that compliance with the criteria in Article 4(2) of Directive 2000/78 can be reviewed by a national court, but also that the church or organisation imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary.

68 The requirement in Article 4(2) of Directive 2000/78 must comply with the principle of proportionality. While that provision, unlike Article 4(1) of the directive, does not expressly provide that the requirement must be 'proportionate', it nonetheless provides that any difference of treatment must take account of the 'general principles of Community law'. As the principle of proportionality is one of the general principles of EU law (see, to that effect, judgments of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 34 and the case-law cited, and of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453, paragraph 51), the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued.

69 In the light of those considerations, the answer to Question 3 is that Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.

Question 2

70 By its second question, the referring court essentially asks whether a national court is required, in a dispute between individuals, to disapply a provision of national law which it is not possible to interpret in conformity with Article 4(2) of Directive 2000/78.

71 It must be recalled that it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision such as Paragraph 9(1) of the AGG can be interpreted in conformity with Article 4(2) of Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (see, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 31 and 32 and the case-law cited).

72 The Court has held, moreover, that the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 33 and the case-law cited).

73 Consequently, a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (see, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 34).

74 In the present case, therefore, it is for the referring court to ascertain whether the national provision in question lends itself to an interpretation in conformity with Directive 2000/78.

75 In the event that it is impossible to interpret the national provision at issue in the main proceedings in conformity with EU law, it must be pointed out, first, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 (see, to that effect, judgment of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 59 and the case-law cited).

76 The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).

77 As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (see, by analogy, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 39; of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296, paragraphs 33 to 36; of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraph 50; and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraphs 57 to 61).

78 Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.

79 Consequently, in the situation mentioned in paragraph 75 above, the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

80 That conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive

from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute (see, to that effect, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraphs 77 to 80, and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraphs 85 to 89).

81 Further, where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests involved, such as respect for the status of churches as laid down in Article 17 TFEU, it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings (see, by analogy, judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 76, and order of 23 April 2015, *Commission* v *Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 31).

82 In the light of the foregoing, the answer to Question 2 is that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

(1) **Article 4(2) of** Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, **read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.**

(2) Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.

(3) A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

Judgment of the Court (Grand Chamber) of 21 January 2020
Proceedings brought by Banco de Santander SA
Request for a preliminary ruling from the Tribunal Económico Administrativo Central

Reference for a preliminary ruling — Article 267 TFEU — Definition of 'court or tribunal of a Member State' — Criteria — Independence of the national body concerned — Irremovability of the members — Inadmissibility of the request for a preliminary ruling

Case C-274/14

JUDGMENT OF THE COURT (Grand Chamber)

21 January 2020 (*)

(Reference for a preliminary ruling — Article 267 TFEU — Definition of 'court or tribunal of a Member State' — Criteria — Independence of the national body concerned — Irremovability of the members — Inadmissibility of the request for a preliminary ruling)

In Case C-274/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain), made by decision of 2 April 2014, received at the Court on 5 June 2014, in the proceedings

Banco de Santander SA

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal (Rapporteur), M. Vilaras, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, T. von Danwitz, C. Lycourgos and N. Piçarra, Judges,

Advocate General: G. Hogan,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2019,

after considering the observations submitted on behalf of:

– Banco de Santander SA, by J.L. Buendía Sierra, E. Abad Valdenebro, R. Calvo Salinero and J.M. Panero Rivas, abogados,

– the Spanish Government, initially by M.A. Sampol Pucurull and A. Rubio González, subsequently by S. Centeno Huerta and A. Rubio González, acting as Agents,

– the European Commission, by R. Lyal, B. Stromsky, C. Urraca Caviedes and P. Němečková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2) of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48); the validity of the Commission's decision of 17 July 2013 to initiate the procedure laid down in Article 108(2) TFEU in relation to State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) — Tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ 2013 C 258, p. 8); and the validity of Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain — Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ 2015 L 56, p. 38).

2 The request has been made in proceedings brought by Banco de Santander SA against a recovery notice issued by the Inspección Financiera (Tax Inspectorate, Spain) concerning the deduction of goodwill resulting from the acquisition by that bank of all the shares in a holding company governed by German law, holding shares in companies established in the European Union.

Legal context

European Union law

Decision 2011/5

3 As is apparent, in essence, from recitals 4 to 6 of Decision 2011/5, by decision of 10 October 2007, published in the *Official Journal of the European Union* on 21 December 2007, the European Commission, following a number of written questions which had been sent to it in 2005 and 2006 by Members of the European Parliament and a complaint from a private operator which had been referred to it in 2007, initiated the investigation procedure, then referred to in Article 88(2) EC, in respect of the Spanish tax amortisation scheme for Spanish companies acquiring significant shareholdings in foreign companies, provided for in Article 12(5) of Ley 43/1995, reguladora del Impuesto de Sociedades (Law 43/1995 on corporation tax) of 27 December 1995 (BOE No 310 of 28 December 1995, p. 37072), and included in Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the revised text of the Law on corporation tax) of 5 March 2004 (BOE No 61 of 11 March 2004, p. 10951; 'the TRLIS').

4 The measure provided for in Article 12(5) of the TRLIS, which entered into force on 1 January 2002, provides that, in the event that an undertaking which is taxable in Spain acquires a shareholding in a 'foreign company' equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least one year, the goodwill resulting from that shareholding, as recorded in the resident undertaking's accounts as a separate intangible asset, may be deducted, in the form of an amortisation, from the basis of assessment for the corporation tax for which that undertaking is liable. That amortisation is applied, in equal instalments, for up to 20 years following the acquisition.

5 In Article 1(1) of Decision 2011/5, the Commission declared the scheme at issue to be incompatible with the common market.

6 According to Article 1(2) and (3) of that decision:

‘2. Nonetheless, tax reductions enjoyed by the beneficiaries in respect of intra-Community acquisitions, by virtue of Article 12(5) TRLIS, which are related to rights held directly or indirectly in foreign companies fulfilling the relevant conditions of the aid scheme by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year, can continue to apply for the entire amortisation period established by the aid scheme.

3. Tax reductions enjoyed by beneficiaries in respect of intra-Community acquisitions, by virtue of Article 12(5) TRLIS which are related to an irrevocable obligation entered into before 21 December 2007 to hold such rights where the contract contains a suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and where the decision and the operation has been notified before 21 December 2007, can continue to apply for the entire amortisation period established by the aid scheme for the part of the rights held as of the date when the suspensive condition is lifted.’

7 Article 4 of Decision 2011/5 requires the Kingdom of Spain to recover the aid granted under the tax scheme at issue, except for that fulfilling the conditions described in Article 1(2) of that decision.

Decision 2011/282/EU

8 By Decision 2011/5, the Commission concluded the procedure with respect to acquisitions by Spanish undertakings of shareholdings in undertakings established in the European Union. However, the Commission kept the procedure open as regards such acquisitions of shareholdings in undertakings established outside the European Union.

9 In Article 1(1) of Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1), the Commission declared incompatible with the internal market the scheme at issue, whereby a tax advantage was granted to undertakings taxable in Spain in order to enable them to amortise the goodwill resulting from acquisitions of shareholdings in undertakings established outside the European Union.

10 Article 1(2) to (5) of that decision provides for certain situations in which beneficiaries of tax reductions under the tax scheme at issue in respect of extra-EU acquisitions can continue to apply those reductions over the entire amortisation period established by that scheme.

11 Article 4 of that decision requires the Kingdom of Spain to recover the aid granted under the tax scheme at issue.

Decision 2015/314

12 By decision of the Commission of 17 July 2013 to initiate the procedure laid down in Article 108(2) TFEU in relation to State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) — Tax amortisation of financial goodwill for foreign shareholding acquisitions, the Commission decided to examine whether the new administrative interpretation of Article 12(5) of the TRLIS, adopted by the Dirección General de Tributos (Directorate-General for Taxation, Spain) (‘the DGT’) and by the Tribunal Económico-Administrativo Central (Central Tax Tribunal) (‘the TEAC’), extending the scope of application of the tax scheme at issue to indirect shareholding acquisitions, was compatible with EU law.

13 That procedure culminated in the adoption, on 14 October 2014, of a third decision on the tax scheme at issue, Decision 2015/314.

14 By that decision, the Commission concluded that, in so far as the tax scheme at issue now applies also to indirect shareholding acquisitions of non-resident companies through the acquisition of shareholdings

in non-resident holding companies, that tax scheme also constitutes State aid that is incompatible with the internal market and which, moreover, was granted contrary to Article 108(3) TFEU. The Commission consequently ordered the Spanish authorities to recover the aid granted.

Spanish law

15 The TEAC, which has its seat in Madrid (Spain), hears and determines at first and last instance complaints against decisions taken by certain central tax authorities. It is also the appeal body in respect of decisions taken by the other Tribunales Económico-Administrativos (Tax Tribunals; 'TEAs'), that is to say, the regional TEAs, and the local TEAs, which have their seats in Ceuta (Spain) and in Melilla (Spain).

16 The Spanish legislation establishing the legal status of TEAs is contained in Ley 58/2003, General Tributaria (Law 58/2003 establishing the General Tax Code) of 17 December 2003 (BOE No 302 of 18 December 2003, p. 44987), as amended by Ley 34/2015 of 21 September 2015 (BOE No 227 of 22 September 2015, p. 83633) ('the LGT'), in particular in Chapter IV of that law, entitled 'Economic-administrative complaints', in Title V thereof, entitled 'Administrative review'.

17 Article 228 of the LGT provides:

'1. Competence to decide economic-administrative complaints shall lie exclusively with the economic-administrative bodies, which shall act with functional independence in the exercise of their duties.

2. In the field of State competence, the economic-administrative bodies shall be:

(a) [The TEAC].

(b) The regional and local [TEAs].

3. The Special Chamber for the Unification of Precedent shall also be considered to be an economic-administrative body.

…'

18 Article 237(3) of the LGT lays down rules in relation to requests for a preliminary ruling that may be made to the Court of Justice by the TEAs, notably a stay of proceedings pending the Court's answer to a question referred for a preliminary ruling.

19 Article 243 of the LGT, entitled 'Extraordinary appeal for the unification of precedent', provides:

'1. An extraordinary appeal for the unification of precedent may be filed by the Director-General for Taxation of the Ministry of the Economy and Finance against the tax decisions issued by [the TEAC], when that Director-General disagrees with the content of such decisions.

…

2. The Special Chamber for the Unification of Precedent shall be competent to resolve such an appeal. The Special Chamber shall be composed of the President of [the TEAC], who shall preside, three members of that Tribunal, the Director-General for Taxation of the Ministry of the Economy and Finance, the Director-General of the State Tax Administration Agency, the Director-General or the Director of the Department of the State Tax Administration Agency to which the body that issued the act which is referred to in the decision that is the object of the appeal is functionally attached, and the President of the Council for the Defence of Taxpayers.

…

3. The decision on appeal shall be adopted by a majority of the members of the Special Chamber. In the event of a tie, the President shall always have the casting vote.

4. The decision on appeal shall be issued within six months and shall respect the particular legal situation relating to the appealed decision, establishing the applicable precedent.

5. The precedent established by such appeal decisions shall be binding on the [TEAs], on the tax bodies of the autonomous communities and of the cities with autonomous status and on the remainder of the State Tax Administration and of the autonomous communities and cities with autonomous status.'

20 Other rules applying to the TEAs are contained in Real Decreto 520/2005, por el que se aprueba el Reglamento general de desarrollo de la Ley 58/2003, de 17 de diciembre, General Tributaria, en materia de revisión en vía administrativa (Royal Decree 520/2005 approving the general regulation for the implementation of Law 58/2003 of 17 December on the General Tax Code in relation to administrative review) of 13 May 2015 (BOE No 126 of 27 May 2005, p. 17835) ('Royal Decree 520/2005').

21 Article 29(2) and (9) of Royal Decree 520/2005 provides:

'2. The President [of the TEAC] shall be appointed and removed by Royal Decree adopted by the Council of Ministers on the proposal of the Minister for the Economy and Finance from among the civil servants who are noted to have the requisite professional experience and reputation in the field of taxation, and shall have the grade of Director-General of the Ministry of the Economy and Finance.

The members [of the TEAC] shall be appointed and removed by Royal Decree adopted by the Council of Ministers on the proposal of the Minister for the Economy and Finance from among the civil servants of the bodies indicated in the list of posts and shall have the grade of Deputy Director-General of the Ministry of the Economy and Finance.

...

9. All the members of the plenum or of the Chambers and the single-member bodies [of the TEAC] shall exercise wholly independently and under their own responsibility the functions which are legally assigned to them and any other functions which may be assigned to them by the President.'

22 According to Article 30(2) and (12) of Royal Decree 520/2005:

'2. The President, the Presidents of the decentralised chamber, the Presidents of Chambers and the members [of the regional and local TEAs] shall be appointed and removed by decree of the Minister for the Economy and Finance from among the civil servants of the bodies indicated in the list of posts. ...

...

12. All the members of the plenum or of the Chambers and the single-member bodies [of the regional and local TEAs] shall exercise wholly independently and under their own responsibility the functions which are legally assigned to them and any other functions which may be assigned to them by the President of the Tribunal or the President of the decentralised chamber.

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

23 In May 2002, Banco de Santander Central Hispano SA ('BSCH'), the ultimate parent company of the tax consolidated group 17/89, acquired 100% of the shares in AKB Holding GmbH ('AKB'), a company governed by German law.

24 That acquisition, the price of which was EUR 1 099 999 999, while AKB's book value was estimated at EUR 183 909 000, generated financial goodwill of EUR 916 091 000 ('the relevant goodwill').

25 As a holding company, AKB owned shares in the following companies, all established in the European Union: AKB Datensysteme GmbH, AKB Autobörse AG, AKB Leasing GmbH, AKB Versicherungsdienst GmbH, AKB Privat und Handelsbank Aktien AG, AKB Vermögensverwaltung GmbH and AKB Marketing Services sp. z o.o.

26 In December 2002, BSCH transferred the shares in AKB whose acquisition price had generated the relevant goodwill to Holneth BV, a company governed by Netherlands law, and Santander Consumer Finance SA ('SCF'), a company governed by Spanish law; both companies also belonged to the tax consolidated group 17/89.

27 In view of the relevant goodwill, the tax consolidated group 17/89 made deductions, pursuant to Article 12(5) of the TRLIS, in its corporate tax returns for the tax years 2002 and 2003.

28 Thus, for the 2002 tax year, BSCH and SCF applied deductions of EUR 27 482 730 and EUR 1 631 395, respectively. For the 2003 tax year, SCF applied a deduction of EUR 45 804 550.

29 In the case of the 2002 tax year, following a tax inspection which culminated in a report dated 21 December 2006, the tax inspectorate, by recovery notice of 7 March 2007, accepted the deduction made by BSCH in respect of EUR 20 262 374, but regularised it in respect of EUR 7 215 356. In the case of SCF, the deduction of EUR 1 631 395 was accepted in full.

30 By recovery notice of 22 July 2010, the tax inspectorate rejected in full the goodwill deduction claimed by SCF in respect of the 2003 tax year.

31 On 16 August 2010, Banco de Santander submitted a complaint against that recovery notice to the TEAC, claiming that, notwithstanding the indirect nature of the relevant goodwill as a result of its having been generated by the acquisition of a holding company, that goodwill is deductible from corporation tax under the terms of Article 12(5) of the TRLIS.

32 It argued that, in the light of the new interpretation of Article 12(5) of the TRLIS, adopted both by the DGT and by the TEAC and referred to in paragraph 12 of the present judgment, the question arose in this case whether, pursuant to Decision 2011/5, the Commission's first decision on the tax scheme at issue, the tax deduction corresponding to the amortisation of the relevant goodwill before 21 December 2007, following the acquisition of a non-resident holding company, must be recovered as aid that is illegal and incompatible with the internal market.

33 Given that the combined provisions of Article 1(2) and Article 4(1) of Decision 2011/5 are such that acquisitions made before 21 December 2007 are excluded from the obligation of recovery, on account of a pre-existing legitimate expectation, and the fact that the acquisition at issue in the main proceedings took place before that date, it was argued that it is essential, for the purposes of determining the dispute in the main proceedings, for an answer to be given to the question as to whether those provisions of Decision 2011/5 must be interpreted as applying also to indirect acquisitions, in particular to the acquisition of a non-resident holding company, such as the one at issue in the main proceedings.

34 In that regard, the TEAC took the view that the administrative interpretation which previously precluded the application of the tax deduction to indirect acquisitions does not constitute a source of law.

35 According to the TEAC, neither the DGT nor the TEAC is part of the legislature or the judiciary. Interpretations given by those bodies are not definitive, since they are subject to review by the courts.

Furthermore, the Tribunal Supremo (Supreme Court, Spain) has not yet ruled on the applicability of Article 12(5) of the TRLIS to indirect shareholding acquisitions.

36 In those circumstances, the TEAC decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(2) of [Decision 2011/5] be interpreted as meaning that the legitimate expectations recognised and defined in that paragraph are to be considered applicable to the deduction of the tax amortisation of financial goodwill under Article 12(5) of the TRLIS in relation to indirect foreign shareholding acquisitions made through the direct acquisition of a non-resident holding company?

(2) If the answer to the first question is affirmative, is [the decision initiating the procedure that led to the adoption of Decision 2015/314], which decides to initiate the procedure provided for under Article 108(2) TFEU for infringement of Article 108 TFEU and of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU (OJ 1999 L 83, p. 1)], invalid?'

37 By decision of 8 January 2015, received at the Court on 27 January 2015, the TEAC considered it necessary to reformulate the questions referred for a preliminary ruling as a result of new developments.

38 These were, on the one hand, the adoption on 15 October 2014 of Decision 2015/314 and, on the other, the judgments of the General Court of the European Union of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939), and of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938), by which the General Court annulled Article 1(1) and Article 4 of both Decision 2011/5 and Decision 2011/282.

39 The TEAC considered that, following those new developments, it was no longer necessary to ask the Court about the interpretation of Decision 2011/5, since the essential question for the outcome of the dispute in the main proceedings was now whether the annulment of that decision by the General Court renders invalid Decision 2015/314, which extends the ban on the deduction provided for in Article 12(5) of the TRLIS as already laid down by Decisions 2011/5 and 2011/282 to indirect acquisitions of shareholdings in non-resident companies.

40 In those circumstances, the TEAC decided to reformulate the questions referred for a preliminary ruling as follows:

'(1) Is [Decision 2015/314] invalid for lack of any factual and legal basis as a result of the judgments of the General Court of the European Union of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939), and [of 7 November 2014,] *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938), which respectively annulled Article 1(1) and Article 4 of [Decision 2011/5 and of Decision 2011/282]?

(2) Is [Decision 2015/314] invalid for lack of reasoning as a result of the judgments of the General Court of the European Union of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939), and [of 7 November 2014,] *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938), which respectively annulled Article 1(1) and Article 4 of [Decision 2011/5 and of Decision 2011/282]?

(3) In the alternative, in the event of a negative answer to the preceding questions:

Is Decision [2015/314] invalid because the new administrative interpretation of Article 12(5) of the TRLIS falls entirely within the scope [of Decision 2011/5 and Decision 2011/282]?'

41 By decision of 8 June 2017, received at the Court on 6 July 2017, the TEAC considered it necessary once again to reformulate the questions referred for a preliminary ruling because of a new development, the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P,

EU:C:2016:981), by which the Court of Justice set aside the judgments of the General Court of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939), and of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938), and referred Cases T-219/10 and T-399/11 back to the General Court.

42 In the light of that new development, the TEAC considered it appropriate to maintain both the questions put forward in the context of the initial request for a preliminary ruling, relating to the interpretation of the scope of application of Article 1(2) of Decision 2011/5, and those put forward in the context of the first reformulation of the questions referred, relating to the validity of Decision 2015/314.

43 As a result of that second reformulation, the questions referred now read as follows:

'(1) In the event that the validity of [Decision 2011/5] is confirmed:

(a) Must Article 1(2) of [Decision 2011/5] be interpreted as meaning that the legitimate expectations recognised and defined in that paragraph are to be considered applicable to the deduction of the tax amortisation of financial goodwill under Article 12(5) of the TRLIS in relation to indirect foreign shareholding acquisitions made through the direct acquisition of a non-resident holding company?

(b) If the answer to the first question is affirmative, is [the decision initiating the procedure that led to the adoption of Decision 2015/314], invalid?

(2) In the event that Article 1 of [Decision 2011/5] is annulled in Case T-219/10:

(a) Is [Decision 2015/314] invalid, because it has been deprived of its factual and legal basis?

(b) Is [Decision 2015/314] invalid, because it has been deprived of its reasoning?

(c) In the alternative, if the answers to the previous questions are negative:

Is [Decision 2015/314] invalid, because the new administrative interpretation of Article 12(5) of the TRLIS falls entirely within the scope of [Decision 2011/5 and Decision 2011/282]?'

44 By judgment of the General Court of 15 November 2018, *World Duty Free Group* v *Commission* (T-219/10 RENV, EU:T:2018:784), the General Court dismissed the action for annulment brought by World Duty Free Group in respect of Decision 2011/5.

45 On 25 January 2019, that company lodged an appeal by which it sought to have that judgment set aside and Decision 2011/5 annulled. That appeal is pending before this Court (Case C-51/19 P).

46 Other appeals with the same subject matter or concerning other judgments of the General Court dismissing actions for annulment brought against Decision 2011/282 are also pending before this Court.

47 There are, moreover, several actions for annulment of Decision 2015/314 currently pending before the General Court.

48 There have been several successive decisions to stay the proceedings in the present case. These were taken principally on the ground that, following its twofold reformulation of the questions referred, the TEAC seeks to ask the Court either about the possible effect of the invalidity of Decision 2011/5 on the validity of Decision 2015/314, should the EU judicature find Decision 2011/5 to be invalid, or about the interpretation of Decision 2011/5 with a view to determining its scope, should the EU judicature confirm the validity of that decision.

49 The question of the validity of Decision 2011/5 is currently still pending before the Courts of the European Union.

50 Nevertheless, having regard in particular to the case-law of the Court of Justice since the present request for a preliminary ruling was made, and to the doubts expressed by the Commission as to whether the TEAC qualifies as a 'court or tribunal' for the purposes of Article 267 TFEU and, therefore, as to whether the request is admissible, it is appropriate that the present proceedings be resumed in order for the Court to examine whether the TEAC falls within that category.

Admissibility of the request for a preliminary ruling

51 According to the Court's settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, to that effect, judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39, p. 273; of 31 May 2005, *Syfait and Others*, C-53/03, EU:C:2005:333, paragraph 29; and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and the case-law cited).

52 In the case of the TEAC, the body making the reference in the present case, there is no doubt, on the basis of the information in the file submitted to the Court, that it satisfies the criteria that it be established by law, that it be permanent, that its jurisdiction be compulsory, that its procedure be *inter partes* and that it apply rules of law.

53 However, the question arises as to whether the TEAC fulfils the criterion of independence.

54 In that regard, the Court held, in paragraph 39 of the judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145), that the Spanish legislation relating to the TEAs, as applicable in the case that gave rise to that judgment, did ensure a separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery of tax and, on the other hand, the TEAs which rule on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority. In paragraph 40 of that judgment, the Court explained that such safeguards gave the TEAs the character of a third party in relation to the departments which adopted the decision forming the subject matter of the complaint and the independence necessary for them to be regarded as courts or tribunals for the purposes of Article 267 TFEU.

55 However, as the Commission also submitted in its written observations, those considerations must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU.

56 In that context, it must be pointed out that the independence of national courts and tribunals is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU, in that, in accordance with the settled case-law of the Court referred to in paragraph 51 of the present judgment, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 43).

57 According to the case-law of the Court, the concept of 'independence' has two aspects. The first aspect, which is external, requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure

liable to impair the independent judgment of its members and to influence their decisions (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited).

58 Again as regards the external aspect of the concept of 'independence', it should be noted that the irremovability of the members of the body concerned constitutes a guarantee that is essential to judicial independence in that it serves to protect the person of those who have the task of adjudicating in a dispute (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 45).

59 The principle of irremovability, the cardinal importance of which is to be emphasised, requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 76).

60 The guarantee of irremovability of the members of a court or tribunal thus requires that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal (see, to that effect, judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraphs 32 and 35).

61 The second — internal — aspect of the concept of 'independence' is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 38 and the case-law cited).

62 Thus, according to the settled case-law of the Court, the concept of 'independence', which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (see, to that effect, judgments of 30 March 1993, *Corbiau*, C-24/92, EU:C:1993:118, paragraph 15, and of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 29 and the case-law cited).

63 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 32).

64 In the present case it must first be stated that, according to the national legislation applicable, in particular Article 29(2) of Royal Decree 520/2005, the President and members of the TEAC are appointed by Royal Decree adopted by the Council of Ministers, on the proposal of the Minister for the Economy and Finance, for an indefinite period. According to that provision, both the President and the members of the TEAC may be removed from office according to the same procedure, that is to say, by Royal Decree adopted by the Council of Ministers on the proposal of the Minister for the Economy and Finance.

65 As to the members of the regional TEAs, it must be noted that, according to Article 30(2) of Royal Decree 520/2005, they are appointed by the Minister for the Economy and Finance from a list of civil servants and may be removed from office by that minister.

66 Whilst, it is true, the applicable national legislation lays down rules governing, inter alia, abstention and recusal of the President and other members of the TEAC or, in the case of the President of the TEAC, rules on conflicts of interest, disqualification and duties of transparency, it is common ground that the arrangements for removal of the President and other members of the TEAC are not determined by specific rules, by means of express legislative provisions, such as those applicable to members of the judiciary. The members of the TEAC are covered solely, in that respect, by the general rules of administrative law and, in particular, by the basic regulations relating to civil servants, as the Spanish Government confirmed during the hearing before the Court. That finding also applies in relation to the members of the regional and local TEAs.

67 Consequently, the removal of the President and the other members of the TEAC and of the members of the other TEAs is not limited, as required by the principle of irremovability recalled in paragraph 59 of the present judgment, to certain exceptional cases reflecting legitimate and compelling grounds that warrant the adoption of such a measure, subject to the principle of proportionality and to the appropriate procedures being followed, such as cases of incapacity or of a serious breach of obligations rendering the individuals concerned unfit for the purposes of carrying out their duties.

68 It follows that the applicable national legislation does not ensure that the President and the other members of the TEAC are protected against direct or indirect external pressures that are liable to cast doubt on their independence.

69 Whilst it is true that, according to the wording of Article 228(1) of the LGT, the members of the TEAs are to exercise their powers 'with functional independence' and that, in accordance with Article 29(9) and with Article 30(12) of Royal Decree 520/2005, they are to exercise 'wholly independently and under their own responsibility' the functions legally assigned to them, the fact remains that there are no particular safeguards in respect of their removal or the termination of their appointment. That system does not constitute an effective safeguard against undue pressure from the executive on the members of the TEAs (see, by analogy, judgment of 31 May 2005, *Syfait and Others*, C-53/03, EU:C:2005:333, paragraph 31).

70 In this, the situation of the members of the TEAs and, in particular, of the TEAC differs, for example, from that of the referring body in the case giving rise to the judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664), in the sense that, as is apparent from paragraphs 11 and 20 of that judgment, the members of that body, unlike the members of the TEAs, have the benefit of a guarantee of irremovability throughout their term of office, exceptions to which are permitted only on the grounds expressly set out by law.

71 Similarly, the TEAs and, in particular, the TEAC differ from the referring body in the case giving rise to the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347). As is apparent from paragraphs 29 to 31 of that judgment, while that body admittedly includes expert members who do not enjoy the particular protection reserved for members of the judiciary by a constitutional provision, it is also composed of members of the judiciary who do enjoy that protection and have in all circumstances the majority of votes and, accordingly, a decisive weight in the decisions adopted by that body, which guarantees its independence.

72 As regards, secondly, the requirement of independence in its second, internal, aspect, referred to in paragraph 61 of the present judgment, it must be noted that there is indeed a separation of functions within the Ministry of the Economy and Finance between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery of tax and, on the other hand, the TEAs which rule on complaints lodged against the decisions of those departments.

73 Nevertheless, as the Advocate General also noted in points 31 and 40 of his Opinion, certain characteristics of the extraordinary appeal procedure before the Sala Especial para la Unificación de Doctrina (Special Chamber for the Unification of Precedent, Spain), a procedure governed by Article 243 of the LGT, are such as to cast doubt on the fact that the TEAC acts as a 'third party' with respect to the interests before it.

74 Only the Director-General of Taxation of the Ministry of the Economy and Finance may lodge such an extraordinary appeal against decisions of the TEAC with which he or she disagrees. However, that Director-General will automatically be part of the eight-person panel that is to hear that appeal, along with the Director-General or the Director of the department of the State Tax Administration Agency to which the body that issued the act referred to in the decision that is the object of that extraordinary appeal belongs. Thus, both the Director-General of Taxation of the Ministry of the Economy and Finance, who lodged the extraordinary appeal against a decision of the TEAC, and the Director-General or the Director of the department of the State Tax Administration Agency which adopted the act referred to in that decision, will sit as part of the Special Chamber of the TEAC hearing that appeal. The roles of party to the extraordinary appeal procedure and that of member of the body that is to hear such an appeal are thus conflated.

75 Moreover, the prospect of such an extraordinary appeal being brought by the Director-General of Taxation of the Ministry of the Economy and Finance against a decision of the TEAC is likely to exert pressure on the TEAC and thus to cast doubt on its independence as well as its impartiality, notwithstanding the fact, invoked by the Spanish Government at the hearing before the Court, that it is apparent from Article 243(4) of the LGT that that extraordinary appeal has only prospective effect and has no impact on decisions already issued by the TEAC, including the decision that is the object of the appeal.

76 Thus, those characteristics of the extraordinary appeal for the unification of precedent which may be brought against decisions of the TEAC demonstrate the organisational and functional links that exist between that body and the Ministry of the Economy and Finance, in particular the Director-General of Taxation of that ministry and the Director-General of the department which adopts the decisions contested before the TEAC. The existence of such links makes it impossible to regard the TEAC as a third party in relation to that administration (see, by analogy, judgment of 30 May 2002, *Schmid*, C-516/99, EU:C:2002:313, paragraphs 38 to 40).

77 Consequently, the TEAC does not satisfy the internal aspect of the requirement of independence that is characteristic of a court or tribunal.

78 It must be added that the fact that the TEAs do not constitute 'courts or tribunals' for the purposes of Article 267 TFEU does not relieve them of the obligation to ensure that EU law is applied when adopting their decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities (see, to that effect, judgments of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraphs 30 to 33; of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraphs 61 and 63; and of 4 December 2018, *The Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraphs 36 and 38).

79 Moreover, the existence of judicial appeals to the Audiencia Nacional (National High Court, Spain) and the Tribunal Supremo (Supreme Court) against decisions of the TEAs following the economic-administrative complaints procedure ensures the effectiveness of the mechanism of the request for a preliminary ruling provided for in Article 267 TFEU and the uniform interpretation of EU law, since those national courts have the option of making or, where appropriate, are required to make a request for a preliminary ruling to the Court of Justice where a decision on the interpretation or the validity of EU law is necessary in order for them to give judgment (see, by analogy, judgment of 31 January 2013, *Belov*, C-394/11, EU:C:2013:48, paragraph 52).

80 Having regard to all the foregoing considerations, it must be held that the request for a preliminary ruling from the TEAC is inadmissible, since that body cannot be described as a 'court or tribunal' for the purposes of Article 267 TFEU.

Costs

81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring body, the decision on costs is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The request for a preliminary ruling from the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain), made by decision of 2 April 2014, is inadmissible.

Case C-507/18: NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford (Opinion of Advocate General Sharpston)

Judgment of the Court (Grand Chamber) of 23 April 2020
NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford

Request for a preliminary ruling from the Corte suprema di cassazione

Reference for a preliminary ruling — Equal treatment in employment and occupation — Directive 2000/78/EC — Article 3(1)(a), Article 8(1) and Article 9(2) — Prohibition of discrimination based on sexual orientation — Conditions for access to employment or to occupation — Concept — Public statements ruling out recruitment of homosexual persons — Article 11(1), Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union — Defence of rights — Sanctions — Legal entity representing a collective interest — Standing to bring proceedings without acting in the name of a specific complainant or in the absence of an injured party — Right to damages

Case C-507/18

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 31 October 2019(1)

Case C-507/18

NH

v

Associazione Avvocatura per i diritti LGBTI — Rete Lenford

(Request for a preliminary ruling from the Corte suprema di cassazione (Italy))

(Directive 2000/78/EC — Equal treatment in employment and occupation — Discrimination based on sexual orientation — Article 3(1)(a) — Access to employment — Public statements excluding the recruitment of homosexuals — Article 8(1) — Article 9(2) — Enforcement and remedies — Standing of an association in the absence of an identifiable victim — Claims for damages)

1. *Έπεα πτερόεντα*, words have wings. The meaning of that expression, the origins of which can be traced back to Homer (2) is twofold: that words fly away, carried by the wind; (3) but also that words travel fast and spread quickly. The present case, concerning statements made during a radio interview, comes closer to the second meaning. Today, words spoken on the radio or television or transmitted via social media are disseminated rapidly and have consequences. The oral statements at the origin of the main proceedings have travelled as far as Luxembourg and give this Court the opportunity to interpret the provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. (4) Does the scope of Article 3(1)(a) of the directive, which prohibits discrimination in access to employment, also cover a general statement made on the radio to the effect that the interviewee would not recruit homosexuals to his law firm? And is it possible, in the absence of an identifiable victim, for an association to seek to enforce of the prohibition of discrimination in employment and occupation, including through the award of damages?

Legal framework

The European Convention for the Protection of Human Rights and Fundamental Freedoms

2. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') provides that:

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

3. Article 14 prohibits discrimination, stating that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

4. A right to employment is not, however, amongst the specific rights protected by the ECHR.

EU law

The Charter of Fundamental Rights of the European Union

5. Article 11(1) of the Charter of Fundamental Rights of the European Union ('the Charter') (5) provides that 'everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

6. Article 15(1) states that 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.'

7. Article 21(1) prohibits 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.

8. Article 52(1) states that 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the [EU] or the need to protect the rights and freedoms of others.' Article 52(3) provides that 'in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent [EU] law providing more extensive protection.'

Directive 2000/78

9. The recitals of Directive 2000/78 state, in particular:

'(1) … the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights …

…

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on … sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

…

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice.

…

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

…

(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

…

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

…

(37) In accordance with the principle of subsidiarity … the objective of this Directive, namely the creation within the [EU] of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States … .'

10. Article 1 provides that the purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

11. Article 2 ('Concept of discrimination') states:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

12. According to Article 3 ('Scope'):

'1. Within the limits of the areas of competence conferred on the [EU], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; ...'

13. Article 8 provides that:

'1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.'

14. Under Article 9 ('Defence of rights'):

'1. Member States shall ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them ...

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

...'

15. Article 17 provides that 'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure

that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …'

Italian law

16. Decreto legislativo 9 luglio 2003, No 216 ('Legislative Decree n° 216/2003') implemented Directive 2000/78. Article 1 explains that the decree 'lays down the provisions relating to the implementation of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation, as regards employment and occupation, establishing the necessary measures to ensure that there is no discrimination on those grounds, taking account also of the different consequences that those forms of discrimination may have for women and men'.

17. Article 2 defines discrimination. Its first paragraph provides that 'the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on the grounds of religion, belief, disability, age or sexual orientation. This principle means that direct or indirect discrimination, as defined below, shall be prohibited:

> (a) direct discrimination [shall be taken to occur where] one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion, belief, disability, age or sexual orientation;
>
> (b) indirect discrimination [shall be taken to occur where] an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons having a particular religion or belief, disabled persons or persons of a certain age or sexual orientation at a particular disadvantage compared with other persons …'.

18. Article 3(1) states that 'the principle of equal treatment without distinction on grounds of religion, belief, disability, age or sexual orientation shall apply to all persons as regards both the public and private sectors and shall be entitled to judicial protection, in accordance with the formal requirements laid down by Article 4, with specific reference to the following areas:

> (a) access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions … .'

19. Article 5 concerns standing and provides that:

> '1. Trade unions, associations and organisations representing the rights or interests affected under a mandate given by a public or certified private instrument, failing which the mandate shall be void, shall have standing to bring proceedings under Article 4 in the name and on behalf of, or in support of, the person subject to the discrimination, against the natural or legal person responsible for the discriminatory behaviour or act.
>
> 2. The persons referred to in paragraph 1 shall also have standing in cases of collective discrimination where it is not automatically and immediately possible to identify individuals affected by the discrimination.'

Facts, procedure and the questions referred

20. NH is a senior lawyer. The material before the Court does not permit definitive conclusions to be drawn as to NH's precise current status within the law firm with which he is associated. During an interview in a radio programme, NH stated that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons. At the time when he made those remarks, there was no current recruitment procedure open at NH's law firm.

21. The Associazione Avvocatura per i diritti LGBTI — Rete Lenford ('the Associazione') (6) is an association of lawyers which, according to its statutes, aims 'to contribute to the development and dissemination of the culture and respect for the rights of [LGBTI] persons' and to create a network of lawyers to offer judicial protection to LGBTI persons and to take representative action on their behalf before national and international jurisdictions. The Associazione brought proceedings against NH, asking that he be ordered to publish a section of the order in a national daily newspaper, to establish an action plan to eliminate discrimination and to pay damages to the Associazione for non-material loss.

22. By order of 6 August 2014 the Tribunale di Bergamo (District Court, Bergamo, Italy), acting as an employment tribunal, found that NH had acted illegally. It held that his behaviour was unlawful because of its discriminatory nature, made the publication order requested and ordered him to pay EUR 10 000 to the Associazione in damages.

23. NH's appeal against that order was dismissed by the Corte d'appello di Brescia (Court of Appeal, Brescia, Italy) by judgment of 23 January 2015.

24. NH appealed in cassation against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation, Italy ('the referring court')).

25. The referring court expresses doubts as to whether the Associazione is a body representing collective interests for the purposes of Article 9(2) of Directive 2000/78 and thus has standing to bring proceedings against NH. It also expresses doubts as to whether NH's statements fall within the scope of Directive 2000/78 on the basis that they concern 'employment', or whether they should be regarded as mere expressions of opinion, unrelated to any discriminatory recruitment procedure.

26. Against that background, the referring court asks the Court the following questions:

> '(1) Must Article 9 of Directive 2000/78 be interpreted as meaning that an association composed of lawyers specialised in the judicial protection of LGBTI persons, the statutes of which state that its objective is to promote LGBTI culture and respect for the rights of LGBTI persons, automatically, as a legal person having a collective interest and as a non-profit association, has standing to bring proceedings, including in respect of a claim for damages, in circumstances of alleged discrimination against LGBTI persons?
>
> (2) On a proper construction of Articles 2 and 3 of Directive 2000/78, does a statement expressing a negative opinion with regard to homosexuals, whereby, in an interview given during a radio entertainment programme, the interviewee stated that he would never appoint an LGBTI person to his law firm, nor wish to use the services of such persons, fall within the scope of the anti-discrimination rules laid down in that directive, even if that statement does not relate to any current or planned recruitment procedure by the interviewee?'

27. Written observations were submitted by NH, the Associazione, the Greek and Italian Governments and the European Commission. At the hearing on 15 July 2019, NH, the Associazione, the Italian Government and the European Commission made oral submissions.

Assessment

Preliminary observations

28. The facts at the origin of the present case are not in contention. NH did say, on a radio interview, that he would not hire a homosexual person to work in his law firm and would not wish to use the services of such persons. The case turns on the legal qualification of those facts. Do they constitute discrimination in relation to employment within the meaning of Directive 2000/78? And if they do, is the Associazione allowed to bring proceedings against NH, in the absence of an identifiable victim?

29. It is thus first necessary to ascertain whether the situation at issue in the main proceedings falls within the scope of Directive 2000/78, and then to examine whether the Associazione has standing to bring proceedings to enforce the provisions of that directive. That is the order in which I shall deal with the preliminary questions (thus reversing the order in which they appear in the order for reference).

30. According to the Court's settled case-law, it is clear from the title of, and preamble to, Directive 2000/78, as well as from its content and purpose, that it is intended to establish a *general framework* for ensuring that everyone benefits from equal treatment 'in matters of employment and occupation' by providing effective protection against discrimination based on any of the grounds listed in Article 1 thereof, which include sexual orientation. (7)

31. The directive also aims to create a level playing field within the European Union as regards equality in employment and occupation. (8) However, the protection offered by the directive is to be considered as a minimum — thus, Member States are free to introduce or to maintain more favourable provisions. (9) Directive 2000/78 offers protection at two different levels: the substantive level, by prohibiting direct and indirect discrimination on the grounds of, inter alia, sexual orientation; and the level of enforcement, by providing a minimum standard for remedies that Member States must ensure are available in cases of discrimination.

Question 2

32. Question 2 addresses the scope of Directive 2000/78. Does a statement made during a radio programme in which the interviewee said plainly and unequivocally that he would never hire a homosexual person to work in his law firm, nor wish to use the services of such persons, fall within the scope of that directive, even if that statement does not relate to any current or planned recruitment procedure?

33. The assessment of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice. (10) That said, it seems to me that *if* Directive 2000/78 applies, the facts of this case as presented to the Court are such as to amount to direct discrimination. It is evident that a homosexual person seeking employment in NH's law firm would be treated less favourably — that is, would not be hired — on the ground of his sexual orientation than another person in a comparable situation. (11)

34. Do the facts described by the referring court fall within the material scope of Directive 2000/78? Are they covered by the rubric of 'employment and occupation', and more particularly by 'conditions for access to employment', as specified by Article 3(1)(a) of the directive?

The scope of Article 3(1)(a) of Directive 2000/78

35. The referring court expresses doubts as to whether there is a sufficient link between NH's statements during the radio interview and access to employment, since there was, at the time those statements were made, no current recruitment procedure or at least a vacancy notice at NH's law firm. It also observes that mere statements of opinion that do not present a minimum link with an employment procedure are protected by the freedom of expression.

36. NH submits that there was no current or planned recruitment procedure. There was thus no professional context. He was expressing his personal opinion as a simple citizen.

37. At the hearing, the Italian Government emphasised that the context in which the statements were made should be considered. The link with access to employment might differ, depending on whether the statements were made during a serious broadcast with the participation of employers and news journalists or during an irony-filled programme of political satire.

38. Is it possible to consider that statements such as those at the origin of the main proceedings, when no current recruitment procedure was open, fall within the scope of 'access to employment' under Article 3(1)(a) of Directive 2000/78?

39. That provision states that discrimination must be avoided in respect of 'selection criteria', 'recruitment conditions' and 'promotion'. It does not, however, define what is meant by 'access to employment'.

40. It follows from the need for EU law to be applied uniformly and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question. (12)

41. Directive 2000/78 is a specific expression, in the areas that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter. (13) The directive does not itself create the principle of equal treatment in employment and occupation. The source of the principle prohibiting those forms of discrimination is found, as is clear from recitals 3 and 4 in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States. (14) The aim of the directive is to put into effect in the Member States the principle of equal treatment by laying down a general framework for combating discrimination in employment and occupation with a view to guaranteeing equal opportunities for all to contribute to the full participation of citizens in economic, cultural and social life and to realising their potential. (15)

42. Given the objective of Directive 2000/78 and the nature of the rights it seeks to safeguard, its scope cannot be defined restrictively. (16) That conclusion also applies to the terms of the directive that define its substantive scope, such as employment, access, vocational guidance and training, working conditions, social protection and advantages. Equality of treatment in respect of access to employed or self-employed activities involves the elimination of *any discrimination* arising from *any provision which prevents access* of individuals to all forms of employment and occupation. (17) Employment and occupation are key elements in guaranteeing equal opportunities for all. (18)

43. The term 'access' is defined as the 'means or opportunity to approach or enter a place'. (19) When it comes to 'access to employment' the term encompasses the conditions, criteria, means, way to get employed work. If an employer chooses not to hire certain persons because of their (perceived) sexual orientation, he establishes a (negative) discriminatory selection criterion for employment. Such a situation falls squarely within the scope of Directive 2000/78.

44. Access to employment and professional development are, as my colleague Advocate General Poiares Maduro put it, 'of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life'. (20)

45. Although it does not directly address the issue at stake here, the Court's case-law already offers some guidance as to what 'access to employment' means.

46. In sex discrimination cases the Court has given a wide meaning to 'access to employment'. Thus, it has stated that 'not only the conditions obtaining before an employment relationship comes into being … are involved in the concept of access to employment' but also factors which influence a person's decision as to whether or not to accept a job offer. (21)

47. In *Feryn*, a case concerning the interpretation of Directive 2000/43, the company's director made public statements that his undertaking was looking to recruit door fitters, but that it could not employ 'immigrants' because its customers were reluctant to give them access to their private residences to carry out the work. The

Court held that 'statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy'. The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment, which is not dependant on identifying a specific complainant claiming to have been the victim. (22)

48. Closer to the present situation is *Asociaţia Accept*, which — as here — concerned the interpretation of Directive 2000/78. In that case, an important shareholder in FC Steaua who had acted as the club's 'banker' stated, during an interview to the mass media concerning the potential transfer of professional footballer X, that he would not accept a homosexual in the team. The football club had not started any negotiations with a view to recruiting player X, who was presented as homosexual. However, the football club did not recruit that player, presumably because of his sexual orientation. (23)

49. The Court held that it might be presumed from facts such as those of the main proceedings that there has been discrimination within the meaning of Directive 2000/78. It was irrelevant that 'the system of recruitment of professional footballers is not based on a public tender or direct negotiation following a selection procedure requiring the submission of applications and pre-selection of players having regard to their interest for the employer'. Moreover, 'a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters'. The fact that such an employer 'might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts'. The perception of the protected groups concerned may also be relevant for the overall assessment of the statements at issue. Further, the fact that a professional football club might not have started any negotiations with a view to recruiting a player presented as being homosexual 'does not preclude the possibility of establishing facts from which it may be inferred that that club has been guilty of discrimination'. (24)

50. I therefore derive the following principles concerning the scope of 'access to employment' in Article 3(1)(a) of Directive 2000/78: (i) that concept must be given an autonomous and uniform interpretation throughout the European Union; (ii) given the objective of Directive 2000/78 and the nature of the rights it seeks to safeguard, the scope of that concept cannot be defined restrictively; (iii) public declarations that persons belonging to a protected group will not be recruited are clearly likely to dissuade certain candidates from submitting their candidature and to hinder their access to the labour market; (iv) the specific method of recruitment is irrelevant (whether or not there has been a call for applications, a selection procedure etc.); (v) provided that the person making the discriminatory statements regarding the selection criteria may reasonably be regarded as having an influence on the potential employer, it is likewise irrelevant that that person is not legally capable of binding the actual employer in recruitment matters; (vi) the fact that the employer may not have started any negotiations with a view to recruiting a person presented as being a member of a protected group does not preclude the possibility of establishing discrimination; and (vii) a finding of discrimination is not dependent on identifying a complainant. Other relevant factors that may be considered are whether the actual employer clearly distanced itself from the statements and the perception of the protected groups concerned.

51. Against that background, how close does the link with an actual recruitment procedure have to be for discriminatory statements such as those in the main proceedings to fall within the scope of Directive 2000/78?

52. It seems to me that a purely hypothetical link is not enough. Thus, for example, suppose a person were to proclaim, 'If I were a lawyer, I would never hire an LGBTI person for my law firm'. If the person making the statement is an architect rather than a lawyer and does not work in a law firm in any capacity, the statement, regrettable as it might be, has no actual link with access to employment. The same would follow if someone who has no garden and no prospect of acquiring one stated that he would never employ an LGBTI gardener. The examples may be multiplied. Depending on how they are constructed, the link between the discriminatory statement and potential access to employment will be closer or more remote.

53. However, the principles that I have distilled from the Court's case-law make it possible to derive a (non-exhaustive) list of criteria to establish when discriminatory statements present a sufficient link with access to employment to fall within the scope of Directive 2000/78.

54. Thus, the *status and capacity of the person making the statements* have to be examined. That person has to be either an actual potential employer or someone who, *de jure* or de facto, is able to exert a significant influence on the potential employer's recruitment policy or, at least, can reasonably be perceived as being able to exert such influence, even though he cannot legally bind the employer in recruitment matters.

55. The *nature and content of the statements made* must also be taken into account. They must concern employment within the area of activity of the potential employer or the person making them — an area, therefore, in which that person is likely to recruit. Such statements must establish the employer's intention to discriminate against members of the protected group. They must also be of such a nature as to dissuade persons belonging to the protected group from applying if and when a vacancy with that potential employer becomes available. In that connection, it seems to me that there should be a *rebuttable presumption* that, sooner or later, the potential employer will wish to recruit and that, when he does so, he will apply the discriminatory criterion that he has announced publicly forms part of his recruitment policy. The burden of rebutting that presumption in any particular case of recruitment would then fall on the potential employer. (25)

56. The *context in which the statements were made* is also relevant. Were they private remarks (uttered, for example, over dinner with the speaker's partner), or statements made in public (or, even worse, live on air and then reproduced via social media)? That said, I reject emphatically the proposition that a 'humorous' discriminatory statement somehow 'does not count' or is acceptable. Humour is a powerful instrument and can all too easily be abused. One can easily imagine the chilling effect of homophobic 'jokes' made by a potential employer in the presence of LGBTI applicants.

57. Last, it is important to consider the extent to which the nature, content and context of the statements made *may discourage persons belonging to the protected group from applying* for employment with that employer. As Advocate General Poiares Maduro cogently explained in *Feryn*, 'in any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired. Therefore, a public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical. To ignore that as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue'. (26)

58. The information presented to the Court indicates that NH is a senior lawyer and that the statements he made referred to his own law firm. He clearly formulated a (negative) recruitment criterion that would discriminate against homosexual potential applicants. His statements were made publicly on the radio. They have been widely diffused — indeed, the Italian Government stated at the hearing that they may readily be found on the Internet. The statements were likely to deter homosexual potential applicants from seeking employment as lawyers or support staff with that law firm.

59. I conclude that statements such as those made in the main proceedings are *capable* of falling within the scope of Article 3(1)(a) of Directive 2000/78. It is for the referring court to establish and assess the relevant facts in greater detail as necessary to arrive at a concluded view. (27)

The interference with freedom of expression

60. The referring court wonders whether NH's statements could be protected by freedom of expression, whilst stating that legislation against discrimination in employment and occupation cannot be considered as interfering with that freedom.

61. Freedom of expression, the right to work and the principle of non-discrimination are all fundamental rights recognised by the Charter (in Articles 11(1), 15(1) and 21(1) respectively). Freedom of expression constitutes one of the essential foundations of a democratic society. As a principle, it applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. (28) Freedom of expression is, however, subject to limitations. (29)

62. In my view, by enacting Directive 2000/78 the EU legislature has expressed a clear choice. Statements that are discriminatory and that fall within the scope of Directive 2000/78 may not be exonerated by invoking freedom of expression. Thus, an *employer* cannot declare that he would not hire LGBTI persons, or disabled persons, or Christians, or Muslims, or Jews, and then invoke freedom of expression as a defence. In making such a statement, he is not exercising his right to freedom of expression. He is enunciating a discriminatory recruitment policy.

63. Was the EU legislature's choice a permissible choice?

64. Article 52(1) of the Charter permits limitations on the exercise of the rights and freedoms laid down therein, on condition that any such limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. (30)

65. Those conditions are met here.

66. First, the limitation to the freedom of expression is provided by law, namely by Directive 2000/78.

67. Second, as the Greek Government submitted in its written observations, the limitations to the freedom of expression deriving from Directive 2000/78 can be justified by reference to the objectives of the directive, namely equal treatment in employment and occupation and the attainment of a high level of employment and social protection; and the limitations are necessary to attain those objectives. Equal treatment in employment and occupation, which is an expression of the fundamental right to be protected against discrimination, is an objective of general interest recognised by the European Union.

68. Third, although the attainment of the objectives of the directive may interfere with freedom of expression, the interference is not such as to affect adversely the essence of that right. Directive 2000/78 only precludes the expression of discriminatory opinions in a limited context, namely that of employment and occupation.

69. Fourth, the principle of proportionality is respected. The scope of Directive 2000/78 is defined by Articles 1 (which lists the grounds of discrimination that are prohibited) and 3 (which defines the directive's personal and material scope). The only statements that are prohibited are those that constitute discrimination *in employment and occupation*. That interference with freedom of expression does not go beyond what is necessary and appropriate to attain the directive's objectives. (31)

70. That interpretation is in line with the case-law of the Strasbourg court. (32) Since the exercise of freedom of expression 'carries with it duties and responsibilities', Article 10(2) of the ECHR authorises interferences 'for the protection of the reputation or rights of others' as long as they are 'prescribed by law' and are 'necessary in a democratic society'. In *Vejdeland and Others* v. *Sweden*, a group of persons were convicted for distributing leaflets in a school expressing contempt for homosexuals. The Strasbourg court found that the interference with the freedom of expression guaranteed by Article 10(1) of the ECHR was justified under Article 10(2) thereof. The Strasbourg court stressed there that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour. It endorsed the conclusion of the Supreme Court of Sweden, which acknowledged 'the applicants' right to express their ideas while at the same time stressing that along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights [and] found that the statements in the leaflets had been unnecessarily offensive'. (33)

71. I therefore consider that the prohibition, under Directive 2000/78, of statements which amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.

The possibility of derogating from Directive 2000/78

72. I have indicated that in my view the statements made by NH in the radio programme amount to direct discrimination on grounds of sexual orientation. (34) As such, they are statements of a kind that is prohibited under Article 2(1)(a) of Directive 2000/78. The only derogations possible in the case of direct discrimination are occupational requirements (Article 4), justifications of differences of treatment on grounds of age (Article 6), positive action (Article 7) and measures necessary for, *inter alia*, the protection of the rights and freedoms of others (Article 2(5)).

73. None of the parties has submitted that the derogations contained in Articles 4, 6 or 7 could be applicable and they seem to me plainly to be irrelevant. Since Article 2(5) was discussed at the hearing, I shall examine it briefly.

74. The Court has held that 'in adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of Directive 2000/78, the principles established by the directive do not apply to measures incorporating differences in treatment on one of the grounds referred to in Article 1 of the directive, on condition, however, that those measures are 'necessary' for the attainment of the abovementioned objectives'. (35) As an exception to the principle of the prohibition of discrimination, Article 2(5) must be interpreted strictly. (36)

75. In my view, the Article 2(5) derogation cannot apply here. First, no relevant national legislation has been identified that would give effect to that derogation. Second, even if (*quod non*) such legislation existed, I cannot see how permitting discriminatory statements which impede access to employment could conceivably be construed as being 'necessary' for 'the protection of individual rights and freedoms *which are necessary for the functioning of a democratic society*'. (37)

76. It follows that none of the possible derogations from the prohibition of direct discrimination provided by Directive 2000/78 are applicable here.

77. In the light of all the foregoing, I conclude that remarks made by an interviewee during a radio programme stating that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons are capable of falling within the scope of Directive 2000/78, as being likely to hinder access to employment. When those statements are not made in the context of a current recruitment procedure, it is for the national court to assess whether the link with access to employment is not hypothetical, in the light of the status and capacity of the person who made the statements, the nature, content and context of the statements, as well as in the extent to which such statements may discourage persons belonging to the protected group from applying for employment with that employer. The prohibition, under Article 2 and 3 of Directive 2000/78, of statements that amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.

Question 1

78. The Associazione, it will be recalled, is an association of lawyers which according to its statutes aims 'to contribute to the development and dissemination of the culture and respect for the rights of [LGBTI] persons' and to create a network of lawyers to offer judicial protection to LGBTI persons and to take representative action on their behalf before national and international jurisdictions. By its first question, the referring court seeks to ascertain whether, under Article 9(2) of Directive 2000/78, such an association has automatic standing

to bring proceedings, including claims for damages, in circumstances of alleged discrimination on grounds of sexual orientation.

79. That question raises three issues. First, does an association have standing to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim? Second, are there specific criteria that an association has to fulfil in order to have standing and, if so, what are those criteria? Third, does the possibility for an association to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim also include bringing claims for damages?

Does an association have standing to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim?

80. Article 9 of Directive 2000/78 reaffirms the fundamental right to an effective remedy and provides that Member States must ensure that all persons who consider themselves wronged by discrimination are able to assert their rights. (38) That provision introduces the right to enforce rights under the directive not only for all persons who consider themselves wronged, but also, in accordance with Article 9(2), for associations with a legitimate interest which may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure.

81. That wording does not however mean that associations are necessarily precluded from acting in the absence of an identifiable complainant. It would be difficult to achieve the directive's objective of fostering conditions for the full participation of citizens in economic, cultural and social life if Directive 2000/78 only bit where an unsuccessful candidate for a post, considering himself to be the victim of (here) direct discrimination, brought legal proceedings against the employer. (39)

82. Article 8(1) of Directive 2000/78 on 'minimum requirements' introduces a 'non-regression' provision in respect of Member States which have or wish to adopt legislation providing for a higher level of protection than that guaranteed by the directive. (40) It provides that the implementation of the directive may under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the areas covered by the directive. (41)

83. The Court has already read Article 8(1) in conjunction with Article 9(2) in order to conclude that Directive 2000/78 in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant. (42) Thus, in *Asociaţia Accept* the Court held that a non-governmental organisation, whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights, can bring an action seeking, inter alia, the imposition of a fine on a football club and one of its shareholders on the grounds that a professional footballer was not hired because he was presumed to be homosexual.

84. That approach is in line with a general trend in the Court's case-law. Indeed, the same solution was adopted in *Feryn*. There, a Belgian body designated, pursuant to Article 13 of Directive 2000/43, to promote equal treatment, applied to the Belgian labour courts for a finding that Feryn applied a discriminatory recruitment policy. The Court found, based first, on the fact that the existence of direct discrimination is not dependent on the identification of a complainant who claims to have been the victim and, second, on the fact that Directive 2000/43 contains a 'minimum requirements' provision (similar to Article 8(1) of Directive 2000/78), that that directive in no way precludes Member States from recognising the right for associations with legitimate interest to ensure compliance with the directive and bring proceedings without acting in the name of a specific complainant or in the absence of an identifiable victim. (43)

85. It follows from Articles 9(2) and 8(1) of Directive 2000/78, as interpreted by the Court's case-law, that Member States are not precluded from granting additional possibilities for legal enforcement. It seems to me – but that is a matter solely for the national court to assess – that this is what Article 5(2) of Legislative Decree No 216/2003 does when it expressly recognises 'standing in cases of collective discrimination where it is not

automatically and immediately possible to identify individuals affected by the discrimination' for the associations it defines in its first paragraph.

Are there specific criteria that an association has to fulfil in order to have standing and, if so, what are those criteria?

86. The order for reference explains that standing for associations in discrimination cases falling within the scope of Directive 2000/78 is governed in Italy by Article 5(1) of Legislative Decree No 216/2003, which affords standing to 'trade unions, associations and organisations representing the rights or interests affected'. The referring court explains that the national legislator has not established any additional criteria in that respect, contrary to the position for associations active in other areas. Thus, the legitimate interest of the association to act must be verified on a case by case basis.

87. NH submits that the Associazione cannot be deemed to represent the interests of LGBTI persons and that it therefore does not have standing to act in the present case. The Associazione is a grouping of around 100 lawyers who are not themselves LGBTI persons. Its aim is to promote the rights and culture of LGBTI persons and to ensure their legal representation. The non-profit character of that association is not certain.

88. Under Article 9(2) of Directive 2000/78, the only requirement for an association to have standing is that it should have a legitimate interest in ensuring that the provisions of the directive are complied with.

89. In *Asociaţia Accept*, the Court examined Article 9(2) of Directive 2000/78 in the light of Article 8(1) thereof and concluded that that provision 'in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant'. (44) That dictum also marks the dividing line between the *locus standi* recognised to associations for the enforcement of obligations under the directive and an *actio popularis*.

90. The directive expressly cross-refers here to national law. Thus, where there is no complainant or identifiable victim, the standing of associations to act is *not* governed by EU law. (45) However, the substantive rights and obligations that they will be seeking to enforce do indeed derive from Directive 2000/78.

91. In that respect, the present case is different from *Julián Hernández and Others*. (46) The Court was there considering Article 11(1) of Directive 2008/94, (47) which states that that directive 'shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'. The Court held that that provision does not grant the Member States an option of legislating by virtue of EU law, but merely recognises the power which the Member States enjoy under national law to provide for such more favourable provisions *outside* the framework of the regime established by that directive. (48) Thus, a provision of national law which merely granted employees more favourable protection resulting from the exercise of the exclusive competence of the Member States (as confirmed by Article 11(1) of Directive 2008/94), could not be regarded as coming within the scope of that directive. (49)

92. By contrast, in the present case the national legislation at issue provides for a procedural right (*locus standi*) in order to enforce substantive rights that derive from EU law (protection from discrimination). That constellation triggers application of the principle of procedural autonomy together with its corollaries, the principles of equivalence and of effectiveness.

93. In accordance with settled case-law, in the absence of EU rules 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 rights which individuals derive from EU law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness). (50)

94. The *principle of equivalence* requires that the national rule in question must be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar. In order to establish whether the principle of equivalence has been complied with here, it will be for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of employment law, to consider both the purpose and the essential characteristics of allegedly similar domestic actions. (51)

95. As regards the *principle of effectiveness*, the Court has held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure. (52)

96. It follows from all the above that: (i) the definition of associations with a legitimate interest is a question for national law; (ii) those associations enforce rights and obligations deriving from EU law; (iii) therefore the principles of equivalence and effectiveness have to be respected. National courts are alone competent to assess those aspects.

97. In order to conduct its assessment, the referring court asks for guidance as to whether the aims of the Associazione (as recalled at point 78 above) correspond to those of an association having a legitimate interest to enforce the rights and obligations deriving from Directive 2000/78.

98. Subject to verification of the facts by the referring court in the light of the applicable national legislation, it seems to me that an association with such objectives is precisely the kind of association that will have a legitimate interest in bringing proceedings in such circumstances. It is also the kind of association to which a victim of discrimination on the grounds of sexual orientation would naturally turn, should they decide to bring proceedings in a particular case.

99. In that respect, NH's arguments concerning the number of members of the Associazione, the fact that they are lawyers and trainee lawyers and the fact that they are not themselves LGBTI persons are completely irrelevant. One does not require, of a public interest association dedicated to protecting wild birds and their habitats, that all its members should have wings, beaks and feathers. There are many excellent advocates within the LGBTI community, who can and do speak eloquently in defence of LGBTI rights. That does not mean that others who are not part of that community – including lawyers and trainee lawyers motivated simply by altruism and a sense of justice – cannot join such an association and participate in its work without putting at risk its standing to bring actions. Accepting NH's arguments would undermine a valuable aid to ensuring adequate judicial protection and would jeopardise the *effet utile* of the directive. (53)

100. The referring court also asks whether an association with legitimate interest has to be non-profit making, in particular in the light of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law. (54)

101. According to the Court's settled case-law, even if recommendations are not intended to produce binding effects, national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions. (55)

102. However, the requirement mentioned in point 4(a) of the recommendation that an association be of a non-profit-making character in order to bring representative actions applies where Member States *designate* representative entities to bring actions. The referring court states that that is not the case in Italy, where the legislator has not designated any such associations to enforce the rights deriving from Directive 2000/78.

103. In its written observations, the Greek Government draws attention to the (possible) risk that a *profit-making* association might abuse the right to bring proceedings in order to enhance its profits, arguing that that would jeopardise the attainment of the objectives of the directive. The most obvious response is that, given the uncertainty inherent in litigation (and perhaps particularly in litigation involving discrimination claims), a trigger-happy approach to launching actions would itself be a risky strategy for a commercially minded association to adopt. Beyond that, it is for the national court to verify *if necessary* that the Associazione is complying with its stated objectives to protect the interests of the persons in question and with its statutes as regards its status. (56)

104. I conclude that it is for national law to define the criteria that must be satisfied in order for an association to have a legitimate interest to bring actions to enforce the rights and obligations stemming from Directive 2000/78, subject to the principles of equivalence and effectiveness.

Does the possibility for associations to bring proceedings to enforce obligations under Directive 2000/78 in the absence of an identifiable victim also include bringing claims for damages?

105. Article 17 of Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions for breaches of national provisions adopted pursuant to that directive. It specifies that those sanctions must be effective, proportionate and dissuasive and that they may comprise the payment of compensation to the victim.

106. Article 17 thus requires Member States to ensure that their national legal systems contain the necessary legal tools to achieve the aim of that directive, so that judicial protection of the rights granted thereunder will be real and effective. It does not, however, prescribe a specific sanction, leaving Member States free to choose between the different solutions suitable for achieving its objective, subject to the principles of equivalence and effectiveness (see points 89 to 93 above).

107. The Court has explained that 'the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must … be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim'. (57) They must 'in particular ensure, in parallel with measures taken to implement Article 9 of that directive, real and effective legal protection of the rights deriving from it … The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect … while respecting the general principle of proportionality'. (58) In any event, 'a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78'. (59)

108. The Court's ruling in *Feryn*, made in the context of Directive 2000/43, provides guidance which is equally pertinent and appropriate in the context of Directive 2000/78: '… where there is no direct victim of discrimination but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the sanctions which Article 15 of Directive 2000/43 requires to be laid down in national law must also be effective, proportionate and dissuasive. If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings'. (60)

109. It follows that: (i) an association empowered by national law to bring proceedings in order to enforce rights and obligations under Directive 2000/78 may ask for discriminatory conduct to be sanctioned; (ii) that applies whether or not there is an identifiable victim; (iii) Directive 2000/78 does not prescribe specific sanctions but leaves the matter to national law; (iv) the sanctions available under national law must be effective, proportionate and dissuasive; and (v) they may take the form of an award of damages. The types of damages available will again be a matter of national law. I see no reason of principle why such damages could not comprise both material and non-material damages, including moral damages.

110. I therefore conclude that Articles 8(1) and 9(2) of Directive 2000/78 permit national legislation giving associations with a legitimate interest standing to bring proceedings for the enforcement of obligations under Directive 2000/78/EC in the absence of an identifiable victim. It is for national law to lay down the criteria to determine whether an association has such a legitimate interest, subject to the principles of equivalence and effectiveness. An association that has a legitimate interest in bringing proceedings may ask for discriminatory conduct to be sanctioned in an effective, proportionate and dissuasive manner, including by an award of damages, under the conditions laid down by national law.

Conclusion

111. I therefore propose that the Court should reply to the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

– Remarks made by an interviewee during a radio programme stating that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons are capable of falling within the scope of Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as being likely to hinder access to employment.

– When those statements are not made in the context of a current recruitment procedure, it is for the national court to assess whether the link with access to employment is not hypothetical, in the light of the status and capacity of the person who made the statements, the nature, content and context of the statements, as well as the extent to which such statements might discourage persons belonging to the protected group from applying for employment with that employer.

– The prohibition, under Article 2 and 3 of Directive 2000/78, of statements that amount to direct discrimination in relation to access to employment cannot be considered to be an interference with freedom of expression such as to violate rights guaranteed by Article 11(1) of the Charter.

– Articles 8(1) and 9(2) of Directive 2000/78 permit national legislation giving associations with a legitimate interest standing to bring proceedings for the enforcement of obligations under Directive 2000/78 in the absence of an identifiable victim. It is for national law to lay down the criteria to determine whether an association has such a legitimate interest, subject to the principles of equivalence and effectiveness.

– An association that has a legitimate interest in bringing proceedings may ask for discriminatory conduct to be sanctioned in an effective, proportionate and dissuasive manner, including by an award of damages, under the conditions laid down by national law.

1 Original language: English.

2 The formula is used several times by Homer, both in the Iliad and in the Odyssey. See, for example, Iliad, Book 15, 145 and 157.

3 In that sense, the formula corresponds to the first part of the well-known Latin expression *verba volant, scripta manent*, underlying the importance of written texts.

4 OJ 2000 L 303, p. 16.

5 OJ 2007 C 303, p. 1.

6 'LGBTI' is an acronym commonly used for lesbian, gay, bisexual, transgender and intersex persons. See, inter alia, Council of the European Union, Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, Luxembourg, 24 June 2013. Those guidelines provide, in point 13, a working definition of the term, indicating that it is not, however, binding and that it has not formally been adopted by an intergovernmental body.

7 Judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, paragraph 40 and the case-law cited.

8 See recital 37 of Directive 2000/78 and judgment of 17 July 2008, *Coleman*, C-303/06, EU:C:2008:415, paragraph 47.

9 Recital 28.

10 See recital 15 and judgment of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275, paragraph 42.

11 See, by analogy, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 25. Since it is unclear from the remarks reported what NH's attitude would have been towards hiring a person who was bisexual, transsexual or intersex, 'another person' should here be taken as meaning 'a person whose apparent sexual orientation was heterosexual'. Whether a person's sexual orientation can be discerned from their appearance and whether questions asked during an interview would (or could, or should) elicit material from which that orientation can be deduced are issues that do not form part of this case and I shall not address them further.

12 See, inter alia, judgment of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456, paragraph 40 and the case-law cited.

13 See judgment of 17 April 2018, Egenberger, C-414/16, EU:C:2018:257, paragraph 47.

14 Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 74.

15 Recital 9 and Article 1 of Directive 2000/78.

16 See, by analogy, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 42 and the case-law cited. That judgment concerned Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22). The scope of Directive 2000/43 is different from that of Directive 2000/78, since the former concerns discrimination in a wide range of areas, as defined in its Article 3(1)(a) to (h), whereas the latter only covers discrimination relating to occupation and employment, as defined in its Article 3(1) (a) to (d). That said, the Court has already referred to its case-law under Directive 2000/43 to draw useful inspiration for interpreting Directive 2000/78: see, for example, the judgment of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275.

17 See the explanation of Article 3 defining the scope of the directive in the Explanatory Memorandum to the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation, OJ 2000 C 177 E, p. 42 ('the Explanatory Memorandum to the Proposal for a Directive'), emphasis added.

18 Recital 9.

19 That definition of 'access' is to be found in the *Oxford English Dictionary*. The *Collins English Dictionary* offers 'the act of approaching or entering', 'the condition of allowing entry', 'the right or privilege to approach, reach, enter, or make use of something' and 'the way or means of approach or entry'.

20 Opinion in *Coleman*, C-303/06, EU:C:2008:61, point 11.

21 See, to that effect, judgment of 13 July 1995, *Meyers*, C-116/94, EU:C:1995:247, paragraph 22. See also Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, Oxford University Press, 2012, p. 287.

22 Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 15, 16, 25 and 31.

23 Judgment of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275, paragraphs 24, 25 and 52. The fact that the football club had not started any negotiations with a view to recruiting player X appears indirectly from paragraph 52 of the judgment.

24 Judgment of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:2013:275, paragraphs 45 and 49 to 52. I note that the Court decided to dispense with an Advocate General's Opinion when dealing with that case.

25 That approach to the burden of proof is in my view consistent with Article 10 of Directive 2000/78, which provides that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

26 Opinion of Advocate General Poiares Maduro, C-54/07, EU:C:2008:155, point 15.

27 See point 33 above. Since the reference comes from a national supreme court in a cassation procedure, it may be necessary for the case to be remitted back to the first instance court to make further findings of fact.

28 Judgment of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 39.

29 See the wording of Article 10 ECHR; see also judgment of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 40.

30 See, inter alia, judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 38. The wording of Article 52(1) is largely inspired by previous case-law of the Court (see, inter alia, judgment of 13 April 2000, *Karlsson and Others*, C-292/97, EU:C:2000:202, paragraph 45) which, in turn, draws on the case-law of the European Court of Human Rights

('the Strasbourg court'). See Lenaerts, K., 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, 2012, 8(3), 375-403.

31 See by analogy, for an analysis of those factors, judgment of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 34 et seq.

32 Article 52(3) of the Charter provides that in so far as the rights it protects correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by that convention. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the Strasbourg court and by this Court. See the Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17.

33 ECtHR, 9 February 2012, *Vejdeland and Others v. Sweden*, CE:ECHR:2012:0209JUD000181307, § 47 to 60.

34 See point 33 above.

35 Judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 55.

36 Judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraphs 54 and 55.

37 See, by analogy, my Opinion in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553, points 104 and 105 (emphasis added).

38 Judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 61.

39 See recital 9 of Directive 2000/78 and, by analogy, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 24.

40 See recital 28 of the directive and the Explanatory Memorandum to the Proposal for a Directive.

41 Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 43.

42 Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 24, 30, 36 and 37.

43 Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 15 to 17 and 25 to 28.

44 Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 37.

45 Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 24, but concerning the particular issue of time limits under Article 9(3) of Directive 2000/78.

46 Judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055.

47 Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

48 At paragraphs 44 and 45 of the judgment.

49 The purpose of the national legislation at issue in that case was *not* to recognise an employee's claim against his employer resulting from his employment relationship (to which Directive 2008/94 is capable of applying by virtue of Article 1(1) thereof), but to recognise *a right of a separate nature*, namely, the right of the employer to request from the Spanish State compensation for the loss suffered as a result of 'irregularities' in the administration of justice: see paragraph 39 of the judgment.

50 Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 25.

51 Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraphs 26 and 28.

52 Judgment of 8 July 2010, *Bulicke*, C-246/09, EU:C:2010:418, paragraph 35.

53 The extensive case-law of this Court on *locus standi* for non-governmental associations in environmental actions (and the specific provisions of the Aarhus Convention granting such organisations standing), provide a useful parallel in this regard. See, inter alia, judgments of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 34 et seq. and of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, C-263/08, EU:C:2009:631.

54 OJ 2013 L 201, p. 60.

55 Judgment of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraph 41.

56 There is no material before the Court as to how the Associazione is funded or as to the amount(s) (if any) that it has obtained for itself (as distinct from the amount(s) obtained on behalf of LBGTI clients for whom it was acting) as a result of successful actions.

57 Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 62. See also, in respect of the parallel provision in Article 15 of Directive 2000/43, judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 40.

58 Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 63 and the case-law cited.

59 Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 64.

60 Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 38 and 39.

Judgment of the Court (Grand Chamber) of 23 April 2020
NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford

Request for a preliminary ruling from the Corte suprema di cassazione

Reference for a preliminary ruling — Equal treatment in employment and occupation — Directive 2000/78/EC — Article 3(1)(a), Article 8(1) and Article 9(2) — Prohibition of discrimination based on sexual orientation — Conditions for access to employment or to occupation — Concept — Public statements ruling out recruitment of homosexual persons — Article 11(1), Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union — Defence of rights — Sanctions — Legal entity representing a collective interest — Standing to bring proceedings without acting in the name of a specific complainant or in the absence of an injured party — Right to damages

Case C-507/18

JUDGMENT OF THE COURT (Grand Chamber)

23 April 2020 (*)

(Reference for a preliminary ruling — Equal treatment in employment and occupation — Directive 2000/78/EC — Article 3(1)(a), Article 8(1) and Article 9(2) — Prohibition of discrimination based on sexual orientation — Conditions for access to employment or to occupation — Concept — Public statements ruling out recruitment of homosexual persons — Article 11(1), Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union — Defence of rights — Sanctions — Legal entity representing a collective interest — Standing to bring proceedings without acting in the name of a specific complainant or in the absence of an injured party — Right to damages)

In Case C-507/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 30 May 2018, received at the Court on 2 August 2018, in the proceedings

NH

v

Associazione Avvocatura per i diritti LGBTI — Rete Lenford,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan, P.G. Xuereb and I. Jarukaitis (Rapporteur), Presidents of Chambers, J. Malenovský, L. Bay Larsen, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges,

Advocate General: E. Sharpston,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 15 July 2019,

after considering the observations submitted on behalf of:

– NH, by C. Taormina and G. Taormina, avvocati,

– Associazione Avvocatura per i diritti LGBTI — Rete Lenford, by A. Guariso, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. De Socio, avvocato dello Stato,

– the Greek Government, by E.-M. Mamouna, acting as Agent,

– the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 October 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 3 and 9 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between NH and the Associazione Avvocatura per i diritti LGBTI — Rete Lenford ('the Associazione') concerning statements made by NH in a radio programme to the effect that he would not wish to work with homosexual persons in his law firm.

Legal context

European Union law

The Charter

3 Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter') is headed 'Freedom of expression and information' and provides, in paragraph 1:

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

4 Article 15 of the Charter, headed 'Freedom to choose an occupation and right to engage in work', provides, in paragraph 1:

'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.'

5 Article 21 of the Charter, relating to non-discrimination, states in paragraph 1:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

Directive 2000/78

6 Recitals 9, 11, 12 and 28 of Directive 2000/78 state:

‘(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on … sexual orientation may undermine the achievement of the objectives of the [FEU] Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on … sexual orientation as regards the areas covered by this Directive should be prohibited throughout the [Union]. …

…

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. …’

7 Article 1 of Directive 2000/78 provides:

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

8 Article 2 of the directive, headed ‘Concept of discrimination’, provides:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …

…’

9 Article 3 of Directive 2000/78 defines the scope of that directive. According to Article 3(1)(a):

‘Within the limits of the areas of competence conferred on the [Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion’.

10 Article 8 of Directive 2000/78, headed 'Minimum requirements', provides, in paragraph 1:

'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.'

11 Article 9 of that directive falls within Chapter II, relating to remedies and enforcement. Under the heading 'Defence of rights', that article provides, in paragraph 2:

'Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.'

12 Article 17 of Directive 2000/78, headed 'Sanctions', provides:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …'

Italian law

13 Decreto legislativo n. 216 — Attuazione della direttiva 2000/78 per la parità di trattamento in materia di occupazione e di condizioni di lavoro (Legislative Decree No 216 implementing Directive 2000/78 for equal treatment in employment and occupation) of 9 July 2003 (GURI No 187, of 13 August 2003, p. 4), as applicable to the dispute in the main proceedings ('Legislative Decree No 216'), provides, in Article 2(1)(a):

'For the purposes of this Decree …, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on the grounds of religion, belief, disability, age or sexual orientation. This principle means that direct or indirect discrimination, as defined below, shall be prohibited:

(a) direct discrimination [shall be taken to occur where] one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion, belief, disability, age or sexual orientation'.

14 Article 3(1)(a) of that legislative decree is worded as follows:

'The principle of equal treatment without distinction on grounds of religion, belief, disability, age or sexual orientation shall apply to all persons as regards both the public and private sectors and shall be entitled to judicial protection, in accordance with the formal requirements laid down by Article 4, with specific reference to the following areas:

(a) access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions'.

15 Article 5 of Legislative Decree No 216 provides:

'1. Trade unions, associations and organisations representing the rights or interests affected under a mandate given by a public or certified private instrument, failing which the mandate shall be void, shall have standing to bring proceedings under Article 4 in the name and on behalf of, or in support of, the person subject to the discrimination, against the natural or legal person responsible for the discriminatory behaviour or act.

2. The persons referred to in paragraph 1 shall also have standing in cases of collective discrimination where it is not automatically and immediately possible to identify individuals affected by the discrimination.'

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

16 It is apparent from the file submitted to the Court that NH is a lawyer and that the Associazione is an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons (LGBTI) in court proceedings.

17 Taking the view that NH had made remarks constituting conduct that was discriminatory on the ground of workers' sexual orientation, contrary to Article 2(1)(a) of Legislative Decree No 216, the Associazione brought proceedings against NH before the Tribunale di Bergamo (District Court, Bergamo, Italy).

18 By order of 6 August 2014, that court, sitting as an employment tribunal, ruled NH's conduct to be unlawful in so far as it was directly discriminatory, NH having stated, in an interview given during a radio programme, that he would not wish to recruit homosexual persons to his law firm nor to use the services of such persons in his law firm. On that basis, the Tribunale di Bergamo (District Court, Bergamo) ordered NH to pay EUR 10 000 to the Associazione in damages and ordered extracts from that order to be published in a national daily newspaper.

19 By judgment of 23 January 2015, the Corte d'appello di Brescia (Court of Appeal, Brescia, Italy) dismissed NH's appeal against that order.

20 NH appealed in cassation against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), the referring court. In support of the appeal, NH alleges, inter alia, misapplication of Article 5 of Legislative Decree No 216 in so far as the appeal court recognised that the Associazione had standing, and infringement or misapplication of Article 2(1)(a) and of Article 3 of the legislative decree, on the grounds that he expressed an opinion with respect to the profession of lawyer in a situation where he was not presenting himself as an employer but as a private citizen, and that the statements at issue were not made in any concrete professional context.

21 The referring court notes that, in its judgment, the appeal court found, first, that 'in a conversation during a radio programme, [NH] made a series of statements gradually elicited by his interviewer … in support of his general aversion to a particular category of individuals that he would not wish to have around him in his firm … nor in the hypothetical choice of his co-workers' and, second, that there was no current or planned recruitment procedure at that time.

22 In that context, the referring court queries, in the first place, whether an association of lawyers, such as the Associazione, constitutes a representative entity for the purposes of Article 9(2) of Directive 2000/78. In that regard, it notes, in particular, that Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (OJ 2013 L 201, p. 60) and Communication COM(2013) 401 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards a European Horizontal Framework for Collective Redress', set out, among the relevant criteria for determining an entity's standing to bring a representative action, not only the link between the objective laid down by the statutes of the entity concerned and the rights which it is claimed have been infringed, but also the non-profit-making character of that entity.

23 In the present case, the standing of the Associazione was recognised by the appeal court in the light of the Associazione's statutes, according to which that association 'aims to contribute to the development

and dissemination of the culture and respect for the rights of [LGBTI] persons', 'by drawing the attention of the legal world', and 'manages the formation of a network of lawyers ...; [and also] fosters and promotes judicial protection and the taking of representative action before national and international jurisdictions'.

24 The referring court states that, under Italian law, where discrimination in matters of employment is directed against a category of persons rather than against an identified victim, Article 5(2) of Legislative Decree No 216 does recognise the entities mentioned in that provision as having standing, those entities being regarded as representing the interests of the injured parties collectively. Nevertheless, the referring court is doubtful as to whether an association of lawyers whose principal objective is to provide legal assistance to LGBTI persons can, merely because its statutes provide that it also aims to promote respect for the rights of those persons, be recognised as having standing to bring proceedings, including in respect of a claim for damages, against employment-related discrimination on the basis of its own direct interest.

25 In the second place, the referring court questions the limits imposed on the exercise of the freedom of expression by the legislation combating discrimination in matters of employment and occupation. It observes that the protection against discrimination afforded by Directive 2000/78 and Legislative Decree No 216 covers the creation, carrying on and termination of an employment relationship and thus affects economic activity. Those instruments appear to it however to be unrelated to the freedom of expression and do not seem to seek to limit that freedom. Furthermore, the application of those instruments would be subject to there being a real risk of discrimination.

26 Consequently, it questions whether, in order for a situation of access to employment falling within Directive 2000/78 and the national implementing legislation to be established, there must be at least an ongoing individual recruitment negotiation or public offer of employment, and whether, in the absence thereof, mere statements which do not have, at the very least, the characteristics of a public offer of employment are protected by the freedom of expression.

27 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 9 of Directive [2000/78] be interpreted as meaning that an association composed of lawyers specialised in the judicial protection of LGBTI persons, the statutes of which state that its objective is to promote LGBTI culture and respect for the rights of LGBTI persons, automatically, as a legal person having a collective interest and as a non-profit association, has standing to bring proceedings, including in respect of a claim for damages, in circumstances of alleged discrimination against LGBTI persons?

(2) On a proper construction of Articles 2 and 3 of Directive [2000/78], does a statement expressing a negative opinion with regard to homosexuals, whereby, in an interview given during a radio entertainment programme, the interviewee stated that he would never appoint an LGBTI person to his law firm nor wish to use the services of such persons, fall within the scope of the anti-discrimination rules laid down in that directive, even where no recruitment procedure has been opened, nor is planned, by the interviewee?'

Consideration of the questions referred

The second question

28 As a preliminary point it must be noted that, by its second question, which it is appropriate to examine first, the referring court refers both to Article 2 of Directive 2000/78, relating to the concept of discrimination, and to Article 3, relating to the scope of the directive. However, it is apparent from the request for a preliminary ruling that what is at issue in the main proceedings is not whether the statements made by NH fall within the concept of 'discrimination', as defined by the first of those provisions, but whether, having regard to the circumstances in which those statements were made, they fall within the material scope of the

directive in so far as it refers, in Article 3(1)(a), to 'conditions for access to employment … or to occupation, including selection criteria and recruitment conditions'.

29 Consequently, the Court considers that, by its second question, the referring court is asking, in essence, whether the concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Directive 2000/78 must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned.

30 Article 3(1)(a) of Directive 2000/78 provides that it is to apply, within the limits of the areas of competence conferred on the Union, to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

31 That directive does not refer to the law of the Member States for the purpose of defining 'conditions for access to employment … or to occupation', but it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union (see, to that effect, judgments of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 28, and of 26 March 2019, *SM (Child placed under Algerian kafala)*, C-129/18, EU:C:2019:248, paragraph 50).

32 In addition, in so far as that directive does not define the terms 'conditions for access to employment … or to occupation', they must be interpreted by reference to their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (see, to that effect, judgments of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19, and of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraph 65).

33 As regards the terms of Article 3(1)(a) of Directive 2000/78, it must be noted that the phrase 'conditions for access to employment … or to occupation' covers, in everyday language, circumstances or facts the existence of which must be established in order for a person to be able to secure particular employment or a particular occupation.

34 However, the terms of that provision do not by themselves enable a determination to be made as to whether statements made outwith any current or planned procedure to recruit a person to particular employment or to a particular occupation fall within the material scope of that directive. It is necessary, therefore, to consider the context of Article 3(1)(a) and the objectives of the directive.

35 In that regard, it must be noted that Directive 2000/78 was adopted on the basis of Article 13 EC, now, after amendment, Article 19(1) TFEU, which confers on the Union the power to take appropriate action to combat discrimination based, inter alia, on sexual orientation.

36 In accordance with Article 1 of Directive 2000/78, and as is clear from the title of, and preamble to, the directive, as well as from its content and purpose, the directive is intended to establish a general framework for combating discrimination on the grounds, inter alia, of sexual orientation as regards 'employment and occupation', with a view to putting into effect in the Member States the principle of equal treatment, by providing everyone with effective protection against discrimination based, in particular, on that ground (see, to that effect, judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, paragraph 40 and the case-law cited).

37 In particular, recital 9 of that directive emphasises that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential. In that respect also, recital 11 of the directive states that discrimination based inter alia on sexual orientation may undermine the achievement of the objectives of the FEU Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

38 Directive 2000/78 is thus a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 47).

39 In the light of that objective and having regard to the nature of the rights which Directive 2000/78 seeks to safeguard and to the fundamental values that underpin it, the concept of 'conditions for access to employment … or to occupation' within the meaning of Article 3(1)(a) of the directive, which defines the scope of that directive, cannot be interpreted restrictively (see, by analogy, judgments of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, paragraph 43, and of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 42).

40 Thus, the Court has already ruled that Directive 2000/78 is capable of applying in circumstances that involve, in employment and occupation, statements concerning 'conditions for access to employment … or to occupation, including … recruitment conditions', within the meaning of Article 3(1)(a) of Directive 2000/78. In particular, it has found that that concept may cover public statements made in relation to a particular recruitment policy even though the system of recruitment under consideration is not based on a public tender or direct negotiation following a selection procedure requiring the submission of applications and pre-selection of applicants having regard to their interest for the employer (see, to that effect, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 44 and 45).

41 It has also held that the mere fact that statements suggestive of a homophobic recruitment policy do not come from a person who has the legal capacity directly to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters is not necessarily a bar to such statements falling within that employer's conditions for access to employment or to occupation. In that regard, the Court has made clear that the fact that the employer did not clearly distance itself from the statements concerned, and the perception of the public or social groups concerned, are relevant factors which the court hearing the case may take into account in the context of an overall appraisal of the facts (see, to that effect, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 47 to 51).

42 Furthermore, the fact that no negotiation with a view to recruitment was under way when the statements concerned were made does not preclude the possibility of such statements falling within the material scope of Directive 2000/78.

43 It follows from those considerations that while certain circumstances, such as the non-existence of a current or planned recruitment procedure, are not decisive for the purposes of determining whether statements relate to a particular recruitment policy and, therefore, fall within the concept of 'conditions for access to employment … or to occupation' within the meaning of Article 3(1)(a) of Directive 2000/78, it is nevertheless necessary, in order for such statements to fall within the material scope of that directive, as defined in that provision, that they be capable in fact of being related to the recruitment policy of a given employer, which means that the link between those statements and the conditions for access to employment and to occupation with that employer must not be hypothetical. Whether such a link exists must be assessed by the national court hearing the case in the context of a comprehensive analysis of the circumstances characterising the statements concerned.

44 As regards the criteria to be taken into consideration to that end, it must be stated that, as the Advocate General also noted, in essence, in points 53 to 56 of her Opinion, the relevant criteria are, first, the status of the person making the statements being considered and the capacity in which he or she made them, which must establish either that he or she is a potential employer or is, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer, or, at the very least, may be perceived by the public or the social groups concerned as being capable of exerting such influence, even if he or she does not have the legal capacity to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters.

45 Also relevant, second, are the nature and content of the statements concerned. They must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer's intention to discriminate on the basis of one of the criteria laid down by Directive 2000/78.

46 Third, the context in which the statements at issue were made — in particular, their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks — must be taken into consideration.

47 That interpretation of Directive 2000/78 is not affected by the possible limitation to the exercise of freedom of expression, raised by the referring court, that it might entail.

48 It is true that freedom of expression, as an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU is based, constitutes a fundamental right guaranteed by Article 11 of the Charter (judgment of 6 September 2011, *Patriciello*, C-163/10, EU:C:2011:543, paragraph 31).

49 However, as is apparent from Article 52(1) of the Charter, freedom of expression is not an absolute right and its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. As the Advocate General has pointed out in points 65 to 69 of her Opinion, that is the case here.

50 The limitations to the exercise of the freedom of expression that may flow from Directive 2000/78 are indeed provided for by law, since they result directly from that directive.

51 Those limitations, moreover, respect the essence of the freedom of expression, since they are applied only for the purpose of attaining the objectives of Directive 2000/78, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection. They are thus justified by those objectives.

52 Such limitations also respect the principle of proportionality in so far as the prohibited grounds of discrimination are listed in Article 1 of Directive 2000/78, the material and personal scope of which is defined in Article 3 of that directive, and the interference with the exercise of freedom of expression does not go beyond what is necessary to attain the objectives of the directive, in that only statements that constitute discrimination in employment and occupation are prohibited.

53 Furthermore, the limitations to the exercise of freedom of expression arising from Directive 2000/78 are necessary to guarantee the rights in matters of employment and occupation of persons who belong to groups of persons characterised by one of the grounds listed in Article 1 of that directive.

54 In particular, if, contrary to the interpretation of the concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Directive 2000/78 and set out in paragraph 43 of the present judgment, statements fell outside the material scope of that directive solely because they were made outwith a recruitment procedure, in particular in the context of an audiovisual entertainment programme, or because

they allegedly constitute the expression of a personal opinion of the person who made them, the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory.

55 As the Advocate General noted, in essence, in points 44 and 57 of her Opinion, in any recruitment process, the principal selection takes place between those who apply, and those who do not. The expression of discriminatory opinions in matters of employment and occupation by an employer or a person perceived as being capable of exerting a decisive influence on an undertaking's recruitment policy is likely to deter the individuals targeted from applying for a post.

56 Consequently, statements which fall within the material scope of Directive 2000/78, as defined in Article 3 thereof, cannot fall outside the regime for combating discrimination in employment and occupation established by that directive on the ground that those statements were made during an audiovisual entertainment programme or that they are also an expression of the personal opinion of the person who made them regarding the category of persons to which they relate.

57 In the present case, it is for the referring court to assess whether the circumstances characterising the statements at issue in the main proceedings establish that the link between those statements and the conditions for access to employment or occupation within the firm of lawyers concerned is not hypothetical, that assessment being of a factual nature, and to apply in the context of that assessment the criteria identified in paragraphs 44 to 46 of the present judgment.

58 Having regard to all the foregoing considerations, the answer to the second question is that the concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Directive 2000/78 must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.

The first question

59 By its first question, the referring court asks, in essence, whether Directive 2000/78 must be interpreted as precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

60 According to Article 9(2) of Directive 2000/78, Member States are to ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of the directive are complied with, may engage, either on behalf or in support of a complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the directive.

61 Thus, it follows from the wording of that provision that it does not require an association such as that at issue in the main proceedings to be given standing in the Member States to bring judicial proceedings for enforcement of obligations under Directive 2000/78 where no injured party can be identified.

62 Nevertheless, Article 8(1) of Directive 2000/78, read in the light of recital 28 thereof, provides that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive.

63 On the basis of that provision, the Court has held that Article 9(2) of Directive 2000/78 in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant (judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 37).

64 When a Member State chooses that option, it is for that Member State to decide under which conditions an association such as that at issue in the main proceedings may bring legal proceedings for a finding of discrimination prohibited by Directive 2000/78 and for a sanction to be imposed in respect of such discrimination. It is in particular for the Member State to determine whether the for-profit or non-profit status of the association is to have a bearing on the assessment of its standing to bring such proceedings, and to specify the scope of such an action, in particular the sanctions that may be imposed at the end of it, such sanctions being required, in accordance with Article 17 of Directive 2000/78, to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party (see, to that effect, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 62 and 63).

65 Having regard to the foregoing considerations, the answer to the first question is that Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. The concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.

2. Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective

of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

Judgment of the General Court (Fourth Chamber, Extended Composition) of 16 December 2020 International Skating Union v European Commission

Competition – Association of undertakings – Speed skating events – Decision finding an infringement of Article 101 TFEU – Regulations of a sports federation – Balance between competition law and the specific nature of the sport – Sports betting – Court of Arbitration for

Sport – Guidelines on the calculation of fines – Scope of territorial application of Article 101 TFEU – Restriction of competition by object – Corrective measures

Case T-93/18

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

16 December 2020 (*)

(Competition – Association of undertakings – Speed skating events – Decision finding an infringement of Article 101 TFEU – Regulations of a sports federation – Balance between competition law and the specific nature of the sport – Sports betting – Court of Arbitration for Sport – Guidelines on the calculation of fines – Scope of territorial application of Article 101 TFEU – Restriction of competition by object – Corrective measures)

In Case T-93/18,

International Skating Union, established in Lausanne (Switzerland), represented by J.-F. Bellis, lawyer,

applicant,

v

European Commission, represented by H. van Vliet, G. Meessen and F. van Schaik, acting as Agents,

defendant,

supported by

Mark Jan Hendrik Tuitert, residing in Hoogmade (Netherlands),

Niels Kerstholt, residing in Zeist (Netherlands),

and

European Elite Athletes Association, established in Amsterdam (Netherlands),

represented by B. Braeken and J. Versteeg, lawyers,

interveners,

APPLICATION under Article 263 TFUE for annulment of Commission Decision C(2017) 8230 final, adopted on 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT/40208 – International Skating Union's eligibility rules),

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of S. Gervasoni, President, L. Madise, P. Nihoul, R. Frendo (Rapporteur) and J. Martín y Pérez de Nanclares, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 June 2020,

gives the following

Judgment

I. Background to the dispute

A. The International Skating Union

1 The International Skating Union ('the applicant' or 'the ISU') is the sole international sports federation recognised by the International Olympic Committee ('the IOC') as responsible at worldwide level for regulating and administering figure skating and speed skating on ice.

2 The applicant is composed of national associations that administer figure skating and speed skating on ice at national level ('the members'). The members comprise local skating clubs and associations, in which athletes who practise speed skating or figure skating as an economic activity are individual members.

3 The applicant also carries out a commercial activity in so far as it organises and owns the rights in the most important international speed skating events. International competitions organised by the applicant include, in particular, the European and World long-track and short-track speed skating championships, the Long Track Speed Skating World Cup and the Short Track Speed Skating World Cup. In addition, the Winter Olympic Games speed skating events are organised by the applicant in the form of international competitions.

B. The rules set by the applicant

4 As the body responsible for administering figure skating and speed skating on ice worldwide, the applicant has power, in particular, to determine the rules of affiliation which its members and individual skaters are required to observe.

5 The rules determined by the applicant are set out in its statutes and include its 'constitution' and procedural provisions, its general and special regulations, its technical rules, the Code of Ethics, the anti-doping rules, the rules on anti-doping procedures and all currently valid communications of the applicant.

6 Among those rules, Rules 102 and 103 of the applicant's general rules ('the eligibility rules') determine the conditions in which skaters may participate in the speed skating and figure skating activities and events that fall within the competence of the applicant. Since 1998 the eligibility rules have provided for a 'comprehensive pre-authorisation system' ('the pre-authorisation system'), according to which skaters may participate only in events authorised by the applicant and/or by its members, which are organised by representatives approved by the applicant and under its rules. For the purposes of the present case, the

relevant versions of the eligibility rules are those dating from June 2014 ('the 2014 eligibility rules') and June 2016 ('the 2016 eligibility rules').

7 As regards the 2014 eligibility rules, it is clear from Rule 102(2)(c) and (7) and Rule 103(2), read together, that, if they participated in an event not authorised by the applicant or by one of its members, the professional skaters and the representatives of the applicant would be exposed to a penalty of a lifetime ban from any competition organised by the applicant.

8 According to Rule 102(1)(a)(i), in the 2014 version, 'a person has the privilege to take part in the activities and competitions under the jurisdiction of the ISU only if such person respects the principles and policies of the ISU as expressed in the ISU statutes'.

9 Rule 102(1)(a)(ii) provided as from 2002 that 'the condition of eligibility [was] made for the adequate protection of the economic and other interests of the ISU, which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of the members and their skaters'.

10 In June 2016, the eligibility rules were revised with a view to amending, in particular, the rules relating to the imposition of penalties. Now, under Rule 102(7), penalties in the event of athletes participating in an event under the jurisdiction of the applicant and not authorised by the latter are to be determined in accordance with the seriousness of the infringement. The system provides for a warning in the case of a first infringement, a ban of up to 5 years in the event of negligent participation in non-authorised events, a ban of up to 10 years for deliberate participation in non-authorised events and finally a penalty consisting of a lifetime ban for very serious infringements, in particular, in the event of participation in non-authorised events which jeopardise the integrity and jurisdiction of the ISU.

11 In addition, the reference to the adequate protection of the applicant's economic interests, contained in the 2014 eligibility rules, was removed from the 2016 version. Rule 102(1)(a)(ii) now provides that 'the condition of eligibility [was] made for adequate protection of the ethical values, jurisdiction objectives and other legitimate respective interests' of the applicant, 'which uses its financial revenues for the administration and development of the ISU sport disciplines and for the support and benefit of the ISU members and their skaters'.

12 In addition, it must be noted that, since 30 June 2006, Article 25 of the applicant's constitution ('the arbitration rules') has provided for the possibility for skaters to lodge an appeal against an ineligibility decision solely before the Court of Arbitration for Sport ('the CAS'), established in Lausanne (Switzerland).

13 On 25 October 2015, the applicant published Communication No 1974 entitled 'Open international competitions', which sets out the procedure to be followed in order to obtain authorisation to organise an open international competition in the context of the pre-authorisation system. That procedure is applicable to members and third-party organisers.

14 Communication No 1974 stipulates that all such events must be authorised in advance by the applicant's council and organised in accordance with its rules. As regards the time limit for making a request for authorisation, that communication draws a distinction between members and third-party organisers. Third-party organisers must submit their requests at least six months before the starting date of the event, while that period is reduced to three months for members.

15 In addition, Communication No 1974 sets out a series of general, financial, technical, sporting and ethical requirements, with which an organiser must comply. First, it is apparent from that communication that any request for authorisation must be accompanied by technical and sporting information, such as information relating to the venue and the value of the prizes to be awarded, as well as general and financial information, such as, in particular, business plans, the budget and planned television coverage for the event. Next, in

order to comply with the ethical requirements, the organiser and any person cooperating with the organiser are required to submit a declaration confirming that they accept the applicant's Code of Ethics and, in particular, that they undertake not to be involved in any betting activity. Finally, Communication No 1974 provides that the applicant reserves the right to request further information for each of those categories of requirements.

16 More particularly as regards ethical requirements, Article 4(h) of the applicant's Code of Ethics has, since 25 January 2012, contained a provision specifically obliging all who involve themselves with the applicant in any capacity 'to refrain from participating in all forms of betting or support for betting or gambling related to any event/activity under the jurisdiction of the ISU'.

17 Communication No 1974 authorises the applicant to accept or reject a request for authorisation, in particular on the basis of the requirements set out in that communication and summarised in paragraph 15 above as well as on the basis of the applicant's fundamental objectives, as defined 'in particular' in Article 3(1) of its constitution. Article 3(1) of the applicant's constitution provides, in essence, that the applicant's objectives are to regulate, govern and promote two ice skating disciplines.

18 In the event that a request is rejected, Communication No 1974 states that the requester may appeal against the applicant's decision before the CAS, having signed an arbitration agreement in accordance with its procedural rules.

19 Moreover, Communication No 1974 stipulates that any organiser is required to pay a solidarity contribution to the applicant, the amount of which is to be determined on a case-by-case basis, for the promotion and development of sports falling within the competence of the applicant at local level.

II. Background to the dispute

A. Administrative procedure

20 On 23 June 2014, the European Commission received a complaint lodged by two of the interveners, Mr Mark Jan Hendrik Tuitert and Mr Niels Kerstholt ('the complainants'), two professional speed skaters, alleging that the 2014 eligibility rules were incompatible with Articles 101 and 102 TFEU. The complainants inter alia maintained that those rules prevented them from taking part in a speed skating event that the Korean company Icederby International Co. Ltd planned to organise in 2014 in Dubai (United Arab Emirates) ('the Dubai Grand Prix'). That event was to involve a new format of races that would take place on a special ice track on which long-track and short-track speed skaters would compete together.

21 On 5 October 2015, the Commission decided to initiate proceedings against the applicant in accordance with Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

22 On 8 January 2016, the applicant informed the Commission that it proposed to make adjustments to the eligibility rules. The adjustments in question were approved by the applicant's congress and came into force on 11 June 2016.

23 On 27 September 2016, the Commission sent a statement of objections to the applicant, which replied on 16 January 2017.

24 On 1 February 2017, a hearing was held in the context of the administrative procedure conducted by the Commission.

25 On 27 April 2017, the applicant submitted a set of commitments in order to address the Commission's competition concerns. However, the Commission considered that those commitments were insufficient for the purpose of resolving the concerns raised within a reasonable time.

26 On 6 October 2017, the Commission sent a letter of facts to the applicant. The applicant replied on 25 October 2017.

27 On 30 October 2017, the applicant submitted a new set of commitments in order to address the Commission's concerns, which the Commission again considered insufficient for the purpose of resolving the concerns raised.

28 On 8 December 2017, the Commission adopted Decision C(2017) 8230 final relating to proceedings under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT. 40208 – International Skating Union's Eligibility rules) ('the contested decision').

B. The contested decision

1. Relevant market

29 The Commission concluded that the relevant market in the present case was the worldwide market for the organisation and commercial exploitation of speed skating ('the relevant market'). However, given the applicant's role as the organiser of the most important speed skating events and the regulator of the discipline, the Commission considered that the eligibility rules would restrict competition even if the market were to be defined more narrowly (recital 115 of the contested decision).

30 The Commission observed that the applicant was able to influence competition on the relevant market because it was the governing body and the only regulator of speed skating and that it had the power to authorise international competitions for that discipline. In addition, the applicant is responsible for organising the most important speed skating events. Its substantial market power is demonstrated by the fact that apart from the applicant and its members, no undertaking has been able to enter the relevant market successfully (recitals 116 à 134 of the contested decision).

2. Application of Article 101(1) TFEU

31 The Commission therefore concluded that the applicant was an association of undertakings and that the eligibility rules constituted a decision by an association of undertakings within the meaning of Article 101(1) TFEU (recitals 147 to 152 of the contested decision).

32 In Section 8.3 of the contested decision, the Commission stated that both the 2014 and 2016 eligibility rules have the object of restricting competition within the meaning of Article 101(1) TFEU. It considered, in essence, that those rules restricted the possibilities for professional speed skaters to take part freely in international events organised by third parties and, therefore, deprived potential organisers of competing events of the services of the athletes which are necessary in order to organise those events. It reached that conclusion after examining the content of those rules, their objectives, the economic and legal context of which they form part and the applicant's subjective intention to exclude third-party organisers (recitals 162 to 188 of the contested decision).

33 The Commission, having concluded that the eligibility rules constituted a restriction of competition by object, considered that there was no need to analyse their effects. However, in Section 8.4 of the contested decision, it set out the reasons why it was able to conclude that those rules also had the effect of restricting competition (recitals 189 to 205 of the contested decision).

34 In Section 8.5 of the contested decision, the Commission considered whether the eligibility rules could fall outside the scope of Article 101 TFEU. In that regard, it observed, in essence, that those rules did not serve only purely legitimate interests, but also corresponded to other interests of the applicant, including its economic interests. In addition, according to the Commission, the consequential effects of the eligibility rules are in part not inherent in the pursuit of legitimate objectives and, in any event, not proportionate to them (recitals 220 and 225 to 266 of the contested decision).

3. Assessment of the arbitration rules

35 In Section 8.7 of the contested decision, the Commission recognised that arbitration was a generally accepted method of resolving disputes and that agreeing to an arbitration clause as such did not constitute a restriction of competition. However, it considered that the arbitration rules reinforced the restrictions of competition caused by the eligibility rules (recital 269 of the contested decision).

36 That conclusion was based, first, on the fact that, in the Commission's view, the arbitration rules made it difficult to obtain effective judicial protection against any ineligibility decisions of the applicant that are contrary to Article 101 TFEU. Secondly, the Commission observed that athletes were required to accept the arbitration rules and the exclusive jurisdiction of the CAS (recitals 270 to 276 of the contested decision).

4. Operative part

37 The Commission therefore concluded, in the operative part of the contested decision, as follows:

'Article 1

The International Skating Union has infringed Article 101 [TFEU] and Article 53 of the [EEA Agreement] by adopting and enforcing the eligibility rules, in particular Rules 102 and 103 of the ISU 2014 General Regulations and the ISU 2016 General Regulations, with regard to speed skating. The infringement started in June 1998 and is still ongoing.

Article 2

'The International Skating Union shall, within 90 days of the date of notification of this Decision, bring to an end the infringement referred to in Article 1 and shall, within that period of time, communicate to the Commission all the measures it has taken for that purpose.

The International Skating Union shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

...

Article 4

If the International Skating Union fails to comply with any of the orders set out in Article 2, the Commission hereby imposes a daily penalty on the International Skating Union of 5% of its average daily turnover in the business year preceding such a failure to comply pursuant to Article 24(1) of Regulation (EC) No 1/2003.'

III. Procedure and forms of order sought

38 By application lodged at the Court Registry on 19 February 2018, the applicant brought the present action.

39 On 17 May 2018, the Commission lodged the defence at the Court Registry.

40 By documents lodged at the Court Registry on 1 June 2018, the European Elite Athletes Association and the complainants applied for leave to intervene in support of the form of order sought by the Commission.

41 The applications for leave to intervene were served on the main parties, which made no objections to them. However, in accordance with Article 144 of the Rules of Procedure of the General Court, they requested that certain confidential information in the case not be communicated to the interveners and, to that end, they produced a non-confidential version of the documents in question.

42 By order of 12 September 2018, the President of the Seventh Chamber allowed the applications to intervene.

43 On 25 March 2019, as the composition of the Chambers of the Court had changed, under Article 27(5) of the Rules of Procedure, the present case was assigned to a new Judge-Rapporteur sitting in the Fifth Chamber, to which the present case was therefore assigned.

44 On 16 October 2019, as the composition of the Chambers of the Court had changed once again, under Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was therefore assigned.

45 On 20 December 2019, on a proposal from the Fourth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the present case to a chamber sitting in extended composition.

46 Acting on a proposal from the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, put written questions to the parties, requesting them to answer those questions at the hearing. In addition, at the invitation of the Court, the applicant submitted a copy of Communication No 1974.

47 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

48 The Commission contends that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

49 The interveners contend that the Court should dismiss the action.

IV. Law

50 In support of its action, the applicant puts forward eight pleas in law. By its first plea, the applicant submits, in essence, that the contested decision is vitiated by contradictory reasoning. By its second and third pleas, the applicant disputes the classification of a restriction of competition by object and by effect applied to the eligibility rules. By its fourth plea, the applicant criticises the Commission's assessments concerning whether the eligibility rules inherently pursue and are proportionate to the objective of protecting the integrity of speed skating from sports betting. By its fifth plea, it contests the Commission's taking into consideration of its decision refusing to grant authorisation to organise the Dubai Grand Prix, in so far as that decision does not fall within the territorial scope of Article 101 TFEU. By its sixth plea, the applicant disputes the conclusion

that its arbitration rules reinforce the alleged restriction of competition. By its seventh plea, the applicant claims that the Commission infringed Article 7 of Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), by imposing, in Article 2 of the operative part of the contested decision, corrective measures not linked to the infringement identified. By its eighth plea, it disputes Article 4 of the operative part of the contested decision on the same grounds as invoked in support of the seventh plea as well as on account of the vague and imprecise nature of the remedies.

51 The Commission, supported by the interveners, disputes all of the arguments put forward by the applicant.

A. First plea, alleging that the reasoning of the contested decision is contradictory

52 By its first plea, the applicant maintains that the contested decision is vitiated by illegality in so far as it is based on manifestly contradictory reasoning.

53 According to settled case-law, the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited; judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44), so that it would be inappropriate for the Court to examine, in considering fulfilment of the obligation to state reasons, the substantive legality of the reasons relied on by the Commission to justify its decision. It follows that, in a plea based on a failure to state reasons or a lack of adequate reasons, objections and arguments which aim to challenge the merits of the contested decision are misplaced and irrelevant (see judgment of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraphs 58 and 59 and the case-law cited).

54 In the present case, in support of the first plea, the applicant puts forward a series of arguments the true position of which is to call into question the merits of the contested decision. Thus, in accordance with the case-law cited in paragraph 53 above, those arguments must be regarded as irrelevant in the context of the present plea. Therefore, in order to examine the first plea, it is necessary to determine only whether, as the applicant claims, the contested decision is vitiated by contradiction in its grounds.

55 In that regard, the applicant claims in essence that the grounds for the contested decision are vitiated by contradiction in so far as the Commission concluded that the eligibility rules restricted competition as such, without having considered that the pre-authorisation system, which they include, did not inherently pursue legitimate objectives. That contradiction is further highlighted by the fact that the Commission stated that the applicant could put an end to the infringement while retaining its pre-authorisation system.

56 It follows from the case-law that the statement of reasons must be logical and, in particular, contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the contested act (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 169, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151).

57 In the present case, the Commission concluded that the eligibility rules as conceived and applied by the applicant on the relevant market restricted competition both by object and effect within the meaning of Article 101 TFEU (see Sections 8.3 to 8.5 of the contested decision).

58 It is apparent from Section 8.5 of the contested decision that the applicant had claimed, during the administrative procedure, that the eligibility rules were not caught by the prohibition in Article 101 TFEU,

inter alia, because the pre-authorisation system included in those rules was essential in order to ensure that the organisers of speed skating events conformed to the applicant's standards and objectives.

59 In recital 254 of the contested decision, the Commission considered that, for the purposes of the present case, it did not need to take a view on whether a pre-authorisation system inherently pursued legitimate objectives. However, it put forward several reasons in support of its conclusion that the pre-authorisation system established by the applicant was not proportionate to the objectives it pursued and, therefore, was caught by the prohibition laid down in Article 101 TFEU (see recitals 254 to 258 of the contested decision).

60 In so doing, the Commission applied the case-law to the effect that not every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) TFEU. In accordance with that case-law, the restrictions arising from a decision by an association of undertakings escapes the prohibition laid down in Article 101 TFEU if they satisfy two cumulative conditions. In the first place, the restriction must be inherent in the pursuit of legitimate objectives and, in the second place, it must be proportionate to those objectives (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 42).

61 In the present case, as indicated in paragraph 59 above, the Commission set out several reasons that led it to conclude that the pre-authorisation system did not satisfy the second criterion set out in the case-law cited in paragraph 60 above, that is, the criterion concerning proportionality. Since the criteria in that case-law are cumulative, the Commission was not required to take a view in the contested decision on whether the system in question inherently pursued legitimate objectives and did not, accordingly, vitiate its decision on account of a contradiction.

62 It is true that the Commission acknowledged, in recital 339 of the contested decision that it would be possible for the applicant to bring an end to the infringement found while retaining a pre-authorisation system. However, that finding is not contrary to the conclusion that the eligibility rules restrict competition, in so far as any acceptance by the Commission of such a system is clearly subject to the condition that 'substantial' changes be made to bring an end to the infringement, that is, changes which aim to counteract the disproportionate nature of that system. It follows that, contrary to what the applicant submits, the Commission did not approve the retention of the applicant's pre-authorisation system as it was designed and, in that regard, nor did it vitiate the reasoning for its decision on account of a contradiction.

63 Consequently, the first plea must be rejected.

B. The second, third and fourth pleas, alleging that the eligibility rules do not restrict competition by object and effect and fall outside the scope of application of Article 101 TFEU

64 By its second, third and fourth pleas, the applicant disputes, first, the assessments made by the Commission concerning the existence of a restriction of competition and, secondly, its conclusion that the eligibility rules are caught by the prohibition laid down in Article 101 TFEU. The Court considers it appropriate to examine those pleas together.

65 To be caught by the prohibition laid down in Article 101(1) TFEU, a decision by an association of undertakings must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market. According to the settled case-law of the Court of Justice since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', means that it is first necessary to consider the precise object of the decision by the association of undertakings (see, to that effect, judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 16, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 24).

66 The concept of restriction of competition by object can be applied only to certain types of coordination between undertakings that reveal, by their very nature, a sufficient degree of harm to the proper functioning of normal competition that it may be found that there is no need to examine their effects (see, to that effect, judgments of 30 June 1966, *LTM*, 56/65, EU:C:1966:38, p. 249; of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49, 50 and 58 and the case-law cited, and of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 31).

67 According to the Court of Justice's case-law, in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a restriction of competition by object within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part (see judgment of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 33, and the case-law cited).

68 Accordingly, in the present case, it is necessary to examine the eligibility rules, in the light of their alleged objectives and their specific context, comprising in particular the power of sports federations to give authorisation, for the purpose of ascertaining whether the Commission was fully entitled to classify the eligibility rules as restricting competition by object.

1. The obligations imposed on a sports federation which has a power of authorisation

69 The applicant argues that the case-law arising from the judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraphs 51 and 52), cited in the footnote on page 267 of the contested decision, is not applicable in the present case, in so far as that case-law concerns the application of Articles 102 and 106 TFEU and not that of Article 101 TFEU as in the present case.

70 In that regard, it must be noted that, according to that case-law, when a rule entrusts a legal person, which itself, organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised, it grants that entity an obvious advantage over its competitors. Such a right may therefore lead the undertaking making use of it to prevent access by other operators to the market concerned. The exercise of that regulatory function should therefore be made subject to restrictions, obligations and review, so that the legal person entrusted with giving that consent may not distort competition by favouring events which it organises or those in whose organisation it participates (see, to that effect, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 51 and 52).

71 It must be held that it follows from the judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraphs 88 and 92), that the Court of Justice applied that case-law by analogy in a case concerning the application of Article 101 TFEU to the rules adopted by an association of undertakings which was both an operator in and the regulator of the relevant market as in the present case. Accordingly, the applicant's argument that the case-law cited in paragraph 70 above is solely applicable in a case concerning the application of Articles 102 and 106 TFEU must be rejected.

72 Furthermore, according to the applicant, the judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas* (C-1/12, EU:C:2013:127, paragraphs 88 and 92) does not justify the application of the case-law cited in paragraph 70 in the present case, since, in that judgment, the Court of Justice applied that case-law in the context of an analysis of a restriction by effect and not of a restriction by object as in the present case. It follows from the case-law that an agreement may restrict competition by object in a particular context, whereas, in other contexts, an analysis of the effects of the agreement would be necessary (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 84). It follows that the fact that the Court of Justice classified the rules of the Association of Chartered Certified Accountants as a restriction by effect does not prevent the case-law cited in paragraph 70 above from being applied in the case of an analysis of a restriction by object.

73 In the present case, as is clear from paragraph 4 above, the applicant has the power to lay down rules in the disciplines for which it has jurisdiction. While it is true that that regulatory function was not delegated to it by a public authority as in the cases giving rise to the judgments cited in paragraphs 70 and 71 above, the fact remains that it exercises, as the sole international sports federation recognised by the IOC for the disciplines in question, a regulatory activity (see, to that effect, judgment of 26 January 2005, *Piau* v *Commission*, T-193/02, EU:T:2005:22, paragraph 78).

74 In addition, it is apparent from recitals 38 to 41 of the contested decision, which moreover are not disputed by the applicant, that speed skating provides very limited income opportunities for the great majority of professional skaters. Moreover, as the Commission noted in recital 172 of the contested decision, again without being contradicted by the applicant, the latter organises or controls the organisation of the most important speed skating events in which skaters who practise that discipline must take part in order to make their living. It must be noted that the eligibility rules laid down in the exercise of the applicant's regulatory function provide for ineligibility penalties in the event that skaters take part in an unauthorised competition. Since skaters cannot miss the opportunity to take part in more important events organised by the applicant, it follows that third party organisers that intend to organise a speed skating event must obtain prior authorisation from the applicant if they wish skaters to take part.

75 Therefore, having regard to the fact that the applicant organises events and also has the power to authorise events organised by third parties, it must be held that that situation is capable of giving rise to a conflict of interests. In those circumstances, it follows from the case-law cited in paragraphs 70 and 71 above that the applicant must ensure, when examining applications for authorisation, that those third parties are not unduly deprived of market access to the point that competition on that market is distorted.

76 Consequently, it is necessary to examine the applicant's arguments disputing the Commission's assessment of the scope and objectives of the eligibility rules taking into account the fact that, in the exercise of its regulatory function, the applicant is required to comply with the obligations arising from the case-law cited in paragraphs 70 and 71 above.

2. The content and objectives of the eligibility rules

77 According to settled case-law, the compatibility of a rule with the rules of EU competition law cannot be assessed in the abstract. Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them is necessarily caught by the prohibition laid down in Article 101(1) TFEU. For the purposes of applying that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings in question was taken or produces its effects, and, more specifically, of its objectives. Next, it is necessary to examine whether the restrictions arising therefrom are inherent in the pursuit of legitimate objectives and are proportionate to those objectives (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97, and of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 42).

78 As regards the objectives that may be pursued, it should be recalled that the second subparagraph of Article 165(1) TFEU provides that the European Union is to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. Under paragraph 2 of that article EU action in that field is aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and ethical integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

79 Accordingly, in the context of the analysis of possible justifications for restrictions in the field of sport, it is necessary to take into consideration the specific characteristics of sport in general and its social and

educational function (see, to that effect and by analogy, judgment of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 40).

80 In the present case, the applicant disputes the assessments made by the Commission concerning the content and objectives of the eligibility rules. In particular, it maintains that the eligibility rules pursue the legitimate objective of protecting the integrity of speed skating from the risks associated with betting.

(a) The content of the eligibility rules

81 The applicant disputes the examination of the content of the eligibility rules and Communication No 1974. In the first place, it claims that those rules could restrict competition by object only if they prohibited skaters entirely from taking part in events organised by third parties, which is not so in the present case.

82 That argument must be rejected at the outset, since it amounts to acknowledging that the classification of conduct constituting a restriction by object relies on the elimination of all competition on the relevant market. It should be noted that the classification of a restriction of competition by object is not reserved for decisions by associations of undertakings which eliminate all competition. It follows from the case-law that that classification is applicable to any decision by an association of undertakings which reveals in itself a sufficient degree of harm to the proper functioning of competition taking into account its content, the objectives pursued and the context in which it takes place (see, to that effect, judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 117).

83 In the second place, the applicant claims that none of the evidence taken into consideration by the Commission permits the conclusion that the eligibility rules have as their object the restriction of competition. According to the applicant, the Commission took into consideration four factors in classifying the eligibility rules as a restriction of competition by object, that is, the lack of a direct link with legitimate objectives, the severity of the penalties, the reference to the protection of the applicant's economic interests and the lack of a link with an event or a series of events organised by the applicant.

(1) The lack of a direct link with legitimate objectives

84 The applicant argues that the finding that the eligibility rules have no direct link with legitimate objectives has no basis.

85 In the first place, it must be held that the eligibility rules do not explicitly state the legitimate objectives that they pursue. It is true that, as the applicant maintains, Rule 102 has referred since 1998 to 'the principles and policies [of the applicant], as expressed in [its statutes]', and provides, following the 2016 amendment that 'the condition of eligibility is made for adequate protection of the ethical values … of the ISU'. However, whereas 'the ethical values' may derive from the applicant's Code of Ethics, the 'principles and policies' have not been explicitly defined or listed in the applicant's statutes or rules. Accordingly, those vague expressions do not in themselves make it possible to clearly identify the legitimate objectives pursued by those rules.

86 In the second place, it should be noted that, since 1998 and up to the publication of Communication No 1974 on 20 October 2015, the eligibility rules did not provide for any authorisation criterion for competition that third parties sought to organise as open international competitions. It follows that, before the publication of that communication, the regulatory framework of the applicant lacked content concerning the criteria for authorising events, so that the applicant had full discretion to refuse to authorise events that third parties planned to organise.

87 That discretionary power was not significantly amended with the publication of Communication No 1974, which supplemented the content of the eligibility rules. Although that communication lists a certain number of requirements of a general, technical, sporting and ethical nature, the fact remains that those

requirements are not exhaustive, since that communication provides, in addition, that the applicant will accept or reject an application for authorisation, taking into account 'in particular' requirements that it determines, which entitles it to accept or refuse an application for authorisation on grounds other than those expressly set out as requirements established by that communication. Moreover, as indicated in paragraph 15 above, it is clear from the content of Communication No 1974 that the applicant reserves the right to request from organisers additional information linked to the abovementioned various requirements.

88 Therefore, it must be held that all the requirements of Communication No 1974 are not authorisation criteria that are clearly defined, transparent, non-discriminatory, reviewable and capable of ensuring the organisers of events effective access to the relevant market (see, to that effect and by analogy, judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 99).

89 It follows from those considerations that, since 1998 and even until after the adoption of Communication No 1974, the applicant had broad discretion to refuse to authorise events proposed by third parties, including for reasons not explicitly provided for, which could lead to the adoption of refusal decisions on grounds which are not legitimate. In those circumstances, the Commission was fully entitled to find, in recitals 163 and 185 of the contested decision, that the eligibility rules, by their content, had no direct link to the legitimate objectives invoked by the applicant during the administrative procedure.

(2) The severity of the penalties

90 The applicant claims that the severity of the penalties is not a relevant factor when determining whether the content of its pre-authorisation system has the object of restricting competition.

91 The Court of Justice has previously held that the repressive nature of rules and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition, since they could, if the penalties are not limited to what is necessary to ensure the proper conduct of the sporting competition and if they were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the sporting activity at issue is engaged in (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 47).

92 In the present case, according to the eligibility rules, skaters who participate in events not authorised by the applicant or one of its members incur a penalty. As is clear from paragraph 7 above, until their amendment in 2016, the eligibility rules provided for a single and extremely severe penalty consisting of a lifetime ban which applied in all cases, irrespective of whether the matter concerned a first or repeated infringement. It follows that the restrictions arising from the 2014 eligibility rules were manifestly disproportionate with regard to the objective of the protection of the integrity of skating.

93 It is true that, as is apparent from paragraph 10 above, in 2016, the system of penalties was relaxed in so far as it no longer provides for a single penalty of a lifetime ban for all infringements. However, it must be noted that the average length of a skater's career is eight years – a fact that the applicant moreover does not dispute. It must therefore be held that the penalties set out in the 2016 eligibility rules, even those with a fixed time limit of 5 to 10 years continue to be disproportionate in so far as they apply, inter alia, to participation in unauthorised third-party events.

94 Furthermore, the 2016 eligibility rules do not precisely set out the conditions that allow the dividing line between different categories of infringements to be determined. In particular, they do not clearly distinguish infringements deemed to be 'very serious' from those which are not. It follows that the system of penalties is unpredictable and thus presents a risk of arbitrary application which leads to those penalties having an excessive deterrent effect.

95 In those circumstances, contrary to what the applicant claims, the severity of the penalties provided for in the eligibility rules constitutes a particularly relevant factor in analysing their content. That severity may dissuade athletes from participating in events not authorised by the applicant, even where there are no legitimate objectives that can justify such a refusal, and, consequently, is likely to prevent market access to potential competitors who are deprived of the participation of athletes that is necessary in order to organise their sporting event.

(3) The absence of a link between the eligibility rules and an event or series of events of the applicant

96 The applicant argues that the fact that the eligibility rules have no link with an event or series of events organised by it is irrelevant in the context of the analysis of a restriction by object.

97 It is apparent from recitals 166 and 243 of the contested decision, read together, that the Commission criticises the fact that the eligibility rules do not subject the imposition of a penalty to the fact that the unauthorised event in which the athletes in question were to have participated coincided with one of the applicant's events. That finding is no more, in reality, than an example of the lack of a direct link with the legitimate objectives invoked by the applicant during the administrative procedure and reveals the broad, or excessive scope, of the eligibility rules. Those rules allow the applicant to impose ineligibility penalties on athletes if they take part in unauthorised events, even if the applicant's schedule does not include any event at the same time and even if the athletes in question cannot, for any reason, take part in events organised by the applicant. Accordingly, the applicant's complaint that the finding made in recitals 166 and 243 is irrelevant must be rejected.

98 The arguments relating to the reference to the protection of the applicant's economic interests are examined in paragraphs 106 to 111 below in the context of the analysis of the objectives of the eligibility rules.

(b) The objectives pursued by the eligibility rules

99 The complaints raised by the applicant concerning the Commission's examination of the objectives of the eligibility rules may be divided into two parts. First, by its fourth plea, it disputes the conclusion that the eligibility rules are not justified by the legitimate objective of protecting the integrity of speed skating from the risks associated with betting. Secondly, in the context of its second plea, the applicant claims that, by relying on the reference to the protection of economic interests contained in the 2014 eligibility rules to support the conclusion that they seek to exclude organisers of competing events, the Commission made a superficial analysis of the objectives pursued.

(1) The first part, based on the objective pursued by the eligibility rules of protecting the integrity of speed skating from the risks associated with betting

100 It should be noted that, during the administrative procedure, the applicant claimed that the eligibility rules pursued several objectives particular to the specific characteristics of the sport. In the context of the present proceedings, although the applicant has relied on several legitimate objectives, it has put forward detailed arguments only in support of the legitimate objective of protecting the integrity of skating from betting.

101 In that regard, it must be noted that the Court of Justice has previously recognised that the protection of the integrity of the sport constitutes a legitimate objective (judgment of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 43). However, the pursuit of legitimate objectives cannot in itself suffice to preclude a finding of restriction of competition by object if the means used to attain them are contrary to the provisions of Article 101 TFEU (see, to that effect, judgments of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 64 and the case-law cited, and of 20 November 2008, *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21). It is appropriate in particular to examine whether the restrictions in question are inherent in

the pursuit of those objectives and proportionate to those objectives (see, to that effect, judgments of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97, and of 18 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, paragraph 42).

102 In the present case, it may be considered that it was legitimate for the applicant to establish rules seeking to prevent sports betting from creating risks of manipulation of competitions and athletes, in accordance with the recommendations of the IOC of 24 June 2010 entitled 'Sports betting: A challenge to be faced' and the Convention on the Manipulation of Sports Competitions adopted by the Council of Europe in 2014.

103 However, even if the restrictions arising from the pre-authorisation system established in the present case are inherent in the pursuit of that legitimate objective of protecting the integrity of speed skating from the risks associated with betting, the fact remains that, in particular for the reasons set out in paragraphs 92 to 95 above, they go beyond what is necessary to achieve such an objective within the meaning of the case-law cited in paragraph 77 above.

104 Accordingly, the applicant's argument that the restrictions arising from the eligibility rules are justified by the objective of protecting the integrity of speed skating from the risks associated with betting must be rejected.

(2) The second part, criticising the Commission's reliance on the objective of protecting the applicant's economic interests

105 In the first place, the applicant criticises the use made by the Commission of the reference to the protection of its economic interests contained in the 2014 eligibility rules in support of the conclusion that they had as their object the protection of its economic interests. The applicant submits, in particular, that the Commission relied incorrectly on the reference to the economic interests contained in the 2014 version of the eligibility rules in concluding that those rules sought to exclude any organiser of competing events that could potentially affect its economic interests, whereas it is clear from the circumstances in which those rules were drawn up that they sought to ensure the conformity of all events under the applicant's jurisdiction with common standards.

106 As the Commission found in recitals 164 and 165 of the contested decision, Rule 102(1)(a)(ii) provided, as from 2002 until its amendment in 2016 that the eligibility condition was made for 'the adequate protection of the economic and other interests of the ISU'. In addition, it is apparent from the case file that that wording was introduced in 2002 to 'clarify the reasons for the eligibility rule'. It follows that the objective of protecting the economic interests preceded the amendment made in 2002, since it was merely explained by the latter. Accordingly the Commission was entitled, without making any error of assessment, to conclude that that objective existed from the start of the infringing period in 1998 until 2016.

107 By contrast, the Commission was wrong to consider, in recital 187 of the contested decision that, despite the removal of the reference to economic interests in the 2016 version of the eligibility rules, it was apparent from the content of that version that those rules continued to seek to protect the applicant's economic interests. The mere fact that Rule 102(1)(a)(ii) in the 2016 version links the words 'other legitimate interests of the applicant' to the use of the applicant's revenues does not permit the view that, since 2016, the eligibility rules have effectively and as a priority pursued the protection of the applicant's economic interests. However, that error on the Commission's part is not capable of calling into question the analysis of legitimate objectives in the contested decision.

108 In that regard, it must be noted that it is legitimate to consider, as the applicant submits (see paragraph 105 above), that, given the specific nature of the sports, it is necessary to ensure that sporting competitions comply with common standards, seeking in particular to ensure that competitions take place fairly and the physical and ethical integrity of sportspeople is protected. The applicant was also reasonably entitled to

consider that a pre-authorisation system, intended to ensure that any organiser respect such standards, was a suitable mechanism to achieve that objective.

109 In addition, even if it were established that the 2016 eligibility rules also pursue an objective of protecting the applicant's economic interests, it should be noted that the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive. As the Commission acknowledged at the hearing, the pursuit of economic objectives is an inherent feature of any undertaking, including a sports federation when it carries out an economic activity.

110 However, as the Commission rightly pointed out in recitals 255 to 258 of the contested decision, the pre-authorisation system as designed by the applicant in the present case goes beyond what is necessary to pursue the objective of ensuring that sporting competitions comply with common standards. First, Communication No 1974 imposes certain obligations on third-party organisers to disclose information of a financial nature which goes beyond what is necessary to achieve the stated objective. In that regard, it should be noted that, although disclosure of a planned budget could be justified by the need to ensure that a third-party organiser is in a position to organise a competition, the applicant has not adduced any evidence to show that disclosure of the business plan as a whole is necessary in order to achieve such an objective. Secondly, the applicant has not provided any justification as to why the pre-authorisation system as formalised in Communication No 1974 provides for a longer and more restrictive time limit for the submission of a request for authorisation in the case of an event organised by a third party (see paragraph 14 above). Thirdly, the requirements laid down by Communication No 1974 are not exhaustive and leave the applicant broad discretion to accept or reject an application for an open international competition. Fourthly, Communication No 1974 does not provide for specific time limits for dealing with requests for authorisation, which could also give rise to arbitrary treatment of such requests.

111 It follows that, even though the Commission wrongly relied on the objective of protecting the applicant's economic interests as regards the 2016 eligibility rules, it was right to find that the pre-authorisation system was disproportionate, in particular in the light of the alleged other objective pursued by the eligibility rules, that all events should comply with common standards.

112 In the second place, the applicant criticises the Commission for considering that it could use its own revenues to support events organised by its members where it would not make its funds available to third parties, in order to then conclude that the 2016 eligibility rules continued to seek protection of the applicant's economic interests. According to the applicant, it is apparent that the Commission would have it finance events organised by third parties.

113 However, in recitals 187 and 220 of the contested decision, the Commission merely observed that the applicant may not use resources from a solidarity contribution also paid by third parties to finance its own events and those of its members, when it did not confer that same benefit on third-party organisers.

114 It is true, as the applicant submits, that a sports federation with limited revenue may legitimately rely on the right to use the solidarity contribution in order to finance events which, in its view, merit such financing, and to deprive others of it. However, in view of its role as an organiser of events and holder of the power to authorise events organised by third parties, the applicant is required to ensure undistorted competition between economic operators within the meaning of the case-law cited in paragraphs 72 and 73 above. It follows that, as the Commission rightly considered, the applicant cannot make the authorisation of events organised by third parties subject to payment of a solidarity contribution which is used to finance only its own events and those of its members. Accordingly, the argument that the Commission required the applicant to finance events organised by third parties must be rejected, since the applicant has not made any other criticisms of recitals 187 and 220 of the contested decision concerning the solidarity contribution.

3. Other aspects of the context of the eligibility rules

115 The applicant claims that the Commission did not carry out a serious analysis of the relevant market in the light of its context. In particular, it submits that the Commission wrongly refused to take into consideration the figure skating events that it had approved.

116 However, figure skating events do not form part of the relevant market as defined by the Commission, namely the global market for the organisation and commercial exploitation of speed skating, a definition which the applicant does not dispute.

117 It is true that, the Court of Justice has held that, when analysing a restriction by object, it is necessary to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the actual conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 78). However, in the case giving rise to that case-law there were interactions between the relevant market and a different related market, which has not been established in the present case. The mere fact that the applicant also has jurisdiction in respect of figure skating and that the same rules apply to both disciplines is not sufficient to demonstrate such interactions. Accordingly, the Commission was not required to take into consideration the events authorised by the applicant in a market different from the relevant market.

118 Furthermore, as stated in paragraphs 86 to 89 above, both before and after the publication of Communication No 1974, the eligibility rules did not provide the exercise of the applicant's regulatory function with the necessary safeguards to ensure that third parties had effective access to the relevant market. Given the absence of objective, transparent, non-discriminatory and verifiable authorisation criteria, the applicant's broad discretion to authorise or reject such events was in no way limited.

119 It follows that the fact that the applicant was able to approve figure skating events, even if they were genuine independent events, is irrelevant to the analysis of the context of the eligibility rules because it does not call into question the conclusion that the applicant's pre-authorisation system allows it to distort competition on the relevant market by favouring its own events to the detriment of events offered by third parties and that, therefore, those rules do not ensure effective access to that market.

120 In the light of all the foregoing considerations, the Commission was right to conclude that the eligibility rules have as their object the restriction of competition. In the light of their content and their objectives, and of the context of the eligibility rules, those rules reveal a sufficient degree of harm to be regarded as restricting competition by object within the meaning of Article 101 TFEU.

121 Since the existence of a restriction of competition by object is sufficiently substantiated by the examination of the content and objectives of the eligibility rules and of their context, there is no need to rule on the applicant's arguments concerning the Commission's conclusions relating to its intention to exclude organisers. Since the intention is not a necessary factor in determining whether a decision by an association of undertakings is restrictive by object (see, to that effect, judgment of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 77), the arguments put forward by the applicant against that part of the examination of restriction by object are ineffective.

122 The applicant's second and fourth pleas must therefore be rejected.

123 Since the Commission has established correctly the existence of a restriction of competition by object, it is not necessary to examine its effects on competition (judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 17, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 25). Accordingly, it is not necessary to examine the merits of the third plea raised by the applicant, alleging that the Commission wrongly concluded that the eligibility rules have the effect of restricting competition.

C. Fifth plea, alleging that the decision relating to the 2014 Dubai Grand Prix does not fall within the territorial scope of Article 101 TFEU

124 The applicant claims that the decision not to approve the Dubai Grand Prix does not fall within the territorial scope of Article 101 TFEU, since that event was to take place outside the territory of the European Economic Area (EEA).

125 As a preliminary point, it should be recalled that, according to the case-law, the Commission's competence under public international law to find and punish conduct adopted outside the European Union may be established on the basis of either the implementation test or the qualified effects test (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 and 47). By virtue of the implementation test, the Commission's competence is justified by the place where the alleged conduct was carried out (judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 16). In accordance with the qualified effects test, the Commission may also justify its competence where the conduct is capable of producing immediate, substantial and foreseeable effects on the territory of the European Union (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 48 to 53).

126 In the present case, the Commission concluded, in Article 1 of the operative part of the contested decision, that the applicant had 'infringed Article 101 [TFEU] … by adopting and enforcing the eligibility rules …'. That conclusion must be read in the light of the grounds of the contested decision.

127 In that regard, although it is true that the contested decision on several occasions criticises the decision adopted by the applicant on the occasion of the Dubai Grand Prix, the fact remains that it is not directed at the refusal decision in respect of that Grand Prix as such. The Commission used the applicant's refusal to approve the Dubai Grand Prix merely to illustrate the way in which it applies the eligibility rules in practice (see, inter alia, recitals 175, 176, 199 to 205, 232 to 235 and 243 of the contested decision).

128 Therefore, in so far as the contested decision concerns the eligibility rules and not the Dubai Grand Prix, the relevant question is not whether that event would have taken place within or outside the territory of the EEA, but whether the Commission was entitled, in accordance with the case-law cited in paragraph 125 above, to rule on the compatibility of the eligibility rules with Article 101 TFEU.

129 In that regard, it must be held that, in view in particular of the severe and disproportionate penalties provided for in the event of the participation of skaters in events not authorised by the applicant and the absence of objective, transparent, non-discriminatory and verifiable authorisation criteria, the applicant's eligibility rules prevent skaters from offering their services to organisers of international speed skating events not authorised by the applicant and, therefore, prevent those organisers from using their services for competing events within or outside the EEA. Consequently, the eligibility rules are capable of producing immediate, substantial and foreseeable effects in the territory of the European Union within the meaning of the case-law referred to in paragraph 125 above. Accordingly, the Commission was entitled in the present case to adopt the contested decision and that decision was not adopted in breach of the territorial scope of Article 101 TFEU.

130 It follows that the fifth plea must be rejected as unfounded.

D. Sixth plea, disputing the conclusion that the applicant's arbitration rules reinforce the restrictions of competition

131 By its sixth plea, the applicant claims that the conclusion in Section 8.7 of the contested decision that its arbitration rules reinforce the restrictions of competition caused by the eligibility rules is unfounded and should be ignored.

132 The Commission raises a plea of inadmissibility against the sixth plea, alleging that the applicant has in no way sought annulment of the finding relating to the arbitration rules. At the hearing, the Commission also stated that Section 8.7 of the contested decision constituted an analysis which it carried out for the sake of completeness and that the conclusion of that section, relating to the arbitration rules, does not therefore form part of the infringement found. In the light of that statement, it follows that the Commission is asking the Court to reject that plea as ineffective. According to the case-law, the ineffective nature of a plea which has been raised refers to its capacity, in the event that it is well founded, to lead to the annulment sought by an applicant; and not to the interest which that applicant may have in bringing such an action or even in raising a specific plea, since those are issues relating to the admissibility of the action and the admissibility of the plea respectively (judgment of 21 September 2000, *EFMA* v *Council*, C-46/98 P, EU:C:2000:474, paragraph 38).

133 In the alternative, the Commission also submits in its defence that the sixth plea is, in any event, unfounded.

1. The effectiveness of the sixth plea

134 In response to a question put to it at the hearing, the applicant confirmed that its request to disregard Section 8.7 of the contested decision in fact concerned seeking of the annulment of the contested decision in so far as it was based on the considerations set out in that point .

135 Article 1 of the contested decision provides that the applicant 'infringed Article 101 [TFEU] and Article 53 of the [EEA Agreement] by adopting and enforcing the eligibility rules, in particular Rules 102 and 103 of the ISU 2014 General Regulations and the ISU 2016 General Regulations, with regard to speed skating'. Furthermore, it is apparent from Section 8.6 of the contested decision, entitled 'Conclusion on Article 101 [TFEU] and Article 53(1) of the EEA Agreement', that Article 1 of the operative part is based on the statement of reasons contained in Sections 8.3 to 8.5 of the contested decision.

136 By contrast, the assessments concerning the arbitration rules appear in a section following the conclusion concerning whether there is a restriction of competition, namely in Section 8.7 of the contested decision. In that section, the Commission did not conclude that the arbitration rules constituted a separate infringement of competition law, but merely that they reinforced the restrictions of competition created by the applicant's eligibility rules.

137 It follows that, as the Commission acknowledged at the hearing, having regard to the infringement found, Section 8.7 of the contested decision dealing with the arbitration rules is superfluous since, even if that section were vitiated by an error, that error would not call into question the existence of a restriction of competition as such. Accordingly, the fact that that section is vitiated by illegality cannot lead to the annulment of Article 1 of the operative part of the contested decision. Accordingly, the applicant's sixth plea, in so far as it seeks annulment of Article 1 of the operative part of the contested decision, is ineffective.

138 However, under Article 2 of the contested decision, the applicant is required, in particular, to bring to an end the infringement referred to in Article 1 and to refrain from repeating any act or conduct having the same or similar object or effect. That article must be read in the light of recitals 338 to 342 of the contested decision, which determine the measures to be taken by the applicant in order to comply with its obligation to bring the infringement to an end. In those recitals, the Commission stated that the applicant could, in essence, put an end to the infringement while retaining its pre-authorisation system only if it introduced substantial amendments not only to the eligibility rules and to Communication No 1974, but also to its arbitration rules.

139 Thus, the Commission made the lawfulness of maintaining the applicant's pre-authorisation system conditional on the substantial amendment, inter alia, of its arbitration rules. It follows that Section 8.7 of the contested decision forms part of the necessary support for Article 2 of its operative part.

140 Therefore, contrary to what the Commission claims, the sixth plea is effective in so far as it is raised in support of the claim for annulment of Article 2 of the contested decision.

2. Substance

141 As regards the merits of that plea, the applicant claims that Section 8.7 of the contested decision is vitiated, in essence, by two errors of assessment. First, the Commission wrongly concluded that the arbitration rules made effective judicial protection against a potentially anticompetitive decision of the applicant more difficult. Secondly, it submits that that section is not relevant in so far as the Commission does not consider that recourse to the CAS arbitration procedure constitutes an infringement of Article 101 TFEU.

142 As is apparent from paragraph 132 above, the Commission acknowledges that the arbitration rules do not constitute an infringement of Article 101 TFEU. However, it defends the assessment it made in Section 8.7 of the contested decision and replies that it was entitled to carry out the analysis at issue.

143 In its written pleadings, the Commission submits, inter alia, that it could have regarded the arbitration rules as an aggravating circumstance within the meaning of point 28 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines'), if it had decided to impose such a penalty.

144 The contested decision does not make use of the concept of an aggravating circumstance and makes no reference to the 2006 Guidelines.

145 However, it must be noted that, having concluded that the eligibility rules restricted competition, the Commission went on to find that the arbitration rules reinforced the restrictions created by those eligibility rules. In addition, it considered, in essence, that in the event of maintaining the pre-authorisation system, the eligibility rules, Communication No 1974 and the applicant's arbitration rules would have to be substantially amended.

146 Thus, while it is true that the Commission did not impose a fine in the present case, after considering doing so at the stage of the statement of objections, the fact remains that the fact that it considered that the arbitration rules reinforced the restrictions created by the eligibility rules led it to extend the scope of the obligations imposed on the applicant, making the lawfulness of maintaining its pre-authorisation system subject to the amendment, inter alia, of those rules.

147 In essence, the Commission thus continued to follow the logic of the 2006 Guidelines on the taking into account of aggravating circumstances in the calculation of fines, even though it did not ultimately impose a fine in the contested decision.

148 Even if the Commission had, as it maintains, extended the obligations incumbent on the applicant on the basis of the 2006 Guidelines and could thus invoke the application of those guidelines without a substitution of grounds, it must be held that it was wrong to consider that the arbitration rules constituted an aggravating circumstance within the meaning of the 2006 Guidelines.

149 In that regard, it must be borne in mind that, while it is true that the guidelines do not constitute the legal basis of the decisions adopted by the Commission, the fact remains that, by adopting such rules of conduct and announcing, by publishing them, that it will apply them, the Commission imposes a limit on the exercise of its own discretion. Accordingly, it cannot depart from those rules without being found, in some circumstances, in breach of general principles of law, such as the principles of equal treatment or of the protection of legitimate expectations. It is not therefore inconceivable that, in certain circumstances and depending on their content, such rules of conduct of general application may produce legal effects (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 to 211).

150 Point 28 of the 2006 Guidelines is worded as follows:

'The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

– where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed [Article 101 TFEU] or [Article 102 TFEU]. The basic amount will be increased by up to 100% for each such infringement established;

– refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

– role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.'

151 The use of the words 'such as' in the first paragraph of point 28 of the 2006 Guidelines indicates that it is a non-exhaustive list of aggravating circumstances (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 105).

152 Nonetheless, it must be held that the aggravating circumstances listed in point 28 of the 2006 Guidelines have in common the fact that they describe unlawful conduct or circumstances which render the infringement more harmful and which justify a particular ruling, resulting in an increase in the penalty imposed on the undertaking responsible. In point 4 of the 2006 Guidelines, the Commission's power to impose fines at a sufficiently deterrent level entails the need to adjust the basic amount of any fine by taking into account, inter alia, any aggravating circumstances surrounding the infringement.

153 It follows that only unlawful conduct or circumstances which render the infringement more harmful, such as the three circumstances listed in point 28 of the guidelines, may justify an increase in the fine imposed for an infringement of EU competition law, since no one can be deterred from lawful or non-harmful conduct.

154 In the present case, it should be noted, first, as the Commission acknowledges in recital 269 of the contested decision, that arbitration is a generally accepted method of binding dispute resolution and that agreeing on an arbitration clause as such does not restrict competition.

155 Secondly, as is apparent from recital 286 of the contested decision and contrary to what the applicant claims, it must be held that the Commission did not consider that the applicant's arbitration rules infringed athletes' right to a fair hearing.

156 Thirdly, it should be noted that the binding nature of arbitration and the fact that the arbitration rules confer exclusive jurisdiction on the CAS to hear disputes relating to decisions on ineligibility made by the applicant may be justified by legitimate interests linked to the specific nature of the sport. In that regard, it should be noted that the European Court of Human Rights has ruled to that effect in a case which concerned, inter alia, the arbitration rules. It recognised that it was clearly in the interest of disputes arising in the context of professional sport, in particular those involving an international dimension, that they could be submitted to a specialised court which is capable of adjudicating quickly and economically. It added that high-level international sporting events are organised in different countries by organisations having their seat in different States, and that they are often open to athletes throughout the world. In that context, recourse to a single, specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty (ECtHR, 2 October 2018, *Mutu and Pechstein v. Switzerland*, CE:ECHR:2018:1002JUD004057510, § 98).

157 Fourthly, it must be borne in mind that the Court of Justice has already held that any person is entitled to bring proceedings before a national court and claim compensation for the harm suffered where there is a causal link between that harm and an agreement or practice prohibited under Article 101 TFEU (see judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 22).

158 The right of any individual to claim compensation for such a loss actually strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (see judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 27, and of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23).

159 In the present case, while it is true that the arbitration rules do not permit skaters to bring an action before a national court for annulment of an ineligibility decision which infringes Article 101(1) TFEU, the fact remains that skaters may bring, if they so wish, in accordance with the case-law cited in paragraphs 157 and 158 above, an action for damages before a national court. Furthermore, organisers who are third parties may also bring an action for damages where they consider that a decision refusing authorisation infringes Article 101(1) TFEU. In such cases, the national court is not bound by the CAS's assessment of the compatibility of the ineligibility decision or the refusal of authorisation with EU competition law and, where appropriate, may submit a request for a preliminary ruling to the Court of Justice under Article 267 TFEU.

160 Furthermore, it should be noted that skaters and third-party organisers who have been the subject of an ineligibility decision or a refusal to grant authorisation contrary to Article 101(1) TFEU may also lodge a complaint with a national competition authority or the Commission, as the complainants have done in the present case. In the event that the authority dealing with the case had to make a decision, that decision could further, if necessary, be reviewed before the EU Courts. The EU Courts could find it necessary to rule on such a matter in the context of an action for annulment brought against a Commission decision or following a reference for a preliminary ruling made by a national court hearing an action brought against a decision of a national competition authority.

161 It follows from the findings set out in paragraphs 157 to 160 above that, contrary to what is argued by the Commission, use of the CAS arbitration system is not such as to compromise the full effectiveness of EU competition law.

162 The case-law relied on by the Commission cannot cast doubt on that conclusion. Unlike the circumstances at issue in the case giving rise to the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 55), the establishment of the CAS does not derive from a treaty by which Member States agreed to remove from the jurisdiction of their own courts and, therefore, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of competition law.

163 It follows from the foregoing that the fact that the arbitration rules conferred on the CAS exclusive jurisdiction to review the legality of ineligibility decisions and that the arbitration in the present case is binding do not constitute unlawful circumstances which make the infringement found in the present case more harmful, as the circumstances listed within the meaning of point 28 of the 2006 Guidelines do. Accordingly, the Commission was not entitled to consider that the arbitration rules constituted an aggravating circumstance and therefore, it was not entitled to conclude that they reinforced the restrictions of competition created by the eligibility rules.

164 It follows that the applicant's sixth plea, alleging that the conclusion contained in Section 8.7 of the contested decision is unfounded, must be upheld.

E. Seventh plea, alleging infringement of the second sentence of Article 7(1) of Regulation No 1/2003

165 By its seventh plea, the applicant disputes the legality of Article 2 of the contested decision, claiming, in essence, that the Commission infringed Article 7 of Regulation No 1/2003 by imposing on it corrective measures which are unrelated to the alleged infringement. In particular, the applicant submits that the Commission wrongly required it, in breach of Article 7(1) of Regulation No 1/2003, to make amendments to the eligibility rules, when the aspects of the rules to which those amendments were to relate did not constitute infringements. Similarly, since the Commission did not find that the arbitration rules constituted an infringement, it cannot require the applicant to amend them.

166 The Commission replies that it did not impose corrective measures on the applicant. It maintains that it merely required the applicant to bring the infringement to an end in accordance with the first sentence of Article 7(1) of Regulation No 1/2003, while leaving it the choice as to how to bring the infringement to an end.

167 It must be borne in mind that Article 7(1) of Regulation No 1/2003 provides that:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end …'

168 The condition laid down in that provision that the corrective measures must be proportionate to the infringement committed means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (judgment of 6 April 1995, *RTE and ITP* v *Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 93).

169 Under Article 2 of the contested decision, the Commission ordered the applicant to bring the infringement found to an end and henceforth to refrain from taking any measure having the same object or effect, or an equivalent effect or object. In recital 339 of the contested decision, the Commission stated that there was 'more than one way' of bringing that infringement effectively to an end, and then identified two. Thus, it considered, first, that the applicant could abolish its pre-authorisation system and the associated system of penalties. Secondly, if the applicant were to choose to maintain a pre-authorisation system, the Commission stated, in recital 339 of the contested decision, that it could 'only' effectively bring the infringement to an end by substantially changing the eligibility rules, the ISU arbitration rules and the authorisation criteria laid down in Communication No 1974, while listing a series of steps that the applicant would need to follow to do this.

170 It must be held at the outset that, since the Commission rightly found that there was a restriction by object in the present case, the present plea must be rejected in so far as it criticises the Commission for imposing on it measures which do not correspond to a finding of infringement.

171 On the other hand, as the Commission submitted at the hearing in reply to a written question put by the Court, the arbitration rules do not form part of the infringement found and, as is apparent from paragraph 163 above, the Commission was wrong to take the view that they reinforced that infringement.

172 In recital 339 of the contested decision, the Commission considered that the maintenance of the pre-authorisation system was possible only if the applicant amended the arbitration rules (see paragraph 169 above). Such a ground, read in the light of Article 2 of the contested decision, which orders the applicant to bring the infringement to an end and to communicate to the Commission the measures taken in that regard, has binding force, even if, as the Commission maintains, that request for amendment of the arbitration rules does not constitute a 'remedy' within the meaning of the second sentence of Article 7(1) of Regulation No 1/2003.

173 It follows from the foregoing that the Commission was wrong to require the applicant to amend the arbitration rules, which did not reinforce the severity of the infringement found and were not, moreover, an integral part of them.

174 Therefore, the seventh plea must be upheld in part in so far as the Commission required the substantial amendment of the arbitration rules in the event that the pre-authorisation system was maintained, and must be rejected as to the remainder.

F. Eighth plea, alleging that the imposition of periodic penalty payments lacks any valid legal basis

175 The applicant submits that the Commission was not entitled to impose periodic penalty payments on it for two reasons. First, the remedies imposed are vague and imprecise and, secondly, they are not linked to the infringement found.

176 In the first place, as is apparent from the examination of the seventh plea, the Commission provided sufficiently precise information concerning the measures to be taken by the applicant in order to put an end to the infringement found. Therefore, the applicant's argument that the Commission was not entitled to impose periodic penalty payments in view of the vague and imprecise nature of those measures must be rejected.

177 In the second place, it should be borne in mind that, under Article 24(1(a) of Regulation No 1/2003, when the Commission adopts a decision pursuant to Article 7 of that regulation, it may also impose periodic penalty payments on undertakings and associations of undertakings in order to compel them to bring to an end an infringement of Article 101 or 102 TFEU. As stated in connection with the seventh plea, the arbitration rules were not part of the infringement found, so that the Commission could not require the applicant to amend them and, consequently, it could not impose periodic penalty payments connected with the requirement to amend those rules.

178 The eighth plea must therefore be upheld in part in so far as it relates to the imposition of periodic penalty payments in the event of failure to amend the arbitration rules and must be rejected as to the remainder.

V. Conclusion on the outcome of the action

179 The applicant's form of order sought concerning the claim for annulment of Article 1 of the contested decision must be rejected.

180 By contrast, it is apparent from the analysis of the sixth and seventh pleas in law, that the Commission was wrong to conclude that the arbitration rules reinforced the restrictions of competition caused by the eligibility rules and that it required substantial amendment to those rules, even though they were not an integral part of the infringement established in Article 1 of the contested decision. Therefore, Article 2 of the contested decision must be annulled in part.

181 Finally, it follows from the analysis of the eighth plea that, consequently, Article 4 of the contested decision, which provides for periodic penalty payments in the event of failure to comply with Article 2, must be annulled in part, in so far as it relates to the requirement to amend the arbitration rules.

Costs

182 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

183 In the present case, since the applicant has been unsuccessful as regards its claim for annulment of Article 1 of the contested decision and has been partially successful with regard to its claim for annulment of Articles 2 and 4 of that decision, each party must be ordered to bear its own costs.

184 Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than the Member States and institutions to bear his or her own costs. In the circumstances of this dispute, it is appropriate that the interveners bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Annuls Articles 2 and 4 of Commission Decision C(2017) 8230 final, adopted on 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT/40208 – International Skating Unions's eligibility rules), in so far as, by requiring the International Skating Union to put an end to the infringement established which is subject to a periodic penalty payment, the Commission refers to the arbitration rules and requires that they be amended in the event that the pre-authorisation system is maintained.

2. Dismisses the action as to the remainder.

3. Orders the International Skating Union and the European Commission to bear their own costs.

4. Orders the European Elite Athletes Association, Mr Mark Jan Hendrik Tuitert and Mr Niels Kerstholt to bear their own costs.

PART D. OTHER MATERIALS

World Football Association (WFA) Statutes

May 2021 edition
(Extract)

NB. Fictional

DEFINITIONS

The terms given below denote the following:

WFA: "World Football Association".

Association: a football association recognised as such by WFA. It is a member of WFA, unless a different meaning is evident from the context.

League: an organisation that is subordinate to an association.....

Member association: an association that has been admitted into membership of WFA by the Congress.

Official: any board member (including the members of the Council), committee member, referee and assistant referee, coach, trainer and any other person responsible for technical, medical and administrative matters in WFAWFA, a confederation, a member association, a league or a club as well as all other persons obliged to comply with the WFAWFA Statutes (except players, football agents and match agents).

Club: a member of an association (that is a member association of WFA) or a member of a league recognised by a member association that enters at least one team in a competition.

Player: any football player licensed by an association.

Association football: the game controlled by WFA and organised by WFA, the confederations and/or the member associations in accordance with the Laws of the Game.

Official competition: a competition for representative teams organised by WFA or any confederation.

Stakeholder: a person, entity or organisation which is not a member association and/or body of WFA but has an interest or concern in WFA's activities, which may affect or be affected by WFA's actions, objectives and policies, in particular clubs, players, coaches and professional leagues.

NB: Terms referring to natural persons are applicable to both genders. Any term in the singular applies to the plural and vice versa.

GENERAL PROVISIONS

2. Objectives

The objectives of WFA are:

a) to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes;

b) to organise its own international competitions;

c) to draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement;

d) to control every type of association football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of WFA or of the Laws of the Game;

e) to use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless of gender or age;

f) to promote the development of women's football and the full participation of women at all levels of football governance; and

g) to promote integrity, ethics and fair play with a view to preventing all methods or practices, such as corruption, doping or match manipulation, which might jeopardise the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.

3. Human rights

WFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.

4. Non-discrimination, equality and neutrality

1. Discrimination of any kind against a country, private person or group of people on account of race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason is strictly prohibited and punishable by suspension or expulsion.

2. WFA remains neutral in matters of politics and religion. Exceptions may be made with regard to matters affected by WFA's statutory objectives.

5. Promoting friendly relations

1. WFA shall promote friendly relations:

a) between and among member associations, confederations, clubs, officials and players; and

b) in society for humanitarian objectives.

2. WFA shall provide the necessary institutional means to resolve any dispute that may arise between or among member associations, confederations, clubs, officials and players.

6. Players

The Council shall regulate the status of players and the provisions for their transfer, as well as questions relating to these matters, in particular the encouragement of player training by clubs and the protection of representative teams, in the form of special regulations from time to time.
[...]

8. Conduct of bodies, officials and others

1. All bodies and officials must observe the Statutes, regulations, decisions and Code of Ethics of WFA in their activities.

2. [...]

3. Every person and organisation involved in the game of football is obliged to observe the Statutes and regulations of WFA as well as the principles of fair play.

[...]

MEMBERSHIP

10. Admission, suspension and expulsion

The Congress shall decide whether to admit, suspend or expel a member association solely upon the recommendation of the Council.

11. Admission

1. Any association which is responsible for organising and supervising football in all of its forms in its country may become a member association.....

2. Membership is only permitted if an association is currently a member of a confederation. The Council may issue regulations with regard to the admission process.

3. Any association wishing to become a member association shall apply in writing to the WFA general secretariat.

4. The association's legally valid statutes shall be enclosed with the application for membership and shall contain the following mandatory provisions:

a) always to comply with the Statutes, regulations and decisions of WFA and of the relevant confederation;

b) to comply with the Laws of the Game in force;

[...]

13. Member associations' rights

1. Member associations have the following rights:

a) to take part in the Congress;

b) to draw up proposals for inclusion in the agenda of the Congress;

c) to nominate candidates for the WFA presidency and the Council;

d) to participate in and cast their votes at all WFA elections in accordance with the WFA Governance Regulations;

e) to take part in competitions organised by WFA;

f) to take part in WFA's assistance and development programmes; and

g) to exercise all other rights arising from these Statutes and other regulations.

2. The exercise of these rights is subject to other provisions in these Statutes and the applicable regulations.

14. Member associations' obligations

1. Member associations have the following obligations:

a) to comply fully with the Statutes, regulations, directives and decisions of WFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art. 56 par. 1 of the WFA Statutes;

b) to take part in competitions organised by WFA;

c) to pay their membership subscriptions;

d) to cause their own members to comply with the Statutes, regulations, directives and decisions of WFA bodies;

e) to convene its supreme and legislative body at regular intervals, at least every two years;

f) to ratify statutes that are in accordance with the requirements of the WFA Standard Statutes;

g) to create a referees' committee that is directly subordinate to the member association;

h) to respect the Laws of the Game;

i) to manage their affairs independently and ensure that their own affairs are not influenced by any third parties in accordance with art. 19 of these Statutes;

j) to comply fully with all other duties arising from these Statutes and other regulations.

2. Violation of the above-mentioned obligations by any member association may lead to sanctions provided for in these Statutes.

3. Violations of par. 1 i) may also lead to sanctions, even if the third-party influence was not the fault of the member association concerned. Each member association is responsible towards WFA for any and all acts of the members of their bodies caused by the gross negligence or wilful misconduct of such members.

15. Member associations' statutes

Member associations' statutes must comply with the principles of good governance, and shall in particular contain, at a minimum, provisions relating to the following matters:

a) to be neutral in matters of politics and religion;

b) to prohibit all forms of discrimination;

c) to be independent and avoid any form of political interference;

d) to ensure that judicial bodies are independent (separation of powers);

e) all relevant stakeholders must agree to respect the Laws of the Game, the principles of loyalty, integrity, sportsmanship and fair play as well as the Statutes, regulations and decisions of WFA and of the respective confederation;

f) all relevant stakeholders must agree to recognise the jurisdiction and authority of CAS and give priority to arbitration as a means of dispute resolution;

g) that the member association has the primary responsibility to regulate matters relating to refereeing, the fight against doping, the registration of players, club licensing, the imposition of disciplinary measures, including for ethical misconduct, and measures required to protect the integrity of competitions;

h) definition of the competences of the decision-making bodies;

i) to avoid conflicts of interests in decision-making;

j) legislative bodies must be constituted in accordance with the principles of representative democracy and taking into account the importance of gender equality in football; and

k) yearly independent audits of accounts.....

20. Status of clubs, leagues and other groups of clubs

1. Clubs, leagues or any other groups affiliated to a member association shall be subordinate to and recognised by that member association. The member association's statutes shall define the scope of authority and the rights and duties of these groups. The statutes and regulations of these groups shall be approved by the member association.

2. Every member association shall ensure that its affiliated clubs can take all decisions on any matters regarding membership independently of any external body.....

CONFEDERATIONS

22. Confederations

1. Member associations that belong to the same continent have formed the following confederations, which are recognised by WFA:...

(c) Associations européennes de football – EFA...

Recognition of each confederation by WFA entails full mutual respect of each other's authority within their respective institutional areas of competence as set forth in these Statutes.

2. WFA may, in exceptional circumstances, authorise a confederation to grant membership to an association that belongs geographically to another continent and is not affiliated to the confederation on that continent. The opinion of the confederation concerned geographically shall be obtained.

3. Each confederation shall have the following rights and obligations:

(a) to comply with and enforce compliance with the Statutes, regulations and decisions of WFA;

(b) to work closely with WFA in every domain so as to achieve the objectives stipulated in art. 2 and to organise international competitions; [...]

(e) to ensure that international leagues or any other such groups of clubs or leagues shall not be formed without its consent and the approval of WFA; [...]

(k) with the mutual cooperation of WFA, to take any action considered necessary to develop the game of football on the continent concerned, such as arranging development programmes, courses, conferences, etc.;

(l) with the mutual cooperation of WFA, to take all actions necessary to ensure that WFA stays neutral, politically and religiously, and that no kind of demonstration or political, religious or racial propaganda is permitted in any venues or other areas.

23. Confederations' statutes

The confederations' statutes must comply with the principles of good governance, and shall in particular contain, at a minimum, provisions relating to the following matters:

a) to be neutral in matters of politics and religion;

b) to prohibit all forms of discrimination;

c) to be independent and avoid any form of political interference;

d) to ensure that judicial bodies are independent (separation of powers);

e) all relevant stakeholders must agree to respect the Laws of the Game, the principles of loyalty, integrity, sportsmanship and fair play as well as the Statutes, regulations and decisions of WFA and of the respective confederation;

f) all relevant stakeholders must agree to recognise the jurisdiction and authority of CAS and give priority to arbitration as a means of dispute resolution;

g) regulation of matters relating to refereeing, the fight against doping, club licensing, the imposition of disciplinary measures, including for ethical misconduct, and measures required to protect the integrity of competitions;

h) definition of the competences of the decision-making bodies;

i) to avoid conflicts of interests in decision-making;

j) legislative bodies must be constituted in accordance with the principles of representative democracy and taking into account the importance of gender equality in football; and

k) yearly independent audits of accounts.

[...]

42. Organising Committee for WFA Competitions

The Organising Committee for WFA Competitions shall organise all official WFA competitions in compliance with the provisions of the regulations applicable to the respective competitions, the hosting documents and the hosting requirements contained or referred to therein. [...]

44. Member Associations Committee

The Member Associations Committee shall deal with relations between WFA and its member associations as well as the member associations' compliance with the WFA Statutes and draw up proposals for optimum cooperation. The committee shall also monitor the evolution of the Statutes and regulations of WFA, the confederations and member associations.
[...]

50. Judicial bodies

1. The judicial bodies of WFA are:

a) the Disciplinary Committee;

b) the Ethics Committee; and

c) the Appeal Committee.

[...]

51. Disciplinary Committee

[...]

2. The Disciplinary Committee may pronounce the sanctions described in these Statutes and the WFA Disciplinary Code on member associations, clubs, officials, players, football agents and match agents.

3. These provisions are subject to the disciplinary powers of the Congress and Council with regard to the suspension and expulsion of member associations.

4. The Council shall issue the WFA Disciplinary Code.

5. The Disciplinary Committee may propose amendments to its regulations to the Council.

53. Appeal Committee

1. The function of the Appeal Committee shall be governed by the WFA Disciplinary Code ....

2. The Appeal Committee is responsible for hearing appeals against decisions from the Disciplinary Committee and the Ethics Committee that are not declared final by the relevant WFA regulations.

3. Decisions pronounced by the Appeal Committee shall be irrevocable and binding on all the parties concerned.
[...]

DISCIPLINARY MEASURES

55. Disciplinary measures

The disciplinary measures are primarily:

1. for natural and legal persons:

a) a warning;
b) a reprimand;
c) a fine;
d) the return of awards.

2. for natural persons:

a) suspension for a specific number of matches or for a specific period;
b) a match suspension;
c) a ban from the dressing rooms and/or the substitutes' bench;
d) a ban from entering a stadium;
e) a ban on taking part in any football-related activity;
f) social work;
g) compliance training;
h) community football service;
i) suspension or withdrawal of a football agent's licence;
j) suspension or withdrawal of a match agent's licence.

3. for legal persons:

a) a ban on registering new players, either nationally or internationally;
b) playing a match without spectators;
c) playing a match with a limited number of spectators;
d) playing a match on neutral territory;
e) a ban on playing in a particular stadium;
f) annulment of the result of a match;
g) deduction of points;
h) relegation to a lower division;
i) expulsion from a competition in progress or from future competitions;
j) forfeit;
k) replaying a match;
l) implementation of a prevention plan;
m) (for member associations) payment of restitution to an affiliated club;
n) (for member associations) reduction or restriction of development ...funding.

[...]

SUBMISSION TO DECISIONS OF WFA

59. Implementation of decisions

1. The confederations, member associations and leagues shall agree to comply fully with any decisions passed by the relevant WFA bodies which, according to these Statutes, are final and not subject to appeal.

2. They shall take every precaution necessary to ensure that their own members, players and officials comply with these decisions.

3. The same obligation applies to football agents and match agents.

60. Sanctions

Any violation of the foregoing provisions will be punished in compliance with the WFA Disciplinary Code. [...]

66. Rights in competitions and events

1. WFA, its member associations and the confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law. These rights include, among others, every kind of financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights and incorporeal rights such as emblems and rights arising under copyright law.

2. The Council shall decide how and to what extent these rights are utilised and draw up special regulations to this end. The Council shall decide alone whether these rights shall be utilised exclusively, or jointly with a third party, or entirely through a third party.

67. Authorisation to distribute

1. WFA, its member associations and the confederations are exclusively responsible for authorising the distribution of image and sound and other data carriers of football matches and events coming under their respective jurisdiction, without any restrictions as to content, time, place and technical and legal aspects.

2. The Council shall issue special regulations to this end.

COMPETITIONS

X. WFA FINAL COMPETITIONS

68. Competition venues

1. The Council shall decide the venue for the final competitions organised by WFA, with the sole exception of the venue for the final competition of the WFA World Cup™ and the WFA Women's World Cup™, which shall be decided by the Congress in accordance with par. 2 of this article.

2. The decision on the venue for the final competition of the WFA World Cup™ and the WFA Women's World Cup™ aims to achieve the objective of securing the best possible hosting conditions in the host country/countries and shall follow the procedure below:

a) Based on specific regulations to be issued by the Council, the WFA general secretariat shall establish a fair and transparent bidding procedure, inviting all qualified member associations to submit a bid and defining in detail the requirements for the bidding and hosting as well as criteria for selecting the host of the event.

b) Based on its best judgement, the WFA general secretariat shall submit to the Council a

public report evaluating the compliance of all bids with the bidding procedure and the requirements for hosting the event, taking into consideration the defined criteria for selecting the host.

c) The Council shall review the report and designate, based on its best judgement and in an open ballot, up to three bids to be submitted to the Congress for a final decision. The result of each ballot and the related votes by the members of the Council shall be made public.

d) The Congress shall select the host venue from the bids designated by the Council. An absolute majority (more than 50%) of the member associations present and eligible to vote is necessary in the first ballot. If an absolute majority is not reached in the first ballot, then the bid with the lowest number of votes in the first ballot is eliminated. In the second ballot, or if fewer than three bids are presented to the Congress, a simple majority (more than 50%) of the valid votes cast is sufficient.

   The result of each ballot and the related votes by the members of the Congress shall be made public.

3. A Congress may not award the hosting rights to more than one WFA World Cup™ at the same meeting.

4. The right to host the event shall not be awarded to members of the same confederation for two consecutive editions of the WFA World Cup™.

[...]

INTERNATIONAL MATCHES AND COMPETITIONS

69. International match calendar

The Council shall compile an international match calendar that shall be binding upon the confederations, member associations and leagues, after conferring with the confederations. [...]

70. International matches and competitions

1. The Council shall be responsible for issuing regulations for organising international matches and competitions between representative teams and between leagues, club and/or scratch teams. No such match or competition shall take place without the prior permission of WFA, the confederations and/or the member associations in accordance with the Regulations Governing International Matches.

2. The Council may issue further provisions for such matches and competitions.

3. The Council shall determine any criteria for authorising line-ups that are not covered by the Regulations Governing International Matches.

4. Notwithstanding the authorisation competences as set forth in the Regulations Governing International Matches, WFA may take the final decision on the authorisation of any international match or competition.

71. Contacts

1. Players and teams affiliated to member associations or provisional members of the confederations may not play matches or make sporting contacts with players or teams that are not affiliated to member

associations or provisional members of the confederations without the approval of WFA.

2. Member associations and their clubs may not play on the territory of another member association without the latter's approval.

72. Authorisation

Associations, leagues or clubs that are affiliated to a member association may only join another member association or take part in competitions on that member association's territory under exceptional circumstances.In each case, authorisation must be given by both member associations, the respective confederation(s) and by WFA.

XV. FINAL PROVISIONS

75. Enforcement

These Statutes were adopted at the Congress on 21 May 2021 and come into force immediately after adoption.

21 May 2021

For WFA

President: *Steve Terrett*
Secretary General: *Vlad Novak*

European Football Association (EFA) Statutes (extract)

Edition 2021

NB. Fictional

DEFINITIONS OF TERMS

1. EFA: European Football Association
2. WFA: World Football Association.
3. 'Member Association': a national football association which is a member of EFA.
4. 'League': a combination of clubs within the territory of a Member Association and which is subordinate to and under the authority of that Member Association.
5. 'Executive Committee': the EFA Executive Committee, as it exists from time to time, in accordance with these Statutes.
6. 'Administration': the EFA Administration, as it exists from time to time, in accordance with these Statutes.
7. 'Fair play' means acting according to ethical principles which, in particular, oppose the concept of sporting success at any price, promote integrity and equal opportunities for all competitors, and emphasise respect of the personality and worth of everyone involved in a sporting event.
8. 'Official': every board member, committee member, referee and assistant referee, coach, trainer and any other person responsible for technical, medical or administrative matters at EFA, a Member Association, League or club as well as all other persons obliged to comply with the EFA Statutes.
9. ECA: European Club Association.
10. EL: European Leagues.

[…]

Article 2: Objectives

1. The objectives of EFA shall be to:

a) deal with all questions relating to European football;
b) promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, religion, race or any other reason;
c) monitor and control the development of every type of football in Europe;
d) organise and conduct international football competitions and tournaments at European level for every type of football whilst respecting the players' health;
e) prevent all methods or practices which might jeopardise the regularity of matches or competitions or give rise to the abuse of football;
f) promote and protect ethical standards and good governance in European football;
g) ensure that sporting values always prevail over commercial interests;
h) redistribute revenue generated by football in accordance with the principle of solidarity and to support reinvestment in favour of all levels and areas of football, especially the grassroots of the game;
i) promote unity among Member Associations in matters relating to European and world football;
j) safeguard the overall interests of Member Associations;
k) ensure that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account;
l) act as a representative voice for the European football family as a whole;

m) maintain good relations with and cooperate with WFA and the other Confederations recognised by WFA;
n) ensure that its representatives within WFA loyally represent the views of EFA and act in the spirit of European solidarity;
o) respect the interests of Member Associations, settle disputes between Member Associations and assist them in any matter upon request.

2. EFA shall seek to achieve its objectives by implementing any measures it deems appropriate, such as setting down rules, entering into agreements or conventions, taking decisions or adopting programmes.

Article 3: Relationship with WFA
1. EFA shall be a Confederation recognised by WFA.
2. EFA shall, if necessary, define its relations and respective urisdictions with WFA by contract.
Relationship with the Stakeholders in European Football

Article 3bis: Relationship with the Stakeholders in European Football
EFA, as the football governing body at European level, may recognise and involve in the consultation process in European football matters, groups representing the interests of the various stakeholders of European football (leagues, clubs, players, supporters), provided that they are:
a) organised in accordance with EFA's Statutes, regulations and values;
b) constituted in a democratic, open and transparent manner.

Article 5: Membership
1. Membership of EFA is open to national football associations situated in the continent of Europe, based in a country which is recognised as an independent state by the majority of members of the United Nations, and which are responsible for the organisation and implementation of football-related matters in the territory of their country.'
[…]

Article 7: Rights of Member Associations
Member Associations shall have the following rights:
a) to take part in and exercise their voting rights at the Congress;
[…]
(e) to take part in EFA competitions with their representative teams and to enter their clubs for these competitions;
(f) to exercise all other rights granted to them by these Statutes and regulations and decisions made under them.
[…]

Article 7bis: Obligations of Member Associations
[…]
3. Leagues or any other groups of clubs at Member Association level shall only be permitted with the Association's express consent and shall be subordinate to it. The Association's statutes shall define the powers apportioned to any such group, as well as its rights and obligations. The statutes and regulations of any such group shall be subject to the approval of the Association.

4. Member Associations shall apply a club licensing system according to the minimum requirements set by EFA from time to time. Member Associations shall include such an obligation and define the licensing bodies in their statutes.

5. Member Associations shall ensure that neither a natural nor a legal person (including holding companies and subsidiaries) exercises control or influence over more than one of their clubs whenever the integrity of any match or competition organised at Member Association level could be jeopardized. Member Associations shall include such an obligation in their statutes and ay down the necessary implementing provisions.

6. Member Associations shall communicate to EFA any amendment of their statutes translated, if necessary, into an official language of EFA.

7. Member Associations shall implement an effective policy aimed at eradicating racism and any other forms of discrimination from football and apply a regulatory framework providing that any such behaviour is strictly sanctioned, including, in particular, by means of serious suspensions for players and officials, as well as partial and full stadium closures if supporters engage in racist behaviour.
[…]

Article 49: Competitions

1. EFA shall have the sole jurisdiction to organise or abolish international competitions in Europe in which Member Associations and/or their clubs participate. WFA competitions shall not be affected by this provision.

2. The Executive Committee shall decide whether to create or take over other competitions, as well as whether to abolish current competitions.

3. International matches, competitions or tournaments which are not organised by EFA but are played on EFA's territory shall require the prior approval of WFA and/or EFA and/or the relevant Member Associations in accordance with the WFA Regulations Governing International Matches and any additional implementing rules adopted by the EFA Executive Committee.

Article 50: Competition Regulations
1. The Executive Committee shall draw up regulations governing the conditions of participation in and the staging of EFA competitions. These regulations shall set out a clear and transparent bidding procedure for all EFA competitions, including competition finals.

1bis. The Executive Committee shall define a club licensing system and in particular:
a) the minimum criteria to be fulfilled by clubs in order to be admitted to EFA competitions;
b) the licensing process (including the minimum requirements for the licensing bodies);
c) the minimum requirements to be observed by the licensors.

2. It shall be a condition of entry into competition that each Member Association and/or club affiliated to a Member Association agrees to comply with the Statutes, and regulations and decisions of competent Organs made under them.

3 The admission to a EFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures.

Article 51: Prohibited Relations
1. No combinations or alliances between EFA Member Associations or between leagues or clubs affiliated, directly or indirectly, to different EFA Member Associations may be formed without the

permission of EFA.

2. A Member Association, or its affiliated leagues and clubs, may neither play nor organise matches outside its own territory without the permission of the relevant Member Associations.

Article 51bis: Principle of Promotion and Relegation

1. A club's entitlement to take part in a domestic league championship shall depend principally on sporting merit. A club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season.

2. In addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby he emphasis is on sporting, infrastructural, administrative, legal and financial considerations. Licensing decisions must be able to be examined by the Member Association's body of appeal.

3. Altering the legal form or company structure of a club to facilitate its qualification on sporting merit and/or its receipt of a licence for a domestic league championship, to the detriment of the integrity of a sports competition, is prohibited. This includes, for example, changing the headquarters, changing the name or transferring stakeholdings between different clubs. Prohibitive decisions must be able to be examined by the Member Association's body of appeal.

4. Concerning the application of this article, each Member Association is responsible for deciding national issues, which may not be delegated to the leagues. EFA is responsible for deciding issues involving more than one Member Association concerning its own territory. WFA is responsible for deciding international issues involving more than one Confederation.

Article 52: Disciplinary Jurisdiction

Disciplinary measures may be imposed for unsportsmanlike conduct, violations of the Laws of the Game, and contravention of EFA's Statutes, regulations, decisions and directives as shall be in force from time to time.

Disciplinary Measures against Member Associations and Clubs

Article 53: Disciplinary Measures against Member Associations and Clubs

1. The following disciplinary measures may be imposed against Member Associations and clubs:

a) a warning,
b) a reprimand,
c) a fine,
d) the annulment of the result of a match,
e) an order that a match be replayed,
f) the deduction of points,
g) awarding a match by default,
h) staging of matches behind closed doors,
i) ordering a ban on the use of a stadium,
j) ordering the playing of a match in a third country,
k) the withholding of revenues from a EFA competition,
l) the prohibition on registering new players in EFA competitions,
m) a restriction on the number of players that a club may register for participation in EFA competitions,
n) disqualification from competitions in progress and/or exclusion from future competitions,
o) the withdrawal of a title or award,

p) the withdrawal of a licence.

2. Further disciplinary measures against Member Associations and clubs may be defined in regulations adopted by the Executive Committee.

3. All disciplinary measures against Member Associations and clubs may be combined with a community football service order.

Article 54: Disciplinary Measures against Individuals

1. The following disciplinary measures may be imposed against individuals:
a) a warning,
b) a reprimand,
c) a fine,
d) suspension for a specified number of matches or for a specified or unspecified period,
e) suspension from carrying out a function for a specified number of matches or for a specified or unspecified period,
f) a ban on exercising any football-related activity,
g) the withdrawal of a title or award.

2. Further disciplinary measures against individuals may be defined in regulations adopted by the Executive Committee.

3. All disciplinary measures against individuals may be combined with a community football service order.

Disciplinary Measures and Directives

Article 55: Disciplinary Measures and Directives

1. The Organs for the Administration of Justice shall have the power to impose disciplinary measures and issue directives.

2. More than one disciplinary measure, together with more than one directive, may be imposed in relation to a particular matter.

3. A directive may be issued as an order ancillary to a disciplinary measure. It sets out how the disciplinary measure shall be carried out and/or may induce the party(ies) concerned to act in a certain manner.

[…]

Article 59: Recognition of the EFA Statutes Recognition of the EFA Statutes

1. Each Member Association shall include in its statutes a provision whereby it, its leagues, clubs, players and officials agree o respect at all times the Statutes, regulations and decisions of EFA, and to recognise the jurisdiction of the European Football Association Tribunal (“EFAT”) in Millsad, Iberland.

2. Each Member Association shall ensure that its leagues, clubs, players and officials acknowledge and accept these obligations.

3. Each participant in a EFA competition shall, when registering its entry, confirm to EFA in writing that it, its players and officials have acknowledged and accepted these obligations.

Article 70: Coming into Force
The current version of these Statutes comes into force on 20 April 2021.

20 April 2021 For the EFA Congress:

The President: *Adam Lazowski*
The General Secretary: *Rosa Greaves*

Extract from (fictional) Statute of the European Football Association Tribunal ("EFAT")
(Version from 1st January 2018)

A. General Provisions

R1. Jurisdiction

The European Football Association Tribunal ("EFAT") shall have compulsory jurisdiction over any disputes arising:

(a) between the European Football Association ("EFA") and any professional football clubs which are direct or indirect members of the European Football Association ("EFA Members"); and
(b) between EFA Members; and
(c) between the EFA or any EFA Member and its professional staff, particularly any football players

provided that the dispute concerns the application of rules laid down by or resulting from the application of the EFA Statute.

EFAT may also exercise jurisdiction over a dispute involving a party mentioned in letters (a)-(c) of the preceding paragraph and another party, not mentioned in letters (a)-(c), provided that the latter irrevocably consents to the jurisdiction of EFAT in such proceedings and the EFAT considers them to have a legitimate interest in the outcome of the proceedings.

R2. Seat

The seat of the EFAT shall be in Millsad, Iberland.

[…]

R7. Proceedings

Proceedings shall be held on an *inter partes* basis and the disputing parties shall be entitled, but not obliged, to be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to the EFAT Court Office, the other party and the Arbitration Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the EFAT Court Office.

[NB. The EFAT statute goes on to describe further detailed rules about the filing of a claim, reply, counterclaim, to giving of evidence by witnesses and in documentary form etc. for the purposes of the see CEEMC moot, it is unnecessary to reproduce the details of these procedural rules.]

[…]

R30. List of EFAT Arbitrators

A list of EFAT arbitrators shall be created.

EFAT arbitrators shall be chosen from persons who are jurists of recognised competence and whose independence is beyond doubt. They shall possess a diploma in law and have at least 10 years of relevant professional knowledge and experience in areas which may give rise to disputes of the kind over which the EFAT has jurisdiction. Their impartiality shall be beyond question.

Every EFA member shall be entitled to nominate one person to be appointed as an EFAT arbitrator. A candidate's appointment as an EFAT arbitrator shall be conditional upon their nomination being approved by the common accord of all EFA members. In the event that a person's nomination is not thus approved by common accord, the nominating EFA member shall be entitled to nominate an alternative candidate.

All candidates whose nomination is approved shall be added to the list of EFAT arbitrators for a period of 6 years. This period may be renewed by the common accord of all EFA members. In the event that an EFAT arbitrator's mandate is not renewed, the relevant EFA member shall nominate a new candidate in accordance with the preceding paragraph.

No person on the list of EFAT arbitrators may act as counsel or authorised representative of any party or other interested person in any dispute being heard before the EFAT, nor shall they give advice to any party on the dispute or the conduct or outcome of the arbitration.

R31. Selection of Arbitration Panel in Individual Disputes

Upon receipt of a Request for Arbitration, a Panel of EFAT arbitrators shall be appointed to hear the dispute.

Unless the disputing parties mutually agree to the appointment of a single arbitrator, the number of arbitrators on each Arbitration Panel shall be three. Each of the disputing parties shall be entitled to appoint one member of the Arbitration Panel, subject to the qualifying criteria in the paragraph below. The third arbitrator, who shall also act as President of the Panel, shall be chosen by the mutual agreement of the arbitrators chosen by the disputing parties, subject to the qualifying criteria in the paragraph below.

An arbitrator shall not be allowed to participate in any dispute involving an EFA Member State in which he/she was born, or raised, or played football, or coached a football team, or regularly featured as a media football commentator, or owns/owned a football club (whether wholly or jointly) or if he/she has, or has had, any other personal or professional connection which may call into question his/her independence as an arbitrator.

[…]

R34. Challenge Commission

An arbitrator's participation in an arbitration may be challenged by either of the disputing parties if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality. The challenge shall be brought within seven days after the ground for the challenge has become known.

Challenges shall be determined by the Challenge Commission, which shall be entitled to remove an arbitrator from an arbitration panel in the event that there are legitimate grounds for doubting that he/she may be viewed as lacking the necessary independence.

[NB. Further description of the Challenge Commission is given in the Statute. For the purposes of the CEEMC, such further details are unnecessary. It suffices to say that there are no grounds for believing the Challenge Commission to be anything other than entirely independent from any of the potential disputing parties before the EFAT.]

[…]

R39 Removal from List of EFAT Arbitrators

During their term of office, a person may only be removed from the list of EFAT arbitrators on the following grounds:

(i) if he/she refuses to carry out his/her duties pursuant to these Rules; or
(ii) if he/she has been convicted of any criminal offence involving an element of dishonesty or fraud;
(iii) if he/she has undertaken any action which gives rise to serious and justified concerns regarding his/her suitability to continue to be registered on the list of EFAT arbitrators.

Proceedings to remove a person from the list of EFAT Arbitrators shall be conducted before the Challenge Commission in accordance with the rules described in R36 below.

If, following the conclusion of proceedings to consider whether to recommend the removal of a person from the list of EFAT Arbitrators, the Challenge Commission recommends such removal, this recommendation shall become a binding decision only if it is supported by a resolution adopted with a two-thirds majority of the EFA Members within 3 months of the Challenge Commission's recommendation. If no such resolution is adopted, the person shall continue to be registered on the list of EFAT Arbitrators. During the period commencing on the date of the Challenge Commission's recommendation and ending 3 months later, the person shall not be entitled to be appointed as an EFAT Arbitrator in any new proceedings, nor to continue participating in any proceedings that are already underway.

[NB. For the purposes of the CEEMC, it is unnecessary to know the procedural details of the Challenge Commission's procedure for considering whether to recommend removing a person from the list of EFAT arbitrators. It suffices to say that any such challenge is conducted in a fair and impartial manner and that the relevant arbitrator is entitled to know the allegations and evidence against the and to dispute them before the Challenge Commission.]

R45. Law Applicable to the Merits

The Panel shall decide the dispute according to the law applicable in the place of its seat.

R46. Award

The award shall be made by a majority decision, or in the case of disputes heard by a single arbitrator, by that sole arbitrator. The award shall state the reasons for any decision[s] adopted therein and any remedies awarded thereby.

The award shall be enforceable 7 days from the date on which it is provided to the disputing parties by courier, facsimile and/or electronic mail.

The award shall be final and binding upon the parties and shall not be capable of being challenged by way of an action for setting aside by any national court, other than where the recognition or enforcement of the award would be contrary to the public policy of the relevant country in which recognition or enforcement are sought.

R47. Enforcement and other issues

(1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the national courts of Iberland any assistance they may require in taking evidence in accordance with the provisions of Iberland's Evidence Act 2005.

[NB. For the purposes of the CEEMC, no further information is required about this national legislation.]

(2) If the arbitral tribunal considers it necessary, it may request Iberland's courts to grant an order for an interim measure of protection or for enforcement of the award.