Central and East European Moot Court Competition 2023

Organised by:

and co-organised by:

Sponsored by:

28th– 30th April 2023

MOOT BUNDLE

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

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

Central & Eastern European Moot Competition

2023 Moot Question

Reference for a preliminary ruling from the Central Court of Danubia in the matter of

The Danubian Criminal Prosecution Office
supported by SmartDrive
v
Octavia Linta

SmartDrive

1. SmartDrive is a company established and headquartered in the EU Member State of Moselia, where it is recognised as an information society service provider under Directives 2000/31 and 2006/123. SmartDrive provides a platform that supports drivers undertaking person transport.
2. The platform is based on a smartphone app, which provides passengers requesting transportation with a list of the first five available drivers, giving their first names, a picture of the driver and a picture of the car, with an indication of expected arrival time, amongst which the passenger may freely choose, as in case C-62/19 *Star Taxi*.
3. The app also sets the price for the drive, but drivers may grant a discount to passengers at any time, which will be indicated on the list of available drivers. Conversely, passengers may – and often do – give tips to drivers, which form a significant part of drivers' income.
4. The app collects payment for both fare and tips from the credit card registered on the app by the passenger, as in case C-390/18 *Airbnb Ireland*. The payment is forwarded to the bank account of the driver after deduction of a 20% service fee for use of the platform, which is calculated from the price before any discount is deducted or tips are added. In addition, drivers pay a 200 Euro service fee per month for registration on the platform.
5. Drivers may at any time refuse a drive, but if they refuse more than 10 drives in a single month, their service fee will be increased by 1% point per drive refused, and if refusals exceed 50 drives in a month they will be barred from the app for the coming calendar month. The same applies if more than 5 justified complaints are received in a single month concerning the appearance and behaviour of the driver or the quality of the car. In case of being barred more than 3 times in a single year, the driver will be excluded from the platform for the coming calendar year.
6. SmartDrive only enters into contracts with independent service providers, irrespective of whether such providers are physical or legal persons, while only the management, accounting and IT staff have employment contracts. The contracts with drivers are not exclusive and drivers may sign up for any of the alternative apps that are common in Moselia.

7. Requirements for registration on the SmartDrive app include holding a certificate as a Professional Person Transporter in Moselia, referred to as the "PPT license" under the Transport Act 2020, or any equivalent certificate from their Member State of residence, unlike the unlicensed drivers situation in Case C-320/16 *Uber*. SmartDrive also checks that the car is properly insured and well maintained.

8. SmartDrive covers the entire territory of Moselia, and the company has applied for permission from the authorities of the neighbouring EU Member State of Danubia to expand services into that state. As part of preparing for the permission to operate in Danubia, SmartDrive has ensured that from a technical perspective, the app already works in both Moselia and Danubia.

9. However, the application is still pending, since SmartDrive faces problems with recognition as an information society service provider in Danubia, where it is instead regarded as a platform-based transport provider, based on the judgment of the CJEU in case C-434/15 *Elite Taxi*.

Danubia

10. Individual person transportation may be performed in Danubia only by holders of licences as a Registered Taxi Operators (RTO), as specified in the Personal Transport Regulation 2002 (PTR 2002). Due to a clerical error, that regulation has not been notified to the EU under Directive 98/34, as replaced by Directive 2015/1535, and subsequently the government found that a notification was no longer required, as established by Case C-255/16 *Falbert*.

11. Under the PTR 2002, licences are only granted if and when an existing licence becomes available, due to death or retirement, or when a new licence is issued by the authority, which has not happened since 2019. New licences are awarded subject to a needs test, which means that the competent authority limits the number of taxi licences to a number corresponding to the estimated demand for taxi services.

12. Section 43 of the regulation foresees that an applicant with at least two years of experience as a full-time taxi driver within Danubia will be given priority to a licence which becomes available, provided that driver was pursuing taxi driving as a main occupation. Section 44 of the Regulation furthermore stipulates that the applicant with the longest service as a full-time taxi driver within Danubia shall be awarded the available licence if several applicants fulfil the conditions in Section 43. If a licence cannot be awarded on the basis of seniority, the decision is subject to the licensing authority's discretion.

13. Under Danubian law, breaches of the regulation are punished harshly, with imprisonment of up to 5 years, fines up to 20,000 Euro per commenced month the violation continues and confiscation of the vehicle.

14. Pursuant to Article 219 of the Danubian Criminal Code, criminal offences committed in Danubia by an employee acting in the course of employment are only attributable to the employer. This is based on a constitutional principle dating back to feudal times.

15. SmartDrive has requested mutual recognition of the Moselian PPT license as equivalent to the Danubian RTO license, but Danubia has refused this as the RTO license forms part of a market management system established in the interest of consumers, so as to avoid the Danubian market having an overflow of service providers.

16. Additionally, as part of consumer protection law, taxi transportation may be performed only against cash payment, so as to avoid the incremental accumulation of credit card debts.

Platform Directive

17. On 6 May 2020, the European Parliament and the Council adopted Directive 2020/7563 on improving working conditions for platform workers in the person transport sector. The preamble indicates that the Directive is based on the Treaty on the Functioning of the European Union, and in particular Articles 91 and 153 thereof.

18. The recitals of the Directive refer to a 2018 analytical report, adopted by the European Commission in 2020, concerning social security coordination and non-standard forms of employment and self-employment. Furthermore, the recitals state that since platform work has become prevalent in the person transport sector, regulation of the working conditions is required at thmonthse European level, as any lack of uniformity would have a negative impact on the internal market.

19. The Directive contains notably the following provisions:

Preamble: indicates that the Directive is based on the Treaty on the Functioning of the European Union, and in particular Articles 91 and 153 thereof.

Article 1 defines platform workers as persons performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved.

Article 2 defines platform work as any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service.

Article 3 defines a digital labour platform as any natural or legal person providing a commercial service which is provided at a distance through electronic means, at the request of a recipient of the service, which involves the organisation of work performed by individuals.

Article 4 provides that the contractual relationship between a digital labour platform that controls, within the meaning of Article 5, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship.

Article 5 provides that "controlling the performance of work" within the meaning of Article 4 shall be understood any one of the following: (a) effectively determining the level of remuneration; (b) requiring the person performing platform work to respect specific binding rules; (c) supervising the performance of work or verifying the quality of the results of the work.

Article 7 provides that the Directive shall not affect the Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to platform workers.

Article 9 provides that the Directive is addressed to the Member States, and that they must bring into force the laws, regulations, and administrative provisions necessary to comply with

the Directive within two years from its adoption.

Octavia Linta

20. On 15 May 2022, Octavia Linta started performing person transport in both Moselia and Danubia, based on the SmartDrive app for which she had signed up after passing an exam and acquiring the PPT license in Moselia as an independent service provider. She is a Moselian native and resident in that country, in a small village close to the border of Danubia, across the river from the capital of Danubia, Weinstein.

21. While Octavia had no particular preference for which of the two countries she drove in, she soon found that fares in Danubia were often more lucrative, in particular airport transfers to and from Weinstein airport, as well as bringing revellers home in the evenings from the thriving nightclub and pub district of Weinstein. This involved both trips wholly within Danubia, and trips to or from Moselia. Whereas she initially had been driving much more within Moselia, from August onwards Octavia found herself crossing over to Danubia at least once a day, and in September more than half of her income came from trips starting or ending in Danubia, or both.

22. On 16 October 2022, the police of Danubia arrested Octavia Linta during a passenger transport on the way from downtown Weinstein to Weinstein airport (i.e. wholly within Danubia). They charged her with unauthorised passenger transport as she had not acquired a Danubian RTO license.

Octavia's Defence

23. Octavia advanced three principal lines of argument in her defence.

24. She argued, firstly, that she was fully licensed under Moselian law, and that Danubia was obliged under EU law to recognise her license since she was performing cross-border services. Article 56 TFEU guarantees the freedom to provide services and is not affected by the specific provisions governing transport in Articles 90-92 TFEU. In that regard, she made the point that it is for the national authorities to demonstrate that any restrictive measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it, as confirmed by case C-110/05 *Commission v Italy*.

25. Octavia argued, secondly, that measures limiting the number of taxi licences have the effect of limiting access to establishment as a taxi operator, and that grounds of an economic nature cannot constitute an overriding reason in the public interest justifying a restriction on a fundamental freedom, as held in Cases C-338/04 *Placanica* and C-338/09 *Yellow Cab*. In any event, the fine imposed under Danubian law violated the principle of proportionality, which applies also to criminal sanctions related to the exercise of the EU right of free movement, as established in Case C-326/88 *Hansen*.

26. Thirdly, Octavia argued that under Directive 2020/7563 she was not an independent driver, but an employee of SmartDrive, since she worked exclusively based on the SmartDrive app, and since the app determined the prices of all her services, as established in Case C-168/14

Grupo Itelevesa. In application of Article 219 of the Danubian Criminal Code, any offence committed by her in the course of employment must therefore be attributed to SmartDrive alone.

27. In Danubia, the Government had submitted a proposal for implementation of Directive 2020/7563 to the Parliament, but due to a constitutional crisis, it was not until 28 October 2022 that the implementation legislation was adopted and came into effect. When the criminal case at the Central Court of Danubia against Octavia Linta started on 10 November 2022, the prosecutor therefore argued that no reliance could be had on the Directive that had not been implemented at the time of the crime, as established by Case C-168/95 *Arcaro* and C-102/02 *Beuttenmüller*.

28. Octavia Linta counter-argued that under EU law, a private party may rely on the effects of a directive to the extent that late transposition means that the government has failed to perform administrative obligations, such as reclassifying the contractual relationship with SmartDrive, as established by Case C-194/94 *CIA Security*.

29. The Danubian prosecutor formally notified SmartDrive of the arguments raised by Octavia and informed it that it was considering proceedings against SmartDrive as the employer of Octavia Linta. On that basis, Smart Drive obtained permission to intervene in the proceedings on this specific point in support of the criminal case brought by the prosecutor.

30. SmartDrive and the prosecutor argued that the Directive was irrelevant since it concerned the social rights of drivers, and not the criminal law liability of employers. Additionally, they argued that Octavia Linta did not fulfil the criteria for an employee, as established by Case C-692/19 *Yodel*.

31. In any event, in the absence of transposition in Danubia, SmartDrive and the prosecutor argued that the Directive cannot give rise to horizontal direct effect against a private undertaking like SmartDrive, as established by Case C-192/94 *El Corte Inglés*.

32. Octavia Linta counterargued that the directive was the embodiment of basic principles of EU law, in the same manner as legislation on equal treatment of gender in employment matters. Such principles must be upheld, as established by the Court of Justice in Case C-144/04 *Mangold*, irrespective of whether the legislation concerned has been implemented in a timely and correct manner.

33. Additionally, Smart Drive argued that the Directive violated the principles of subsidiarity and proportionality as it seeks to impose an employment obligation on private parties that had chosen to remain in a contractual relationship based on service provision. Thereby, the Directive violated the right of commercial property in the EU Charter (which can be relied upon in these circumstances: Case C-617/10 *Åkerberg Fransson*), as by analogy with Case C-501/18 *BT*.

34. Finally, the prosecution argued that since the Directive concerned the field of transportation, general principles EU law could only find application in a limited manner, as established in case C-541/16 *Commission v Denmark*, and for that reason Octavia Linta could not rely on any mutual recognition obligations in relation to her Danubian authorisation.

Octavia's Equal Pay Claim

35. Octavia's lawyers had in the meantime investigated some of the practices of SmartDrive further and had discovered on the basis of comparison data, which SmartDrive shared among its drivers to encourage competition and award a monthly prize to the drivers with the highest fare income and the greatest distance travelled, that female drivers had significantly lower incomes than male drivers.

36. In absolute income terms, no female driver featured in the top 25% of earners, which could not be explained by the fact that some female drivers chose to work shorter hours and avoided the lucrative evening drives. Even when dividing income by distance travelled, male drivers had on average 37% higher income per kilometre. In the light of this obvious discrepancy, it is not surprising that only 18% of SmartDrive drivers are female.

37. It seems that the difference may in particular be due to three factors: (i) customers on the most lucrative airport transfers or nightclub runs, as well as for long-distance transfers, tend to pick male drivers with late model sporty cars; (ii) female drivers are often picked by female customers travelling on their own, many of whom, even on the nightclub runs, are students or restaurant staff who do not tip very much; and (iii) female drivers end up being penalised more often for refusing drives, being sometimes more reluctant to drive groups of rowdy male customers.

38. Octavia introduced a collateral counterclaim, a procedural device permitted in Danubian criminal procedure, against SmartDrive to recover lost earnings and compensation for breach of the equal pay provision in Article 4 of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which has been fully implemented in Danubia.

39. Additionally, she relied on Section 141 of the Danubian Constitution, which reflects Article 157(1) TFEU and provides: "In Danubia, the principle of equal pay for male and female workers for equal work or work of equal value is applied"; see also Case 43/75 *Defrenne*. In that regard, she claimed that the discrimination was directly caused by the SmartDrive app, in the same manner as in Joined Cases C-297/10 and C-298/10 *Hennigs*.

40. Octavia in particular argued that, in order to ensure that work of equal value was remunerated in the same way, as notably required by Case C-624/19 *K v Tesco*, SmartDrive was required to ensure that female drivers received an equal share of the more lucrative drives, and tips of an equal value. In any event, SmartDrive should be precluded from organising its activities in such a was as to penalise female drivers for putting their safety concerns first, even if that means turning down drives more frequently.

41. SmartDrive counter-argued that the burden of proof for gender discrimination rested on Octavia Linta, as established by case 109/88 *Danfoss*, and that that burden had not been discharged.

Questions

42. The Central Court of Danubia found that there were doubts regarding the interpretation and application of EU law in the circumstances of the case pending before it and decided to refer the following questions to the Court of Justice of the European Union:

1. **Does EU law preclude legislation such as the Danubian Personal Transport Regulation 2002, which limits the number of taxi licences and makes it practically impossible for companies and drivers based in other Member State to obtain a licence?**

2. **May Octavia Linta rely on the mutual recognition in Danubia of her PPT license as an independent service provider in the field of person transport issued by the authorities of Moselia?**

3. **(a) Is Directive 2020/7563 to be interpreted to the effect that Octavia Linta's contractual relationship with SmartDrive is one of employment in circumstances such as the ones described?**

   (b) In the affirmative, may an individual in the position of Octavia Linta rely on that Directive in those circumstances to shift criminal liability to another private party by virtue of Article 219 of the Danubian Criminal Code?

4. **May SmartDrive rely on the protection of commercial property, as well as the principles of subsidiarity and proportionality, to avoid an employment obligation being imposed on private parties that have chosen to remain in a contractual relationship based on service provision?**

5. **Is Octavia Linta entitled to claim compensation for breach of the principle of equal pay for equal work as set out in Article 4 of Directive 2006/54 and Article 157(1) TFEU?**

During day 1 (Saturday), questions 1-3 will be mooted.

During day 2 (Sunday, other than the final), questions 4-5 will be mooted (but the judges may also choose to add another question[s] at their discretion. This will be confirmed on Saturday evening.

The judges will inform each of the finalist teams which questions will to be mooted in the final.

Central & Eastern European Moot Competition

2023 COMPETITION RULES

1. Competition and important dates:

This twenty-eighth edition of the competition takes place in Dubrovnik at the Inter-University. It is co-hosted by the University of Zagreb.

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, we were delighted to return to face-to-face mooting in Budapest in 2022! Now, Dubrovnik is coming…

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 prizes awarded to 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: 23rd December 2022
NB. The organising committee may, at its absolute discretion, consider applications from teams who have not registered 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: 10th February 2023 (see section 5 below for details of the organisers' bank details). If you have difficulty in meeting this deadline, please email us at: organisers@ceemc.co.uk

Final date for submitting written pleadings: 4th April 2022

2. Participating Teams

The CEEMC is open to teams comprising 3 or 4 members (mooters). Each team member must also:

- be enrolled as a full-time student on a university course (inc. as an Erasmus student) at a university in an EU candidate country, an Eastern Partnership Country or a Member State that acceded to the EU after 2004; and:
- be 30 years old or younger; 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 location.

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 stages, described below.

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

STAGE 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/oral 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.

STAGE 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 at reh opening ceremony on Friday, 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 team 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 (for dealing with all questions to be mooted on that day)
Pleadings for respondent: Max 20 minutes (for 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)

If these time limits are exceeding, it is entirely at the discretion of the court whether a team will be granted extra time (normally not exceeding 5 extra minutes) in order to continue their pleadings.

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
TOTAL	*100*

STAGE 3: Day 2 of Oral Pleadings (8 selected teams only)

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 separately.

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.

STAGE 4: Final (2 selected teams only)

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 (for dealing with all questions to be mooted on that day)
Pleadings for respondent:	Max 45 minutes (for 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 (this can be a person who mooted at *any stage* on Day 2, not necessarily someone who appeared in the final)
- other individual speakers whom the judges feel deserve special recognition
- best written pleadings

4. Fees

The competition fee is **EUR 1,300** per team*. This includes the fee for accommodation**, sustenance and participation in the competition***.

* Each team may include 3 or 4 mooting team members and one accompanying coach. An extra fee of EUR 250 per person applies to any team wishing to send an extra coach or observer. Please inform us as soon as possible if this applies to your team, and in any case by no later than **30 January 2023**.

** Each team will be allocated a number of beds in the 2-person or 3-person rooms available at the CEEMC accommodation venue, corresponding to the number of people in the team (inc. coach[es]). If any team member or coach wishes to have a single room, an additional fee of €20 per night will be payable. Please inform us as soon as possible if this applies to your team, and in any case by no later than **30 January 2023**.

*** Each team is individually responsible for other costs, including travel to/from the competition and any administrative or visa charges to the CEEMC location (please contact us if you need additional support when applying for a visa).

The competition fee must be paid by bank transfer and received by no later than the date specified in Section 1 above **Competition and important dates). If you/your university would prefer to pay by credit card, please contact us at:** organisers@ceemc.co.uk

Confirmation of payment must be sent immediately thereafter (as an email attachment) to: organisers@ceemc.co.uk

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).

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 we payments all payments in full (**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 or write to us at the details below:
Juris Angliae Scientia
Faculty Of Law, University Of Cambridge,
10 West Road, Cambridge, CB3 9BZ
United Kingdom
Company No. 2659061
Registered Charity No. 1013738

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 28th April 2023

17.30	Registration of teams and lottery of Team Identification Number
18:00	Inner Temple Representatives -
18.30	Welcome Reception and buffet

SATURDAY 29th April 2023

09.00	Opening words by Organising Committee and Judges; Group Photo

Day 1 Mooting

09.30 - 11.00	Round 1 moots
11.15 - 12.45	Round 2 moots
13.00 - 14.00	LUNCH
14.15 - 15.45	Round 3 moots
16.00 - 17.30	Round 4 moots
20.00	DINNER (Announcement of semi-finalists)

SUNDAY 30th April 2023

Day 2 Mooting

09.00 - 11.00	First semi-finals
11.15 - 13.15	Second semi-finals
13.30	LUNCH (Announcement of finalists)

Final

15.00	FINAL (followed immediately by presentation of moot-participation certificates and prize ceremony)
20.00	Celebration dinner, party and singing competition.

MONDAY 1st May 2023

Departure of teams.

PART B. EU LEGISLATIVE MATERIALS

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

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 VI: TRANSPORT

Article 90

(ex Article 70 TEC)

The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy.

Article 91

(ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

Article 92

(ex Article 72 TEC)

Until the provisions referred to in Article 91(1) have been laid down, no Member State may, unless the Council has unanimously adopted a measure granting a derogation, make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.

Article 93

(ex Article 73 TEC)

Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 94

(ex Article 74 TEC)

Any measures taken within the framework of the Treaties in respect of transport rates and conditions shall take account of the economic circumstances of carriers.

Article 95

(ex Article 75 TEC)

1. In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited.

2. Paragraph 1 shall not prevent the European Parliament and the Council from adopting other measures pursuant to Article 91(1).

3. The Council shall, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, lay down rules for implementing the provisions of paragraph 1.

The Council may in particular lay down the provisions needed to enable the institutions of the Union to secure compliance with the rule laid down in paragraph 1 and to ensure that users benefit from it to the full.

4. The Commission shall, acting on its own initiative or on application by a Member State, investigate any cases of discrimination falling within paragraph 1 and, after consulting any Member State concerned, shall take the necessary decisions within the framework of the rules laid down in accordance with the provisions of paragraph 3.

Article 96

(ex Article 76 TEC)

1. The imposition by a Member State, in respect of transport operations carried out within the Union, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited, unless authorised by the Commission.

2. The Commission shall, acting on its own initiative or on application by a Member State, examine the rates and conditions referred to in paragraph 1, taking account in particular of the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances on the one hand, and of the effects of such rates and conditions on competition between the different modes of transport on the other.

After consulting each Member State concerned, the Commission shall take the necessary decisions.

3. The prohibition provided for in paragraph 1 shall not apply to tariffs fixed to meet competition.

Article 97

(ex Article 77 TEC)

Charges or dues in respect of the crossing of frontiers which are charged by a carrier in addition to the transport rates shall not exceed a reasonable level after taking the costs actually incurred thereby into account.

Member States shall endeavour to reduce these costs progressively.

The Commission may make recommendations to Member States for the application of this Article.

Article 98

(ex Article 78 TEC)

The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this Article.

Article 99

(ex Article 79 TEC)

An Advisory Committee consisting of experts designated by the governments of Member States shall be attached to the Commission. The Commission, whenever it considers it desirable, shall consult the Committee on transport matters.

Article 100

(ex Article 80 TEC)

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

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.

[...]

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.

PROTOCOL (No 1) ON THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

RECALLING that the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State,

DESIRING to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts of the Union as well as on other matters which may be of particular interest to them,

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

TITLE I
INFORMATION FOR NATIONAL PARLIAMENTS

Article 1

Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council.

Article 2

Draft legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments.

For the purposes of this Protocol, "draft legislative acts" shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act.

Draft legislative acts originating from the Commission shall be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council.

Draft legislative acts originating from the European Parliament shall be forwarded to national Parliaments directly by the European Parliament.

Draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council.

Article 3

National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

If the draft legislative act originates from a group of Member States, the President of the Council shall forward the reasoned opinion or opinions to the governments of those Member States.

If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the reasoned opinion or opinions to the institution or body concerned.

Article 4

An eight-week period shall elapse between a draft legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions shall be possible in cases of urgency, the reasons for which shall be stated in the act or position of the Council. Save in urgent cases for which due reasons have been given, no agreement may be reached on a draft legislative act during those eight weeks. Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position.

Article 5

The agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft legislative acts, shall be forwarded directly to national Parliaments, at the same time as to Member States' governments.

Article 6

When the European Council intends to make use of the first or second subparagraphs of Article 48(7) of the Treaty on European Union, national Parliaments shall be informed of the initiative of the European Council at least six months before any decision is adopted.

Article 7

The Court of Auditors shall forward its annual report to national Parliaments, for information, at the same time as to the European Parliament and to the Council.

Article 8

Where the national Parliamentary system is not unicameral, Articles 1 to 7 shall apply to the component chambers.

TITLE II
INTERPARLIAMENTARY COOPERATION

Article 9

The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.

Article 10

A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the conference shall not bind national Parliaments and shall not prejudge their positions.

PROTOCOL (No 2) ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

THE HIGH CONTRACTING PARTIES,

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

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union, and to establish a system for monitoring the application of those principles,

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

Article 1

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.

Article 2

Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

Article 3

For the purposes of this Protocol, "draft legislative acts" shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act.

Article 4

The Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

The European Parliament shall forward its draft legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

Article 5

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

Article 6

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

Article 7

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

3. Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

> (a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;
>
> (b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

Article 8

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules

laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

Article 9

The Commission shall submit each year to the European Council, the European Parliament, the Council and national Parliaments a report on the application of Article 5 of the Treaty on European Union. This annual report shall also be forwarded to the Economic and Social Committee and the Committee of the Regions.

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.

I

(Acts whose publication is obligatory)

DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 June 2000

on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

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

Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [4], a high level of Community integration is achieved.

(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

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(1) OJ C 30, 5.2.1999, p. 4.
(2) OJ C 169, 16.6.1999, p. 36.
(3) Opinion of the European Parliament of 6 May 1999 (OJ C 279, 1.10.1999, p. 389), Council common position of 28 February 2000 (OJ C 128, 8.5.2000, p. 32) and Decision of the European Parliament of 4 May 2000 (not yet published in the Official Journal).

(4) OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

(6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

(8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

(11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1] and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [2] form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society services, also embraces in particular Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [3], Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [4], Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [5], Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [6], Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers [7], Council Directive 92/59/EEC of 29 June 1992 on general product safety [8], Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis [9], Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [10], Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products [11], Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [12], the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products [13]; this Directive

(1) OJ L 95, 21.4.1993, p. 29.
(2) OJ L 144, 4.6.1999, p. 19.
(3) OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).
(4) OJ L 42, 12.2.1987, p. 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).
(5) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).
(6) OJ L 158, 23.6.1990, p. 59.
(7) OJ L 80, 18.3.1998, p. 27.
(8) OJ L 228, 11.8.1992, p. 24.
(9) OJ L 280, 29.10.1994, p. 83.
(10) OJ L 166, 11.6.1998, p. 51. Directive as amended by Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12).
(11) OJ L 210, 7.8.1985, p. 29. Directive as amended by Directive 1999/34/EC (OJ L 141, 4.6.1999, p. 20).
(12) OJ L 171, 7.7.1999, p. 12.
(13) OJ L 113, 30.4.1992, p. 13.

should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1] adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded form the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2] and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [3] which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services [4] and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [5]; this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an

(1) OJ L 213, 30.7.1998, p. 9.
(2) OJ L 281, 23.11.1995, p. 31.
(3) OJ L 24, 30.1.1998, p. 1.
(4) OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).
(5) OJ L 320, 28.11.1998, p. 54.

employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of 'recipient of a service' covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.

(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.

(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1] consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [2]; the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

[1] OJ L 15, 21.1.1998, p. 14.

[2] OJ L 13, 19.1.2000, p. 12.

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of information society services.

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for 'mere conduit' and for 'caching' when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.

(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society [1], stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

— the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

— the representation of a client and defence of his interests before the courts,

— gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) 'information society services': services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

[1] OJ C 23, 28.1.1999, p. 1.

(b) 'service provider': any natural or legal person providing an information society service;

(c) 'established service provider': a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) 'recipient of the service': any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) 'consumer': any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) 'commercial communication': any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

— information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

— communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

(g) 'regulated profession': any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-years' duration [1] or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [2];

(h) 'coordinated field': requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

— the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

— the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

— requirements applicable to goods as such,

— requirements applicable to the delivery of goods,

— requirements applicable to services not provided by electronic means.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

— public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

— the protection of public health,

[1] OJ L 19, 24.1.1989, p. 16.
[2] OJ L 209, 24.7.1992, p. 25. Directive as last amended by Commission Directive 97/38/EC (OJ L 184, 12.7.1997, p. 31).

— public security, including the safeguarding of national security and defence,

— the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

— asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

— notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services [1].

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

— any professional body or similar institution with which the service provider is registered,

— the professional title and the Member State where it has been granted,

— a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [2].

(1) OJ L 117, 7.5.1997, p. 15.
(2) OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7

Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8

Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11

Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

— the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,

— the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

Article 12

'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III

IMPLEMENTATION

Article 16

Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17

Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18

Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:

'11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).'

Article 19

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV

FINAL PROVISIONS

Article 21

Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, 'notice and take down' procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23

Entry into force

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

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Luxemburg, 8 june 2000.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	G. d'OLIVEIRA MARTINS

ANNEX

DEROGATIONS FROM ARTICLE 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

— copyright, neighbouring rights, rights referred to in Directive 87/54/EEC [1] and Directive 96/9/EC [2] as well as industrial property rights,

— the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC [3],

— Article 44(2) of Directive 85/611/EEC [4],

— Article 30 and Title IV of Directive 92/49/EEC [5], Title IV of Directive 92/96/EEC [6], Articles 7 and 8 of Directive 88/357/EEC [7] and Article 4 of Directive 90/619/EEC [8],

— the freedom of the parties to choose the law applicable to their contract,

— contractual obligations concerning consumer contacts,

— formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,

— the permissibility of unsolicited commercial communications by electronic mail.

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[1] OJ L 24, 27.1.1987, p. 36.
[2] OJ L 77, 27.3.1996, p. 20.
[3] Not yet published in the Official Journal.
[4] OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).
[5] OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 95/26/EC.
[6] OJ L 360, 9.12.1992, p. 2. Directive as last amended by Directive 95/26/EC.
[7] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 92/49/EC.
[8] OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EC.

DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 5 July 2006

on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

Having regard to the proposal from the Commission,

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

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

Whereas:

(1) Council Directive 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 ([3]) and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes ([4]) have been significantly amended ([5]). 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 ([6]) and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ([7]) also contain provisions which have as their purpose the implementation of the principle of equal treatment between men and women. Now that new amendments are being made to the said Directives, it is desirable, for reasons of clarity, that the provisions in question should be recast by bringing together in a single text the main provisions existing in this field as well as certain developments arising out of the case-law of the Court of Justice of the European Communities (hereinafter referred to as the Court of Justice).

([1]) OJ C 157, 28.6.2005, p. 83.

([2]) Opinion of the European Parliament of 6 July 2005 (not yet published in the Official Journal), Council Common Position of 10 March 2006(OJ C 126 E, 30.5.2006, p. 33) and Position of the European Parliament of 1 June 2006 (not yet published in the Official Journal).

([3]) OJ L 39, 14.2.1976, p. 40. Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

([4]) OJ L 225, 12.8.1986, p. 40. Directive as amended by Directive 96/97/EC (OJ L 46, 17.2.1997, p. 20).

([5]) See Annex I Part A.

([6]) OJ L 45, 19.2.1975, p. 19.

([7]) OJ L 14, 20.1.1998, p. 6. Directive as amended by Directive 98/52/EC (OJ L 205, 22.7.1998, p. 66).

(2) Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(4) Article 141(3) of the Treaty now provides a specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

(5) Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

(7) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice.

(8) The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and

indispensable part of the *acquis communautaire*, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.

(9) In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.

(10) The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer.

(11) The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons.

(12) Specific measures should be adopted to ensure the implementation of the principle of equal treatment in occupational social security schemes and to define its scope more clearly.

(13) In its judgment of 17 May 1990 in Case C-262/88 ([1]), the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Cases C-7/93 ([2]) and C-351/00 ([3]), that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.

(15) The Court of Justice has confirmed that whilst the contributions of male and female workers to a defined-benefit pension scheme are covered by Article 141 of the Treaty, any inequality in employers' contributions paid under funded defined-benefit schemes which is due to the use of actuarial factors differing according to sex is not to be assessed in the light of that same provision.

(16) By way of example, in the case of funded defined-benefit schemes, certain elements, such as conversion into a capital sum of part of a periodic pension, transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension or a reduced pension where the worker opts to take earlier retirement, may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented.

(17) It is well established that benefits payable under occupational social security schemes are not to be considered as remuneration insofar as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who initiated legal proceedings or brought an equivalent claim under the applicable national law before that date. It is therefore necessary to limit the implementation of the principle of equal treatment accordingly.

(18) The Court of Justice has consistently held that the Barber Protocol ([4]) does not affect the right to join an occupational pension scheme and that the limitation of the effects in time of the judgment in Case C-262/88 does not apply to the right to join an occupational pension scheme. The Court of Justice also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice. The Court of Justice has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

(19) Ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the principle of proportionality.

([1]) C-262/88: Barber v Guardian Royal Exchange Assurance Group (1990 ECR I-1889).

([2]) C-7/93: Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune (1994 ECR I-4471).

([3]) C-351/00: Pirkko Niemi (2002 ECR I-7007).

([4]) Protocol 17 concerning Article 141 of the Treaty establishing the European Community (1992).

(20) 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. Measures within the meaning of Article 141(4) of the Treaty may include membership or the continuation of the activity of organisations or unions whose main objective is the promotion, in practice, of the principle of equal treatment between men and women.

(21) 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 one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

(22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

(23) It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.

(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding ([1]). This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ([2]).

(25) For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women on maternity leave and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

(26) In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men in family and working life ([3]), Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment.

(27) Similar considerations apply to the granting by Member States to men and women of an individual and non-transferable right to leave subsequent to the adoption of a child. It is for the Member States to determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.

(28) The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the Member States.

(29) The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.

(30) The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a *prima facie* case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.

(31) With a view to further improving the level of protection offered by this Directive, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of a complainant, without prejudice to national rules of procedure concerning representation and defence.

(32) Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle

([1]) OJ L 348, 28.11.1992, p. 1.

([2]) OJ L 145, 19.6.1996, p. 4. Directive as amended by Directive 97/75/EC (OJ L 10, 16.1.1998, p. 24).

([3]) OJ C 218, 31.7.2000, p. 5.

of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.

(33) It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

(34) In order to enhance the effective implementation of the principle of equal treatment, Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations.

(35) Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.

(36) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(37) For the sake of a better understanding of the different treatment of men and women in matters of employment and occupation, comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels.

(38) Equal treatment of men and women in matters of employment and occupation cannot be restricted to legislative measures. Instead, the European Union and the Member States should continue to promote the raising of public awareness of wage discrimination and the changing of public attitudes, involving all parties concerned at public and private level to the greatest possible extent. The dialogue between the social partners could play an important role in this process.

(39) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

(40) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part B.

(41) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making [1], Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Article 2

Definitions

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

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

[1] OJ C 321, 31.12.2003, p. 1.

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) 'pay': 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/her employment from his/her employer;

(f) 'occupational social security schemes': schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ([1]) whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 3

Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

([1]) OJ L 6, 10.1.1979, p. 24.

TITLE II

SPECIFIC PROVISIONS

CHAPTER 1

Equal pay

Article 4

Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

CHAPTER 2

Equal treatment in occupational social security schemes

Article 5

Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6

Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7

Material scope

1. This Chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

(i) sickness,

(ii) invalidity,

(iii) old age, including early retirement,

(iv) industrial accidents and occupational diseases,

(v) unemployment;

(b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Article 8

Exclusions from the material scope

1. This Chapter does not apply to:

(a) individual contracts for self-employed persons;

(b) single-member schemes for self-employed persons;

(c) insurance contracts to which the employer is not a party, in the case of workers;

(d) optional provisions of occupational social security schemes offered to participants individually to guarantee them:

(i) either additional benefits,

(ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits;

(e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

2. This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

Article 9

Examples of discrimination

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

(a) determining the persons who may participate in an occupational social security scheme;

(b) fixing the compulsory or optional nature of participation in an occupational social security scheme;

(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;

(d) laying down different rules, except as provided for in points (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;

(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

(f) fixing different retirement ages;

(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;

(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

(i) setting different levels for workers' contributions;

(j) setting different levels for employers' contributions, except:

(i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,

(ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;

(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Chapter is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.

Article 10

Implementation as regards self-employed persons

1. Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for self-employed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EEC became applicable in their territory.

2. This Chapter shall not preclude rights and obligations relating to a period of membership of an occupational social security scheme for self-employed persons prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 11

Possibility of deferral as regards self-employed persons

As regards occupational social security schemes for self-employed persons, Member States may defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits:

(i) either until the date on which such equality is achieved in statutory schemes,

(ii) or, at the latest, until such equality is prescribed by a directive;

(b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;

(c) the application of Article 9(1)(i) in relation to the use of actuarial calculation factors, until 1 January 1999 or for Member States whose accession took place after that date until the date that Directive 86/378/EEC became applicable in their territory.

Article 12

Retroactive effect

1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and before 17 May 1990, that date shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.

4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

Article 13

Flexible pensionable age

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Chapter.

CHAPTER 3

Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14

Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or 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, as well as pay as provided for in Article 141 of the Treaty;

(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. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex 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 its objective is legitimate and the requirement is proportionate.

Article 15

Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16

Paternity and adoption leave

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

TITLE III

HORIZONTAL PROVISIONS

CHAPTER 1

Remedies and enforcement

Section 1

Remedies

Article 17

Defence of rights

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial 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/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 equal treatment.

Article 18

Compensation or reparation

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

Section 2

Burden of proof

Article 19

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. 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.

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

CHAPTER 2

Promotion of equal treatment — dialogue

Article 20

Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

Article 21

Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in a planned and systematic way in the workplace, in access to employment, vocational training and promotion.

4. To this end, employers shall be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include an overview of the proportions of men and women at different levels of the organisation; their pay and pay differentials; and possible measures to improve the situation in cooperation with employees' representatives.

Article 22

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 grounds of sex with a view to promoting the principle of equal treatment.

CHAPTER 3

General horizontal provisions

Article 23

Compliance

Member States shall take all necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended;

(c) occupational social security schemes containing such provisions may not be approved or extended by administrative measures.

Article 24

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, 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 25

Penalties

Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 26

Prevention of discrimination

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

Article 27

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. Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the provisions of this Directive are complied with.

Article 28

Relationship to Community and national provisions

1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.

Article 29

Gender mainstreaming

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Article 30

Dissemination of information

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.

TITLE IV

FINAL PROVISIONS

Article 31

Reports

1. By 15 February 2011, the Member States shall communicate to the Commission 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. Without prejudice to paragraph 1, Member States shall communicate to the Commission, every four years, the texts of any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration No 28 annexed to the Final Act of the Treaty of Amsterdam.

3. Member States shall assess the occupational activities referred to in Article 14(2), in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment periodically, but at least every 8 years.

Article 32

Review

By 15 February 2011 at the latest, the Commission shall review the operation of this Directive and if appropriate, propose any amendments it deems necessary.

Article 33

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 August 2008 at the latest or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement. Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this Directive. Member States shall take all necessary steps to be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those measures.

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. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

The obligation to transpose this Directive into national law shall be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

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

Article 34

Repeal

1. With effect from 15 August 2009 Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC shall be repealed without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.

2. References made to the repealed Directives shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 35

Entry into force

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

Article 36

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament	*For the Council*
The President	*The President*
J. BORRELL FONTELLES	P. LEHTOMÄKI

ANNEX I

PART A

Repealed Directives with their successive amendments

Council Directive 75/117/EEC	OJ L 45, 19.2.1975, p. 19
Council Directive 76/207/EEC	OJ L 39, 14.2.1976, p. 40
Directive 2002/73/EC of the European Parliament and of the Council	OJ L 269, 5.10.2002, p. 15
Council Directive 86/378/EEC	OJ L 225, 12.8.1986, p. 40
Council Directive 96/97/EC	OJ L 46, 17.2.1997, p. 20
Council Directive 97/80/EC	OJ L 14, 20.1.1998, p. 6
Council Directive 98/52/EC	OJ L 205, 22.7.1998, p. 66

PART B

List of time limits for transposition into national law and application dates

(referred to in Article 34(1))

Directive	Time-limit for transposition	Date of application
Directive 75/117/EEC	19.2.1976	
Directive 76/207/EEC	14.8.1978	
Directive 86/378/EEC	1.1.1993	
Directive 96/97/EC	1.7.1997	17.5.1990 in relation to workers, except for those workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under national law. Article 8 of Directive 86/378/EEC — 1.1.1993 at the latest. Article 6(1)(i), first indent of Directive 86/378/EEC –1.1.1999 at the latest.
Directive 97/80/EC	1.1.2001	As regards the United Kingdom of Great Britain and Northern Ireland 22.7.2001
Directive 98/52/EC	22.7.2001	
Directive 2002/73/EC	5.10.2005	

ANNEX II

Correlation table

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/EEC	Directive 97/80/EC	This Directive
—	Article 1(1)	Article 1	Article 1	Article 1
—	Article 1(2)	—	—	—
—	Article 2(2), first indent	—	—	Article 2(1), (a)
—	Article 2(2), second indent	—	Article 2(2)	Article 2(1), (b)
—	Article 2(2), third and fourth indents	—	—	Article 2(1), (c) and (d)
—	—	—	—	Article 2(1), (e)
—	—	Article 2(1)	—	Article 2(1), (f)
—	Article 2(3) and (4) and Article 2(7) third subparagraph	—	—	Article 2(2)
—	Article 2(8)	—	—	Article 3
Article 1	—	—	—	Article 4
—	—	Article 5(1)	—	Article 5
—	—	Article 3	—	Article 6
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—	—	Article 2(3)	—	Article 8(2)
—	—	Article 6	—	Article 9
—	—	Article 8	—	Article 10
—	—	Article 9	—	Article 11
—	—	(Article 2 of Directive 96/97/EC)	—	Article 12
—	—	Article 9a	—	Article 13
—	Articles 2(1) and 3 (1)	—	Article 2(1)	Article 14(1)
—	Article 2(6)	—	—	Article 14(2)
—	Article 2(7), second subparagraph	—	—	Article 15
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Article 2	Article 6(1)	Article 10	—	Article 17(1)
—	Article 6(3)	—	—	Article 17(2)
—	Article 6(4)	—	—	Article 17(3)

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/EEC	Directive 97/80/EC	This Directive
—	Article 6(2)	—	—	Article 18
—	—	—	Articles 3 and 4	Article 19
—	Article 8a	—	—	Article 20
—	Article 8b	—	—	Article 21
—	Article 8c	—	—	Article 22
Articles 3 and 6	Article 3 (2)(a)	—	—	Article 23(a)
Article 4	Article 3(2)(b)	Article 7(a)	—	Article 23(b)
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—	Article 8e(1)	—	Article 4(2)	Article 27(1)
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Article 9	Article 10	Article 12(2)	Article 7, fourth subparagraph	Article 31(1) and (2)
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Article 8	Article 9(1), first subparagraph and 9 (2) and (3)	Article 12(1)	Article 7, first, second and third subparagraphs	Article 33
—	Article 9(1), second subparagraph	—	—	—
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DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 December 2006

on services in the internal market

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

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

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

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

Whereas:

(1) The European Community is seeking to forge ever closer links between the States and peoples of Europe and to ensure economic and social progress. In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of services is ensured. In accordance with Article 43 of the Treaty the freedom of establishment is ensured. Article 49 of the Treaty establishes the right to provide services within the Community. The elimination of barriers to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress. In eliminating such barriers it is essential to ensure that the development of service activities contributes to the fulfilment of the task laid down in Article 2 of the Treaty of promoting throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States.

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

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

(4) Since services constitute the engine of economic growth and account for 70 % of GDP and employment in most Member States, this fragmentation of the internal market has a negative impact on the entire European economy, in particular on the competitiveness of SMEs and the movement of workers, and prevents consumers from gaining access to a greater variety of competitively priced services. It is important to point out that the services sector is a key employment sector for women in particular, and that they therefore stand to benefit greatly from new opportunities offered by the completion of the internal market for services. The European Parliament and the Council have emphasised that the removal of legal barriers to the establishment of a genuine internal market is a matter of priority for achieving the goal set by the European Council in Lisbon of 23 and 24 March 2000

[1] OJ C 221, 8.9.2005, p. 113.

[2] OJ C 43, 18.2.2005, p. 18.

[3] Opinion of the European Parliament of 16 February 2006 (not yet published in the Official Journal), Council Common Position of 24 July 2006 (OJ C 270 E, 7.11.2006, p. 1) and Position of the European Parliament of 15 November 2006. Council Decision of 11 December 2006.

of improving employment and social cohesion and achieving sustainable economic growth so as to make the European Union the most competitive and dynamic knowledge-based economy in the world by 2010, with more and better jobs. Removing those barriers, while ensuring an advanced European social model, is thus a basic condition for overcoming the difficulties encountered in implementing the Lisbon Strategy and for reviving the European economy, particularly in terms of employment and investment. It is therefore important to achieve an internal market for services, with the right balance between market opening and preserving public services and social and consumer rights.

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

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

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

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

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

(10) This Directive does not concern requirements governing access to public funds for certain providers. Such requirements include notably those laying down conditions under which providers are entitled to receive public funding, including specific contractual conditions, and in particular quality standards which need to be observed as a condition for receiving public funds, for example for social services.

(11) This Directive does not interfere with measures taken by Member States, in accordance with Community law, in relation to the protection or promotion of cultural and linguistic diversity and media pluralism, including the funding thereof. This Directive does not prevent Member States from applying their fundamental rules and principles relating to the freedom of press and freedom of expression. This Directive does not affect Member State laws prohibiting discrimination on grounds of nationality or on grounds such as those set out in Article 13 of the Treaty.

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

(13) It is equally important that this Directive fully respect Community initiatives based on Article 137 of the Treaty with a view to achieving the objectives of Article 136 thereof concerning the promotion of employment and improved living and working conditions.

(14) This Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect Member States' social security legislation.

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

(16) This Directive concerns only providers established in a Member State and does not cover external aspects. It does not concern negotiations within international organisations on trade in services, in particular in the framework of the General Agreement on Trade in Services (GATS).

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

(18) Financial services should be excluded from the scope of this Directive since these activities are the subject of specific Community legislation aimed, as is this Directive, at achieving a genuine internal market for services. Consequently, t his exclusion should cover all financial services such as banking, credit, insurance, including reinsurance, occupational or personal pensions, securities, investment funds, payments and investment advice, including the services listed in Annex I to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions ([1]).

(19) In view of the adoption in 2002 of a package of legislative instruments relating to electronic communications networks and services, as well as to associated resources and services, which has established a regulatory framework facilitating access to those activities within the internal market, notably through the elimination of most individual authorisation schemes, it is necessary to exclude issues dealt with by those instruments from the scope of this Directive.

(20) The exclusion from the scope of this Directive as regards matters of electronic communications services as covered by Directives 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ([2]), 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ([3]), 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and

([1]) OJ L 177, 30.6.2006, p. 1.
([2]) OJ L 108, 24.4.2002, p. 7.
([3]) OJ L 108, 24.4.2002, p. 21.

services (Framework Directive) ([1]), 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ([2]) and 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ([3]) should apply not only to questions specifically dealt with in these Directives but also to matters for which the Directives explicitly leave to Member States the possibility of adopting certain measures at national level.

(21) Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.

(22) The exclusion of healthcare from the scope of this Directive should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided.

(23) This Directive does not affect the reimbursement of healthcare provided in a Member State other than that in which the recipient of the care is resident. This issue has been addressed by the Court of Justice on numerous occasions, and the Court has recognised patients' rights. It is important to address this issue in another Community legal instrument in order to achieve greater legal certainty and clarity to the extent that this issue is not already addressed in Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community ([4]).

(24) Audiovisual services, whatever their mode of transmission, including within cinemas, should also be excluded from the scope of this Directive. Furthermore, this Directive should not apply to aids granted by Member States in the audiovisual sector which are covered by Community rules on competition.

(25) Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.

(26) This Directive is without prejudice to the application of Article 45 of the Treaty.

(27) This Directive should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers m andated by the State or by charities recognised as such by the State with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised. These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.

(28) This Directive does not deal with the funding of, or the system of aids linked to, social services. Nor does it affect the criteria or conditions set by Member States to ensure that social services effectively carry out a function to the benefit of the public interest and social cohesion. In addition, this Directive should not affect the principle of universal service in Member States' social services.

(29) Given that the Treaty provides specific legal bases for taxation matters and given the Community instruments already adopted in that field, it is necessary to exclude the field of taxation from the scope of this Directive.

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

([1]) OJ L 108, 24.4.2002, p. 33.
([2]) OJ L 108, 24.4.2002, p. 51.
([3]) OJ L 201, 31.7.2002, p. 37. Directive as amended by Directive 2006/24/EC (OJ L 105, 13.4.2006, p. 54).
([4]) OJ L 149, 5.7.1971, p. 2. Regulation as last amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council (OJ L 114, 27.4.2006, p. 1).

(31) This Directive is consistent with and does not affect Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications ([1]). It deals with questions other than those relating to professional qualifications, for example professional liability insurance, commercial communications, multidisciplinary activities and administrative simplification. With regard to temporary cross-border service provision, a derogation from the provision on the freedom to provide services in this Directive ensures that Title II on the free provision of services of Directive 2005/36/EC is not affected. Therefore, none of the measures applicable under that Directive in the Member State where the service is provided is affected by the provision on the freedom to provide services.

(32) This Directive is consistent with Community legislation on consumer protection, such as Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive) ([2]) and Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) ([3]).

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

([1]) OJ L 255, 30.9.2005, p. 22.

([2]) OJ L 149, 11.6.2005, p. 22.

([3]) OJ L 364, 9.12.2004, p. 1. Regulation as amended by Directive 2005/29/EC.

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

(35) Non-profit making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus, they might not constitute economic activities within the meaning of Community law and should fall outside the scope of this Directive.

(36) The concept of 'provider' should cover any natural person who is a national of a Member State or any legal person engaged in a service activity in a Member State, in exercise either of the freedom of establishment or of the free movement of services. The concept of provider should thus not be limited solely to cross-border service provision within the framework of the free movement of services but should also cover cases in which an operator establishes itself in a Member State in order to develop its service activities there. On the other hand, the concept of a provider should not cover the case of branches in a Member State of companies from third countries because, under Article 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community. The concept of 'recipient' should also cover third country nationals who already benefit from rights conferred upon them by Community acts such as Regulation (EEC) No 1408/71, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents ([4]), Council Regulation (EC) No 859/2003 of 14 May 2003

([4]) OJ L 16, 23.1.2004, p. 44.

extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [1] and Directive 2004/38/ECof the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2]. Furthermore, Member States may extend the concept of recipient to other third country nationals that are present within their territory.

(37) The place at which a provider is established should be determined in accordance with the case law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. This requirement may also be fulfilled where a company is constituted for a given period or where it rents the building or installation through which it pursues its activity. It may also be fulfilled where a Member State grants authorisations for a limited duration only in relation to particular services. An establishment does not need to take the form of a subsidiary, branch or agency, but may consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. According to this definition, which requires the actual pursuit of an economic activity at the place of establishment of the provider, a mere letter box does not constitute an establishment. Where a provider has several places of establishment, it is important to determine the place of establishment from which the actual service concerned is provided. Where it is difficult to determine from which of several places of establishment a given service is provided, the location of the provider's centre of activities relating to this particular service should be that place of establishment.

(38) The concept of 'legal persons', according to the Treaty provisions on establishment, leaves operators free to choose the legal form which they deem suitable for carrying out their activity. Accordingly, 'legal persons', within the meaning of the Treaty, means all entities constituted under, or governed by, the law of a Member State, irrespective of their legal form.

(39) The concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.

(40) The concept of 'overriding reasons relating to the public interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

(41) The concept of 'public policy', as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of public security includes issues of public safety.

(42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.

[1] OJ L 124, 20.5.2003, p. 1.
[2] OJ L 158, 30.4.2004, p. 77.

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

(44) Member States should introduce, where appropriate, forms harmonised at Community level, as established by the Commission, which will serve as an equivalent to certificates, attestations or any other document in relation to establishment.

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

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

(47) With the aim of administrative simplification, general formal requirements, such as presentation of original documents, certified copies or a certified translation, should not be imposed, except where objectively justified by an overriding reason relating to the public interest, such as the protection of workers, public health, the protection of the environment or the protection of consumers. It is also necessary to ensure that an authorisation as a general rule permits access to, or exercise of, a service activity throughout the national territory, unless a new authorisation for each establishment, for example for each new hypermarket, or an authorisation that is restricted to a specific part of the national territory is objectively justified by an overriding reason relating to the public interest.

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

(49) The fee which may be charged by points of single contact should be proportionate to the cost of the procedures and formalities with which they deal. This should not prevent Member States from entrusting the points of single contact with the collection of other administrative fees, such as the fee of supervisory bodies.

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

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

(52) The setting up, in the reasonably near future, of electronic means of completing procedures and formalities will be vital for administrative simplification in the field of service activities, for the benefit of providers, recipients and competent authorities. In order to meet that obligation as to results, national laws and other rules applicable to services may need to be adapted. This obligation should not prevent Member States from providing other means of completing such procedures and formalities, in addition to electronic means. The fact that it must be possible to complete those procedures and formalities at a distance means, in particular, that Member States must ensure that they may be completed across borders. The obligation as to results does not cover procedures or formalities which by their very nature are impossible to complete at a distance. Furthermore, this does not interfere with Member States' legislation on the use of languages.

(53) The granting of licences for certain service activities may require an interview with the applicant by the competent authority in order to assess the applicant's personal integrity and suitability for carrying out the service in question. In such cases, the completion of formalities by electronic means may not be appropriate.

(54) The possibility of gaining access to a service activity should be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. However, the provision to that effect made by this Directive cannot be relied upon in order to justify authorisation schemes which are prohibited by other Community instruments such as Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures [1], or Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) [2]. The results of the process of mutual evaluation will make it possible to determine, at Community level, the types of activity for which authorisation schemes should be eliminated.

(55) This Directive should be without prejudice to the possibility for Member States to withdraw authorisations after they have been issued, if the conditions for the granting of the authorisation are no longer fulfilled.

(56) According to the case law of the Court of Justice, public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to the public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions. However, no such authorisation scheme or restriction should discriminate on grounds of nationality. Further, the principles of necessity and proportionality should always be respected.

(57) The provisions of this Directive relating to authorisation schemes should concern cases where the access to or exercise of a service activity by operators requires a decision by a competent authority. This concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, since this Directive does not deal with rules on public procurement.

(58) In order to facilitate access to and exercise of service activities, it is important to evaluate and report on authorisation schemes and their justification. This reporting obligation concerns only the existence of authorisation schemes and not the criteria and conditions for the granting of an authorisation.

[1] OJ L 13, 19.1.2000, p. 12.
[2] OJ L 178, 17.7.2000, p. 1.

(59) The authorisation should as a general rule enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, unless a territorial limit is justified by an overriding reason relating to the public interest. For example, environmental protection may justify the requirement to obtain an individual authorisation for each installation on the national territory. This provision should not affect regional or local competences for the granting of authorisations within the Member States.

(60) This Directive, and in particular the provisions concerning authorisation schemes and the territorial scope of an authorisation, should not interfere with the division of regional or local competences within the Member States, including regional and local self-government and the use of official languages.

(61) The provision relating to the non-duplication of conditions for the granting of an authorisation should not prevent Member States from applying their own conditions as specified in the authorisation scheme. It should only require that competent authorities, when considering whether these conditions are met by the applicant, take into account the equivalent conditions which have already been satisfied by the applicant in another Member State. This provision should not require the application of the conditions for the granting of an authorisation provided for in the authorisation scheme of another Member State.

(62) Where the number of authorisations available for an activity is limited because of scarcity of natural resources or technical capacity, a procedure for selection from among several potential candidates should be adopted with the aim of developing through open competition the quality and conditions for supply of services available to users. Such a procedure should provide guarantees of transparency and impartiality and the authorisation thus granted should not have an excessive duration, be subject to automatic renewal or confer any advantage on the provider whose authorisation has just expired. In particular, the duration of the authorisation granted should be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested. This provision should not prevent Member States from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity. These authorisationsshould remain in any case subject to the other provisions of this Directive relating to authorisation schemes.

(63) In the absence of different arrangements, failing a response within a time period, an authorisation should be deemed to have been granted. However, different arrangements may be put in place in respect of certain activities, where objectively justified by overriding reasons relating to the public interest, including a legitimate interest of third parties. Such different arrangements could include national rules according to which, in the absence of a response of the competent authority, the application is deemed to have been rejected, this rejection being open to challenge before the courts.

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

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

(66) Access to or the exercise of a service activity in the territory of a Member State should not be subject to an economic test. The prohibition of economic tests as a prerequisite for the grant of authorisation should cover economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest, such as the protection of the urban environment, social policy or public health. The prohibition should not affect the exercise of the powers of the authorities responsible for applying competition law.

(67) With respect to financial guarantees or insurance, the prohibition of requirements should concern only the obligation that the requested financial guarantees or insurance must be obtained from a financial institution established in the Member State concerned.

(68) With respect to pre-registration, the prohibition of requirements should concern only the obligation that the provider, prior to the establishment, be pre-registered for a given period in a register held in the Member State concerned.

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

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

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

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

(73) The requirements to be examined include national rules which, on grounds other than those relating to professional qualifications, reserve access to certain activities to particular providers. These requirements also include obligations on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons, and requirements which relate to the shareholding of a company, in particular obligations to hold a minimum amount of capital for certain service activities or to have a specific qualification in order to hold share capital in or to manage certain companies. The evaluation of the compatibility of fixed minimum and/or maximum tariffs with the freedom of establishment concerns only tariffs imposed by competent authorities specifically for the provision of certain services and not, for example, general rules on price determination, such as for the renting of houses.

(74) The mutual evaluation process means that during the transposition period Member States will first have to conduct a screening of their legislation in order to ascertain whether any of the above mentioned requirements exists in their legal systems. At the latest by the end of the transposition period, Member States should draw up a report on the results of this screening. Each report will be submitted to all other Member States and interested parties. Member States will then have six months in which to submit their observations on these reports. At the latest by one year after the date of transposition of this Directive, the Commission should draw up a summary report, accompanied where appropriate by proposals for further initiatives. If necessary the Commission, in cooperation with the Member States, could assist them to design a common method.

(75) The fact that this Directive specifies a number of requirements to be abolished or evaluated by the Member States during the transposition period is without prejudice to any infringement proceedings against a Member State for failure to fulfil its obligations under Articles 43 or 49 of the Treaty.

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

(77) Where an operator travels to another Member State to exercise a service activity there, a distinction should be made between situations covered by the freedom of establishment and those covered, due to the temporary nature of the activities concerned, by the free movement of services. As regards the distinction between the freedom of establishment and the free movement of services, according to the case law of the Court of Justice the key element is whether or not the operator is established in the Member State where it provides the service concerned. If the operator is established in the Member State where it provides its services, it should come under the scope of application of the freedom of establishment. If, by contrast, the operator is not established in the Member State where the service is provided, its activities should be covered by the free movement of services. The Court of Justice has consistently held that the temporary nature of the activities in question should be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity. The fact that the activity is temporary should not mean that the provider may not equip itself with some forms of infrastructure in the Member State where the service is provided, such as an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of providing the service in question.

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

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

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

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

(82) The provisions of this Directive should not preclude the application by a Member State of rules on employment conditions. Rules laid down by law, regulation or administrative provisions should, in accordance with the Treaty, be justified for reasons relating to the protection of workers and be non-discriminatory, necessary, and proportionate, as interpreted by the Court of Justice, and comply with other relevant Community law.

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

(84) The derogation from the provision on the freedom to provide services concerning postal services should cover both activities reserved to the universal service provider and other postal services.

(85) The derogation from the provision on the freedom to provide services relating to the judicial recovery of debts and the reference to a possible future harmonisation instrument should concern only the access to and the exercise of activities which consist, notably, in bringing actions before a court relating to the recovery of debts.

(86) This Directive should not affect terms and conditions of employment which, pursuant to Directive 96/71/ECof the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1], apply to workers posted to provide a service in the territory of another Member State. In such cases, Directive 96/71/EC stipulates that providers have to comply with terms and conditions of employment in a listed number of areas applicable in the Member State where the service is provided. These are: maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, including overtime rates, the conditions of hiring out of workers, in particular the protection of workers hired out by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth and of children and young people and equality of treatment between men and women and other provisions on non-discrimination. This not only concerns terms and conditions of employment which are laid down by law but also those laid down in collective agreements or arbitration awards that are officially declared or de facto universally applicable within the meaning of Directive 96/71/EC. Moreover, this Directive should not prevent Member States from applying terms and conditions of employment on matters other than those listed in Article 3(1) of Directive 96/71/EC on the grounds of public policy.

(87) Neither should this Directive affect terms and conditions of employment in cases where the worker employed for the provision of a cross-border service is recruited in the Member State where the service is provided. Furthermore, this Directive should not affect the right for the Member State where the service is provided to determine the existence of an employment relationship and the distinction between self-employed persons and employed persons, including 'false self-employed persons'. In that respect the essential characteristic of an employment relationship within the meaning of Article 39 of the Treaty should be the fact that for a certain period of time a person provides services for and under the direction of another person in return for which he receives remuneration. Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Articles 43 and 49 of the Treaty.

(88) The provision on the freedom to provide services should not apply in cases where, in conformity with Community law, an activity is reserved in a Member State to a particular profession, for example requirements which reserve the provision of legal advice to lawyers.

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

(90) Contractual relations between the provider and the client as well as between an employer and employee should not be subject to this Directive. The applicable law regarding the contractual or non contractual obligations of the provider should be determined by the rules of private international law.

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

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

[1] OJ L 18, 21.1.1997, p. 1.

(93) The concept of financial assistance provided for the use of a particular service should not apply to systems of aids granted by Member States, in particular in the social field or in the cultural sector, which are covered by Community rules on competition, nor to general financial assistance not linked to the use of a particular service, for example grants or loans to students.

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

(95) The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient's nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment. Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination.

(96) It is appropriate to provide that, as one of the means by which the provider may make the information which he is obliged to supply easily accessible to the recipient, he supply his electronic address, including that of his website. Furthermore, the obligation to make available certain information in the provider's information documents which present his services in detail should not cover commercial communications of a general nature, such as advertising, but rather documents giving a detailed description of the services proposed, including documents on a website.

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

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

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

(100) It is necessary to put an end to total prohibitions on commercial communications by the regulated professions, not by removing bans on the content of a commercial communication but rather by removing those bans which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media. As regards the content and methods of commercial communication, it is necessary to encourage professionals to draw up, in accordance with Community law, codes of conduct at Community level.

(101) It is necessary and in the interest of recipients, in particular consumers, to ensure that it is possible for providers to offer multidisciplinary services and that restrictions in this regard be limited to what is necessary to ensure the impartiality, independence and integrity of the regulated professions. This does not affect restrictions or prohibitions on carrying out particular activities which aim at ensuring independence in cases in which a Member State entrusts a provider with a particular task, notably in the area of urban development, nor should it affect the application of competition rules.

(102) In order to increase transparency and promote assessments based on comparable criteria with regard to the quality of the services offered and supplied to recipients, it is important that information on the meaning of quality labels and other distinctive marks relating to these services be easily accessible. That obligation of transparency is particularly important in areas such as tourism, especially the hotel business, in which the use of a system of classification is widespread. Moreover, it is appropriate to examine the extent to which European standardisation could facilitate compatibility and quality of services. European standards are drawn up by the European standards-setting bodies, the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). Where appropriate, the Commission may, in accordance with the procedures laid down in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations [1] and of rules on Information Society services, issue a mandate for the drawing up of specific European standards.

(103) In order to solve potential problems with compliance with judicial decisions, it is appropriate to provide that Member States recognise equivalent guarantees lodged with institutions or bodies such as banks, insurance providers or other financial services providers established in another Member State.

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

(105) Administrative cooperation is essential to make the internal market in services function properly. Lack of cooperation between Member States results in proliferation of rules applicable to providers or duplication of controls for cross-border activities, and can also be used by rogue traders to avoid supervision or to circumvent applicable national rules on services. It is, therefore, essential to provide for clear, legally binding obligations for Member States to cooperate effectively.

(106) For the purposes of the Chapter on administrative cooperation, 'supervision' should cover activities such as monitoring and fact finding, problem solving, enforcement and imposition of sanctions and subsequent follow-up activities.

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

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

(109) In cases where a provider moves temporarily to a Member State other than the Member State of establishment, it is necessary to provide for mutual assistance between those two Member States so that the former can carry out checks, inspections and enquiries at the request of the Member State of establishment or carry out such checks on its own initiative if these are merely factual checks.

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

[1] OJ L 204, 21.7.1998, p. 37. Directive as last amended by the 2003 Act of Accession.

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

(112) Cooperation between Member States requires a well-functioning electronic information system in order to allow competent authorities easily to identify their relevant interlocutors in other Member States and to communicate in an efficient way.

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

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

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

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

(117) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(118) In accordance with paragraph 34 of the Interinstitutional Agreement on better law-making [2], Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

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

2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

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

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

[1] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

[2] OJ C 321, 31.12.2003, p. 1.

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

6. This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.

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

Article 2

Scope

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

2. This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

(b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;

(c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;

(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;

(e) services of temporary work agencies;

(f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;

(g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;

(h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;

(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

(k) private security services;

(l) services provided by notaries and bailiffs, who are appointed by an official act of government.

3. This Directive shall not apply to the field of taxation.

Article 3

Relationship with other provisions of Community law

1. If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. These include:

(a) Directive 96/71/EC;

(b) Regulation (EEC) No 1408/71;

(c) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1];

(d) Directive 2005/36/EC.

2. This Directive does not concern rules of private international law, in particular rules governing the law applicable to contractual and non contractual obligations, including those which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member State.

[1] OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

3. Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

Article 4

Definitions

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

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

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

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

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

5) 'establishment' means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;

6) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

7) 'requirement' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) 'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

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

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

11) 'regulated profession' means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC;

12) 'commercial communication' means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:

(a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;

(b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.

CHAPTER II

ADMINISTRATIVE SIMPLIFICATION

Article 5

Simplification of procedures

1. Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them.

2. The Commission may introduce harmonised forms at Community level, in accordance with the procedure referred to in Article 40(2). These forms shall be equivalent to certificates, attestations and any other documents required of a provider.

3. Where Member States require a provider or recipient to supply a certificate, attestation or any other document proving that a requirement has been satisfied, they shall accept any document from another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. They may not require a document from another Member State to be produced in its original form, or as a certified copy or as a certified translation, save in the cases provided for in other Community instruments or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security.

The first subparagraph shall not affect the right of Member States to require non-certified translations of documents in one of their official languages.

4. Paragraph 3 shall not apply to the documents referred to in Article 7(2) and 50 of Directive 2005/36/EC, in Articles 45(3), 46, 49 and 50 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [1], in Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [2], in the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [3] and in the Eleventh Council Directive 89/666/EECof 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State [4].

Article 6

Points of single contact

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

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

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

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

Article 7

Right to information

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

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

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

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

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

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

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

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

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

[1] OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) No 2083/2005 (OJ L 333, 20.12.2005, p. 28).

[2] OJ L 77, 14.3.1998, p. 36. Directive as amended by the 2003 Act of Accession.

[3] OJ L 65, 14.3.1968, p. 8. Directive as last amended by Directive 2003/58/EC of the European Parliament and of the Council (OJ L 221, 4.9.2003, p. 13).

[4] OJ L 395, 30.12.1989, p. 36.

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

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

Article 8

Procedures by electronic means

1. Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.

2. Paragraph 1 shall not apply to the inspection of premises on which the service is provided or of equipment used by the provider or to physical examination of the capability or of the personal integrity of the provider or of his responsible staff.

3. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt detailed rules for the implementation of paragraph 1 of this Article with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at Community level.

CHAPTER III

FREEDOM OF ESTABLISHMENT FOR PROVIDERS

SECTION 1

Authorisations

Article 9

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

Article 10

Condiations for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.

Article 11

Duration of authorisation

1. An authorisation granted to a provider shall not be for a limited period, except where:

(a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;

(b) the number of available authorisations is limited by an overriding reason relating to the public interest;

or

(c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

2. Paragraph 1 shall not concern the maximum period before the end of which the provider must actually commence his activity after receiving authorisation.

3. Member States shall require a provider to inform the relevant point of single contact provided for in Article 6 of the following changes:

(a) the creation of subsidiaries whose activities fall within the scope of the authorisation scheme;

(b) changes in his situation which result in the conditions for authorisation no longer being met.

4. This Article shall be without prejudice to the Member States' ability to revoke authorisations, when the conditions for authorisation are no longer met.

Article 12

Selection from among several candidates

1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.

Article 13

Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.

2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.

3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.

4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

5. All applications for authorisation shall be acknowledged as quickly as possible. The acknowledgement must specify the following:

(a) the period referred to in paragraph 3;

(b) the available means of redress;

(c) where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.

6. In the case of an incomplete application, the applicant shall be informed as quickly as possible of the need to supply any additional documentation, as well as of any possible effects on the period referred to in paragraph 3.

7. When a request is rejected because it fails to comply with the required procedures or formalities, the applicant shall be informed of the rejection as quickly as possible.

SECTION 2

Requirements prohibited or subject to evaluation

Article 14

Prohibited requirements

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

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

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

   (b) a requirement that the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies be resident within the territory;

2) a prohibition on having an establishment in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State;

3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

4) conditions of reciprocity with the Member State in which the provider already has an establishment, save in the case of conditions of reciprocity provided for in Community instruments concerning energy;

5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest;

6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large;

7) an obligation to provide or participate in a financial guarantee or to take out insurance from a provider or body established in their territory. This shall not affect the possibility for Member States to require insurance or financial guarantees as such, nor shall it affect requirements relating to the participation in a collective compensation fund, for instance for members of professional bodies or organisations;

8) an obligation to have been pre-registered, for a given period, in the registers held in their territory or to have previously exercised the activity for a given period in their territory.

Article 15

Requirements to be evaluated

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

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

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

(b) an obligation on a provider to take a specific legal form;

(c) requirements which relate to the shareholding of a company;

(d) requirements, other than those concerning matters covered by Directive 2005/36/EC or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;

(e) a ban on having more than one establishment in the territory of the same State;

(f) requirements fixing a minimum number of employees;

(g) fixed minimum and/or maximum tariffs with which the provider must comply;

(h) an obligation on the provider to supply other specific services jointly with his service.

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

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

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

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

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.

5. In the mutual evaluation report provided for in Article 39(1), Member States shall specify the following:

(a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;

(b) the requirements which have been abolished or made less stringent.

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

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

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

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

CHAPTER IV

FREE MOVEMENT OF SERVICES

SECTION 1

Freedom to provide services and related derogations

Article 16

Freedom to provide services

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

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

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

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

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

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

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

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

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

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

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

Article 17

Additional derogations from the freedom to provide services

Article 16 shall not apply to:

1) services of general economic interest which are provided in another Member State, inter alia:

   (a) in the postal sector, services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ([1]);

   (b) in the electricity sector, services covered by Directive 2003/54/EC ([2]) of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity;

   (c) in the gas sector, services covered by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas ([3]);

   (d) water distribution and supply services and waste water services;

   (e) treatment of waste;

2) matters covered by Directive 96/71/EC;

3) matters covered by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ([4]);

4) matters covered by Council Directive 77/249/EEC of 22 March 1977to facilitate the effective exercise by lawyers of freedom to provide services ([5]);

5) the activity of judicial recovery of debts;

([1]) OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

([2]) OJ L 176, 15.7.2003, p. 37. Directive as last amended by Commission Decision 2006/653/EC (OJ L 270, 29.9.2006, p. 72).

([3]) OJ L 176, 15.7.2003, p. 57.

([4]) OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003.

([5]) OJ L 78, 26.3.1977, p. 17. Directive as last amended by the 2003 Act of Accession.

6) matters covered by Title II of Directive 2005/36/EC, as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession;

7) matters covered by Regulation (EEC) No 1408/71;

8) as regards administrative formalities concerning the free movement of persons and their residence, matters covered by the provisions of Directive 2004/38/EC that lay down administrative formalities of the competent authorities of the Member Statewhere the service is provided with which beneficiaries must comply;

9) as regards third country nationals who move to another Member State in the context of the provision of a service, the possibility for Member States to require visa or residence permits for third country nationals who are not covered by the mutual recognition regime provided for in Article 21 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders [1] or the possibility to oblige third country nationals to report to the competent authorities of the Member State in which the service is provided on or after their entry;

10) as regards the shipment of waste, matters covered by Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community [2];

11) copyright, neighbouring rights and rights covered by Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products [3] and by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [4], as well as industrial property rights;

12) acts requiring by law the involvement of a notary;

13) matters covered by Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audit of annual accounts and consolidated accounts [5];

14) the registration of vehicles leased in another Member State;

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

Article 18

Case-by-case derogations

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

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

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

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

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

(d) the measures are proportionate.

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

SECTION 2

Rights of recipients of services

Article 19

Prohibited restrictions

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

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

[1] OJ L 239, 22.9.2000, p. 19. Convention as last amended by Regulation (EC) No 1160/2005 of the European Parliament and of the Council (OJ L 191, 22.7.2005, p. 18).
[2] OJ L 30, 6.2.1993, p. 1. Regulation as last amended by Commission Regulation (EC) No 2557/2001 (OJ L 349, 31.12.2001, p. 1).
[3] OJ L 24, 27.1.1987, p. 36.
[4] OJ L 77, 27.3.1996, p. 20.
[5] OJ L 157, 9.6.2006, p. 87.

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

Article 20

Non-discrimination

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

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

Article 21

Assistance for recipients

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

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

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

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

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

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

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

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

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

CHAPTER V

QUALITY OF SERVICES

Article 22

Information on providers and their services

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

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

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

(c) where the activity is subject to an authorisation scheme, the particulars of the relevant competent authority or the single point of contact;

(d) where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1];

[1] OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2006/18/EC (OJ L 51, 22.2.2006, p. 12).

(e) in the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted;

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

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

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

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

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

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

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

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

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

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

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

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

(a) where the price is not pre-determined by the provider for a given type of service, the price of the service or, if an exact price cannot be given, the method for calculating the price so that it can be checked by the recipient, or a sufficiently detailed estimate;

(b) as regards the regulated professions, a reference to the professional rules applicable in the Member State of establishment and how to access them;

(c) information on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services;

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

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

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

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

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

Article 23

Professional liability insurance and guarantees

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

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

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

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

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

5. For the purpose of this Article

— 'direct and particular risk' means a risk arising directly from the provision of the service,

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

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

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

Article 24

Commercial communications by the regulated professions

1. Member States shall remove all total prohibitions on commercial communications by the regulated professions.

2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

Article 25

Multidisciplinary activities

1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.

However, the following providers may be made subject to such requirements:

(a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality;

(b) providers of certification, accreditation, technical monitoring, test or trial services, in so far as is justified in order to ensure their independence and impartiality.

2. Where multidisciplinary activities between providers referred to in points (a) and (b) of paragraph 1 are authorised, Member States shall ensure the following:

(a) that conflicts of interest and incompatibilities between certain activities are prevented;

(b) that the independence and impartiality required for certain activities is secured;

(c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy.

3. In the report referred to in Article 39(1), Member States shall indicate which providers are subject to the requirements laid down in paragraph 1 of this Article, the content of those requirements and the reasons for which they consider them to be justified.

Article 26

Policy on quality of services

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

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

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

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

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

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

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

Article 27

Settlement of disputes

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

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

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

3. Where a financial guarantee is required for compliance with a judicial decision, Member States shall recognise equivalent guarantees lodged with a credit institution or insurer established in another Member State. Such credit institutions must be authorised in a Member State in accordance with Directive 2006/48/EC and such insurers in accordance, as appropriate, with First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1] and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2].

4. Member States shall take the general measures necessary to ensure that providers who are subject to a code of conduct, or are members of a trade association or professional body, which provides for recourse to a non-judicial means of dispute settlement inform the recipient thereof and mention that fact in any document which presents their services in detail, specifying how to access detailed information on the characteristics of, and conditions for, the use of such a mechanism.

CHAPTER VI

ADMINISTRATIVE COOPERATION

Article 28

Mutual assistance – general obligations

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

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

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[1] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

[2] OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2005/68/EC.

3. Information requests and requests to carry out any checks, inspections and investigations under this Chapter shall be duly motivated, in particular by specifying the reason for the request. Information exchanged shall be used only in respect of the matter for which it was requested.

4. In the event of receiving a request for assistance from competent authorities in another Member State, Member States shall ensure that providers established in their territory supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws.

5. In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question shall rapidly inform the requesting Member State with a view to finding a solution.

6. Member States shall supply the information requested by other Member States or the Commission by electronic means and within the shortest possible period of time.

7. Member States shall ensure that registers in which providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States.

8. Member States shall communicate to the Commission information on cases where other Member States do not fulfil their obligation of mutual assistance. Where necessary, the Commission shall take appropriate steps, including proceedings provided for in Article 226 of the Treaty, in order to ensure that the Member States concerned comply with their obligation of mutual assistance. The Commission shall periodically inform Member States about the functioning of the mutual assistance provisions.

Article 29

Mutual assistance – general obligations for the Member State of establishment

1. With respect to providers providing services in another Member State, the Member State of establishment shall supply information on providers established in its territory when requested to do so by another Member State and, in particular, confirmation that a provider is established in its territory and, to its knowledge, is not exercising his activities in an unlawful manner.

2. The Member State of establishment shall undertake the checks, inspections and investigations requested by another Member State and shall inform the latter of the results and, as the case may be, of the measures taken. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities can decide on the most appropriate measures to be taken in each individual case in order to meet the request by another Member State.

3. Upon gaining actual knowledge of any conduct or specific acts by a provider established in its territory which provides services in other Member States, that, to its knowledge, could cause serious damage to the health or safety of persons or to the environment, the Member State of establishment shall inform all other Member States and the Commission within the shortest possible period of time.

Article 30

Supervision by the Member State of establishment in the event of the temporary movement of a provider to another Member State

1. With respect to cases not covered by Article 31(1), the Member State of establishment shall ensure that compliance with its requirementsis supervised in conformity with the powers of supervision provided for in its national law, in particular through supervisory measures at the place of establishment of the provider.

2. The Member State of establishment shall not refrain from taking supervisory or enforcement measures in its territory on the grounds that the service has been provided or caused damage in another Member State.

3. The obligation laid down in paragraph 1 shall not entail a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the Member State where the service is provided. Such checks and controls shall be carried out by the authorities of the Member State where the provider is temporarily operating at the request of the authorities of the Member State of establishment, in accordance with Article 31.

Article 31

Supervision by the Member State where the service is provided in the event of the temporary movement of the provider

1. With respect to national requirements which may be imposed pursuant to Articles 16 or 17, the Member State where the service is provided is responsible for the supervision of the activity of the provider in its territory. In conformity with Community law, the Member State where the service is provided:

(a) shall take all measures necessary to ensure the provider complies with those requirements as regards the access to and the exercise of the activity;

(b) shall carry out the checks, inspections and investigations necessary to supervise the service provided.

2. With respect to requirements other than those referred to in paragraph 1, where a provider moves temporarily to another Member State in order to provide a service without being established there, the competent authorities of that Member State shall participate in the supervision of the provider in accordance with paragraphs 3 and 4.

3. At the request of the Member State of establishment, the competent authorities of the Member State where the service is provided shall carry out any checks, inspections and investigations necessary for ensuring the effective supervision by the Member State of establishment. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities may decide on the most appropriate measures to be taken in each individual case in order to meet the request by the Member State of establishment.

4. On their own initiative, the competent authorities of the Member State where the service is provided may conduct checks, inspections and investigations on the spot, provided that those checks, inspections or investigations are not discriminatory, are not motivated by the fact that the provider is established in another Member State and are proportionate.

Article 32

Alert mechanism

1. Where a Member State becomes aware of serious specific acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment in its territory or in the territory of other Member States, that Member State shall inform the Member State of establishment, the other Member States concerned and the Commission within the shortest possible period of time.

2. The Commission shall promote and take part in the operation of a European network of Member States' authorities in order to implement paragraph 1.

3. The Commission shall adopt and regularly update, in accordance with the procedure referred to in Article 40(2), detailed rules concerning the management of the network referred to in paragraph 2 of this Article.

Article 33

Information on the good repute of providers

1. Member States shall, at the request of a competent authority in another Member State, supply information, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities in respect of the provider which are directly relevant to the provider's competence or professional reliability. The Member State which supplies the information shall inform the provider thereof. A request made pursuant to the first subparagraph must be duly substantiated, in particular as regards the reasons for the request for information.

2. Sanctions and actions referred to in paragraph 1 shall only be communicated if a final decision has been taken. With regard to other enforceable decisions referred to in paragraph 1, the Member State which supplies the information shall specify whether a particular decision is final or whether an appeal has been lodged in respect of it, in which case the Member State in question should provide an indication of the date when the decision on appeal is expected.

Moreover, that Member State shall specify the provisions of national law pursuant to which the provider was found guilty or penalised.

3. Implementation of paragraphs 1and 2 must comply with rules on the provision of personal dataand with rights guaranteed to persons found guilty or penalised in the Member States concerned, including by professional bodies. Any information in question which is public shall be accessible to consumers.

Article 34

Accompanying measures

1. The Commission, in cooperation with Member States, shall establish an electronic system for the exchange of information between Member States, taking into account existing information systems.

2. Member States shall, with the assistance of the Commission, take accompanying measures to facilitate the exchange of officials in charge of the implementation of mutual assistance and training of such officials, including language and computer training.

3. The Commission shall assess the need to establish a multiannual programme in order to organise relevant exchanges of officials and training.

Article 35

Mutual assistance in the event of case-by-case derogations

1. Where a Member State intends to take a measure pursuant to Article 18, the procedure laid down in paragraphs 2 to 6 of this Article shall apply without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation.

2. The Member State referred to in paragraph 1 shall ask the Member State of establishment to take measures with regard to the provider, supplying all relevant information on the service in question and the circumstances of the case.

The Member State of establishment shall check, within the shortest possible period of time, whether the provider is operating lawfully and verify the facts underlying the request. It shall inform the requesting Member State within the shortest possible period of time of the measures taken or envisaged or, as the case may be, the reasons why it has not taken any measures.

3. Following communication by the Member State of establishment as provided for in the second subparagraph of paragraph 2, the requesting Member State shall notify the Commission and the Member State of establishment of its intention to take measures, stating the following:

(a) the reasons why it believes the measures taken or envisaged by the Member State of establishment are inadequate;

(b) the reasons why it believes the measures it intends to take fulfil the conditions laid down in Article 18.

4. The measures may not be taken until fifteen working days after the date of notification provided for in paragraph 3.

5. Without prejudice to the possibility for the requesting Member State to take the measures in question upon expiry of the period specified in paragraph 4, the Commission shall, within the shortest possible period of time, examine the compatibility with Community law of the measures notified.

Where the Commission concludes that the measure is incompatible with Community law, it shall adopt a decision asking the Member State concerned to refrain from taking the proposed measures or to put an end to the measures in question as a matter of urgency.

6. In the case of urgency, a Member State which intends to take a measure may derogate from paragraphs 2, 3 and 4. In such cases, the measures shall be notified within the shortest possible period of time to the Commission and the Member State of establishment, stating the reasons for which the Member State considers that there is urgency.

Article 36

Implementing measures

In accordance with the procedure referred to in Article 40(3), the Commission shall adopt the implementing measures designed to amend non-essential elements of this Chapter by supplementing it by specifying the time-limits provided for in Articles 28 and 35. The Commission shall also adopt, in accordance with the procedure referred to in Article 40(2), the practical arrangements for the exchange of information by electronic means between Member States, and in particular the interoperability provisions for information systems.

CHAPTER VII

CONVERGENCE PROGRAMME

Article 37

Codes of conduct at Community level

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

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

Article 38

Additional harmonisation

The Commission shall assess, by 28 December 2010 the possibility of presenting proposals for harmonisation instruments on the following subjects:

(a) access to the activity of judicial recovery of debts;

(b) private security services and transport of cash and valuables.

Article 39

Mutual evaluation

1. By 28 December 2009 at the latest, Member States shall present a report to the Commission, containing the information specified in the following provisions:

(a) Article 9(2), on authorisation schemes;

(b) Article 15(5), on requirements to be evaluated;

(c) Article 25(3), on multidisciplinary activities.

2. The Commission shall forward the reports provided for in paragraph 1 to the Member States, which shall submit their observations on each of the reports within six months of receipt. Within the same period, the Commission shall consult interested parties on those reports.

3. The Commission shall present the reports and the Member States' observations to the Committee referred to in Article 40(1), which may make observations.

4. In the light of the observations provided for in paragraphs 2 and 3, the Commission shall, by 28 December 2010 at the latest, present a summary report to the European Parliament and to the Council, accompanied where appropriate by proposals for additional initiatives.

5. By 28 December 2009 at the latest, Member States shall present a report to the Commission on the national requirements whose application could fall under the third subparagraph of Article 16(1) and the first sentence of Article 16(3), providing reasons why they consider that the application of those requirements fulfil the criteria referred to in the third subparagraph of Article 16(1) and the first sentence of Article 16(3).

Thereafter, Member States shall transmit to the Commission any changes in their requirements, including new requirements, as referred to above, together with the reasons for them.

The Commission shall communicate the transmitted requirements to other Member States. Such transmission shall not prevent the adoption by Member States of the provisions in question. The Commission shall on an annual basis thereafter provide analyses and orientations on the application of these provisions in the context of this Directive.

Article 40

Committee procedure

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 41

Review clause

The Commission, by 28 December 2011 and every three years thereafter, shall present to the European Parliament and to the Council a comprehensive report on the application of this Directive. This report shall, in accordance with Article 16(4), address in particular the application of Article 16. It shall also consider the need for additional measures for matters excluded from the scope of application of this Directive. It shall be accompanied, where appropriate, by proposals for amendment of this Directive with a view to completing the Internal Market for services.

Article 42

Amendment of Directive 98/27/EC

In the Annex to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1], the following point shall be added:

'13. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36)'.

Article 43

Protection of personal data

The implementation and application of this Directive and, in particular, the provisions on supervision shall respect the rules on the protection of personal data as provided for in Directives 95/46/EC and 2002/58/EC.

CHAPTER VIII

FINAL PROVISIONS

Article 44

Transposition

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

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

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

[1] OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2005/29/EC.

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

Article 45

Entry into force

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

Article 46

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 12 December 2006.

For the European Parliament	*For the Council*
The President	*The President*
J. BORRELL FONTELLES	M. PEKKARINEN

I

(Legislative acts)

DIRECTIVES

DIRECTIVE (EU) 2015/1535 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 9 September 2015

laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114, 337 and 43 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinions of the European Economic and Social Committee ([1]),

Acting in accordance with the ordinary legislative procedure ([2]),

Whereas:

(1) Directive 98/34/EC of the European Parliament and of the Council ([3]) has been substantially amended several times ([4]). In the interests of clarity and rationality, that Directive should be codified.

(2) The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Therefore, the prohibition of quantitative restrictions on the movement of goods and of measures having an equivalent effect is one of the basic principles of the Union.

(3) In order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards national initiatives for the establishment of technical regulations.

(4) Barriers to trade resulting from technical regulations relating to products may be allowed only where they are necessary in order to meet essential requirements and have an objective in the public interest of which they constitute the main guarantee.

([1]) Opinion of 14 July 2010 (OJ C 44, 11.2.2011, p. 142) and opinion of 26 February 2014 (OJ C 214, 8.7.2014, p. 55).
([2]) Position of the European Parliament of 15 April 2014 (not yet published in the Official Journal) and decision of the Council of 13 July 2015.
([3]) Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204, 21.7.1998, p. 37). The original title was 'Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations'. It was amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 217, 5.8.1998, p. 18).
([4]) See Annex III, Part A.

(5) It is essential for the Commission to have the necessary information at its disposal before the adoption of technical provisions. Consequently, the Member States, which are required to facilitate the achievement of its task pursuant to Article 4(3) of the Treaty on European Union (TEU), must notify it of their projects in the field of technical regulations.

(6) All the Member States must also be informed of the technical regulations envisaged by any one Member State.

(7) The aim of the internal market is to create an environment that is conducive to the competitiveness of undertakings. Increased provision of information is one way of helping undertakings to make more of the advantages inherent in this market. It is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts and by means of the provisions relating to the confidentiality of such drafts.

(8) It is appropriate, in the interests of legal certainty, that Member States publicly announce that a national technical regulation has been adopted in accordance with the formalities laid down in this Directive.

(9) As far as technical regulations for products are concerned, the measures designed to ensure the proper functioning or the continued development of the market include greater transparency of national intentions and a broadening of the criteria and conditions for assessing the potential effect of the proposed regulations on the market.

(10) It is therefore necessary to assess all the requirements laid down in respect of a product and to take account of developments in national practices for the regulation of products.

(11) Requirements, other than technical specifications, referring to the life cycle of a product after it has been placed on the market are liable to affect the free movement of that product or to create obstacles to the proper functioning of the internal market.

(12) It is necessary to clarify the concept of a de facto technical regulation. In particular, the provisions by which the public authority refers to technical specifications or other requirements, or encourages the observance thereof, and the provisions referring to products with which the public authority is associated, in the public interest, have the effect of conferring on such requirements or specifications a more binding value than they would otherwise have by virtue of their private origin.

(13) The Commission and the Member States must also be allowed sufficient time in which to propose amendments to an envisaged measure, in order to remove or reduce any barriers which it might create to the free movement of goods.

(14) The Member State concerned must take account of those amendments when formulating the definitive text of the measure envisaged.

(15) It is inherent in the internal market that, in particular where the principle of mutual recognition cannot be implemented by the Member States, the Commission adopts or proposes the adoption of binding acts. A specific temporary standstill period has been established in order to prevent the introduction of national measures from compromising the adoption of binding acts by the European Parliament and the Council or by the Commission in the same field.

(16) The Member State concerned is to, pursuant to the general obligations laid down in Article 4(3) TEU, defer implementation of the envisaged measure for a period sufficient to allow either a joint examination of the proposed amendments or the preparation of a proposal for a legislative act or the adoption of a binding act of the Commission.

(17) With a view to facilitating the adoption of measures by the European Parliament and the Council, Member States should refrain from adopting technical regulations once the Council has adopted a position at first reading on a Commission proposal concerning that sector.

(18) It is necessary to provide for a Standing Committee, the members of which are appointed by the Member States, with the task of cooperating in the efforts of the Commission to lessen any adverse effects on the free movement of goods.

(19) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for the transposition into national law of the Directives set out in Part B of Annex III,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

1. For the purposes of this Directive, the following definitions apply:

(a) 'product' means any industrially manufactured product and any agricultural product, including fish products;

(b) 'service' means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

(i) 'at a distance' means that the service is provided without the parties being simultaneously present;

(ii) 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex I;

(c) 'technical specification' means 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.

The term 'technical specification' also covers production methods and processes used in respect of agricultural products, as referred to in the second subparagraph of Article 38(1) of the Treaty on the Functioning of the European Union (TFEU), products intended for human and animal consumption, and medicinal products as defined in Article 1 of Directive 2001/83/EC of the European Parliament and of the Council [1], as well as production methods and processes relating to other products, where these have an effect on their characteristics;

(d) 'other requirements' means a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

(e) 'rule on services' means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

For the purposes of this definition:

(i) a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner;

[1] 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 L 311, 28.11.2001, p. 67).

(ii) a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner;

(f) 'technical regulation' means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations shall include:

(i) laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions;

(ii) voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications;

(iii) technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

This comprises technical regulations imposed by the authorities designated by the Member States and appearing on a list drawn up and updated, where appropriate, by the Commission, in the framework of the Committee referred to in Article 2.

The same procedure shall be used for amending this list;

(g) 'draft technical regulation' means the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.

2. This Directive shall not apply to:

(a) radio broadcasting services;

(b) television broadcasting services covered by point (e) of Article 1(1) of Directive 2010/13/EU of the European Parliament and of the Council ([1]).

3. This Directive shall not apply to rules relating to matters which are covered by Union legislation in the field of telecommunications services, as covered by Directive 2002/21/EC of the European Parliament and of the Council ([2]).

4. This Directive shall not apply to rules relating to matters which are covered by Union legislation in the field of financial services, as listed non-exhaustively in Annex II to this Directive.

5. With the exception of Article 5(3), this Directive shall not apply to rules enacted by or for regulated markets within the meaning of Directive 2004/39/EC of the European Parliament and of the Council ([3]) or by or for other markets or bodies carrying out clearing or settlement functions for those markets.

([1]) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

([2]) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

([3]) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

6. This Directive shall not apply to those measures Member States consider necessary under the Treaties for the protection of persons, in particular workers, when products are used, provided that such measures do not affect the products.

Article 2

A Standing Committee shall be set up consisting of representatives appointed by the Member States who may call on the assistance of experts or advisers; its chairman shall be a representative of the Commission.

The Committee shall draw up its own rules of procedure.

Article 3

1. The Committee shall meet at least twice a year.

The Committee shall meet in a specific composition to examine questions concerning Information Society services.

2. The Commission shall submit to the Committee a report on the implementation and application of the procedures set out in this Directive, and shall present proposals aimed at eliminating existing or foreseeable barriers to trade.

3. The Committee shall express its opinion on the communications and proposals referred to in paragraph 2 and may, in that regard, propose, in particular, that the Commission:

(a) ensure where necessary, in order to avoid the risk of barriers to trade, that initially the Member States concerned decide amongst themselves on appropriate measures;

(b) take all appropriate measures;

(c) identify the areas where harmonisation appears necessary, and, should the case arise, undertake appropriate harmonisation in a given sector.

4. The Committee must be consulted by the Commission:

(a) when deciding on the actual system through which the exchange of information provided for in this Directive is to be effected and on any change to it;

(b) when reviewing the operation of the system provided for in this Directive.

5. The Committee may be consulted by the Commission on any preliminary draft technical regulation received by the latter.

6. Any question regarding the implementation of this Directive may be submitted to the Committee at the request of its chairman or of a Member State.

7. The proceedings of the Committee and the information to be submitted to it shall be confidential.

However, the Committee and the national authorities may, provided that the necessary precautions are taken, consult, for an expert opinion, natural or legal persons, including persons in the private sector.

8. With respect to rules on services, the Commission and the Committee may consult natural or legal persons from industry or academia, and where possible representative bodies, capable of delivering an expert opinion on the social and societal aims and consequences of any draft rule on services, and take note of their advice whenever requested to do so.

Article 4

Member States shall communicate to the Commission, in accordance with Article 5(1), all requests made to standards institutions to draw up technical specifications or a standard for specific products for the purpose of enacting a technical regulation for such products in the form of draft technical regulations, and shall state the grounds for their enactment.

Article 5

1. Subject to Article 7, 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 those grounds have not already been made clear in the draft.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned to the Commission, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft technical regulation again to the Commission under the conditions set out in the first and second subparagraphs of this paragraph if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

Where, in particular, the draft technical regulation seeks to limit the marketing or use of a chemical substance, preparation or product on grounds of public health or of the protection of consumers or the environment, Member States shall also forward either a summary or the references of all relevant data relating to the substance, preparation or product concerned and to known and available substitutes, where such information may be available, and communicate the anticipated effects of the measure on public health and the protection of the consumer and the environment, together with an analysis of the risk carried out as appropriate in accordance with the principles provided for in the relevant part of Section II.3 of Annex XV to Regulation (EC) No 1907/2006 of the European Parliament and of the Council ([1]).

The Commission shall immediately notify the other Member States of the draft technical regulation and all documents which have been forwarded to it; it may also refer this draft, for an opinion, to the Committee referred to in Article 2 of this Directive and, where appropriate, to the committee responsible for the field in question.

With respect to the technical specifications or other requirements or rules on services referred to in point (iii) of the second subparagraph of point (f) of Article 1(1) of this Directive, the comments or detailed opinions of the Commission or Member States may concern only aspects which may hinder trade or, in respect of rules on services, the free movement of services or the freedom of establishment of service operators and not the fiscal or financial aspects of the measure.

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.

3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.

4. Information supplied under this Article shall not be confidential except at the express request of the notifying Member State. Any such request shall be supported by reasons.

In cases of that kind, if the necessary precautions are taken, the Committee referred to in Article 2 and the national authorities may seek expert advice from physical or legal persons in the private sector.

([1]) Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

5. When draft technical regulations form part of measures which are required to be communicated to the Commission at the draft stage under another Union act, Member States may make a communication within the meaning of paragraph 1 under that other act, provided that they formally indicate that the said communication also constitutes a communication for the purposes of this Directive.

The absence of a reaction from the Commission under this Directive to a draft technical regulation shall not prejudice any decision which might be taken under other Union acts.

Article 6

1. Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 5(1).

2. Member States shall postpone:

— for four months the adoption of a draft technical regulation in the form of a voluntary agreement within the meaning of point (ii) of the second subparagraph of point (f) of Article 1(1),

— without prejudice to paragraphs 3, 4 and 5 of this article, for six months the adoption of any other draft technical regulation except for draft rules on services,

from the date of receipt by the Commission of the communication referred to in Article 5(1), if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market,

— without prejudice to paragraphs 4 and 5, for four months the adoption of any draft rule on services, from the date of receipt by the Commission of the communication referred to in Article 5(1), if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of services or to the freedom of establishment of service operators within the internal market.

With regard to draft rules on services, detailed opinions from the Commission or Member States may not affect any cultural policy measures, in particular in the audiovisual sphere, which Member States might adopt in accordance with the law of the Union, taking account of their linguistic diversity, their specific national and regional characteristics and their cultural heritage.

The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

With respect to rules on services, the Member State concerned shall indicate, where appropriate, the reasons why the detailed opinions cannot be taken into account.

3. With the exclusion of draft rules relating to services, Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 5(1) of this Directive, if, within three months of that date, the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU.

4. Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 5(1) of this Directive, if, within the three months following that date, the Commission announces its finding that the draft technical regulation concerns a matter which is covered by a proposal for a directive, regulation or decision presented to the European Parliament and the Council in accordance with Article 288 TFEU.

5. If the Council adopts a position at first reading during the standstill period referred to in paragraphs 3 and 4, that period shall, subject to paragraph 6, be extended to 18 months.

6. The obligations referred to in paragraphs 3, 4 and 5 shall lapse:

(a) when the Commission informs the Member States that it no longer intends to propose or adopt a binding act;

(b) when the Commission informs the Member States of the withdrawal of its draft or proposal;

(c) when a binding act has been adopted by the European Parliament and the Council or by the Commission.

7. Paragraphs 1 to 5 shall not apply in cases where:

(a) for urgent reasons, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants, and for rules on services, also for public policy, in particular the protection of minors, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible; or

(b) for urgent reasons occasioned by serious circumstances relating to the protection of the security and the integrity of the financial system, in particular the protection of depositors, investors and insured persons, a Member State is obliged to enact and implement rules on financial services immediately.

In the communication referred to in Article 5, the Member State shall give reasons for the urgency of the measures taken. The Commission shall give its views on the communication as soon as possible. It shall take appropriate action in cases where improper use is made of this procedure. The European Parliament shall be kept informed by the Commission.

Article 7

1. Articles 5 and 6 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:

(a) comply with binding Union acts which result in the adoption of technical specifications or rules on services;

(b) fulfil the obligations arising out of international agreements which result in the adoption of common technical specifications or rules on services in the Union;

(c) make use of safeguard clauses provided for in binding Union acts;

(d) apply Article 12(1) of Directive 2001/95/EC of the European Parliament and of the Council [1];

(e) restrict themselves to implementing a judgment of the Court of Justice of the European Union;

(f) restrict themselves to amending a technical regulation within the meaning of point (f) of Article 1(1), in accordance with a Commission request, with a view to removing a barrier to trade or, in the case of rules on services, to the free movement of services or the freedom of establishment of service operators.

2. Article 6 shall not apply to the laws, regulations and administrative provisions of the Member States prohibiting manufacture in so far as they do not impede the free movement of products.

3. Paragraphs 3 to 6 of Article 6 shall not apply to the voluntary agreements referred to in point (ii) of the second subparagraph of point (f) of Article 1(1).

4. Article 6 shall not apply to the technical specifications or other requirements or the rules on services referred to in point (iii) of the second subparagraph of point (f) of Article 1(1).

Article 8

The Commission shall report every two years to the European Parliament, the Council and the European Economic and Social Committee on the results of the application of this Directive.

[1] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4).

The Commission shall publish annual statistics on the notifications received in the *Official Journal of the European Union*.

Article 9

When Member States adopt a technical regulation, it shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of its official publication. The methods of making such reference shall be laid down by Member States.

Article 10

Directive 98/34/EC, as amended by the acts listed in Part A of Annex III to this Directive, is repealed, without prejudice to the obligations of the Member States relating to the time limits for the transposition into national law of the Directives set out in Part B of Annex III to the repealed Directive and in Part B of Annex III to this Directive.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.

Article 11

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

Article 12

This Directive is addressed to the Member States.

Done at Strasbourg, 9 September 2015.

For the European Parliament	*For the Council*
The President	*The President*
M. SCHULZ	N. SCHMIT

ANNEX I

Indicative list of services not covered by the second subparagraph of point (b) of Article 1(1)

1. *Services not provided 'at a distance'*

Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices:

(a) medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present;

(b) consultation of an electronic catalogue in a shop with the customer on site;

(c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;

(d) electronic games made available in a video arcade where the customer is physically present.

2. *Services not provided 'by electronic means'*

— services having material content even though provided via electronic devices:

  (a) automatic cash or ticket dispensing machines (banknotes, rail tickets);

  (b) access to road networks, car parks, etc., charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made,

— offline services: distribution of CD-ROMs or software on diskettes,

— services which are not provided via electronic processing/inventory systems:

  (a) voice telephony services;

  (b) telefax/telex services;

  (c) services provided via voice telephony or fax;

  (d) telephone/telefax consultation of a doctor;

  (e) telephone/telefax consultation of a lawyer;

  (f) telephone/telefax direct marketing.

3. *Services not supplied 'at the individual request of a recipient of services'*

Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):

(a) television broadcasting services (including near-video on-demand services), covered by point (e) of Article 1(1) of Directive 2010/13/EU;

(b) radio broadcasting services;

(c) (televised) teletext.

ANNEX II

Indicative list of the financial services covered by Article 1(4)

— Investment services,

— insurance and reinsurance operations,

— banking services,

— operations relating to pension funds,

— services relating to dealings in futures or options.

Such services include in particular:

(a) investment services referred to in the Annex to Directive 2004/39/EC; services of collective investment undertakings;

(b) services covered by the activities subject to mutual recognition referred to in Annex I to Directive 2013/36/EU of the European Parliament and of the Council ([1]);

(c) operations covered by the insurance and reinsurance activities referred to in Directive 2009/138/EC of the European Parliament and of the Council ([2]).

([1]) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

([2]) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

ANNEX III

PART A

Repealed Directive with list of the successive amendments thereto

(referred to in Article 10)

Directive 98/34/EC of the European Parliament and of the Council (OJ L 204, 21.7.1998, p. 37)	
Directive 98/48/EC of the European Parliament and of the Council (OJ L 217, 5.8.1998, p. 18)	
Part 1, Title H of Annex II to Act of Accession 2004 (OJ L 236, 23.9.2003, p. 68)	Only as regards the reference, in point 2, to Directive 98/34/EC
Council Directive 2006/96/EC (OJ L 363, 20.12.2006, p. 81)	Only as regards the reference, in Article 1, to Directive 98/34/EC
Regulation (EU) No 1025/2012 of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12)	Only Article 26(2)

PART B

Time-limits for transposition into national law

(referred to in Article 10)

Directive	Time-limit for transposition
98/34/EC	—
98/48/EC	5 August 1999
2006/96/EC	1 January 2007

ANNEX IV

Correlation Table

Directive 98/34/EC	This Directive
Article 1, first paragraph, introductory wording	Article 1(1), introductory wording
Article 1, first paragraph, point (1)	Article 1(1), point (a)
Article 1, first paragraph, point (2), first subparagraph	Article 1(1), point (b), first subparagraph
Article 1, first paragraph, point (2), second subparagraph, first indent	Article 1(1), point (b), second subparagraph, point (i)
Article 1, first paragraph, point (2), second subparagraph, second indent	Article 1(1), point (b), second subparagraph, point (ii)
Article 1, first paragraph, point (2), second subparagraph, third indent	Article 1(1), point (b), second subparagraph, point (iii)
Article 1, first paragraph, point (2), third subparagraph	Article 1(1), point (b), third subparagraph
Article 1, first paragraph, point (2), fourth subparagraph, introductory wording	Article 1(2), introductory wording
Article 1, first paragraph, point (2), fourth subparagraph, first indent	Article 1(2), point (a)
Article 1, first paragraph, point (2), fourth subparagraph, second indent	Article 1(2), point (b)
Article 1, first paragraph, point (3)	Article 1(1), point (c)
Article 1, first paragraph, point (4)	Article 1(1), point (d)
Article 1, first paragraph, point (5), first subparagraph	Article 1(1), point (e), first subparagraph
Article 1, first paragraph, point (5), second subparagraph	Article 1(3)
Article 1, first paragraph, point (5), third subparagraph	Article 1(4)
Article 1, first paragraph, point (5), fourth subparagraph	Article 1(5)
Article 1, first paragraph, point (5), fifth subparagraph, introductory sentence	Article 1(1), point (e), second subparagraph, introductory sentence
Article 1, first paragraph, point (5), fifth subparagraph, first indent	Article 1(1), point (e), second subparagraph, point (i)
Article 1, first paragraph, point (5), fifth subparagraph, second indent	Article 1(1), point (e), second subparagraph, point (ii)
Article 1, first paragraph, point (11), first subparagraph	Article 1(1), point (f), first subparagraph
Article 1, first paragraph, point (11), second subparagraph, introductory sentence	Article 1(1), point (f), second subparagraph, introductory sentence
Article 1, first paragraph, point (11) second subparagraph, first indent	Article 1(1), point (f), second subparagraph, point (i)
Article 1, first paragraph, point (11), second subparagraph, second indent	Article 1(1), point (f), second subparagraph, point (ii)

Directive 98/34/EC	This Directive
Article 1, first paragraph, point (11), second subparagraph, third indent	Article 1(1), point (f), second subparagraph, point (iii)
Article 1, first paragraph, point (11), third subparagraph	Article 1(1), point (f), third subparagraph
Article 1, first paragraph, point (11), fourth subparagraph	Article 1(1), point (f), fourth subparagraph
Article 1, first paragraph, point (12)	Article 1(1), point (g)
Article 1, second paragraph	Article 1(6)
Article 5	Article 2
Article 6(1) and (2)	Article 3(1) and (2)
Article 6(3), introductory wording	Article 3(3), introductory wording
Article 6(3), second indent	Article 3(3), point (a)
Article 6(3), third indent	Article 3(3), point (b)
Article 6(3), fourth indent	Article 3(3), point (c)
Article 6(4), introductory wording	Article 3(4), introductory wording
Article 6(4), point (c)	Article 3(4), point (a)
Article 6(4), point (d)	Article 3(4), point (b)
Article 6(5) to (8)	Article 3(5) to (8)
Article 7	Article 4
Article 8	Article 5
Article 9(1) to (5)	Article 6(1) to (5)
Article 9(6), introductory wording	Article 6(6), introductory wording
Article 9(6), first indent	Article 6(6), point (a)
Article 9(6), second indent	Article 6(6), point (b)
Article 9(6), third indent	Article 6(6), point (c)
Article 9(7), first subparagraph, introductory wording	Article 6(7), first subparagraph, introductory wording
Article 9(7), first subparagraph, first indent	Article 6(7), first subparagraph, point (a)
Article 9(7), first subparagraph, second indent	Article 6(7), first subparagraph, point (b)
Article 9(7), second subparagraph	Article 6(7), second subparagraph
Article 10(1), introductory wording	Article 7(1), introductory wording
Article 10(1), first indent	Article 7(1), point (a)
Article 10(1), second indent	Article 7(1), point (b)
Article 10(1), third indent	Article 7(1), point (c)

Directive 98/34/EC	This Directive
Article 10(1), fourth indent	Article 7(1), point (d)
Article 10(1), fifth indent	Article 7(1), point (e)
Article 10(1), sixth indent	Article 7(1), point (f)
Article 10(2), (3) and (4)	Article 7(2), (3) and (4)
Article 11, first sentence	Article 8, first paragraph
Article 11, second sentence	Article 8, second paragraph
Article 12	Article 9
Article 13	—
—	Article 10
Article 14	Article 11
Article 15	Article 12
Annex III	—
Annex IV	—
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Extracts from Commission Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work

NB. Important note to CEEMC 2023 moot teams

The extracts below are taken from a real-life Commisison Proposal. The CEEMC 2023 Moot Question states that this Proposal is the basis for having adopted fictional Directive 2020/7563 on improving working conditions for platform workers in the person transport sector.

The Moot Question states (para 17) that the fictional Directive was adopted on 6 May 2020. However, in real-life, the Commission's Proposal was not submitted until 9 December 2021, so it would not be possible for Directive 2020/7563 (adopted 18 months earlier) to have been based on the Proposal.

For the purposes of the moot, we wish you to adopt the fiction that the Proposal predated the adoption of Directive 2020/7563 and that a sufficient period of time was allowed to enable the Directive to be lawfully adopted. The judges will not expect you to know/recite any dates mentioned in the Proposal, but if it helps you may simply subtract 2 years from any dates mentioned in the Proposal extracts below (i.e. references to 2021 become references to 2019). You should not challenge the lawful adoption of the Directive on the basis that the Proposal did not in real-life pre-date the Directive or that an insufficient period of time was permitted for the Directive to be adopted or implemented.

These extracts from the Commission Proposal are included to provide background to the adoption of fictional Directive 2020/7563. For the purposes of the CEEMC, you do not need to know any more details about the Proposal than those below. Likewise, you should limit your focus on the fictional Directive to those provisons which are explictly stated in the Moot Question.

EUROPEAN COMMISSION

Brussels, 9.12.2021

COM(2021) 762 final

2021/0414(COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on improving working conditions in platform work

(Text with EEA relevance)

{SEC(2021) 581 final} - {SWD(2021) 395 final} - {SWD(2021) 396 final} - {SWD(2021) 397 final}

EXPLANATORY MEMORANDUM

1.CONTEXT OF THE PROPOSAL

•Reasons for and objectives of the proposal

One of the objectives of the Union is the promotion of the well-being of its peoples and sustainable development of Europe based on a highly competitive social market economy, aiming at full employment and social progress. 1 The right of every worker to working conditions which respect their health, safety and dignity, and workers' right to information and consultation are enshrined in the Charter of Fundamental Rights of the European Union. The European Pillar of Social Rights states that "regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection." 2

In her political guidelines, President von der Leyen stressed that "digital transformation brings fast change that affects our labour markets" and undertook the commitment to "look at ways to improve the labour conditions of platform workers". 3 The proposed Directive delivers on this commitment and supports the implementation of the European Pillar of Social Rights Action Plan, welcomed by Member States, social partners and civil society at the Porto Social Summit in May 2021, by addressing the changes brought by the digital transformation to labour markets.

The digital transition, accelerated by the COVID-19 pandemic, is shaping the EU's economy and its labour markets. Digital labour platforms 4 have become an important element of this newly emerging social and economic landscape. They have continued expanding in size, with revenues in the digital labour platform economy in the EU estimated to have grown by around 500% in the last five years. 5 Today, over 28 million people in the EU work through digital labour platforms. In 2025, their number is expected to have reached 43 million. 6 Digital labour platforms are present in a variety of economic sectors. Some offer services "on-location", such as ride-hailing, delivery of goods, cleaning or care services. Others operate solely online with services such as data encoding, translation or design. Platform work varies in terms of level of skills required as well as the way the work is organised and controlled by the platforms.

Digital labour platforms promote innovative services and new business models and create many opportunities for consumers and businesses. They can efficiently match supply and demand for labour and offer possibilities to make a living or earn additional income, including for people who face barriers in access to the labour market, such as young people, people with disabilities, migrants, people with minority racial and ethnic background or people with caring responsibilities. Platform work creates opportunities to establish or broaden a client base, sometimes across borders. It brings businesses a much wider access to consumers, opportunities to diversify revenues and develop new business lines, thereby helping them to grow. For consumers it means improved access to products and services which would be otherwise hard to reach, as well as access to a new and more varied choice of services. Still, as digital labour platforms introduce new forms of work organisation, they challenge existing rights and obligations related to labour law and social protection.

Nine out of ten platforms active in the EU currently are estimated to classify people working through them as self-employed. 7 Most of those people are genuinely autonomous in their work and can use platform work as a way to develop their entrepreneurial activities. 8 Such genuine self-employment is making a positive contribution to job creation, business development, innovation, accessibility of services, and digitalisation in the EU.

However, there are also many people who experience subordination to and varying degrees of control by the digital labour platforms they operate through, for instance as regards pay levels or working conditions. According to one estimate, up to five and a half million people working through digital labour platforms could be at risk of employment status misclassification. 9 Those people are especially likely to experience poor working conditions and inadequate access to social protection. 10 As a result of the misclassification, they cannot enjoy the rights and protections to which they are entitled as workers. These rights include the right to a minimum wage, working time regulations, occupational safety and health protection, equal pay between men and women and the right to paid leave, as well as improved access to social protection against work accidents, unemployment, sickness and old age.

Digital labour platforms use automated systems to match supply and demand for work. Albeit in different ways, digital platforms use them to assign tasks, to monitor, evaluate and take decisions for the people working through them. Such practices are often referred to as "algorithmic management". While algorithmic management is used in a growing number of ways in the wider labour market, it is clearly inherent to digital labour platforms' business model. It creates efficiencies in the matching of supply and demand but has also a significant impact on working conditions in platform work. Algorithmic management also conceals the existence of subordination and control by the digital labour platform on the persons performing the work. The potential for gender bias and discrimination in algorithmic management could also amplify gender inequalities. Understanding how algorithms influence or determine certain decisions (such as the access to future task opportunities or bonuses, the imposition of sanctions or the possible suspension or restriction of accounts) is paramount, given the implications for the income and working conditions of people working through digital labour platforms. Currently, however, there is insufficient transparency regarding such automated monitoring and decision-making systems and people lack efficient access to remedies in the face of decisions taken or supported by such systems. Algorithmic management is a relatively new and – apart from EU data protection rules – largely unregulated phenomenon in the platform economy that poses challenges to both workers and the self-employed working through digital labour platforms.

Difficulties in enforcement and lack of traceability and transparency, including in cross-border situations, are also thought to exacerbate some instances of poor working conditions or inadequate access to social protection. National authorities do not always have sufficient access to data on digital labour platforms and people working through them, such as the number of persons performing platform work on a regular basis, their contractual or employment status, or digital labour platforms' terms and conditions. The problem of traceability is especially relevant when platforms operate across borders, making it unclear where platform work is performed and by whom. This, in turn, makes it difficult for national authorities to enforce existing obligations, including in terms of social security contributions.

The general objective of the proposed Directive is to improve the working conditions and social rights of people working through platforms, including with the view to support the conditions for the sustainable growth of digital labour platforms in the European Union.

The specific objectives through which the general objective will be addressed are:

(1) to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights;

(2) to ensure fairness, transparency and accountability in algorithmic management in the platform work context; and

(3) to enhance transparency, traceability and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders.

The first specific objective will be attained by establishing a comprehensive framework to tackle employment status misclassification in platform work. This framework includes appropriate procedures to ensure correct determination of the employment status of people performing platform work, in line with the principle of primacy of facts, as well as a rebuttable presumption of employment relationship (including a reversal of the burden of proof) for persons working through digital labour platforms that control certain elements of the performance of work. This legal presumption would apply in all legal and administrative proceedings, including those launched by national authorities competent for enforcing labour and social protection rules, and can be rebutted by proving that there is no employment relationship by reference to national definitions. This framework is expected to benefit both the false and the genuine self-employed working through digital labour platforms. Those who, as a result of correct determination of their employment status, will be recognised as workers will enjoy improved working conditions – including health and safety, employment protection, statutory or collectively bargained minimum wages and access to training opportunities – and gain access to social protection according to national rules. Conversely, genuine self-employed people working through platforms will indirectly benefit from more autonomy and independence, as a result of digital labour platforms adapting their practices to avoid any risk of reclassification. Digital labour platforms will also gain from increased legal certainty, including with respect to potential court challenges. Other businesses that compete with digital labour platforms by operating in the same sector will benefit from a level playing field as regards the cost of social protection contributions. Member States will enjoy increased revenues in the form of additional tax and social protection contributions.

The proposed Directive aims at attaining the second specific objective of ensuring fairness, transparency and accountability in algorithmic management by introducing new material rights for people performing platform work. These include the right to transparency regarding the use and functioning of automated monitoring and decision-making systems, which specifies and complements existing rights in relation to the protection of personal data. The proposed Directive also aims at ensuring human monitoring of the impact of such automated systems on working conditions with a view to safeguarding basic workers' rights and health and safety at work. To ensure fairness and accountability of significant decisions taken or supported by automated systems, the proposed Directive also includes establishing appropriate channels for discussing and requesting review of such decisions. With certain exceptions, these provisions apply to all people working through platforms, including the genuine self-employed. As regards workers, the proposed Directive also aims at fostering social dialogue on algorithmic management systems by introducing collective rights regarding information and consultation on substantial changes related to use of automated monitoring and decision-making systems. As a result, all people working through platforms and their representatives will enjoy better transparency and understanding of algorithmic management practices as well as more effective access to remedies against automated decisions, leading to improved working conditions. These rights will build on and extend existing safeguards in respect of processing of personal data by automated decision-making

systems laid down in the General Data Protection Regulation as well as proposed obligations for providers and users of artificial intelligence (AI) systems in terms of transparency and human oversight of certain AI systems in the proposal for an AI Act (see more details below).

Finally, concrete measures are proposed to achieve the third objective of enhancing transparency and traceability of platform work with a view to supporting competent authorities in enforcing existing rights and obligations in relation to working conditions and social protection. This includes clarifying the obligation for digital labour platforms which are employers to declare platform work to the competent authorities of the Member State where it is performed. The proposed Directive will also improve labour and social protection authorities' knowledge of which digital labour platforms are active in their Member State by giving those authorities access to relevant basic information on the number of people working through digital labour platforms, their employment status and their standard terms and conditions. These measures will help those authorities in ensuring compliance with labour rights and in collecting social security contributions, and thus improve working conditions of people performing platform work.

•Consistency with existing policy provisions in the policy area

In order to prevent a race to the bottom in employment practices and social standards to the detriment of workers, the EU has created a minimum floor of labour rights that apply to workers across all Member States. The EU labour and social acquis sets minimum standards through a number of key instruments.

Only workers who fall under the personal scope of such legal instruments benefit from the protection they afford. 11 Self-employed people, including those working through platforms, fall outside the scope and typically do not enjoy these rights, making the worker status a gateway to the EU labour and social acquis. (The only exception are the equal treatment directives which also cover access to self-employment 12 , due to broader legal bases.)

Relevant legal instruments for employed people working through platforms include:

–The Directive on transparent and predictable working conditions 13 provides for measures to protect working conditions of people who work in non-standard work relationships. This includes rules on transparency, the right to information, probationary periods, parallel employment, minimum predictability of work and measures for on-demand contracts. These minimum standards are particularly relevant for people working through platforms, given their atypical work organisation and patterns. However, while the Directive ensures transparency on basic working conditions, the information duty on employers does not extend to the use of algorithms in the workplace and how they affect individual workers.

–The Directive on work-life balance for parents and carers 14 lays down minimum requirements related to parental, paternity and carers' leave and flexible work arrangements for parents or carers. It complements the Directive on safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding 15 , which provides for a minimum period of maternity leave, alongside other measures.

–The Working Time Directive 16 lays down minimum requirements for the organisation of working time and defines concepts such as 'working time' and 'rest periods'. While the Court of Justice of the European Union (CJEU) has traditionally interpreted the concept of 'working time' as requiring the worker to be physically present at a place determined by the employer, in recent cases the Court has extended this concept in particular when a 'stand-by' time system is in place (i.e. where a worker is not required to remain at their workplace but shall remain available to work if called by the employer). In 2018, the Court made clear that 'stand-by' time,

during which the worker's opportunities to carry out other activities are significantly restricted, shall be regarded as working time. 17

–The Directive on temporary agency work 18 defines a general framework applicable to the working conditions of temporary agency workers. It lays down the principle of non-discrimination, regarding the essential conditions of work and of employment, between temporary agency workers and workers who are recruited by the user company. Due to the typically triangular contractual relationship of platform work, this Directive can be of relevance for platform work. Depending on the business model of a digital labour platform and on whether its customers are private consumers or businesses, it might qualify as a temporary-work agency assigning its workers to user companies. In some cases, the platform might be the user company making use of the services of workers assigned by temporary-work agencies.

–The Occupational Health and Safety (OSH) Framework Directive 19 lays down the main principles for encouraging improvements in the health and safety at work. It guarantees minimum safety and health requirements throughout the EU. The Framework Directive is accompanied by further directives focusing on specific aspects of safety and health at work.

–The Directive establishing a general framework for informing and consulting employees 20 plays a key role in promoting social dialogue by setting minimum principles, definitions and arrangements for information and consultation of workers' representatives at the company level within each Member State.

–When adopted, the proposed Directive on adequate minimum wages will establish a framework to improve the adequacy of minimum wages and to increase the access of workers to minimum wage protection.

–When adopted, the proposed Directive on pay transparency 22 will strengthen the application of the principle of equal pay for equal work or work of equal value between men and women.

In addition, regulations on the coordination of national social security systems apply to both employed and self-employed people working through platforms in a cross-border situation 23 .

Finally, the Council Recommendation on access to social protection for workers and the self-employed 24 recommends Member States to ensure that both workers and the self-employed have access to effective and adequate social protection. The Recommendation covers unemployment, sickness and health care, maternity and paternity, invalidity, old-age and survivors' benefits and benefits in respect of accidents at work and occupational diseases.

•Consistency with other Union policies

Existing and proposed EU internal market and data protection instruments are relevant for digital labour platforms' operations and the people working through them. Still, not all identified challenges in platform work are sufficiently addressed by those legal instruments. While they tackle algorithmic management in certain respects, they do not specifically address the perspective of workers, labour market specificities and collective labour rights.

Relevant EU internal market and data protection instruments include:

–The Regulation on promoting fairness and transparency for business users of online intermediation services (or 'Platform-to-Business Regulation') 25 aims at ensuring that self-employed 'business users' of an online platform's intermediation services are treated in a transparent and fair way and that they have access to effective redress in the event of disputes.

The relevant provisions focus, among others, on transparency of terms and conditions for business users, procedural safeguards in case of the restriction, suspension and termination of accounts, transparency regarding ranking, and complaint-handling mechanisms. These are linked to algorithmic management, but the Regulation does not cover other key aspects, such as transparency of automated monitoring and decision-making systems (other than ranking), human monitoring of such systems and specific rights regarding the review of significant decisions affecting working conditions. The Regulation does not apply to persons in an employment relationship or to digital labour platforms that are considered, as a result of an overall assessment, as not providing 'information society services', but for instance a transport service.

–The General Data Protection Regulation (GDPR) lays down rules for the protection of natural persons concerning the processing of their personal data. It grants people working through platforms a range of rights regarding their personal data, regardless of their employment status. Such rights include, in particular, the right not to be subject to a decision based solely on automated processing which produces legal effects concerning the data subject or similarly significantly affects them (with certain exceptions), as well as the right to transparency on the use of automated decision-making. Where automated processing is permitted under the exceptions, the data controller must implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express their point of view and to contest the decision. While these rights are particularly relevant for people working through platforms subject to algorithmic management, recent court cases have highlighted the limitations and difficulties that workers – and most notably persons performing platform work – face when aiming to assert their data protection rights in the context of algorithmic management. 27 This concerns in particular the difficulty to draw the line between algorithmic decisions that do or do not affect workers in a sufficiently 'significant' way. Moreover, while the GDPR grants individual rights to the people affected, it does not encompass important collective aspects inherent in labour law, including those related to the role of workers' representatives, information and consultation of workers and the role of labour inspectorates in enforcing labour rights. The legislator therefore provided for the possibility of more specific rules to ensure the protection of workers' personal data in the employment context, including as regards the organisation of work (Article 88 GDPR).

–When adopted, the proposed Artificial Intelligence Act 28 will address risks linked to the use of certain artificial intelligence (AI) systems. The proposed AI Act aims to ensure that AI systems placed on the market and used in the EU are safe and respect fundamental rights, such as the principle of equal treatment. It tackles issues related to development, deployment, use and regulatory oversight of AI systems and addresses inherent challenges such as bias (including gender bias) and lack of accountability, including by setting requirements for high-quality datasets, helping to tackle the risk of discrimination. The proposed AI regulation lists AI systems used in employment, worker management and access to self-employment that are to be considered as high-risk. It puts forward mandatory requirements that high-risk AI systems must comply with, as well as obligations for providers and users of such systems. The proposed AI Act provides specific requirements on transparency for certain AI systems, and will ensure that digital labour platforms, as users of high-risk AI systems, will have access to the information they need to use the system in a lawful and responsible manner. Where digital labour platforms are providers of high risk AI systems, they will need to test and document their systems appropriately. Furthermore, the proposal for an AI Act imposes requirements on providers of AI systems to enable human oversight and to issue instructions in this regard. By ensuring transparency and traceability of high-risk AI systems, the AI Act aims to facilitate the implementation of existing

rules on the protection of fundamental rights, whenever such AI systems are in use. Nonetheless, it does not take into account the diversity of rules on working conditions in different Member States and sectors, and it does not provide safeguards in relation to the respect of working conditions for the people directly affected by the use of the AI systems, such as workers.

2.LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

•Legal basis

The proposed Directive is based on Article 153(1)(b) of Treaty on the Functioning of the European Union (TFEU), which empowers the Union to support and complement the activities of the Member States with the objective to improve working conditions. In this area, Article 153(2)(b) TFEU enables the European Parliament and the Council to adopt – in accordance with the ordinary legislative procedure – directives setting minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives must avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

This legal basis allows the Union to set minimum standards regarding the working conditions of people performing platform work where they are in an employment relationship and thus classified as 'workers'. The CJEU has ruled that the classification of a 'self-employed person' under national law does not prevent that person being classified as a worker within the meaning of EU law if their independence is merely notional, thereby disguising an employment relationship. 29 False self-employed people are thus also covered by EU labour legislation based on Article 153 TFEU.

The proposed Directive is also based on Article 16(2) TFEU insofar as it addresses the situation of persons performing platform work in relation to the protection of their personal data processed by automated monitoring and decision-making systems. This Article empowers the European Parliament and the Council to lay down rules relating to the protection of individuals with regard to the processing of personal data.

•Subsidiarity (for non-exclusive competence)

Flexibility and constant adaptation of business models are key features of the platform economy, whose primary means of production are algorithms, data and clouds. As they are not tied to any fixed assets and premises, digital labour platforms can easily move and operate across borders, swiftly starting operations in certain markets, sometimes closing down for business or regulatory reasons and re-opening in another country with laxer rules.

While Member States operate in one single market, they have taken different approaches on whether or not to regulate platform work, and in what direction. More than 100 court decisions and 15 administrative decisions dealing with the employment status of people working through platforms have been observed in the Member States, with varying outcomes but predominantly in favour of reclassifying people working through platforms as workers. 30 In addition to the legal uncertainty this entails for the digital labour platforms and for those working through them, the high number of court cases points to difficulties in maintaining a level playing field among Member States as well as between digital labour platforms and other businesses, and in avoiding downward pressure on labour standards and working conditions. Certain digital labour platforms may engage in unfair commercial practices with respect to other businesses, for example, by not complying with the same rules and operating under the same conditions. Consequently, EU action is needed to ensure that the highly mobile and fast-moving platform economy develops

alongside the labour rights of people working through platforms.

Digital labour platforms are often based in one country, while operating through people based elsewhere. 59% of all people working through platforms in the EU engage with clients based in another country. 31 This adds complexity to contractual relationships. The working conditions and social protection coverage of people performing cross-border platform work is equally uncertain and depends strongly on their employment status. National authorities (such as labour inspectorates, social protection institutions and tax authorities) are often not aware of which digital labour platforms are active in their country, how many people are working through them and under what employment status the work is performed. Risks of non-compliance with rules and obstacles to tackling undeclared work are higher in cross-border situations, in particular when online platform work is concerned. In this context, relevant actions aimed at tackling the cross-border challenges of platform work, including notably the lack of data to allow for a better enforcement of rules, are best taken at EU level.

National action alone would not achieve the EU's Treaty-based core objectives of promoting sustainable economic growth and social progress, as Member States may hesitate to adopt more stringent rules or to strictly enforce existing labour standards, while they compete with one another to attract digital labour platforms' investments.

Only an EU initiative can set common rules that apply to all digital labour platforms operating in the EU, while also preventing fragmentation in the fast-developing single market for digital labour platforms. This would ensure a level playing field in the area of working conditions and algorithmic management between digital labour platforms operating in different Member States. Hence, the specific EU added value lies in the establishment of minimum standards in these areas which will foster upward convergence in employment and social outcomes across the Union, and facilitate the development of the platform economy across the EU.

•Proportionality

The proposed Directive provides for minimum standards, thus ensuring that the degree of intervention will be kept to the minimum necessary in order to reach the objectives of the proposal. Member States which have already more favourable provisions in place than those put forward in the proposed Directive will not have to change or lower them. Member States may also decide to go beyond the minimum standards set out in the proposed Directive.

The principle of proportionality is respected considering the size and nature of the identified problems. For instance, the rebuttable presumption proposed to address the problem of misclassification of the employment status will only apply to digital labour platforms that exert a certain level of control over the performance of work. Other digital labour platforms will thus not be concerned by the presumption. Similarly the provisions on automated monitoring and decision-making systems do not go beyond what is necessary to achieve the objectives of fairness, transparency and accountability in algorithmic management.

•Choice of the instrument

ARTICLE 153(2)(B) TFEU IN COMBINATION WITH 153(1)(B) TFEU PROVIDES EXPLICITLY THAT DIRECTIVES MAY BE USED FOR ESTABLISHING MINIMUM REQUIREMENTS CONCERNING WORKING CONDITIONS TO BE IMPLEMENTED BY MEMBER STATES. RULES BASED ON ARTICLE 16(2) TFEU MAY ALSO BE LAID DOWN IN DIRECTIVES.

3.RESULTS OF STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

•Stakeholder consultations

In line with Article 154 TFEU, the Commission has carried out a two-stage consultation of the social partners on possible EU action to improve working conditions in platform work. In the first stage, between 24 February and 7 April 2021, the Commission consulted social partners on the need for an initiative on platform work, and its possible direction. 32 In the second stage, between 15 June and 15 September 2021, the Commission consulted social partners on the content and legal instrument of the envisaged proposal. 33

Both trade unions and employers' organisations agreed with the overall challenges as identified in the second-stage consultation document, but differed on the need for concrete action at EU level.

Trade unions called for a Directive based on Article 153(2) TFEU providing for the rebuttable presumption of an employment relationship with reversed burden of proof and a set of criteria to verify the status. They maintained that such an instrument should apply both to online and on-location platforms. Trade unions also supported the introduction of new rights related to the algorithmic management in the employment domain, and generally opposed a third status for people working through platforms. They highlighted the need for social dialogue.

Employers' organisations agreed that there are issues that should be tackled, such as regarding working conditions, misclassification of employment status or access to information. However, action should be taken at national level, on a case-by-case basis and within the framework of the different national social and industrial relations systems. Regarding algorithmic management, they highlighted that the focus should be on efficient implementation and enforcement of existing and upcoming legal instruments.

There was no agreement among social partners to enter into negotiations to conclude an agreement at Union level, as foreseen in Article 155 TFEU.

In addition, the Commission held a substantial number of exchanges with many stakeholders to inform this initiative, including dedicated and bilateral meetings with platform companies, platform workers' associations, trade unions, Member States' representatives, experts from academia and international organisations and representatives of civil society. 34 On 20 and 21 September 2021, the Commission held two dedicated meetings with platform operators and representatives of platform workers to hear their views on the possible directions for EU action.

The European Parliament has called 35 for a strong EU action to address employment status misclassification, and improve transparency in the use of algorithms, including for workers' representatives. The Council of Ministers of the EU 36 , the European Economic and Social Committee 37 and the Committee of the Regions 38 have also called for specific action on platform work.

•Collection and use of expertise

The Commission contracted external experts to produce several studies gathering relevant evidence, which was used to support the impact assessment and prepare this proposal:

–"Study to support the impact assessment of an EU Initiative on improving the working conditions in platform work" (2021) by PPMI. 39

–"Digital Labour Platforms in the EU: Mapping and Business Models" (2021) by CEPS. 40

–"Study to gather evidence on the working conditions of platform workers" (2019) by CEPS. 41

The Commission also based its assessment on the reviews by the European Centre of Expertise in the field of labour law, employment and labour market policies (ECE).

–"Thematic Review 2021 on Platform work" (2021) based on country articles for the 27 EU Member States. 42

–"Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions" (2021). 43

–"Jurisprudence of national Courts in Europe on algorithmic management at the workplace" (2021). 44

The Commission additionally drew on external expertise and used the following studies and reports to support the impact assessment:

–Eurofound reports: "Employment and Working Conditions of Selected Types of Platform Work" (2018). 45

–JRC reports: "Platform Workers in Europe Evidence from the COLLEEM Survey" (2018), 46 and "New evidence on platform workers in Europe. Results from the second COLLEEM survey" (2020). 47

–ILO report: "The role of digital labour platforms in transforming the world of work" (2021). 48

Moreover, the Commission's assessment has also relied on its mapping of policies in Member States, relevant academic literature and CJEU case-law.

•Impact assessment

The Impact Assessment 49 was discussed with the Regulatory Scrutiny Board (RSB) on 27 October 2021. The RSB issued a positive opinion with comments, which have been addressed by further clarifying the coherence with linked initiatives, explaining why and how the issues related to algorithmic management are particularly relevant for the platform economy and better reflecting the views of different categories of stakeholders, including digital labour platforms and people working through them. The combination of measures put forward in this proposal was assessed in the Impact Assessment as the most effective, efficient and coherent. The quantitative and qualitative analysis of the preferred combination of measures shows that a substantial improvement in the working conditions and access to social protection for people working through platforms is expected. Digital labour platforms will also benefit from increased legal certainty and conditions for a sustainable growth, in line with the EU's social model. As a spillover effect, other businesses competing with digital labour platforms will benefit from a newly levelled playing field.

As a result of actions to address the risk of misclassification, between 1.72 million and 4.1 million people are expected to be reclassified as workers (circa 2.35 million on-location and 1.75 million online considering the higher estimation figures). This would grant them access to the rights and protections of the national and EU labour acquis. People who currently earn below the minimum wage would enjoy increased annual earnings of up to EUR 484 million, as statutory laws and/or industry-wide collective agreements would cover them as well. This means an average annual increase in EUR 121 per worker, ranging from EUR 0 for those already earning above the minimum wage before reclassification to EUR 1 800 for those earning below it. In-work poverty and precariousness would thus decrease as a result of reclassification and the resulting improved access to social protection. Hence, income stability and predictability would improve. Up to 3.8 million people would receive confirmation of their self-employment status and, as a result of actions by platforms aimed at relinquishing

control to avoid reclassification as employers, they would enjoy more autonomy and flexibility. New rights related to algorithmic management in platform work may lead to improved working conditions for over 28 million people (both workers and self-employed) and greater transparency in the use of artificial intelligence (AI) at the workplace, with positive spill-over effects for the wider market of AI systems. The initiative would also improve transparency and traceability of platform work, including in cross-border situations, with positive effects for national authorities in terms of better enforcement of existing labour and fiscal rules, as well as improved collection of tax and social protection contributions. To this end, Member States could benefit from up to EUR 4 billion in increased tax and social protection contributions per year.

Actions to address the risk of misclassification could result in up to EUR 4.5 billion increase in costs per year for digital labour platforms. Businesses relying on them and consumers may be faced with part of these costs, depending on how digital labour platforms decide to pass them onto third parties. New rights related to algorithmic management and the foreseen measures to improve enforcement, transparency and traceability imply negligible to low costs for digital labour platforms. The initiative may negatively affect the flexibility enjoyed by people working through platforms. However, such flexibility, especially in terms of arranging work schedules, may be only apparent already now, since actual working times depend on the real-time demand for services, supply of workers, and other factors. It was not possible to meaningfully quantify what this would entail in terms of change in full-time equivalents and potential job losses, given the very high number of variables such calculation would entail (e.g. evolving national regulatory landscapes, shifts in platforms' sources of investment, reallocation of tasks from part-time false self-employed to full-time workers). For some people working through digital labour platforms currently earning above the minimum wage, reclassification might lead to lower wages, as some digital labour platforms might offset higher social protection costs by reducing salaries.

Other measures considered in the Impact Assessment included: non-binding guidelines on how to deal with misclassification cases; a combination of a shift in the burden of proof with out-of-court administrative procedures for dealing with the misclassification of the employment status; non-binding guidelines on algorithmic management; algorithmic management rights for workers only; data interoperability obligations for digital labour platforms; setting up national registers to improve relevant data collection and keep track of platform work developments, including in cross border situations. They were overall considered less efficient, less effective and less coherent vis-à-vis the stated objectives of the initiative, as well as with the overarching values, aims, objectives and existing and forthcoming initiatives of the EU.

•Regulatory fitness and simplification

The initiative includes different sets of measures, some of which aim at minimising compliance costs for micro, small and medium-sized enterprises (SME). While measures addressing the risk of misclassification cannot be mitigated because they directly pertain to fundamental workers' rights, the administrative procedures required by the measures on algorithmic management and on improving enforcement, traceability and transparency allow for mitigations tailored to SMEs. Notably, these include longer deadlines to provide responses for requests of review of algorithmic decisions and the reduction in the frequency of updating relevant information.

•Fundamental rights

The Charter of Fundamental Rights of the European Union protects a broad range of rights in the employment context. These include the workers' right to fair and just working conditions

(Article 31) and to information and consultation within the undertaking (Article 27) , as well as the right to the protection of personal data (Article 8) and the freedom to conduct a business (Article 16). The proposed Directive promotes the rights contained in the Charter in the platform work context by addressing the employment status misclassification and by putting forward specific provisions regarding the use of automated monitoring and decision-making systems in platform work. It also strengthens information and consultation rights for platform workers and their representatives on decisions likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems.

4.BUDGETARY IMPLICATIONS

The proposal does not require additional resources from the European Union's budget.

5.OTHER ELEMENTS

•Implementation plans and monitoring, evaluation and reporting arrangements

Member States must transpose the Directive two years after it enters into force and communicate to the Commission the national execution measures via the MNE-Database. In line with Article 153(3) TFEU, they may entrust the social partners with the implementation of the Directive. The Commission stands ready to provide technical support to Member States to implement the Directive.

The Commission will review the implementation of the Directive five years after it enters into force and propose, where appropriate, legislative amendments. Progress towards achieving the objectives of the initiative will be monitored by a series of core indicators (listed in the Impact Assessment Report). The monitoring framework will be subject to further adjustment according to the final legal and implementation requirements and timeline.

•Explanatory documents (for directives)

The proposed Directive touches on labour law, specifies and complements data protection rules and contains both substantive and procedural rules. Member States might use different legal instruments to transpose it. It is therefore justified that Member States accompany the notification of their transposition measures with one or more documents explaining the relationship between the components of the Directive and the corresponding parts of national transposition instruments, in accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents. 50

•Detailed explanation of the specific provisions of the proposal

PART C. CJEU JURISPRUDENCE

Judgment of the Court of 8 April 1976. - Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. - Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium. - The principle that men and women should receive equal pay for equal work. - Case 43-75.

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Greek special edition Page 00175
Portuguese special edition Page 00193
Spanish special edition Page 00173
Swedish special edition Page 00059
Finnish special edition Page 00063

Keywords

1 . SOCIAL POLICY - MEN AND WOMEN WORKERS - PAY - EQUALITY - DIRECT DISCRIMINATION - INDIVIDUAL RIGHTS - PROTECTION BY NATIONAL COURTS

(EEC TREATY , ARTICLE 119)

2 . SOCIAL POLICY - MEN AND WOMEN WORKERS - PAY - EQUALITY - DIRECT DISCRIMINATION - INDIVIDUAL RIGHTS - DATE OF TAKING EFFECT - TIME-LIMIT FIXED BY THE TREATY - RESOLUTION OF MEMBER STATES - DIRECTIVE OF COUNCIL - INEFFECTIVE TO VARY TIME-LIMIT - AMENDMENT OF TREATY - METHOD OF EFFECTING

(EEC TREATY , ARTICLES 119 AND 236)

3 . SOCIAL POLICY - MEN AND WOMEN WORKERS - PAY - EQUALITY - DIRECT DISCRIMINATION - INDIVIDUAL RIGHTS - CLAIMS - RETROACTIVITY - LEGAL CERTAINTY

(EEC TREATY , ARTICLE 119)

4 . SOCIAL POLICY - MEN AND WOMEN WORKERS - PAY - EQUALITY - INDIRECT DISCRIMINATION - ELIMINATION - COMMUNITY POWERS AND NATIONAL POWERS

(EEC TREATY , ARTICLE 119)

Summary

1 . THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY , WHICH IS LAID DOWN BY ARTICLE 119 , IS ONE OF THE FOUNDATIONS OF THE COMMUNITY . IT MAY BE RELIED ON BEFORE THE NATIONAL COURTS . THESE COURTS HAVE A DUTY TO ENSURE THE PROTECTION OF THE RIGHTS WHICH THAT PROVISION VESTS IN INDIVIDUALS , IN PARTICULAR IN THE CASE OF THOSE FORMS OF DISCRIMINATION WHICH HAVE THEIR ORIGIN DIRECTLY IN LEGSILATIVE PROVISIONS OR COLLECTIVE LABOUR AGREEMENTS , AS WELL AS WHERE MEN AND WOMEN RECEIVE UNEQUAL PAY FOR EQUAL WORK WHICH IS CARRIED OUT IN THE SAME ESTABLISHMENT OR SERVICE , WHETHER PRIVATE OR PUBLIC .

2 . (A) THE APPLICATION OF THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY WAS TO HAVE BEEN FULLY SECURED BY THE ORIGINAL MEMBER STATES AS FROM 1 JANUARY1 - LANGUAGE OF THE CASE : FRENCH .

1962 , THE END OF THE FIRST STAGE OF THE TRANSITIONAL PERIOD . WITHOUT PREJUDICE TO ITS POSSIBLE EFFECTS AS REGARDS ENCOURAGING AND ACCELERATING THE FULL IMPLEMENTATION OF ARTICLE 119 , THE RESOLUTION OF THE MEMBER STATES OF 31 DECEMBER 1961 WAS INEFFECTIVE TO MAKE ANY VALID MODIFICATION OF THE TIME-LIMIT FIXED BY THE TREATY . APART FROM ANY SPECIFIC PROVISIONS , THE TREATY CAN ONLY BE MODIFIED BY MEANS OF THE AMENDMENT PROCEDURE CARRIED OUT IN ACCORDANCE WITH ARTICLE 236 .

(B) IN THE ABSENCE OF TRANSITIONAL PROVISIONS , THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY HAS BEEN FULLY EFFECTIVE IN THE NEW MEMBER STATES SINCE THE ENTRY INTO FORCE OF THE ACCESSION TREATY , THAT IS , SINCE 1 JANUARY 1973 . THE COUNCIL DIRECTIVE NO 75/117 WAS INCAPABLE OF DIMINISHING THE EFFECT OF ARTICLE 119 OR OF MODIFYING ITS EFFECT IN TIME .

3 . IMPORTANT CONSIDERATIONS OF LEGAL CERTAINTY AFFECTING ALL THE INTERESTS INVOLVED , BOTH PUBLIC AND PRIVATE , MAKE IT IMPOSSIBLE IN PRINCIPLE TO REOPEN THE QUESTION OF PAY AS REGARDS THE PAST . THE DIRECT EFFECT OF ARTICLE 119 CANNOT BE RELIED ON IN ORDER TO SUPPORT CLAIMS CONCERNING PAY PERIODS PRIOR TO THE DATE OF THIS JUDGMENT , EXCEPT AS REGARDS THOSE WORKERS WHO HAVE ALREADY BROUGHT LEGAL PROCEEDINGS OR MADE AN EQUIVALENT CLAIM .

4 . EVEN IN THE AREAS IN WHICH ARTICLE 119 HAS NO DIRECT EFFECT , THAT PROVISION CANNOT BE INTERPRETED AS RESERVING TO THE NATIONAL LEGISLATURE EXCLUSIVE POWER TO IMPLEMENT THE PRINCIPLE OF EQUAL PAY SINCE , TO THE EXTENT TO WHICH SUCH IMPLEMENTATION IS NECESSARY , IT MAY BE ACHIEVED BY A COMBINATION OF COMMUNITY AND NATIONAL PROVISIONS .

Parties

IN CASE 43/75

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE COUR DU TRAVAIL (LABOUR COURT), BRUSSELS , FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

GABRIELLE DEFRENNE , FORMER AIR HOSTESS , RESIDING IN BRUSSELS-JETTE ,

AND

SOCIETE ANONYME BELGE DE NAVIGATION AERIENNE SABENA , THE REGISTERED OFFICE OF WHICH IS AT BRUSSELS ,

Subject of the case

ON THE INTERPRETATION OF ARTICLE 119 THE EEC TREATY ,

Grounds

1 BY A JUDGMENT OF 23 APRIL 1975 , RECEIVED AT THE COURT REGISTRY ON 2 MAY 1975 , THE COUR DU TRAVAIL , BRUSSELS , REFERRED TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS CONCERNING THE EFFECT AND IMPLEMENTATION OF ARTICLE 119 OF THE TREATY REGARDING THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY FOR EQUAL WORK .

2 THESE QUESTIONS AROSE WITHIN THE CONTEXT OF AN ACTION BETWEEN AN AIR HOSTESS AND HER EMPLOYER , SABENA S.A ., CONCERNING COMPENSATION CLAIMED BY THE APPLICANT IN THE MAIN ACTION ON THE GROUND THAT , BETWEEN 15 FEBRUARY 1963 AND 1 FEBRUARY 1966 , SHE SUFFERED AS A FEMALE WORKER DISCRIMINATION IN TERMS OF PAY AS COMPARED WITH MALE COLLEAGUES WHO WERE DOING THE SAME WORK AS ' CABIN STEWARD ' .

3 ACCORDING TO THE JUDGMENT CONTAINING THE REFERENCE , THE PARTIES AGREE THAT THE WORK OF AN AIR HOSTESS IS IDENTICAL TO THAT OF A CABIN STEWARD AND IN THESE CIRCUMSTANCES THE EXISTENCE OF DISCRIMINATION IN PAY TO THE DETRIMENT OF THE AIR HOSTESS DURING THE PERIOD IN QUESTION IS NOT DISPUTED .

THE FIRST QUESTION (DIRECT EFFECT OF ARTICLE 119)

4 THE FIRST QUESTION ASKS WHETHER ARTICLE 119 OF THE TREATY INTRODUCES ' DIRECTLY INTO THE NATIONAL LAW OF EACH MEMBER STATE OF THE EUROPEAN COMMUNITY THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY FOR EQUAL WORK AND DOES IT THEREFORE , INDEPENDENTLY OF ANY NATIONAL PROVISION , ENTITLE WORKERS TO INSTITUTE PROCEEDINGS BEFORE NATIONAL COURTS IN ORDER TO ENSURE ITS OBSERVANCE? '

5 IF THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE , THE QUESTION FURTHER ENQUIRES AS FROM WHAT DATE THIS EFFECT MUST BE RECOGNIZED .

6 THE REPLY TO THE FINAL PART OF THE FIRST QUESTION WILL THEREFORE BE GIVEN WITH THE REPLY TO THE SECOND QUESTION .

7 THE QUESTION OF THE DIRECT EFFECT OF ARTICLE 119 MUST BE CONSIDERED IN THE LIGHT OF THE NATURE OF THE PRINCIPLE OF EQUAL PAY , THE AIM OF THIS PROVISION AND ITS PLACE IN THE SCHEME OF THE TREATY .

8 ARTICLE 119 PURSUES A DOUBLE AIM .

9 FIRST , IN THE LIGHT OF THE DIFFERENT STAGES OF THE DEVELOPMENT OF SOCIAL LEGISLATION IN THE VARIOUS MEMBER STATES , THE AIM OF ARTICLE 119 IS TO AVOID A SITUATION IN WHICH UNDERTAKINGS ESTABLISHED IN STATES WHICH HAVE ACTUALLY IMPLEMENTED THE PRINCIPLE OF EQUAL PAY SUFFER A COMPETITIVE DISADVANTAGE IN INTRA-COMMUNITY COMPETITION AS COMPARED WITH UNDERTAKINGS ESTABLISHED IN STATES WHICH HAVE NOT YET ELIMINATED DISCRIMINATION AGAINST WOMEN WORKERS AS REGARDS PAY .

10 SECONDLY , THIS PROVISION FORMS PART OF THE SOCIAL OBJECTIVES OF THE COMMUNITY , WHICH IS NOT MERELY AN ECONOMIC UNION , BUT IS AT THE SAME TIME INTENDED , BY COMMON ACTION , TO ENSURE SOCIAL PROGRESS AND SEEK THE CONSTANT IMPROVEMENT OF THE LIVING AND WORKING CONDITIONS OF THEIR PEOPLES , AS IS EMPHASIZED BY THE PREAMBLE TO THE TREATY .

11 THIS AIM IS ACCENTUATED BY THE INSERTION OF ARTICLE 119 INTO THE BODY OF A CHAPTER DEVOTED TO SOCIAL POLICY WHOSE PRELIMINARY PROVISION , ARTICLE 117 , MARKS ' THE NEED TO PROMOTE IMPROVED WORKING CONDITIONS AND AN IMPROVED STANDARD OF LIVING FOR WORKERS , SO AS TO MAKE POSSIBLE THEIR HARMONIZATION WHILE THE IMPROVEMENT IS BEING MAINTAINED ' .

12 THIS DOUBLE AIM , WHICH IS AT ONCE ECONOMIC AND SOCIAL , SHOWS THAT THE PRINCIPLE OF EQUAL PAY FORMS PART OF THE FOUNDATIONS OF THE COMMUNITY .

13 FURTHERMORE , THIS EXPLAINS WHY THE TREATY HAS PROVIDED FOR THE COMPLETE IMPLEMENTATION OF THIS PRINCIPLE BY THE END OF THE FIRST STAGE OF THE TRANSITIONAL PERIOD .

14 THEREFORE , IN INTERPRETING THIS PROVISION , IT IS IMPOSSIBLE TO BASE ANY ARGUMENT ON THE DILATORINESS AND RESISTANCE WHICH HAVE DELAYED THE ACTUAL IMPLEMENTATION OF THIS BASIC PRINCIPLE IN CERTAIN MEMBER STATES .

15 IN PARTICULAR , SINCE ARTICLE 119 APPEARS IN THE CONTEXT OF THE HARMONIZATION OF WORKING CONDITIONS WHILE THE IMPROVEMENT IS BEING MAINTAINED , THE OBJECTION THAT THE TERMS OF THIS ARTICLE MAY BE OBSERVED IN OTHER WAYS THAN BY RAISING THE LOWEST SALARIES MAY BE SET ASIDE .

16 UNDER THE TERMS OF THE FIRST PARAGRAPH OF ARTICLE 119 , THE MEMBER STATES ARE BOUND TO ENSURE AND MAINTAIN ' THE APPLICATION OF THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY FOR EQUAL WORK ' .

17 THE SECOND AND THIRD PARAGRAPHS OF THE SAME ARTICLE ADD A CERTAIN NUMBER OF DETAILS CONCERNING THE CONCEPTS OF PAY AND WORK REFERRED TO IN THE FIRST PARAGRAPH .

18 FOR THE PURPOSES OF THE IMPLEMENTATION OF THESE PROVISIONS A DISTINCTION MUST BE DRAWN WITHIN THE WHOLE AREA OF APPLICATION OF ARTICLE 119 BETWEEN , FIRST , DIRECT AND OVERT DISCRIMINATION WHICH MAY BE IDENTIFIED SOLELY WITH THE AID OF THE CRITERIA BASED ON EQUAL WORK AND EQUAL PAY REFERRED TO BY THE ARTICLE IN QUESTION AND , SECONDLY , INDIRECT AND DISGUISED DISCRIMINATION WHICH CAN ONLY BE IDENTIFIED BY REFERENCE TO MORE EXPLICIT IMPLEMENTING PROVISIONS OF A COMMUNITY OR NATIONAL CHARACTER .

19 IT IS IMPOSSIBLE NOT TO RECOGNIZE THAT THE COMPLETE IMPLEMENTATION OF THE AIM PURSUED BY ARTICLE 119 , BY MEANS OF THE ELIMINATION OF ALL DISCRIMINATION , DIRECT OR INDIRECT , BETWEEN MEN AND WOMEN WORKERS , NOT ONLY AS REGARDS INDIVIDUAL UNDERTAKINGS BUT ALSO ENTIRE BRANCHES OF INDUSTRY AND EVEN OF THE ECONOMIC SYSTEM AS A WHOLE , MAY IN CERTAIN CASES INVOLVE THE ELABORATION OF CRITERIA WHOSE IMPLEMENTATION NECESSITATES THE TAKING OF APPROPRIATE MEASURES AT COMMUNITY AND NATIONAL LEVEL .

20 THIS VIEW IS ALL THE MORE ESSENTIAL IN THE LIGHT OF THE FACT THAT THE COMMUNITY MEASURES ON THIS QUESTION , TO WHICH REFERENCE WILL BE MADE IN ANSWER TO THE SECOND QUESTION , IMPLEMENT ARTICLE 119 FROM THE POINT OF VIEW OF EXTENDING THE NARROW CRITERION OF ' EQUAL WORK ' , IN ACCORDANCE IN PARTICULAR WITH THE PROVISIONS OF CONVENTION NO 100 ON EQUAL PAY CONCLUDED BY THE INTERNATIONAL LABOUR ORGANIZATION IN 1951 , ARTICLE 2 OF WHICH ESTABLISHES THE PRINCIPLE OF EQUAL PAY FOR WORK ' OF EQUAL VALUE ' .

21 AMONG THE FORMS OF DIRECT DISCRIMINATION WHICH MAY BE IDENTIFIED SOLELY BY REFERENCE TO THE CRITERIA LAID DOWN BY ARTICLE 119 MUST BE INCLUDED IN PARTICULAR THOSE WHICH HAVE THEIR ORIGIN IN LEGISLATIVE PROVISIONS OR IN COLLECTIVE LABOUR AGREEMENTS AND WHICH MAY BE DETECTED ON THE BASIS OF A PURELEY LEGAL ANALYSIS OF THE SITUATION .

22 THIS APPLIES EVEN MORE IN CASES WHERE MEN AND WOMEN RECEIVE UNEQUAL PAY FOR EQUAL WORK CARRIED OUT IN THE SAME ESTABLISHMENT OR SERVICE , WHETHER PUBLIC OR PRIVATE .

23 AS IS SHOWN BY THE VERY FINDINGS OF THE JUDGMENT MAKING THE REFERENCE , IN SUCH A SITUATION THE COURT IS IN A POSITION TO ESTABLISH ALL THE FACTS WHICH ENABLE IT TO DECIDE WHETHER A WOMAN WORKER IS RECEIVING LOWER PAY THAN A MALE WORKER PERFORMING THE SAME TASKS .

24 IN SUCH SITUATION , AT LEAST , ARTICLE 119 IS DIRECTLY APPLICABLE AND MAY THUS GIVE RISE TO INDIVIDUAL RIGHTS WHICH THE COURTS MUST PROTECT .

25 FURTHERMORE , AS REGARDS EQUAL WORK , AS A GENERAL RULE , THE NATIONAL LEGISLATIVE PROVISIONS ADOPTED FOR THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL PAY AS A RULE MERELY REPRODUCE THE SUBSTANCE OF THE TERMS OF ARTICLE 119 AS REGARDS THE DIRECT FORMS OF DISCRIMINATION .

26 BELGIAN LEGISLATION PROVIDES A PARTICULARLY APPOSITE ILLUSTRATION OF THIS POINT , SINCE ARTICLE 14 OF ROYAL DECREE NO 40 OF 24 OCTOBER 1967 ON THE EMPLOYMENT OF WOMEN MERELY SETS OUT THE RIGHT OF ANY FEMALE WORKER TO INSTITUTE PROCEEDINGS BEFORE THE RELEVANT COURT FOR THE APPLICATION OF THE PRINCIPLE OF EQUAL PAY SET OUT IN ARTICLE 119 AND SIMPLY REFERS TO THAT ARTICLE .

27 THE TERMS OF ARTICLE 119 CANNOT BE RELIED ON TO INVALIDATE THIS CONCLUSION .

28 FIRST OF ALL , IT IS IMPOSSIBLE TO PUT FORWARD AN ARGUMENT AGAINST ITS DIRECT EFFECT BASED ON THE USE IN THIS ARTICLE OF THE WORD ' PRINCIPLE ' , SINCE , IN THE LANGUAGE OF THE TREATY , THIS TERM IS SPECIFICALLY USED IN ORDER TO INDICATE THE FUNDAMENTAL NATURE OF CERTAIN PROVISIONS , AS IS SHOWN , FOR EXAMPLE , BY THE HEADING OF THE FIRST PART OF THE TREATY WHICH IS DEVOTED TO ' PRINCIPLES ' AND BY ARTICLE 113 , ACCORDING TO WHICH THE COMMERCIAL POLICY OF THE COMMUNITY IS TO BE BASED ON ' UNIFORM PRINCIPLES ' .

29 IF THIS CONCEPT WERE TO BE ATTENUATED TO THE POINT OF REDUCING IT TO THE LEVEL OF A VAGUE DECLARATION , THE VERY FOUNDATIONS OF THE COMMUNITY AND THE COHERENCE OF ITS EXTERNAL RELATIONS WOULD BE INDIRECTLY AFFECTED .

30 IT IS ALSO IMPOSSIBLE TO PUT FORWARD ARGUMENTS BASED ON THE FACT THAT ARTICLE 119 ONLY REFERS EXPRESSLY TO ' MEMBER STATES ' .

31 INDEED , AS THE COURT HAS ALREADY FOUND IN OTHER CONTEXTS , THE FACT THAT CERTAIN PROVISIONS OF THE TREATY ARE FORMALLY ADDRESSED TO THE MEMBER STATES DOES NOT PREVENT RIGHTS FROM BEING CONFERRED AT THE SAME TIME ON ANY INDIVIDUAL WHO HAS AN INTEREST IN THE PERFORMANCE OF THE DUTIES THUS LAID DOWN .

32 THE VERY WORDING OF ARTICLE 119 SHOWS THAT IT IMPOSES ON STATES A DUTY TO BRING ABOUT A SPECIFIC RESULT TO BE MANDATORILY ACHIEVED WITHIN A FIXED PERIOD .

33 THE EFFECTIVENESS OF THIS PROVISION CANNOT BE AFFECTED BY THE FACT THAT THE DUTY IMPOSED BY THE TREATY HAS NOT BEEN DISCHARGED BY CERTAIN MEMBER STATES AND THAT THE JOINT INSTITUTIONS HAVE NOT REACTED SUFFICIENTLY ENERGETICALLY AGAINST THIS FAILURE TO ACT .

34 TO ACCEPT THE CONTRARY VIEW WOULD BE TO RISK RAISING THE VIOLATION OF THE RIGHT TO THE STATUS OF A PRINCIPLE OF INTERPRETATION , A POSITION THE ADOPTION OF WHICH WOULD NOT BE CONSISTENT WITH THE TASK ASSIGNED TO THE COURT BY ARTICLE 164 OF THE TREATY .

35 FINALLY , IN ITS REFERENCE TO ' MEMBER STATES ' , ARTICLE 119 IS ALLUDING TO THOSE STATES IN THE EXERCISE OF ALL THOSE OF THEIR FUNCTIONS WHICH MAY USEFULLY CONTRIBUTE TO THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL PAY .

36 THUS , CONTRARY TO THE STATEMENTS MADE IN THE COURSE OF THE PROCEEDINGS THIS PROVISION IS FAR FROM MERELY REFERRING THE MATTER TO THE POWERS OF THE NATIONAL LEGISLATIVE AUTHORITIES .

37 THEREFORE , THE REFERENCE TO ' MEMBER STATES ' IN ARTICLE 119 CANNOT BE INTERPRETED AS EXCLUDING THE INTERVENTION OF THE COURTS IN DIRECT APPLICATION OF THE TREATY .

38 FURTHERMORE IT IS NOT POSSIBLE TO SUSTAIN ANY OBJECTION THAT THE APPLICATION BY NATIONAL COURTS OF THE PRINCIPLE OF EQUAL PAY WOULD AMOUNT TO MODIFYING INDEPENDENT AGREEMENTS CONCLUDED PRIVATELY OR IN THE SPHERE OF INDUSTRIAL RELATIONS SUCH AS INDIVIDUAL CONTRACTS AND COLLECTIVE LABOUR AGREEMENTS .

39 IN FACT , SINCE ARTICLE 119 IS MANDATORY IN NATURE , THE PROHIBITION ON DISCRIMINATION BETWEEN MEN AND WOMEN APPLIES NOT ONLY TO THE ACTION OF PUBLIC AUTHORITIES , BUT ALSO EXTENDS TO ALL AGREEMENTS WHICH ARE INTENDED TO REGULATE PAID LABOUR COLLECTIVELY , AS WELL AS TO CONTRACTS BETWEEN INDIVIDUALS .

40 THE REPLY TO THE FIRST QUESTION MUST THEREFORE BE THAT THE PRINCIPLE OF EQUAL PAY CONTAINED IN ARTICLE 119 MAY BE RELIED UPON BEFORE THE NATIONAL COURTS AND THAT THESE COURTS HAVE A DUTY TO ENSURE THE PROTECTION OF THE RIGHTS WHICH THIS PROVISION VESTS IN INDIVIDUALS , IN PARTICULAR AS REGARDS THOSE TYPES OF DISCRIMINATION ARISING DIRECTLY FROM LEGISLATIVE PROVISIONS OR COLLECTIVE LABOUR AGREEMENTS , AS WELL AS IN CASES IN WHICH MEN AND WOMEN RECEIVE UNEQUAL PAY FOR EQUAL WORK WHICH IS CARRIED OUT IN THE SAME ESTABLISHMENT OR SERVICE , WHETHER PRIVATE OR PUBLIC .

THE SECOND QUESTION (IMPLEMENTATION OF ARTICLE 119 AND POWERS OF THE COMMUNITY AND OF THE MEMBER STATES)

41 THE SECOND QUESTION ASKS WHETHER ARTICLE 119 HAS BECOME ' APPLICABLE IN THE INTERNAL LAW OF THE MEMBER STATES BY VIRTUE OF MEASURES ADOPTED BY THE AUTHORITIES OF THE EUROPEAN ECONOMIC COMMUNITY ' , OR WHETHER THE NATIONAL LEGISLATURE MUST ' BE REGARDED AS ALONE COMPETENT IN THIS MATTER ' .

42 IN ACCORDANCE WITH WHAT HAS BEEN SET OUT ABOVE , IT IS APPROPRIATE TO JOIN TO THIS QUESTION THE PROBLEM OF THE DATE FROM WHICH ARTICLE 119 MUST BE REGARDED AS HAVING DIRECT EFFECT .

43 IN THE LIGHT OF ALL THESE PROBLEMS IT IS FIRST NECESSARY TO ESTABLISH THE CHRONOLOGICAL ORDER OF THE MEASURES TAKEN ON A COMMUNITY LEVEL TO ENSURE THE IMPLEMENTATION OF THE PROVISION WHOSE INTERPRETATION IS REQUESTED .

44 ARTICLE 119 ITSELF PROVIDES THAT THE APPLICATION OF THE PRINCIPLE OF EQUAL PAY WAS TO BE UNIFORMLY ENSURED BY THE END OF THE FIRST STAGE OF THE TRANSITIONAL PERIOD AT THE LATEST .

45 THE INFORMATION SUPPLIED BY THE COMMISSION REVEALS THE EXISTENCE OF IMPORTANT DIFFERENCES AND DISCREPANCIES BETWEEN THE VARIOUS STATES IN THE IMPLEMENTATION OF THIS PRINCIPLE .

46 ALTHOUGH , IN CERTAIN MEMBER STATES , THE PRINCIPLE HAD ALREADY LARGELY BEEN PUT INTO PRACTICE BEFORE THE ENTRY INTO FORCE OF THE TREATY , EITHER BY MEANS OF EXPRESS CONSTITUTIONAL AND LEGISLATIVE PROVISIONS OR BY SOCIAL PRACTICES ESTABLISHED BY COLLECTIVE LABOUR AGREEMENTS , IN OTHER STATES ITS FULL IMPLEMENTATION HAS SUFFERED PROLONGED DELAYS .

47 IN THE LIGHT OF THIS SITUATION , ON 30 DECEMBER 1961 , THE EVE OF THE EXPIRY OF THE TIME-LIMIT FIXED BY ARTICLE 119 , THE MEMBER STATES ADOPTED A RESOLUTION CONCERNING THE HARMONIZATION OF RATES OF PAY OF MEN AND WOMEN WHICH WAS INTENDED TO PROVIDE FURTHER DETAILS CONCERNING CERTAIN ASPECTS OF THE MATERIAL CONTENT OF THE PRINCIPLE OF EQUAL PAY , WHILE DELAYING ITS IMPLEMENTATION ACCORDING TO A PLAN SPREAD OVER A PERIOD OF TIME .

48 UNDER THE TERMS OF THAT RESOLUTION ALL DISCRIMINATION , BOTH DIRECT AND INDIRECT , WAS TO HAVE BEEN COMPLETELY ELIMINATED BY 31 DECEMBER 1964 .

49 THE INFORMATION PROVIDED BY THE COMMISSION SHOWS THAT SEVERAL OF THE ORIGINAL MEMBER STATES HAVE FAILED TO OBSERVE THE TERMS OF THAT RESOLUTION AND THAT , FOR THIS REASON , WITHIN THE CONTEXT OF THE TASKS ENTRUSTED TO IT BY ARTICLE 155 OF THE TREATY , THE COMMISSION WAS LED TO BRING TOGETHER THE REPRESENTATIVES OF THE GOVERNMENTS AND THE TWO SIDES OF INDUSTRY IN ORDER TO STUDY THE SITUATION AND TO AGREE TOGETHER UPON THE MEASURES NECESSARY TO ENSURE PROGRESS TOWARDS THE FULL ATTAINMENT OF THE OBJECTIVE LAID DWON IN ARTICLE 119 .

50 THIS LED TO BE DRAWING UP OF SUCCESSIVE REPORTS ON THE SITUATION IN THE ORIGINAL MEMBER STATES , THE MOST RECENT OF WHICH , DATED 18 JULY 1973 , RECAPITULATES ALL THE FACTS .

51 IN THE CONCLUSION TO THAT REPORT THE COMMISSION ANNOUNCED ITS INTENTION TO INITIATE PROCEEDINGS UNDER ARTICLE 169 OF THE TREATY , FOR FAILURE TO TAKE THE REQUISITE ACTION , AGAINST THOSE OF THE MEMBER STATES WHO HAD NOT BY THAT DATE DISCHARGED THE OBLIGATIONS IMPOSED BY ARTICLE 119 , ALTHOUGH THIS WARNING WAS NOT FOLLOWED BY ANY FURTHER ACTION .

52 AFTER SIMILAR EXCHANGES WITH THE COMPETENT AUTHORITIES IN THE NEW MEMBER STATES THE COMMISSION STATED IN ITS REPORT DATED 17 JULY 1974 THAT , AS REGARDS THOSE STATES , ARTICLE 119 HAD BEEN FULLY APPLICABLE SINCE 1 JANUARY 1973 AND THAT FROM THAT DATE THE POSITION OF THOSE STATES WAS THE SAME AS THAT OF THE ORIGINAL MEMBER STATES .

53 FOR ITS PART , IN ORDER TO HASTEN THE FULL IMPLEMENTATION OF ARTICLE 119 , THE COUNCIL ON 10 FEBRUARY 1975 ADOPTED DIRECTIVE NO 75/117 ON THE APPROXIMATION OF

THE LAWS OF THE MEMBER STATES RELATING TO THE APPLICATION OF THE PRINCIPLE OF EQUAL PAY FOR MEN AND WOMEN (OJ L 45 , P . 19).

54 THIS DIRECTIVE PROVIDES FURTHER DETAILS REGARDING CERTAIN ASPECTS OF THE MATERIAL SCOPE OF ARTICLE 119 AND ALSO ADOPTS VARIOUS PROVISIONS WHOSE ESSENTIAL PURPOSE IS TO IMPROVE THE LEGAL PROTECTION OF WORKERS WHO MAY BE WRONGED BY FAILURE TO APPLY THE PRINCIPLE OF EQUAL PAY LAID DOWN BY ARTICLE 119 .

55 ARTICLE 8 OF THIS DIRECTIVE ALLOWS THE MEMBER STATES A PERIOD OF ONE YEAR TO PUT INTO FORCE THE APPROPRIATE LAWS , REGULATIONS AND ADMINISTRATIVE PROVISIONS .

56 IT FOLLOWS FROM THE EXPRESS TERMS OF ARTICLE 119 THAT THE APPLICATION OF THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY WAS TO BE FULLY SECURED AND IRREVERSIBLE AT THE END OF THE FIRST STAGE OF THE TRANSITIONAL PERIOD , THAT IS , BY 1 JANUARY 1962 .

57 WITHOUT PREJUDICE TO ITS POSSIBLE EFFECTS AS REGARDS ENCOURAGING AND ACCELERATING THE FULL IMPLEMENTATION OF ARTICLE 119 , THE RESOLUTION OF THE MEMBER STATES OF 30 DECEMBER 1961 WAS INEFFECTIVE TO MAKE ANY VALID MODIFICATION OF THE TIME-LIMIT FIXED BY THE TREATY .

58 IN FACT , APART FROM ANY SPECIFIC PROVISIONS , THE TREATY CAN ONLY BE MODIFIED BY MEANS OF THE AMENDMENT PROCEDURE CARRIED OUT IN ACCORDANCE WITH ARTICLE 236 .

59 MOREOVER , IT FOLLOWS FROM THE FOREGOING THAT , IN THE ABSENCE OF TRANSITIONAL PROVISIONS , THE PRINCIPLE CONTAINED IN ARTICLE 119 HAS BEEN FULLY EFFECTIVE IN THE NEW MEMBER STATES SINCE THE ENTRY INTO FORCE OF THE ACCESSION TREATY , THAT IS , SINCE 1 JANUARY 1973 .

60 IT WAS NOT POSSIBLE FOR THIS LEGAL SITUATION TO BE MODIFIED BY DIRECTIVE NO 75/117 , WHICH WAS ADOPTED ON THE BASIS OF ARTICLE 100 DEALING WITH THE APPROXIMATION OF LAWS AND WAS INTENDED TO ENCOURAGE THE PROPER IMPLEMENTATION OF ARTICLE 119 BY MEANS OF A SERIES OF MEASURES TO BE TAKEN ON THE NATIONAL LEVEL , IN ORDER , IN PARTICULAR , TO ELIMINATE INDIRECT FORMS OF DISCRIMINATION , BUT WAS UNABLE TO REDUCE THE EFFECTIVENESS OF THAT ARTICLE OR MODIFY ITS TEMPORAL EFFECT .

61 ALTHOUGH ARTICLE 119 IS EXPRESSLY ADDRESSED TO THE MEMBER STATES IN THAT IT IMPOSES ON THEM A DUTY TO ENSURE , WITHIN A GIVEN PERIOD , AND SUBSEQUENTLY TO MAINTAIN THE APPLICATION OF THE PRINCIPLE OF EQUAL PAY , THAT DUTY ASSUMED BY THE STATES DOES NOT EXCLUDE COMPETENCE IN THIS MATTER ON THE PART OF THE COMMUNITY .

62 ON THE CONTRARY , THE EXISTENCE OF COMPETENCE ON THE PART OF THE COMMUNITY IS SHOWN BY THE FACT THAT ARTICLE 119 SETS OUT ONE OF THE ' SOCIAL POLICY ' OBJECTIVES OF THE TREATY WHICH FORM THE SUBJECT OF TITLE III , WHICH ITSELF APPEARS IN PART THREE OF THE TREATY DEALING WITH THE ' POLICY OF THE COMMUNITY ' .

63 IN THE ABSENCE OF ANY EXPRESS REFERENCE IN ARTICLE 119 TO THE POSSIBLE ACTION TO BE TAKEN BY THE COMMUNITY FOR THE PURPOSES OF IMPLEMENTING THE SOCIAL POLICY , IT IS APPROPRIATE TO REFER TO THE GENERAL SCHEME OF THE TREATY AND TO THE COURSES OF ACTION FOR WHICH IT PROVIDED , SUCH AS THOSE LAID DOWN IN ARTICLES 100 , 155 AND , WHERE APPROPRIATE , 235 .

64 AS HAS BEEN SHOWN IN THE REPLY TO THE FIRST QUESTION , NO IMPLEMENTING PROVISION , WHETHER ADOPTED BY THE INSTITUTIONS OF THE COMMUNITY OR BY THE NATIONAL AUTHORITIES , COULD ADVERSELY AFFECT THE DIRECT EFFECT OF ARTICLE 119 .

65 THE REPLY TO THE SECOND QUESTION SHOULD THEREFORE BE THAT THE APPLICATION OF ARTICLE 119 WAS TO HAVE BEEN FULLY SECURED BY THE ORIGINAL MEMBER STATES AS FROM 1 JANUARY 1962 , THE BEGINNING OF THE SECOND STAGE OF THE TRANSITIONAL PERIOD , AND BY THE NEW MEMBER STATES AS FROM 1 JANUARY 1973 , THE DATE OF ENTRY INTO FORCE OF THE ACCESSION TREATY .

66 THE FIRST OF THESE TIME-LIMITS WAS NOT MODIFIED BY THE RESOLUTION OF THE MEMBER STATES OF 30 DECEMBER 1961 .

67 AS INDICATED IN REPLY TO THE FIRST QUESTION , COUNCIL DIRECTIVE NO 75/117 DOES NOT PREJUDICE THE DIRECT EFFECT OF ARTICLE 119 AND THE PERIOD FIXED BY THAT DIRECTIVE FOR COMPLIANCE THEREWITH DOES NOT AFFECT THE TIME-LIMITS LAID DOWN BY ARTICLE 119 OF THE EEC TREATY AND THE ACCESSION TREATY .

68 EVEN IN THE AREAS IN WHICH ARTICLE 119 HAS NO DIRECT EFFECT , THAT PROVISION CANNOT BE INTERPRETED AS RESERVING TO THE NATIONAL LEGISLATURE EXCLUSIVE POWER TO IMPLEMENT THE PRINCIPLE OF EQUAL PAY SINCE , TO THE EXTENT TO WHICH SUCH IMPLEMENTATION IS NECESSARY , IT MAY BE RELIEVED BY A COMBINATION OF COMMUNITY AND NATIONAL MEASURES .

THE TEMPORAL EFFECT OF THIS JUDGMENT

69 THE GOVERNMENTS OF IRELAND AND THE UNITED KINGDOM HAVE DRAWN THE COURT ' S ATTENTION TO THE POSSIBLE ECONOMIC CONSEQUENCES OF ATTRIBUTING DIRECT EFFECT TO THE PROVISIONS OF ARTICLE 119 , ON THE GROUND THAT SUCH A DECISION MIGHT , IN MANY BRANCHES OF ECONOMIC LIFE , RESULT IN THE INTRODUCTION OF CLAIMS DATING BACK TO THE TIME AT WHICH SUCH EFFECT SAME INTO EXISTENCE .

70 IN VIEW OF THE LARGE NUMBER OF PEOPLE CONCERNED SUCH CLAIMS , WHICH UNDERTAKINGS COULD NOT HAVE FORESEEN , MIGHT SERIOUSLY AFFECT THE FINANCIAL SITUATION OF SUCH UNDERTAKINGS AND EVEN DRIVE SOME OF THEM TO BANKRUPTCY .

71 ALTHOUGH THE PRACTICAL CONSEQUENCES OF ANY JUDICIAL DECISION MUST BE CAREFULLY TAKEN INTO ACCOUNT , IT WOULD BE IMPOSSIBLE TO GO SO FAR AS TO DIMINISH THE OBJECTIVITY OF THE LAW AND COMPROMISE ITS FUTURE APPLICATION ON THE GROUND OF THE POSSIBLE REPERCUSSIONS WHICH MIGHT RESULT , AS REGARDS THE PAST , FROM SUCH A JUDICIAL DECISION .

72 HOWEVER , IN THE LIGHT OF THE CONDUCT OF SEVERAL OF THE MEMBER STATES AND THE VIEWS ADOPTED BY THE COMMISSION AND REPEATEDLY BROUGHT TO THE NOTICE OF THE CIRCLES CONCERNED , IT IS APPROPRIATE TO TAKE EXCEPTIONALLY INTO ACCOUNT THE FACT THAT , OVER A PROLONGED PERIOD , THE PARTIES CONCERNED HAVE BEEN LED TO CONTINUE WITH PRACTICES WHICH WERE CONTRARY TO ARTICLE 119 , ALTHOUGH NOT YET PROHIBITED UNDER THEIR NATIONAL LAW .

73 THE FACT THAT , IN SPITE OF THE WARNINGS GIVEN , THE COMMISSION DID NOT INITIATE PROCEEDINGS UNDER ARTICLE 169 AGAINST THE MEMBER STATES CONCERNED ON GROUNDS OF FAILURE TO FULFIL AN OBLIGATION WAS LIKELY TO CONSOLIDATE THE INCORRECT IMPRESSION AS TO THE EFFECTS OF ARTICLE 119 .

74 IN THESE CIRCUMSTANCES , IT IS APPROPRIATE TO DETERMINE THAT , AS THE GENERAL LEVEL AT WHICH PAY WOULD HAVE BEEN FIXED CANNOT BE KNOWN , IMPORTANT CONSIDERATIONS OF LEGAL CERTAINTY AFFECTING ALL THE INTERESTS INVOLVED , BOTH PUBLIC AND PRIVATE , MAKE IT IMPOSSIBLE IN PRINCIPLE TO REOPEN THE QUESTION AS REGARDS THE PAST .

75 THEREFORE , THE DIRECT EFFECT OF ARTICLE 119 CANNOT BE RELIED ON IN ORDER TO SUPPORT CLAIMS CONCERNING PAY PERIODS PRIOR TO THE DATE OF THIS JUDGMENT , EXCEPT AS REGARDS THOSE WORKERS WHO HAVE ALREADY BROUGHT LEGAL PROCEEDINGS OR MADE AN EQUIVALENT CLAIM .

Decision on costs

COSTS

76 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE .

77 AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE COUR DU TRAVAIL , BRUSSELS , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE COUR DU TRAVAIL , BRUSSELS , BY JUDGMENT DATED 23 APRIL 1975 HEREBY RULES :

1 . THE PRINCIPLE THAT MEN AND WOMEN SHOULD RECEIVE EQUAL PAY , WHICH IS LAID DOWN BY ARTICLE 119 , MAY BE RELIED ON BEFORE THE NATIONAL COURTS . THESE COURTS HAVE A DUTY TO ENSURE THE PROTECTION OF THE RIGHTS WHICH THAT PROVISION VESTS IN INDIVIDUALS , IN PARTICULAR IN THE CASE OF THOSE FORMS OF DISCRIMINATION WHICH HAVE THEIR ORIGIN IN LEGISLATIVE PROVISIONS OR COLLECTIVE LABOUR AGREEMENTS , AS WELL AS WHERE MEN AND WOMEN RECEIVE UNEQUAL PAY FOR EQUAL WORK WHICH IS CARRIED OUT IN THE SAME ESTABLISHMENT OR SERVICE , WHETHER PRIVATE OR PUBLIC .

2 . THE APPLICATION OF ARTICLE 119 WAS TO HAVE BEEN FULLY SECURED BY THE ORIGINAL MEMBER STATES AS FROM 1 JANUARY 1962 , THE BEGINNING OF THE SECOND STAGE OF THE TRANSITIONAL PERIOD , AND BY THE NEW MEMBER STATES AS FROM 1 JANUARY 1973 , THE DATE OF ENTRY INTO FORCE OF THE ACCESSION TREATY . THE FIRST OF THESE TIME-LIMITS WAS NOT MODIFIED BY THE RESOLUTION OF THE MEMBER STATES OF 30 DECEMBER 1961 .

3 . COUNCIL DIRECTIVE NO 75/117 DOES NOT PREJUDICE THE DIRECT EFFECT OF ARTICLE 119 AND THE PERIOD FIXED BY THAT DIRECTIVE FOR COMPLIANCE THEREWITH DOES NOT AFFECT THE TIME-LIMITS LAID DOWN BY ARTICLE 119 OF THE EEC TREATY AND THE ACCESSION TREATY .

4 . EVEN IN THE AREAS IN WHICH ARTICLE 119 HAS NO DIRECT EFFECT , THAT PROVISION CANNOT BE INTERPRETED AS RESERVING TO THE NATIONAL LEGISLATURE EXCLUSIVE POWER TO IMPLEMENT THE PRINCIPLE OF EQUAL PAY SINCE , TO THE EXTENT TO WHICH SUCH

IMPLEMENTATION IS NECESSARY , IT MAY BE ACHIEVED BY A COMBINATION OF COMMUNITY AND NATIONAL PROVISIONS .

5 . EXCEPT AS REGARDS THOSE WORKERS WHO HAVE ALREADY BROUGHT LEGAL PROCEEDINGS OR MADE AN EQUIVALENT CLAIM , THE DIRECT EFFECT OF ARTICLE 119 CANNOT BE RELIED ON IN ORDER TO SUPPORT CLAIMS CONCERNING PAY PERIODS PRIOR TO THE DATE OF THIS JUDGMENT .

Judgment of the Court of 12 July 1984. - Ulrich Hofmann v Barmer Ersatzkasse. - Reference for a preliminary ruling: Landessozialgericht Hamburg - Germany. - Equal treatment for men and women - Maternity leave. - Case 184/83.

Keywords

SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - DIRECTIVE 76/207 - PURPOSE - PROTECTION OF WOMEN IN RELATION TO PREGNANCY AND MATERNITY - SCOPE - DISCRETION OF MEMBER STATES - ADDITIONAL MATERNITY LEAVE GRANTED TO THE MOTHER - GRANT OF SUCH LEAVE TO THE FATHER - DUTY OF MEMBER STATES - NONE

(COUNCIL DIRECTIVE 76/207 , ARTS 1 , 2 (3) AND (4), AND 5 (1))

Summary

1 . DIRECTIVE 76/207 IS NOT DESIGNED TO SETTLE QUESTIONS CONCERNING THE ORGANIZATION OF THE FAMILY , OR TO ALTER THE DIVISION OF RESPONSABILITY BETWEEN PARENTS .

2.BY RESERVING TO MEMBER STATES THE RIGHT TO RETAIN OR INTRODUCE PROVISIONS WHICH ARE INTENDED TO PROTECT WOMEN IN CONNECTION WITH '' PREGNANCY AND MATERNITY '', DIRECTIVE 76/207 RECOGNIZES THE LEGITIMACY , IN TERMS OF THE PRINCIPLE OF EQUAL TREATMENT , OF PROTECTING A WOMAN 'S NEEDS IN TWO RESPECTS . FIRST , IT IS LEGITIMATE TO ENSURE THE PROTECTION OF A WOMAN 'S BIOLOGICAL CONDITION DURING PREGNANCY AND THEREAFTER UNTIL SUCH TIME AS HER PHYSIOLOGICAL AND MENTAL FUNCTIONS HAVE RETURNED TO NORMAL AFTER CHILDBIRTH ; SECONDLY , IT IS LEGITIMATE TO PROTECT THE SPECIAL RELATIONSHIP BETWEEN A WOMAN AND HER CHILD OVER THE PERIOD WHICH FOLLOWS PREGNANCY AND CHILDBIRTH , BY PREVENTING THAT RELATIONSHIP FROM BEING DISTURBED BY THE MULTIPLE BURDENS WHICH WOULD RESULT FROM THE SIMULTANEOUS PURSUIT OF EMPLOYMENT .

3.MATERNITY LEAVE GRANTED TO A WOMAN ON EXPIRY OF THE STATUTORY PROTECTIVE PERIOD FALLS WITHIN THE SCOPE OF ARTICLE 2 (3) OF DIRECTIVE 76/207 , INASMUCH AS IT SEEKS TO PROTECT A WOMAN IN CONNECTION WITH THE EFFECTS OF PREGNANCY AND MOTHERHOOD . THAT BEING SO , SUCH LEAVE MAY LEGITIMATELY BE RESERVED TO THE MOTHER TO THE EXCLUSION OF ANY OTHER PERSON , IN VIEW OF THE FACT THAT IT IS ONLY THE MOTHER WHO MAY FIND HERSELF SUBJECT TO UNDESIRABLE PRESSURES TO RETURN TO WORK PREMATURELY .

4.DIRECTIVE 76/207 LEAVES MEMBER STATES WITH A DISCRETION AS TO THE SOCIAL MEASURES WHICH THEY ADOPT IN ORDER TO GUARANTEE , WITHIN THE FRAMEWORK LAID DOWN BY THE DIRECTIVE , THE PROTECTION OF WOMEN IN CONNECTION WITH PREGNANCY AND MATERNITY AND TO OFFSET THE DISADVANTAGES WHICH WOMEN , BY COMPARISON WITH MEN , SUFFER WITH REGARD TO THE RETENTION OF EMPLOYMENT . SUCH MEASURES ARE CLOSELY LINKED TO THE GENERAL SYSTEM OF SOCIAL PROTECTION IN THE VARIOUS MEMBER STATES . THE MEMBER STATES THEREFORE ENJOY A REASONABLE MARGIN OF DISCRETION AS REGARDS BOTH THE NATURE OF THE PROTECTIVE MEASURES AND THE DETAILED ARRANGEMENTS FOR THEIR IMPLEMENTATION .

5.ARTICLES 1 , 2 AND 5 (1) OF DIRECTIVE 76/207 MUST BE INTERPRETED AS MEANING THAT A MEMBER STATE MAY , AFTER THE PROTECTIVE PERIOD HAS EXPIRED , GRANT TO MOTHERS A PERIOD OF MATERNITY LEAVE WHICH THE STATE ENCOURAGES THEM TO TAKE BY THE PAYMENT OF AN ALLOWANCE . THE DIRECTIVE DOES NOT IMPOSE ON MEMBER STATES A REQUIREMENT THAT THEY SHALL , AS AN ALTERNATIVE , ALLOW SUCH LEAVE TO BE GRANTED TO FATHERS , EVEN WHERE THE PARENTS SO DECIDE .

Parties

IN CASE 184/83

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE LANDESSOZIALGERICHT (HIGHER SOCIAL COURT) HAMBURG FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

ULRICH HOFMANN , RESIDING IN HAMBURG ,

AND

BARMER ERSATZKASSE , WUPPERTAL ,

Subject of the case

ON THE INTERPRETATION OF ARTICLES 1 , 2 AND 5 (1) OF COUNCIL DIRECTIVE 76/207 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 ,

Grounds

1 BY AN ORDER OF 9 AUGUST 1983 , RECEIVED AT THE COURT REGISTRY ON 29 AUGUST 1983 , THE LANDESSOZIALGERICHT (HIGHER SOCIAL COURT) HAMBURG REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS CONCERNING THE INTERPRETATION OF 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 (OFFICIAL JOURNAL 1976 , L 39 , P . 40), IN ORDER TO DETERMINE WHETHER PARAGRAPH 8A OF THE MUTTERSCHUTZGESETZ (LAW FOR THE PROTECTION OF WORKING MOTHERS) OF 18 APRIL 1968 , AS AMENDED BY THE LAWS OF 25 JUNE 1979 AND 22 DECEMBER 1981 (BUNDESGESETZBLATT I , 1968 , P . 315 , 1979 , P . 797 , AND 1981 , P . 1523), IS COMPATIBLE WITH COMMUNITY LAW .

2 THE ORDER MAKING THE REFERENCE TO THE COURT DISCLOSES THAT MR HOFMANN , THE PLAINTIFF IN THE MAIN PROCEEDINGS , IS THE FATHER OF AN ILLEGITIMATE CHILD , OF WHICH HE HAS ACKNOWLEDGED PATERNITY . HE OBTAINED UNPAID LEAVE FROM HIS EMPLOYER FOR THE PERIOD BETWEEN THE EXPIRY OF THE STATUTORY PROTECTIVE PERIOD OF EIGHT WEEKS WHICH WAS AVAILABLE TO THE MOTHER AND THE DAY ON WHICH THE CHILD REACHED THE AGE OF SIX MONTHS ; DURING THAT TIME HE TOOK CARE OF THE CHILD WHILE THE MOTHER CONTINUED HER EMPLOYMENT .

3 AT THE SAME TIME THE PLAINTIFF SUBMITTED TO THE BARMER ERSATZKASSE , THE DEFENDANT IN THE MAIN PROCEEDINGS , A CLAIM FOR PAYMENT , DURING THE PERIOD OF MATERNITY LEAVE PROVIDED FOR BY PARAGRAPH 8A OF THE MUTTERSCHUTZGESETZ , OF AN ALLOWANCE PURSUANT TO THE COMBINED PROVISIONS OF PARAGRAPH 13 THEREOF AND PARAGRAPH 200 (4) OF THE REICHSVERSICHERUNGSORDNUNG (GERMAN INSURANCE REGULATION).

4 THE DEFENDANT REFUSED THE PLAINTIFF ' S REQUEST , AND HIS APPEAL AGAINST THAT REFUSAL WAS ALSO UNSUCCESSFUL . AN ACTION BROUGHT BEFORE THE SOZIALGERICHT (SOCIAL COURT) HAMBURG WAS DISMISSED BY A JUDGMENT OF 19 OCTOBER 1982 , ON THE GROUND THAT THE WORDING OF PARAGRAPH 8 (A) OF THE MUTTERSCHUTZGESETZ AND THE INTENTION OF THE LEGISLATURE INDICATED THAT ONLY MOTHERS COULD CLAIM MATERNITY LEAVE . ACCORDING TO THE SOZIALGERICHT , IT WAS THE DELIBERATE INTENT OF THE LEGISLATURE NOT TO CREATE ' ' PARENTAL LEAVE ' ' .

5 THE PLAINTIFF APPEALED AGAINST THAT DECISION TO THE LANDESSOZIALGERICHT HAMBURG , ARGUING THAT THE MATERNITY LEAVE INTRODUCED BY THE MUTTERSCHUTZGESETZ WAS NOT IN FACT DESIGNED TO PROTECT THE MOTHER ' S HEALTH BUT WAS CONCERNED EXCLUSIVELY WITH THE MOTHER ' S CARE OF THE CHILD . IN THE COURSE OF THE PROCEEDINGS BEFORE THE LANDESSOZIALGERICHT , HE REQUESTED PRIMARILY THAT THE PROCEEDINGS SHOULD BE STAYED AND THAT CERTAIN QUESTIONS ON THE INTERPRETATION OF DIRECTIVE 76/207 SHOULD BE REFERRED TO THE COURT OF JUSTICE .

6 IN VIEW OF THE DOUBTS WHICH HAD ARISEN AS TO THE COMPATIBILITY OF THE NATIONAL LEGISLATION ON MATERNITY LEAVE WITH THE AFORESAID DIRECTIVE , THE LANDESSOZIALGERICHT GRANTED MR HOFMANN ' S REQUEST , PARTICULARLY SINCE IT HAD LEARNED THAT THE COMMISSION HAD BROUGHT PROCEEDINGS ON THE SAME ISSUE AGAINST THE FEDERAL REPUBLIC OF GERMANY CLAIMING THAT THE LATTER HAD FAILED TO FULFIL ITS TREATY OBLIGATIONS (CASE 248/83). IT THEREFORE REFERRED TWO QUESTIONS TO THE COURT , WORDED AS FOLLOWS :

' ' 1 . ARE ARTICLES 1 , 2 AND 5 (1) OF COUNCIL DIRECTIVE 76/207/EEC 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 (OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES , L 39 , PP . 40 TO 42) INFRINGED IF , ON THE EXPIRY OF THE EIGHT-WEEK PROTECTIVE PERIOD FOR WORKING MOTHERS FOLLOWING CHILDBIRTH , A PERIOD OF LEAVE WHICH THE STATE ENCOURAGES BY PAYMENT OF THE NET REMUNERATION OF THE PERSON CONCERNED , SUBJECT TO A MAXIMUM OF DM 25 PER

CALENDAR DAY , AND WHICH LASTS UNTIL THE DAY ON WHICH THE CHILD REACHES THE AGE OF SIX MONTHS CAN BE CLAIMED SOLELY BY WORKING MOTHERS AND NOT , BY WAY OF ALTERNATIVE , IF THE PARENTS SO DECIDE , BY WORKING FATHERS?

2.IF THE ANSWER TO QUESTION 1 IS IN THE AFFIRMATIVE , ARE ARTICLES 1 , 2 AND 5 (1) OF COUNCIL DIRECTIVE 76/207/EEC DIRECTLY APPLICABLE IN THE MEMBER STATES?

' '

7 IN ITS ORDER , THE LANDESSOZIALGERICHT POINTS OUT THAT THE PLAINTIFF , AT THE SAME TIME , LODGED A VERFASSUNGSBESCHWERDE (AN OBJECTION ON A POINT OF CONSTITUTIONAL LAW) WITH THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT), PLEADING THAT SOME OF THE PROVISIONS OF THE LAW INSTITUTING THE MATERNITY LEAVE WERE UNCONSTITUTIONAL , ON THE GROUND THAT THEY INFRINGED THE RULE OF THE EQUALITY OF MEN AND WOMEN BEFORE THE LAW , ENSHRINED IN ARTICLE 3 (2) AND (3) OF THE GRUNDGESETZ (BASIC LAW).

FIRST QUESTION (SCOPE AND LIMITS OF THE PRINCIPLE OF EQUAL TREATMENT)

8 IT IS APPROPRIATE FIRST OF ALL TO SET OUT THE LEGISLATIVE PROVISIONS ON MATERNITY LEAVE WHICH FORM THE SUBJECT-MATTER OF THE PROCEEDINGS PENDING BEFORE THE LANDESSOZIALGERICHT .

9 UNDER PARAGRAPH 6 (1) OF THE MUTTERSCHUTZGESETZ , WOMEN MAY NOT BE EMPLOYED DURING THE EIGHT WEEKS WHICH FOLLOW CHILDBIRTH . ACCORDING TO PARAGRAPH 8A OF THAT LAW , MOTHERS ARE ENTITLED TO MATERNITY LEAVE FROM THE END OF THE PROTECTIVE PERIOD PROVIDED FOR BY PARAGRAPH 6 (1) UNTIL THE DAY ON WHICH THE CHILD ATTAINS THE AGE OF SIX MONTHS . THE LEAVE MUST BE CLAIMED BY THE MOTHER AT LEAST FOUR WEEKS PRIOR TO THE EXPIRY OF THE PROTECTIVE PERIOD AND IS SUBJECT TO THE CONDITION THAT THE MOTHER MUST HAVE HELD EMPLOYMENT FOR A PERIOD OF , GENERALLY SPEAKING , NINE MONTHS BEFORE THE BIRTH . IF THE CHILD DIES DURING THE PERIOD OF LEAVE , THE LEAVE IS , AS A GENERAL RULE , TERMINATED THREE WEEKS AFTER THE DEATH . UNDER PARAGRAPH 9A , THE EMPLOYER IS FORBIDDEN TO TERMINATE THE EMPLOYMENT CONTRACT DURING THE MATERNITY LEAVE AND FOR A PERIOD OF TWO MONTHS THEREAFTER . UNDER PARAGRAPH 13 OF THE LAW , THE MOTHER RECEIVES AN ALLOWANCE FROM THE STATE WHICH IS EQUAL TO HER EARNINGS , BUT SUBJECT TO AN UPPER LIMIT OF DM 25 PER DAY , ACCORDING TO THE PROVISIONS IN FORCE AT THE MATERIAL TIME .

10 THE PLAINTIFF CLAIMS , ESSENTIALLY , THAT THE MAIN OBJECT OF THE DISPUTED LEGISLATIVE PROVISIONS , IN CONTRAST WITH THE PROTECTIVE PERIOD PROVIDED FOR BY PARAGRAPH 6 , IS NOT TO GIVE SOCIAL PROTECTION TO THE MOTHER ON BIOLOGICAL AND MEDICAL GROUNDS BUT RATHER TO PROTECT THE CHILD . THE PLAINTIFF DRAWS THAT CONCLUSION , ON THE ONE HAND , FROM THE TRAVAUX PREPARATOIRES RELATING TO THE LAW INTRODUCING MATERNITY LEAVE AND , ON THE OTHER HAND , FROM CERTAIN OBJECTIVE CHARACTERISTICS OF THE LAW . HE DRAWS PARTICULAR ATTENTION TO THREE CHARACTERISTICS :

(I) THE FACT THAT THE LEAVE IS WITHDRAWN IN THE EVENT OF THE CHILD ' S DEATH , WHICH DEMONSTRATES THAT THE LEAVE WAS CREATED IN THE INTERESTS OF THE CHILD AND NOT OF THE MOTHER ;

(II)THE OPTIONAL NATURE OF THE LEAVE , WHICH MEANS THAT IT CANNOT BE SAID TO HAVE BEEN INTRODUCED TO MEET IMPERATIVE BIOLOGICAL OR MEDICAL NEEDS ;

(III)LASTLY , THE REQUIREMENT THAT THE WOMAN SHOULD HAVE BEEN EMPLOYED FOR A MINIMUM PERIOD PRIOR TO CHILDBIRTH ; THIS INDICATES THAT IT WAS NOT CONSIDERED NECESSARY TO GRANT THE LEAVE IN THE INTERESTS OF THE MOTHER , OTHERWISE IT OUGHT TO HAVE BEEN EXTENDED TO ALL WOMEN IN EMPLOYMENT IRRESPECTIVE OF THE DATE ON WHICH THEIR EMPLOYMENT COMMENCED .

11 ACCORDING TO THE PLAINTIFF , THE PROTECTION OF THE MOTHER AGAINST THE MULTIPLICITY OF BURDENS IMPOSED BY MOTHERHOOD AND HER EMPLOYMENT COULD BE ACHIEVED BY NON-DISCRIMINATORY MEASURES , SUCH AS ENABLING THE FATHER TO ENJOY THE LEAVE OR CREATING A PERIOD OF PARENTAL LEAVE , SO AS TO RELEASE THE MOTHER FROM THE RESPONSIBILITY OF CARING FOR THE CHILD AND THEREBY ALLOW HER TO RESUME EMPLOYMENT AS SOON AS THE STATUTORY PROTECTIVE PERIOD HAD EXPIRED . THE PLAINTIFF FURTHER CLAIMS THAT THE CHOICE BETWEEN THE OPTIONS THEREBY CREATED SHOULD , IN CONFORMITY WITH THE PRINCIPLE ON NON-DISCRIMINATION BETWEEN THE SEXES , BE LEFT COMPLETELY AT THE DISCRETION OF THE PARENTS OF THE CHILD .

12 THE PLAINTIFF ' S VIEWPOINT IS SUPPORTED BY THE COMMISSION , WHICH TAKES THE VIEW THAT THE PROVISO IN ARTICLE 2 (3) OF DIRECTIVE 76/207 , WHICH PERMITS MEMBER STATES TO MAINTAIN PROVISIONS CONCERNING THE PROTECTION OF WOMEN , PARTICULARLY AS REGARDS PREGNANCY AND MATERNITY , CALLS FOR A RESTRICTIVE INTERPRETATION INASMUCH AS IT DEROGATES FROM THE PRINCIPLE OF EQUAL TREATMENT . SINCE THAT PRINCIPLE CONSTITUTES A ' ' FUNDAMENTAL RIGHT ' ' , ITS APPLICATION CANNOT BE LIMITED EXCEPT BY PROVISIONS WHICH ARE OBJECTIVELY NECESSARY FOR THE PROTECTION OF THE MOTHER . IF NATIONAL LEGISLATION , SUCH AS THAT IN THIS INSTANCE , SERVES THE INTERESTS OF THE CHILD AS WELL , ITS PURPOSE SHOULD PREFERABLY BE ACHIEVED BY NON-DISCRIMINATORY MEANS . IN THE PRESENT INSTANCE , HOWEVER , THE PROTECTION PROVIDED FOR BY ARTICLE 2 (3) OF THE DIRECTIVE MAY EQUALLY

WELL BE ATTAINED BY A REDUCTION OF THE MOTHER ' S DOMESTIC DUTIES , ACHIEVED BY GRANTING THE LEAVE TO THE FATHER .

13 THE COMMISSION DRAWS ATTENTION TO THE FACT THAT , IN A NUMBER OF MEMBER STATES , SOCIAL LEGISLATION IS MOVING TOWARDS THE GRANT OF ' ' PARENTAL LEAVE ' ' OR OF ' ' CHILD-CARE LEAVE ' ' , WHICH IS TO BE PREFERRED TO LEAVE WHICH IS AVAILABLE TO THE MOTHER ALONE . IT STATED THAT IT WAS CONSIDERING WHETHER TO BRING ACTIONS FOR FAILURE TO FULFIL A TREATY OBLIGATION AGAINST A NUMBER OF MEMBER STATES WHICH , IN VARIOUS FORMS , RETAINED MEASURES WHICH WERE COMPARABLE TO THE MATERNITY LEAVE PROVIDED FOR BY THE GERMAN LEGISLATION .

14 THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , SUPPORTING THE VIEWPOINT OF THE BARMER ERSATZKASSE , ARGUES THAT LEGAL PROTECTION AFFORDED TO THE MOTHER BY THE DISPUTED LEGISLATION AIMS TO REDUCE THE CONFLICT BETWEEN A WOMAN ' S ROLE AS A MOTHER AND HER ROLE AS A WAGE-EARNER , IN ORDER TO PRESERVE HER HEALTH AND THAT OF THE CHILD . IT ADMITS THAT THERE ARE DIFFERING VIEWS ON THE LENGTH OF TIME FOR WHICH A WOMAN SHOULD ENJOY SPECIAL TREATMENT FOLLOWING PREGNANCY AND CHILDBIRTH , BUT IT ARGUES THAT THE PERIOD IN QUESTION , ALTHOUGH VARYING FROM WOMAN TO WOMAN , EXTENDS CONSIDERABLY BEYOND THE END OF THE STATUTORY EIGHT-WEEK PERIOD OF PROTECTION LAID DOWN BY THE LAW . HENCE THE CREATION OF MATERNITY LEAVE IS JUSTIFIED FOR REASONS WHICH ARE CONNECTED WITH A WOMAN ' S BIOLOGICAL CHARACTERISTICS , SINCE ITS AIM IS TO AVOID PLACING THE MOTHER , ON EXPIRY OF THE STATUTORY PROTECTIVE PERIOD , UNDER AN OBLIGATION TO DECIDE WHETHER OR NOT TO RESUME HER EMPLOYMENT . INDEED , EXPERIENCE AND STATISTICS DEMONSTRATE THAT A CONSIDERABLE NUMBER OF WORKING WOMEN WERE COMPELLED , UNDER EARLIER LEGISLATION , TO GIVE UP THEIR EMPLOYMENT AS A RESULT OF MOTHERHOOD .

15 IN REPLY TO THE ARGUMENTS PUT FORWARD IN PARTICULAR BY THE PLAINTIFF IN THE MAIN PROCEEDINGS , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY MAINTAINS THAT MATERNITY LEAVE UNDER GERMAN LEGISLATION CONSTITUTES AN UNINTERRUPTED CONTINUATION OF THE PROTECTION GIVEN TO A MOTHER BEYOND THE END OF THE PROTECTIVE PERIOD PROVIDED FOR BY PARAGRAPH 6 (1) OF THE MUTTERSCHUTZGESETZ . THE WITHDRAWAL OF THE LEAVE IN THE EVENT OF THE CHILD ' S DEATH IS JUSTIFIED BY THE FACT THAT ITS DEATH PUTS AN END TO THE MULTIPLICITY OF BURDENS BORNE BY THE WOMAN AS A RESULT OF MOTHERHOOD AND HER EMPLOYMENT . THE FACT THAT THE LEAVE IS OPTIONAL AND MAY BE CLAIMED BY THE MOTHER IS CONSISTENT WITH ITS OBJECTIVE , NAMELY TO ENABLE THE WOMAN TO CHOOSE FREELY , IN THE LIGHT OF HER PHYSICAL CONDITION AND OF OTHER FAMILY AND SOCIAL FACTORS , THE SOLUTION WHICH IS BETTER SUITED TO HER PERSONAL CIRCUMSTANCES ; BY VIRTUE OF THAT PROVISION THE PURPOSE OF THE LEAVE , NAMELY TO PROTECT THE MOTHER , MAY BE BETTER ACHIEVED THAN BY THE ADOPTION OF OTHER SULUTIONS , SUCH AS THE GRANT OF LEAVE TO THE FATHER OR THE ASSUMPTION BY OTHER MEMBERS OF THE FAMILY OF RESPONSIBILITY FOR LOOKING AFTER THE CHILD . FINALLY , THE PROVISION WHICH MAKES THE GRANT OF LEAVE SUBJECT TO THE PREREQUISITE THAT THE MOTHER SHALL HAVE BEEN IN EMPLOYMENT FOR A MINIMUM PERIOD PRIOR TO GIVING BIRTH IS EXPLAINED BY THE CONCERN TO AVOID ABUSES WHEREBY EXPECTANT MOTHERS TAKE UP EMPLOYMENT DURING PREGNANCY FOR THE PURPOSE OF ENJOYING LEAVE AND THE PECUNIARY BENEFITS ATTACHING TO IT .

16 THE GORVERNMENT OF THE UNITED KINGDOM , AFTER SETTING OUT THE ARRANGEMENTS FOR PROTECTING MOTHERS UNDER THE SOCIAL LEGISLATION OF THE UNITED KINGDOM , SUPPORTS THE VIEWPOINT OF THE GERMAN GOVERNMENT . IT REACTS CRITICALLY TO THE CONTENTIONS PUT FORWARD BY THE COMMISSION , WHICH IN ITS VIEW PLACES TOO RESTRICTIVE AN INTERPRETATION ON ARTICLE 2 (3) OF THE DIRECTIVE , THEREBY DISCOURAGING MEMBER STATES FROM AVAILING THEMSELVES OF THE POSSIBILITIES OFFERED BY THAT PROVISION .

17 FOR THE PURPOSE OF ANSWERING THE QUESTION RAISED BY THE LANDESSOZIALGERICHT , IT IS APPROPRIATE IN THE FIRST INSTANCE TO SET OUT THE PROVISIONS OF DIRECTIVE 76/207 TO WHICH REFERENCE HAS BEEN MADE .

18 THE DIRECTIVE IS DESIGNED TO IMPLEMENT THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS INTER ALIA ' ' WORKING CONDITIONS ' ' , WITH A VIEW TO ATTAINING THE SOCIAL POLICY AIMS OF THE EEC TREATY TO WHICH THE THIRD RECITAL IN THE PREAMBLE TO THE DIRECTIVE REFERS .

19 TO THAT END , ARTICLE 1 DEFINES ' ' THE PRINCIPLE OF EQUAL TREATMENT ' ' AS MEANING THAT THE DIRECTIVE SEEKS TO PUT INTO EFFECT IN THE MEMBER STATES THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , PROMOTION , VOCATIONAL TRAINING AND WORKING CONDITIONS . ACCORDING TO ARTICLE 2 (1), THE PRINCIPLE OF EQUAL TREATMENT MEANS ' ' THAT THERE SHALL BE NO DISCRIMINATION WHATSOEVER ON GROUNDS OF SEX EITHER DIRECTLY OR INDIRECTLY BY REFERENCE IN PARTICULAR TO MARITAL OR FAMILY STATUS . ' ' UNDER ARTICLE 5 (1), APPLICATION OF THE PRINCIPLE OF EQUAL TREATMENT WITH REGARD TO WORKING CONDITIONS ' ' MEANS THAT MEN AND WOMEN SHALL BE GUARANTEED THE SAME CONDITIONS WITHOUT DISCRIMINATION ON GROUNDS OF SEX ' ' ; PARAGRAPH (2) OF THE ARTICLE REQUIRES MEMBER STATES TO ABOLISH ANY LAWS , REGULATIONS AND ADMINISTRATIVE PROVISIONS CONTRARY TO THE PRINCIPLE OF EQUAL TREATMENT AND TO AMEND THOSE WHICH CONFLICT WITH THE PRINCIPLE ' ' WHEN THE CONCERN FOR PROTECTION WHICH ORIGINALLY INSPIRED THEM IS NO LONGER WELL FOUNDED ' ' .

20 PARAGRAPHS (2), (3) AND (4) OF ARTICLE 2 INDICATE , IN VARIOUS RESPECTS , THE LIMITS OF THE PRINCIPLE OF EQUAL TREATMENT LAID DOWN BY THE DIRECTIVE .

21 UNDER PARAGRAPH (2), WHICH IS OF NO RELEVANCE TO THE PRESENT CASE , THE DIRECTIVE IS EXPRESSED TO BE WITHOUT PREJUDICE TO THE RIGHT OF MEMBER STATES TO EXCLUDE FROM ITS FIELD OF APPLICATION THOSE OCCUPATIONAL ACTIVITIES FOR WHICH , ' ' BY REASON OF THEIR NATURE OR THE CONTEXT IN WHICH THEY ARE CARRIED OUT , THE SEX OF THE WORKER CONSTITUTES A DETERMINING FACTOR . ' '

22 PARAGRAPH (3) MAKES THE FOLLOWING PROVISION : ' ' THIS DIRECTIVE SHALL BE WITHOUT PREJUDICE TO PROVISIONS CONCERNING THE PROTECTION OF WOMEN , PARTICULARLY AS REGARDS PREGNANCY AND MATERNITY . ' '

23 REFERENCE SHOULD ALSO BE MADE IN THE PRESENT CONTEXT TO PARAGRAPH (4), ACCORDING TO WHICH THE DIRECTIVE IS TO BE WITHOUT PREJUDICE TO MEASURES TO PROMOTE EQUAL OPPORTUNITY FOR MEN AND WOMEN , ' ' BY REMOVING EXISTING INEQUALITIES WHICH AFFECT WOMEN ' S OPPORTUNITIES IN THE AREAS REFERRED TO IN ARTICLE 1 (1) ' ' , THAT IS TO SAY , AS REGARDS ACCESS TO EMPLOYMENT , PROMOTION AND OTHER WORKING CONDITIONS .

24 IT IS APPARENT FROM THE ABOVE ANALYSIS THAT THE DIRECTIVE IS NOT DESIGNED TO SETTLE QUESTIONS CONCERNED WITH THE ORGANIZATION OF THE FAMILY , OR TO ALTER THE DIVISION OF RESPONSIBILITY BETWEEN PARENTS .

25 IT SHOULD FURTHER BE ADDED , WITH PARTICULAR REFERENCE TO PARAGRAPH (3), THAT , BY RESERVING TO MEMBER STATES THE RIGHT TO RETAIN , OR INTRODUCE PROVISIONS WHICH ARE INTENDED TO PROTECT WOMEN IN CONNECTION WITH ' ' PREGNANCY AND MATERNITY ' ' , THE DIRECTIVE RECOGNIZES THE LEGITIMACY , IN TERMS OF THE PRINCIPLE OF EQUAL TREATMENT , OF PROTECTING A WOMAN ' S NEEDS IN TWO RESPECTS . FIRST , IT IS LEGITIMATE TO ENSURE THE PROTECTION OF A WOMAN ' S BIOLOGICAL CONDITION DURING PREGNANCY AND THEREAFTER UNTIL SUCH TIME AS HER PHYSIOLOGICAL AND MENTAL FUNCTIONS HAVE RETURNED TO NORMAL AFTER CHILDBIRTH ; SECONDLY , IT IS LEGITIMATE TO PROTECT THE SPECIAL RELATIONSHIP BETWEEN A WOMAN AND HER CHILD OVER THE PERIOD WHICH FOLLOWS PREGNANCY AND CHILDBIRTH , BY PREVENTING THAT RELATIONSHIP FROM BEING DISTURBED BY THE MULTIPLE BURDENS WHICH WOULD RESULT FROM THE SIMULTANEOUS PURSUIT OF EMPLOYMENT .

26 IN PRINCIPLE , THEREFORE , A MEASURE SUCH AS MATERNITY LEAVE GRANTED TO A WOMAN ON EXPIRY OF THE STATUTORY PROTECTIVE PERIOD FALLS WITHIN THE SCOPE OF ARTICLE 2 (3) OF DIRECTIVE 76/207 , INASMUCH AS IT SEEKS TO PROTECT A WOMAN IN CONNECTION WITH THE EFFECTS OF PREGNANCY AND MOTHERHOOD . THAT BEING SO , SUCH LEAVE MAY LEGITIMATELY BE RESERVED TO THE MOTHER TO THE EXCLUSION OF ANY OTHER PERSON , IN VIEW OF THE FACT THAT IT IS ONLY THE MOTHER WHO MAY FIND HERSELF SUBJECT TO UNDESIRABLE PRESSURES TO RETURN TO WORK PREMATURELY .

27 FURTHERMORE , IT SHOULD BE POINTED OUT THAT THE DIRECTIVE LEAVES MEMBER STATES WITH A DISCRETION AS TO THE SOCIAL MEASURES WHICH THEY ADOPT IN - ORDER TO GUARANTEE , WITHIN THE FRAMEWORK LAID DOWN BY THE DIRECTIVE , THE PROTECTION OF WOMEN IN CONNECTION WITH PREGNANCY AND MATERNITY AND TO OFFSET THE DISADVANTAGES WHICH WOMEN , BY COMPARISON WITH MEN , SUFFER WITH REGARD TO THE RETENTION OF EMPLOYMENT . SUCH MEASURES ARE , AS THE GOVERNMENT OF THE UNITED KINGDOM HAS RIGHTLY OBSERVED , CLOSELY LINKED TO THE GENERAL SYSTEM OF SOCIAL PROTECTION IN THE VARIOUS MEMBER STATES . IT MUST THEREFORE BE CONCLUDED THAT THE MEMBER STATES ENJOY A REASONABLE MARGIN OF DISCRETION AS REGARDS BOTH THE NATURE OF THE PROTECTIVE MEASURES AND THE DETAILED ARRANGEMENTS FOR THEIR IMPLEMENTATION .

28 IT FOLLOWS FROM THE FOREGOING THAT THE REPLY TO BE GIVEN TO THE QUESTION SUBMITTED BY THE LANDESSOZIALGERICHT HAMBURG IS THAT ARTICLES 1 , 2 AND 5 (1) OF COUNCIL DIRECTIVE 76/207 MUST BE INTERPRETED AS MEANING THAT A MEMBER STATE MAY , AFTER THE STATUTORY PROTECTIVE PERIOD HAS EXPIRED , GRANT TO MOTHERS A PERIOD OF MATERNITY LEAVE WHICH THE STATE ENCOURAGES THEM TO TAKE BY THE PAYMENT OF AN ALLOWANCE . THE DIRECTIVE DOES NOT IMPOSE ON MEMBER STATES A REQUIREMENT THAT THEY SHALL , AS AN ALTERNATIVE , ALLOW SUCH LEAVE TO BE GRANTED TO FATHERS , EVEN WHERE THE PARENTS SO DECIDE .

29 SINCE THE REPLY TO THE FIRST QUESTION SUBMITTED BY THE LANDESSOZIALGERICHT IS IN THE NEGATIVE , THE SECOND QUESTION , CONCERNING THE EFFECT OF DIRECTIVE 76/207 IN THE EVENT OF ITS PROVISIONS BEING DISREGARDED BY A MEMBER STATE , IS OTIOSE .

COSTS

30 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS PENDING BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE LANDESSOZIALGERICHT HAMBURG , BY ORDER DATED 9 AUGUST 1983 , HEREBY RULES :

ARTICLES 1 , 2 AND 5 (1) OF COUNCIL DIRECTIVE 76/207 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 MUST BE INTERPRETED AS MEANING THAT A MEMBER STATE MAY , AFTER THE PROTECTIVE PERIOD HAS EXPIRED , GRANT TO MOTHERS A PERIOD OF MATERNITY LEAVE WHICH THE STATE ENCOURAGES THEM TO TAKE BY THE PAYMENT OF AN ALLOWANCE . THE DIRECTIVE DOES NOT IMPOSE ON MEMBER STATES A REQUIREMENT THAT THEY SHALL , AS AN ALTERNATIVE , ALLOW SUCH LEAVE TO BE GRANTED TO FATHERS , EVEN WHERE THE PARENTS SO DECIDE .

Judgment of the Court of 17 October 1989. - Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss. - Reference for a preliminary ruling: Faglige Voldgiftsret - Denmark. - Social policy - Equal pay for men and women. - Case 109/88.

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Keywords

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1.Preliminary questions - Reference to the Court - National court or tribunal within the meaning of Article 177 of the Treaty - Definition

(EEC Treaty, Art . 177)

2.Social policy - Male and female workers - Equal pay - Lack of transparency in undertaking' s system of pay - Average pay for women less than that for men - Burden of proof of non-discrimination - Application of criteria for pay supplement - Conditions

(EEC Treaty, Art . 119; Council Directive 75/117, Arts 1 and 6)

Summary

1.Where the law provides that an industrial arbitration board has jurisdiction in disputes between parties to collective agreements made between employees' and employers' organizations and either party may bring a case before it, so that the jurisdiction does not depend on the agreement between them, and the composition of the board is not within the parties' discretion but is determined by the law, 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 .

2.Directive 75/117 on equal pay for men and women must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men .

Where it appears that the application of criteria for pay supplements such as mobility, training or the length of service of the employee systematically works to the disadvantage of female employees, the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, but not if that criterion is understood as covering the quality of the work done by the employee; he may also justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee; he does not have to provide special justification for recourse to the criterion of length

of service, for it goes hand in hand with experience, which generally enables the employee to perform his duties better .

Parties

In Case 109/88

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) Is it 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 .

The burden of proof (Questions 1 (a) and 3 (a))

10 It is apparent from the documents before the Court that the issue between the parties to the main proceedings has its origin in the fact that the system of individual supplements applied to basic pay is implemented in such a way that a woman is unable to identify the reasons for a difference between her pay and that of a man doing the same work . Employees do not know what criteria in the matter of supplements are applied to them and how they are applied . They know only the amount of their supplemented pay without being able to determine the effect of the individual criteria . Those who are in a particular wage group are thus unable to compare the various components of their pay with those of the pay of their colleagues who are in the same wage group .

11 In those circumstances the questions put by the national court must be understood as asking whether the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female

worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men .

12 In that respect it must first be borne in mind that in its judgment of 30 June 1988 in Case 318/86 Commission v France ((1988)) ECR 3559, paragraph 27, the Court condemned a system of recruitment, characterized by a lack of transparency, as being contrary to the principle of equal access to employment on the ground that the lack of transparency prevented any form of supervision by the national courts .

13 It should next be pointed out that in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned . They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory .

14 Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed . The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality .

15 To show that his practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent .

16 In those circumstances the answers to Questions 1 (a) and 3 (a) must be that the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men .

The lawfulness of the contested criteria relating to supplements in question (Questions 1 (b) and 2 (a) and (c))

17 These questions ask in essence whether the directive must be interpreted as meaning that where it appears that the application of the criteria relating to supplements, such as mobility, training or length of service, systematically works to the disadvantage of female employees, the employer may, none the less, and if so on what conditions, justify its use . To answer that question it is necessary to consider each of the criteria separately .

18 As regards, in the first place, the criterion of mobility, the documents before the Court do not clearly disclose what is to be meant by this . At the hearing the Employers' Association stated that willingness to work different hours did not in itself justify a wage supplement . In applying the criterion of mobility the employer makes a global assessment of the quality of work done by his employees . For that purpose he takes account, in particular, of their enthusiasm for their work, their sense of initiative and the amount of work done .

19 In those circumstances a distinction must be made according to whether the criterion of mobility is employed to reward the quality of work done by the employee or is used to reward the employee' s adaptability to variable hours and varying places of work .

20 In the first case the criterion of mobility is undoubtedly wholly neutral from the point of view of sex . Where it systematically works to the disadvantage of women that can only be because the employer has misapplied it . It is inconceivable that the quality of work done by women should generally be less good . The employer cannot therefore justify applying the criterion of mobility, so understood, where its application proves to work systematically to the disadvantage of women .

21 The position is different in the second case . If it is understood as covering the employee' s adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly .

22 In its judgment of 13 May 1986 in Case 170/84 Bilka v Weber von Hartz ((1986)) ECR 1607, the Court took the view that an undertaking' s policy of generally paying full-time employees more than part-time employees who were excluded from the undertaking' s pension scheme, could affect far more women than men in view of the difficulties which women encountered in working full-time . It nevertheless held that the undertaking might show that its wages practice was based on objectively justified factors unrelated to any discrimination on grounds of sex and if the undertaking did so there was no infringement of Article 119 of the Treaty . Those considerations also apply in the case of a wages practice which specially remunerates the employee' s adaptability to variable hours and varying places of work . The employer may therefore justify the remuneration of such adaptability by showing it is of importance for the performance of specific tasks entrusted to the employee .

23 In the second place, as regards the criterion of training, it is not be excluded that it may work to the disadvantage of women in so far as they have had less opportunity than men for training or have taken less advantage of such opportunity . Nevertheless, in view of the considerations set out in the aforementioned judgment of 13 May 1986 the employer may justify remuneration of special training by showing that it is of importance for the performance of specific tasks entrusted to the employee .

24 In the third place, as regards the criterion of length of service, it is also not to be excluded, as with training, that it may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career . Nevertheless, since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employee .

25 In those circumstances the answer to Questions 1 (b) and 2 (a) and (c) must be that the Equal Pay Directive must be interpreted as meaning that where it appears that the application of criteria, such as the employee' s mobility, training or length of service, for the award of pay supplements systematically works to the disadvantage of female employees :

(i) the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee,

but not if that criterion is understood as covering the quality of the work done by the employee;

(ii) the employer may justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee;

(iii) the employer does not have to provide special justification for recourse to the criterion of length of service .

The manner in which an employer may lawfully differentiate the pay of his employees (Question 2 (b))

26 Since the answers to the questions on the lawfulness of the criteria for the supplements in issue (Questions 1 (b) and 2 (a) and (c)) have shown the manner in which the lawfulness of such criteria for supplements should be appraised under Community law, the question of a way in which an employer may lawfully differentiate the pay of his employees (Question 2 (b)) does not call for an answer .

The effect of the existence of two separate collective agreements (Question 4)

27 With this question the national court asks whether the fact that two separate collective agreements applying essentially to male and female employees respectively excludes the application of the Equal Pay Directive .

28 In that respect it is to be observed that the order making the reference itself shows that the aforementioned collective agreement of 19 March 1983 is the only one at issue in the present case . The parties to the main proceedings moreover confirmed at the hearing that this is the case . In those circumstances it is not necessary to answer Question 4 put by the national court .

Decision on costs

Costs

29 The costs incurred by the Danish, Italian, Portuguese and United Kingdom Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable . As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court .

Operative part

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Industrial Arbitration Board, by order of 12 October 1987, hereby rules :

Council Directive 117/75/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 must be interpreted as meaning that :

(1) where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a

female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men;

(2) where it appears that the application of criteria for additional payments such as mobility, training or the length of service of the employee systematically works to the disadvantage of female employees :

(i) the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, but not if that criterion is understood as covering the quality of the work done by the employee;

(ii) the employer may justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee;

(iii) the employer does not have to provide special justification for recourse to the criterion of length of service .

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Judgment of the Court

of 10 July 1990

Anklagemyndigheden v Hansen & Soen I/S. Reference for a preliminary ruling: Vestre Landsret - Denmark. Transport - Penalties for infringement of Community law - Strict criminal liability - Regulation (EEC) No 543/69. Case C-326/88.

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1 . Member States - Obligations - Obligation to penalize infringements of Community law – Scope (EEC Treaty, Art. 5)

2 . Transport - Road transport - Social provisions - Application by the Member States - Introduction of strict criminal liability of the employer for infringements committed by his employees – Whether permissible – Conditions (Regulation No 543/69 of the Council, Arts 7(2) and 11)

1 . Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

2 . Neither Regulation No 543/69 on the harmonization of certain social legislation relating to road transport nor the general principles of Community law preclude the application of national provisions under which an employer whose drivers infringe Articles 7(2) and 11 of the regulation may be the subject of a criminal penalty notwithstanding the fact that the infringement cannot be imputed to an intentional wrongful act or to negligence on the employer' s part, on condition that the penalty provided for is similar to those imposed in the event of infringement of provisions of national law of similar nature and importance and is proportionate to the seriousness of the infringement committed.

In Case C-326/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Vestre Landsret (Western Regional Court) for a preliminary ruling in the proceedings pending before that court between Anklagemyndigheden (Public Prosecutor)

and

Hansen & S n I/S, in the person of Hardy Hansen,

on the interpretation of Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport

(Official Journal, English Special Edition 1969 (I), p. 170),

THE COURT

composed of : O. Due, President, Sir Gordon Slynn and C. N. Kakouris (Presidents of Chambers), J. C.Moitinho de Almeida, G. C . Rodríguez Iglesias, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General : W. Van Gerven

Registrar : H. A. Ruehl, Principal Administrator,

after considering the observations submitted on behalf of

the Danish Government, by J rgen Molde, Legal Adviser, acting as Agent,

the United Kingdom, by S. J. Hay of the Treasury Solicitor' s Department, acting as Agent,

the Commission of the European Communities, by Johannes Buhl, Legal Adviser, and Ricardo Gosalbo Bono, a member of the Commission' s Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument on the part of Hansen & S n I/S, represented by Mr Hjulmand, advocate,

and on the part of the Danish Government, the United Kingdom and the Commission at the hearing on 19

October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 December 1989,

gives the following

Judgment

1 By decision of 29 January 1988, which was received at the Court on 9 November 1988, the Vestre Landsret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport.

2 That question was raised in criminal proceedings initiated against Hansen & S n I/S, in its capacity as the employer of a driver, on the ground that the latter had infringed certain provisions of Regulation No 543/69, namely Article 7(2) concerning the maximum daily driving period and Article 11 concerning the compulsory daily rest period.

3 Article 18(1) of Regulation No 543/69 provides that the Member States are to adopt such laws, regulations or administrative provisions as may be necessary for the implementation of the regulation. Those provisions must cover inter alia the penalties applicable in case of breach of the rules laid down therein.

4 In accordance with the authority conferred on him by Article 1(1) of Danish Law No 508 of 29 November 1972 to implement the provisions of the aforesaid Council regulation, the Danish Minister for Labour adopted Ministerial Order No 448 of 2 June 1981. According to Article 9 of that order, in the case of infringements of Articles 7 and 11 of Regulation No 543/69 an employer may be made liable to a fine where the journey is undertaken in his interest, even though the infringement cannot be imputed to an intentional act or negligence on his part .

5 On the basis of that provision, Hansen & S n was ordered to pay a fine by the Graasten District Court, although the infringement was not imputed to an intentional act or negligence on the defendant' s part . In its appeal to the Vestre Landsret, Hansen & S n argued that strict criminal liability, such as that introduced by the 1981 order, was incompatible with Regulation No 543/69 of the Council.

6 The Vestre Landsret decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling :

"Does Regulation (EEC) No 543/69 of the Council on the harmonization of certain social legislation relating to road transport, as amended, prohibit national provisions under which an employer whose drivers infringe Articles 7(2) and 11 of the regulation concerning driving and rest periods may be the subject of a criminal penalty notwithstanding the fact that the infringement cannot be imputed to an intentional act or to negligence on the employer' s part?"

7 Reference is made to the Report for the Hearing for a fuller account of the legal background and the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 Hansen & S n has put forward two arguments in support of the view that Article 9 of the 1981 Danish order is incompatible with Regulation No 543/69.

9 In the first place, it argues that, by introducing strict criminal liability, the Danish Government sought to extend the scope of Regulation No 543/69 and imposed on employers an obligation which is not provided for therein. In support of that assertion it refers to the Court' s judgment in Case 69/74 Auditeur de travail v Cagnon and Taquet [1975] ECR 171, paragraph 10, in which the Court stated that the obligation imposed on the employer by Article 11 of that regulation was limited to taking the necessary measures to permit his employees to have the daily rest period laid down.

10 In support of that argument, Hanson & S n adds that Article 15 of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport (Official Journal 1985 L 370, p. 1), which repealed Regulation No 543/69 with effect from 29 September 1986, merely rendered more explicit the provisions that were applicable under the regulation previously in force. According to that provision, the employer is required to organize the work in such a way as to enable drivers to comply with the Community rules, and is required to take appropriate steps to prevent the repetition of any breaches found.

11 That argument cannot be accepted. Articles 7 and 11 of Regulation No 543/69 set limits to the driving periods and rest periods which must be complied with by the driver and other crew members of a vehicle.

Article 18 requires the Member States to take the measures necessary to ensure compliance with those limits. A provision of national law which makes an employer criminally liable for an infringement by one of his employees of the rules laid down by Articles 7 and 11 of Regulation No 543/69 does not in itself extend the scope of that regulation. Such liability constitutes a means of ensuring compliance with the limits set by those provisions.

12 As for Article 15 of Regulation No 3820/85, its purpose is not to limit the employer' s liability for his employees who fail to comply with the driving and rest periods, but to impose specific and distinct obligations on the employer himself. It follows that there is nothing in the

provisions in question to prevent an employer from being made strictly liable in criminal law.

13 Hansen & S n also maintains that although Denmark alone has introduced a system of strict criminal liability, the risk of being penalized is greater for undertakings established in that Member State and therefore competition within the common market is distorted, contrary to the aims of Regulation No 543/69 which is designed to harmonize the relevant national legislation.

14 It should be noted, in that regard, that although Regulation No 543/69 is designed to harmonize certain provisions which affect competition in the field of road transport, it leaves a broad discretion to the Member States with regard to the implementation of those provisions. In the first place, Article 13 authorizes the Member States to apply stricter measures to drivers of vehicles registered within their territory, and secondly Article 18 leaves it to the Member States to determine the nature and the severity of the penalties to be imposed in case of breach.

15 It should be further observed that the economic consequences of an infringement of Regulation No 543/69 vary not only according to the system of criminal liability introduced by the Member State in question but also according to the level of the fine imposed and the degree of effectiveness of the checks carried out. Accordingly, the introduction of a system of strict criminal liability does not in itself involve a distortion of the conditions of competition.

16 Regulation No 543/69 must therefore be regarded as not precluding the application of national provisions penalizing an employer whose drivers have infringed Articles 7(2) and 11 of the regulation, even though that infringement cannot be imputed to an intentional wrongful act or to negligence on the employer' s part.

17 Furthermore, it should be borne in mind that, according to the consistent case-law of the Court, as confirmed by its judgment in Case 68/88 Commission v Greece [1989] ECR 2965, where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the EEC Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

18 It is apparent from the order for reference that the introduction of strict criminal liability corresponds to the system generally applicable in Denmark for the protection of the working environment.

19 Furthermore, it is necessary to bear in mind, in the first place, that a system of strict liability may prompt the employer to organize the work of his employees in such a way as to ensure compliance with the regulation and, secondly, that road safety, which, according to the third and ninth recitals in the preamble to Regulation No 543/69, is one of the objectives of that regulation, is a matter of public interest which may justify the imposition of a fine on the employer for infringements committed by his employees and a system of strict criminal liability. Hence the imposition of a fine, which is consistent with the duty of cooperation referred to in Article 5 of the EEC Treaty, is not disproportionate to the objective pursued. The application of the principle of proportionality to the amount of the fine has not been called in question in this case.

20 It follows from all the foregoing considerations that the answer to the question submitted by the Vestre Landsret must be that neither Regulation No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport nor the general principles of Community law preclude the application of national provisions under which an employer whose drivers infringe Articles 7(2) and 11 of the regulation may be the subject of a criminal penalty notwithstanding the fact that the infringement cannot be imputed to an intentional wrongful act or to negligence on the employer' s part, on condition that the penalty provided for is similar to those imposed in the event of infringement of provisions of national law of similar nature and importance and is proportionate to the seriousness of the infringement committed.

Costs

21 The costs incurred by the Danish Government, 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 proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Vestre Landsret, by decision of 28 January 1988, hereby rules :

Neither Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport nor the general principles of Community law preclude the application of national provisions under which an employer whose drivers infringe Articles 7(2) and 11 of the regulation may be the subject of a criminal penalty notwithstanding the fact that the infringement cannot be imputed to an intentional wrongful act or to negligence on the employer' s part, on condition that the penalty provided for is similar to those imposed in the event of infringement of provisions of national law of similar nature and importance and is proportionate to the seriousness of the infringement committed.

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Judgment of the Court (Sixth Chamber)

of 7 March 1996

El Corte Inglés SA v Cristina Blazquez Rivero. Reference for a preliminary ruling: Juzgado de Primera Instancia n. 10 de Sevilla - Spain. Direct effect of unimplemented directive - Council Directive 87/102/EEC concerning consumer credit. Case C-192/94.

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1. Acts of the institutions ° Directives ° Direct effect ° Limits ° Possibility of relying on a directive against an individual ° Precluded (EC Treaty, Art. 189, third para.)

2. Approximation of laws ° Consumer protection in respect of consumer credit ° Directive 87/102 ° Possibility, in the absence of implementing measures, of relying on the directive in order to claim a right of action against a lender who is a private person ° Precluded ° Community competence under Article 129a ° No effect (EC Treaty, Arts 129a and 189, third para.; Council Directive 87/102, Art. 11)

3. Community law ° Rights conferred on individuals ° Infringement by a Member State of the obligation to transpose a directive ° Obligation to make good damage caused to individuals ° Conditions (EC Treaty, Art. 189, third para.)

1. The ability to rely on directives against State entities is based on the binding nature of directives ° which applies only with regard to the Member States to which they are addressed ° and seeks to prevent a State from taking advantage of its failure to comply with Community law. The effect of extending that principle to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations or decisions. It follows that a directive may not of itself impose obligations on an individual and may therefore not be relied upon as such against such a person.

2. In the absence of measures implementing Directive 87/102 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit within the period prescribed by that directive, a consumer may not, even in view of Article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit, and assert that right before a national court. Article 129a is limited in scope. On the one hand, it provides that the Community is under a duty to contribute to the attainment of a high level of consumer protection. On the other, it creates Community competence with a view to specific action relating to consumer protection policy apart from measures taken in connection with the internal market. In so far as it merely assigns an objective to the Community and confers powers on it to that end without also laying down any obligation on Member States or individuals, Article 129a cannot justify the possibility of clear, precise and unconditional provisions of directives on consumer protection which have not been transposed into Community law within the prescribed period being directly relied on as between individuals.

3. If the result prescribed by the directive cannot be achieved by way of interpretation, Community law requires the Member States to make good damage caused to individuals

through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State' s obligation and the damage suffered.

In Case C-192/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Juzgado de Primera Instancia No 10

de Sevilla (Spain) for a preliminary ruling in the proceedings pending before that court between

El Corte Inglés SA

and

Cristina Blazquez Rivero

on the interpretation of Article 129a of the EC Treaty and Article 11 of Council Directive 87/102/EEC of

22 December 1986 for the approximation of the laws, regulations and administrative provisions of the

Member States concerning consumer credit

THE COURT (Sixth Chamber),

composed of: C.N. Kakouris, President of the Chamber, G. Hirsch (Rapporteur), P.J.G. Kapteyn, J.L.

Murray and H. Ragnemalm, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

° El Corte Inglés SA, by S. Martínez Lage and J. Pérez-Bustamente Koester, of the Madrid Bar,

° the Spanish Government, by A.J. Navarro Gonzalez, Director-General for Community Legal and

Institutional Affairs, and R. Silva de Lapuerta, Abogado del Estado, acting as Agents,

° the French Government, by I. Latournarie, Civil Administrator in the Legal Affairs Department of the

Ministry of Foreign Affairs, and E. Belliard, Deputy Director for Legal Affairs in that ministry, acting as Agents,

° the Commission of the European Communities, by A. Alcover, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 December 1995, gives the following

Judgment

1 By order of 30 June 1994, received at the Court on 4 July 1994, the Juzgado de Primera Instancia No 10 (Court of First Instance No 10), Seville, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 129a of the EC Treaty and Article 11 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48, hereinafter "the directive").

2 The question was raised in proceedings brought by a finance company, El Corte Inglés (hereinafter "the finance company"), against Mrs Blazquez Rivero after she suspended payments to the finance company.

3 Mrs Blazquez Rivero entered into a contract for holiday travel with the travel agency Viajes El Corte Inglés SA (hereinafter "the travel agency") which she financed in part by a loan obtained from the finance company. The finance company had the exclusive right to grant loans to the travel agency' s customers under an agreement between the two companies.

4 Mrs Blazquez Rivero accused the travel agency of shortcomings in performing its obligations and made several complaints against it. When those complaints proved unsuccessful, she ceased to pay instalments on the loan, whereupon the finance company brought proceedings in the Juzgado de Primera Instancia, Seville, for payment of the outstanding balance.

5 Before the national court, Mrs Blazquez Rivero entered the defence against the finance company that the travel contract had not been performed, without drawing any distinction between the finance company and the travel agent in view of the close bond between them.

6 The national court took the view that Article 11(2) of the directive enabled the consumer to bring an action against the finance company. Article 11(2) provides as follows:

"Where:

(a) in order to buy goods or obtain services the consumer enters into a credit agreement with a person other than the supplier of them;

and

(b) the grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier;

and

(c) the consumer referred to in subparagraph (a) obtains his credit pursuant to that pre-existing agreement;

and

(d) the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for supply of them; and

(e) the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled,

the consumer shall have the right to pursue remedies against the grantor of credit. Member States shall determine to what extent and under what conditions these remedies shall be exercisable."

7 In the national court' s view, it is irrelevant that the action was brought, as in this case by the finance company and not by the consumer, since rights may be relied on in any event whether by way of action or by way of defence.

8 It found, however, that Article 11(2) of the directive had not been transposed into Spanish law even though the period prescribed for implementation had run out at the material time and that the result intended by that provision could not be attained by interpreting national law in conformity with the directive. Indeed, Article 1257 of the Spanish Civil Code, under which "contracts shall have effects only between the parties which concluded them and their heirs", prevents the consumer from pleading the shortcomings of the travel agency as against the finance company.

9 Although it considered that Article 11(2) was sufficiently clear, precise and unconditional to be relied on before it, it suspended the proceedings and asked the Court to give a preliminary ruling on the following question:

"Is Article 11 of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, which has not been implemented in national law by the Spanish State, directly applicable in a case where a consumer seeks to rely, against a claim by the grantor of credit, on the defects in the service supplied by the supplier with whom the said grantor of credit has concluded an exclusive agreement for granting credit to his customers?"

10 Shortly after this question was referred, the Court gave judgment in Case C-91/92 Faccini Dori [1994] ECR I-3325, in which it reaffirmed its case-law according to which directives do not have any horizontal direct effect. The Court forwarded a copy of that judgment to the national court and asked it whether, in the light of that judgment, it wished to maintain its question.

11 The national court considered that the judgment in Faccini Dori provided a clear answer to the question of the horizontal direct effect of unimplemented directives, but observed that, unlike in the case of the dispute before it, Faccini Dori was concerned with facts antedating the entry into force of the Treaty on European Union. That Treaty introduced a new consumer protection provision, Article 129a.

12 Article 129a provides as follows:

"1. The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;

(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them."

13 The national court maintained its question on the ground that it wondered whether that

rule establishing the principle of a high degree of consumer protection might have any bearing on the direct effect as between individuals of Article 11 of the directive.

14 By its question, the national court essentially seeks to establish whether, in the absence of measures implementing the directive within the prescribed period, a consumer may, in view of Article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit and assert that right before a national court.

Whether the provisions of the directive relating to the consumer' s right of action may be relied on in proceedings between the consumer and a lender

15 As the Court has consistently held (see, in particular, Case 152/84 Marshall I [1986] ECR 723, paragraph 48), a directive may not of itself impose obligations on an individual and may therefore not be relied upon as such against such a person.

16 As for the case-law on when directives may be relied upon against State entities, it is based on the binding nature of directives, which applies only with regard to the Member States to which they are addressed, and seeks to prevent a State from taking advantage of its own failure to comply with Community law (see Marshall I, paragraphs 48 and 49).

17 The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations or decisions (see Faccini Dori, paragraph 24).

18 Article 129a of the Treaty cannot alter that case-law, even if only in relation to directives on consumer protection.

19 Suffice it to say in this connection that the scope of Article 129a is limited. On the one hand, it provides that the Community is under a duty to contribute to the attainment of a high level of consumer protection. On the other, it creates Community competence with a view to specific action relating to consumer protection policy apart from measures taken in connection with the internal market.

20 In so far as it merely assigns an objective to the Community and confers powers on it to that end without also laying down any obligation on Member States or individuals, Article 129a cannot justify the possibility of clear, precise and unconditional provisions of directives on consumer protection which have not been transposed into Community law within the prescribed period being directly relied on as between individuals.

21 Consequently, a consumer cannot base on the directive itself a right of action against a lender who is a private person following shortcomings in the supply of goods or the provision of services and assert that right before a national court.

22 Moreover, if the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy [1991] ECR I-5357, paragraph 39, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State' s obligation and the damage suffered (Faccini Dori,

paragraph 27).

23 In the light of the foregoing, it should be stated in reply to the national court' s question that, in the absence of measures implementing the directive within the prescribed period, a consumer may not, even in view of Article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier

or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit and assert that right before a national court.

Costs

24 The costs incurred by the Spanish and French Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber), in answer to the question referred to it by the Juzgado de Primera Instancia No 10, Seville, by order of 30 June 1994, hereby rules:

In the absence of measures implementing Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit within the prescribed period, a consumer may not, even in view of Article 129a of the EC Treaty, base a right of action on the directive itself against a lender who is a private person, on account of inadequacies in the supply of goods or provision of services by the supplier or provider with whom the lender concluded an exclusive agreement with regard to the grant of credit and assert that right before a national court.

Judgment of the Court of 30 April 1996. - CIA Security International SA v Signalson SA and Securitel SPRL. - Reference for a preliminary ruling: Tribunal de commerce de Liège - Belgium. - Interpretation of Article 30 of the EC Treaty and of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations - National legislation on the marketing of alarm systems and networks - Prior administrative approval. - Case C-194/94.

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Keywords

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1. Preliminary rulings ° Reference to the Court ° Scope of national legislation ° Need for a preliminary ruling ° Assessment by the national court

(EC Treaty, Art. 177)

2. Approximation of laws ° Procedure for the provision of information in the field of technical standards and regulations ° Technical regulations within the meaning of Directive 83/189 ° Meaning ° National legislation on security firms and equipment made available by them to consumers

(Council Directive 83/189, Art. 1)

3. Approximation of laws ° Procedure for the provision of information in the field of technical standards and regulations ° Member States' obligation to notify to the Commission any draft regulations ° Possibility for individuals to rely on the corresponding provisions ° Breach of the obligation ° Consequence ° Unnotified regulations not enforceable against individuals

(Council Directive 83/189, Arts 8 and 9)

4. Free movement of goods ° Quantitative restrictions ° Measures having equivalent effect ° Carrying on of business as a security firm made subject to prior administrative approval ° Whether permissible

(EC Treaty, Art. 30)

Summary

1. Under the procedure provided for by Article 177 of the Treaty, it is for the national court to assess the scope of national provisions and the manner in which they are to be applied. Since the national court is best placed to assess, in view of the particularities of the case, the need for a preliminary ruling in order to give its judgment, preliminary questions cannot be regarded as having become redundant as a result of national legislation being replaced by other legislation.

2. A national provision according to which only persons with prior ministerial authorization may operate a security firm does not constitute a technical regulation within the meaning of Article 1 of the Directive 83/189, laying down a procedure for the provision of information in the field of technical standards and regulations, in so far as such a provision merely lays down the conditions for the establishment of security firms and contains no specifications defining the characteristics of products.

On the other hand, provisions laying down the procedure for approval of alarm systems and networks which security firms may make available to consumers do constitute such technical

regulations in so far as such provisions lay down detailed rules defining in particular the conditions concerning the quality tests and function tests which must be fulfilled in order for an alarm system or network to be approved and marketed in the national territory.

In the case of a rule which provides that the products in question may be marketed only after having being previously approved according to a procedure to be laid down by administrative regulation, classification of such a rule depends on its legal effects under domestic law. If, under domestic law, such a rule merely serves as a basis for enabling administrative regulations containing rules binding on the persons concerned to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive. If, however, it obliges the undertakings concerned to apply for prior approval of their equipment, it must be classified as a technical regulation, even if the administrative rules envisaged have not been adopted.

3. Articles 8 and 9 of Directive 83/189, laying down a procedure for the provision of information in the field of technical standards and regulations, under which Member States must notify the Commission of all draft technical regulations covered by the directive and, except in particular urgent cases, suspend their adoption and implementation for specified periods, are to be interpreted as meaning that individuals may rely on them before the national court, which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

First, by laying down a precise obligation on Member States to notify draft technical regulations before they are adopted, those provisions are unconditional and sufficiently precise in terms of their content. Secondly, an interpretation of the directive to the effect that breach of the obligation to notify constitutes a substantial defect such as to render the technical regulations in question inapplicable to individuals is such as to ensure the effectiveness of the preventive Community control for which the directive made provision in order to ensure that goods can move freely, which is what it was designed to do.

4. Article 30 of the Treaty does not preclude a national provision according to which only persons with prior ministerial authorization may operate a security firm. Since such a provision imposes a condition for the establishment and carrying on of business as a security firm, it does not fall within the scope of Article 30.

In Case C-194/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Commerce de Liège (Belgium) for a preliminary ruling in the proceedings pending before that court between

CIA Security International SA

and

Signalson SA,

Securitel SPRL,

on the interpretation of Article 30 of the EC Treaty and 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 by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward and J.-P. Puissochet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann (Rapporteur), J.L. Murray, H. Ragnemalm and L. Sevón, Judges,

Advocate General: M.B. Elmer,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

° CIA Security International SA, by C. van Rutten, of the Liège Bar,

° Signalson SA, by V.-V. Dehin, of the Liège Bar,

° Securitel SPRL, by J.-L. Brandenberg, of the Liège Bar,

° the Belgian Government, by J. Devadder, Director of Administration in the Ministry of Foreign Affairs, acting as Agent,

° the German Government, by E. Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

° the Netherlands Government, by A. Bos, Legal Adviser, acting as Agent,

° the United Kingdom, by S. Braviner, of the Treasury Solicitor' s Department, and E. Sharpston, Barrister, acting as Agents,

° the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and J.-F. Pasquier, national official seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of CIA Security International SA, represented by C. van Rutten; of Signalson SA, represented by V.-V. Dehin; of the Belgian Government, represented by D. Jacob, Deputy Adviser in the Ministry of Home Affairs, acting as Agent; of the Netherlands Government,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1995,

gives the following

Judgment

1 By judgment of 20 June 1994, received at the Court on 4 July 1994, the Tribunal de Commerce (Commercial Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of Article 30 of that Treaty and 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, hereinafter "Directive 83/189"), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75).

2 Those questions have been raised in two sets of proceedings between (i) CIA Security International SA (hereinafter "CIA Security") and Signalson SA (hereinafter "Signalson") and (ii) CIA Security and Securitel SPRL (hereinafter "Securitel"), those three companies being

security firms within the meaning of the Belgian Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services (hereinafter "the 1990 Law").

3 Article 1(3) of the 1990 Law provides: "Any legal or natural person pursuing an activity consisting in supplying to third parties, on a permanent or occasional basis, design, installation and maintenance services for alarm systems and networks shall be considered to be a security firm for the purposes of this Law."

4 Article 1(4) of the 1990 Law provides: "The alarm systems and networks referred to in this article are those intended to prevent or record crimes against persons or property".

5 Article 4 of the 1990 Law provides: "Only persons with prior authorization from the Home Affairs Ministry may operate a security firm. Authorization shall be granted only if the firm meets the requirements laid down in this Law and the conditions concerning financial means and technical equipment prescribed by royal decree ...".

6 Article 12 of the 1990 Law provides: "The alarm systems and networks referred to in Article 1(4) and their components may be marketed or otherwise made available to users only after prior approval has been granted under a procedure to be laid down by royal decree ...".

7 That procedure was laid down by Royal Decree of 14 May 1991 laying down the procedure for approval of the alarm systems and networks referred to in the 1990 Law (hereinafter "the 1991 Decree").

8 Article 2(1) of the 1991 Decree provides: "No manufacturer, importer, wholesaler or any other natural or legal person may market new equipment or otherwise make it available to users in Belgium if it has not been previously approved by a committee established for that purpose (the 'equipment committee')."

9 Articles 4 to 7 of the 1991 Decree provide for equipment to be examined and tested before it can be approved.

10 According to Article 5, that examination is to consist of identifying the equipment, checking electrical circuits against the documents submitted by the manufacturer and checking the minimum required functions. The tests carried out on the equipment, provided for by Article 6 of the 1991 Decree, concern functional adequacy, mechanical aspects, mechanical and/or electronic reliability, sensitivity to false alarms, and protection against fraud or attempts to neutralize the equipment. For that purpose, equipment is subjected to the tests prescribed in Annexes 3 and 4 to the 1991 Decree.

11 Article 8 of the 1991 Decree provides that: "If the applicant establishes by means of the necessary documents that his equipment has already undergone tests which are at least equivalent to those described in Article 7 in an authorized laboratory in another Member State of the EEC according to EEC rules and that it has been approved at most three years before the date of the current application, a body referred to in Article 4(1) shall carry out on the equipment only such tests as have not yet been carried out in the other Member State of the EEC."

12 The case-file also shows that the 1991 Decree was not notified to the Commission in accordance with the procedure for the provision of information on technical regulations laid down in Directive 83/189 and that, in February 1993, following delivery of a reasoned opinion by the Commission pursuant to Article 169 of the EEC Treaty, the Belgian Government notified a new draft royal decree laying down the procedure for approval of alarm systems and networks. That draft, adopted on 31 March 1994, is substantially identical

to the 1991 Decree which it repealed, Article 8 of the 1991 Decree having, however, been amended in accordance with suggestions made by the Commission.

13 The three companies involved in the main proceedings are competitors whose business is, in particular, the manufacture and sale of alarm systems and networks.

14 On 21 January 1994 CIA Security applied to the Liège Commercial Court for orders requiring Signalson and Securitel to cease alleged unfair trading practices pursued in January 1994. It based its claims on Articles 93 and 95 of the Belgian Law of 14 July 1991 on Commercial Practices which prohibits unfair trading practices. CIA Security claims that Signalson and Securitel have libelled it by claiming in particular that the Andromède alarm system which it markets did not fulfil the requirements laid down by Belgian legislation on security systems.

15 Signalson and Securitel have lodged counterclaims, the main one being for an order restraining CIA Security from continuing to carry on business on the ground that it is not authorized as a security firm and that it is marketing an alarm system which has not been approved.

16 In an interim judgment the Liège Commercial Court held that, although the main claims and counterclaims seek orders restraining unfair practices prohibited by the Law on Commercial Practices, those practices must still be assessed by reference to the provisions of the 1990 Law and the 1991 Decree.

17 It then found that if CIA Security has infringed the 1990 Law and the 1991 Decree, the actions which it has brought could be declared inadmissible for lack of locus standi or sufficient legal interest in bringing proceedings whilst if the 1990 Law and the 1991 Decree are incompatible with Community law, Signalson and Securitel will not be able to base their counterclaims for restraining orders on breach of those legal provisions.

18 Unsure whether the Belgian provisions in question are compatible with Article 30 of the Treaty and having found that those provisions had not been previously notified to the Commission in accordance with Directive 83/189, the Liège Commercial Court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Does the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services and, more particularly, Articles 4 and 12 thereof, create quantitative restrictions on imports or does it contain measures having an effect equivalent to a quantitative restriction prohibited by Article 30 of the EEC Treaty?

2. Is the Royal Decree of 14 May 1991 laying down the procedure for approving alarm systems and networks, which is referred to in the Law of 10 April 1990, and in particular Articles 2 and 8 thereof, compatible with Article 30 of the Treaty which prohibits quantitative restrictions on imports and all measures having an effect equivalent to a quantitative restriction?

3. Does the abovementioned Law of 10 April 1990, in particular Articles 4 and 12 therefore, contain technical regulations which should have been communicated to the Commission beforehand in accordance with Article 8 of Directive 83/189/EEC?

4. Does the Royal Decree of 14 May 1991, in particular Articles 2 and 8 thereof, contain technical regulations which should have been communicated to the Commission beforehand in accordance with Article 8 of Directive 83/189/EEC?

5. Are the provisions of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, in particular Articles 8 and 9 thereof, unconditional and sufficiently precise to be relied upon by individuals in proceedings before national courts?

6. Do Community law and the protection which it affords to individuals require a national court to refuse to apply a national technical regulation which has not been communicated to the Commission by the Member State which adopted it, in accordance with the obligation laid down in Article 8 of Council Directive 83/189/EEC?"

Preliminary observations

19 According to the Belgian Government, Signalson and Securitel, any question as to the compatibility of the 1991 Decree with Community law is now redundant since in the type of case before it the national court must apply the law in force at the time when it gives its ruling and that, since the time when proceedings were commenced, the 1991 Decree has been replaced by the Royal Decree of 31 March 1994, which, according to the Commission, is in accordance with Community law.

20 That argument cannot be accepted. According to the case-law of the Court, it is for the national court to assess the scope of the national provisions and the manner in which they must be applied (see, in particular, the judgment in Case C-45/94 Ayuntamiento de Ceuta [1995] ECR I-4385, paragraph 26). Since the national court is best placed to assess, in view of the particularities of the case, the need for a preliminary ruling in order to give its judgment, the preliminary questions cannot be regarded as having become redundant as a result of the Decree of 14 May 1991 being replaced by the Royal Decree of 31 March 1994.

21 That being so, the third, fourth, fifth and sixth questions should be answered first.

The third and fourth questions

22 By its third and fourth questions the national court asks in substance whether provisions such as Articles 4 and 12 of the 1990 Law and the 1991 Decree constitute technical regulations which should have been notified to the Commission prior to their adoption, in accordance with Article 8 of Directive 83/189.

23 "Technical regulation" is defined in point (5) of Article 1 of Directive 83/189 as "technical specifications, 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, except those laid down by local authorities". "Technical specification" is defined in point (1) of that article as "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 terminology, symbols, testing and test methods, packaging, marking or labelling ...".

24 The first point which must be examined is whether a provision such as Article 4 of the 1990 Law constitutes a technical regulation within the meaning of Directive 83/189.

25 The answer to that question must be negative since according to Directive 83/189 technical regulations are specifications defining the characteristics of products and Article 4 is confined to laying down conditions governing the establishment of security firms.

26 As regards the 1991 Decree, it contains detailed rules defining, in particular, the conditions concerning the quality tests and function tests which must be fulfilled in order for

an alarm system or network to be approved and marketed in Belgium. Those rules therefore constitute technical regulations within the meaning of Directive 83/189.

27 As regards Article 12 of the 1990 Law, it is to be recalled that it provides that the products in question may be marketed only after having been previously approved according to a procedure to be laid down by royal decree, which was laid down by the 1991 Decree.

28 According to the Commission and CIA Security, Article 12 of the 1990 Law constitutes a technical regulation within the meaning of Directive 83/189 whilst Signalson, the United Kingdom and the Belgian Government, in their written observations, submit that this article is merely a framework law not comprising any technical regulation within the meaning of Directive 83/189.

29 A rule is classified as a technical regulation for the purposes of Directive 83/189 if it has legal effects of its own. If, under domestic law, the rule merely serves as a basis for enabling administrative regulations containing rules binding on interested parties to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive (see the judgment in Case C-317/92 Commission v Germany [1994] ECR I-2039, paragraph 26). It should be recalled here that, according to the first subparagraph of Article 8(1) of Directive 83/189, the Member States must communicate, at the same time as the draft technical regulation, the enabling instrument on the basis of which it was adopted, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

30 However, a rule must be classified as a technical regulation within the meaning of Directive 83/189 if, as the Belgian Government submitted at the hearing, it requires the undertakings concerned to apply for prior approval of their equipment, even if the administrative rules envisaged have not been adopted.

31 The reply to be given to the third and fourth questions must therefore be that a rule such as Article 4 of the 1990 Law does not constitute a technical regulation within the meaning of Directive 83/189 whereas provisions such as those contained in the 1991 Decree do constitute technical regulations and that classification of a rule such as Article 12 of the 1990 Law depends on the legal effects which it has under domestic law.

The fifth and sixth questions

32 By its fifth and sixth questions the national court asks in substance whether the provisions of Directive 83/189, and particularly Articles 8 and 9 thereof, are unconditional and sufficiently precise for individuals to be able to rely on them before a national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

33 Article 8(1) and (2) of Directive 83/189 provides:

"1. Member States shall immediately communicate to the Commission any draft technical regulation, except where such technical regulation 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 brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft. Where appropriate, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions

principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

The Commission shall immediately notify the other Member States of any draft it has received; it may also refer this draft to the Committee referred to in Article 5 and, if appropriate, to the Committee responsible for the field in question for its opinion.

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation."

34 Article 9 of Directive 83/189 provides:

"1. Without prejudice to paragraphs 2 and 2a, Member States shall postpone the adoption of a draft technical regulation for six months from the date of notification referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods. The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

2. The period in paragraph 1 shall be 12 months if, within three months following the notification referred to in Article 8(1), the Commission gives notice of its intention of proposing or adopting a Directive on the subject.

2a. If the Commission ascertains that a communication pursuant to Article 8(1) relates to a subject covered by a proposal for a directive or regulation submitted to the Council, it shall inform the Member State concerned of this fact within three months of receiving the communication.

Member States shall refrain from adopting technical regulations on a subject covered by a proposal for a directive or regulation submitted by the Commission to the Council before the communication provided for in Article 8(1) for a period of 12 months from the date of its submission.

Recourse to paragraphs 1, 2 and 2a of this Article cannot be accumulative.

3. Paragraphs 1, 2 and 2a shall not apply in those cases where, for urgent reasons relating to the protection of public health or safety, the protection of health and life of animals or plants, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible. The Member State shall give, in the communication referred to in Article 8, the reasons which warrant the urgency of the measures taken. The Commission shall take appropriate action in cases where improper use is made of this procedure."

35 Article 10 of Directive 83/189 provides that: "Articles 8 and 9 shall not apply where the Member States fulfil their obligations as arising out of Community directives and regulations; the same shall apply in the case of obligations arising out of international agreements which result in the adoption of uniform technical specifications in the Community."

36 In 1986, in Communication 86/C 245/05 (OJ 1986 C 245, p. 4) the Commission defined its position on the point raised by the Liège Commercial Court in its last two questions. In that communication the Commission stated that Directive 83/189 enabled it, as well as the Member States, to play an important role in preventing the creation of new technical barriers

to trade and that the obligations of the Member States created by the directive are clear and unequivocal in that:

° the Member States must notify all draft technical regulations falling under the Directive;

° they must suspend the adoption of the draft technical regulations automatically for three months, other than in the special cases covered by Article 9(3) of the Directive;

° they must suspend the adoption of the draft technical regulation for a further period of three or nine months depending on whether objections have been raised or whether Community legislation is envisaged.

Finally, the Commission stated that failure by Member States to respect the obligations arising under the directive would lead to the creation of serious loopholes in the internal market, with potentially damaging trade effects.

37 In the communication the Commission deduces from the points made therein that "when a Member State enacts a technical regulation falling within the scope of Directive 83/189/EEC without notifying the draft to the Commission and respecting the standstill obligation, the regulation thus adopted is unenforceable against third parties in the legal system of the Member State in question. The Commission therefore considers that litigants have a right to expect national courts to refuse to enforce national technical regulations which have not been notified as required by Community law".

38 In the present case the Commission has maintained that interpretation of Directive 83/189, which CIA Security has endorsed.

39 The German and Netherlands Governments and the United Kingdom do not agree with that interpretation. They consider that technical regulations within the meaning of Directive 83/189 may be enforced against individuals even if they were adopted in breach of the obligations which the directive entails. The arguments on which that interpretation is based are examined below.

40 The first point which must be made is that Directive 83/189 is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling public interest requirements. The control is also effective in that all draft technical regulations covered by the directive must be notified and, except in the case of those regulations whose urgency justifies an exception, their adoption or entry into force must be suspended during the periods laid down by Article 9.

41 The notification and the period of suspension therefore afford the Commission and the other Member States an opportunity to examine whether the draft regulations in question create obstacles to trade contrary to the EC Treaty or obstacles which are to be avoided through the adoption of common or harmonized measures and also to propose amendments to the national measures envisaged. This procedure also enables the Commission to propose or adopt Community rules regulating the matter dealt with by the envisaged measure.

42 It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in

Case 8/81 Becker [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357.

43 The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.

44 That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts.

45 It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.

46 The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.

47 The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.

48 For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

49 That interpretation of the directive is in accordance with the judgment given in Case 380/87 Enichem Base and Others v Comune di Cinisello Balsamo [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission' s agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and

the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

50 In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonizing directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission' s agreement or lack of opposition.

51 Finally, it must be examined whether, as the United Kingdom in particular observes, there are reasons specific to Directive 83/189 which preclude it from being interpreted as rendering technical regulations adopted in breach of the directive inapplicable to third parties.

52 In this regard, it has already been observed that if such regulations were not enforceable against third parties, this would create a legislative vacuum in the national legal system in question and could therefore entail serious drawbacks, particularly where safety regulations were concerned.

53 This argument cannot be accepted. A Member State may use the urgent-case procedure provided for in Article 9(3) of Directive 83/189 where, for reasons defined by that provision, it considers it necessary to prepare technical regulations in a very short space of time which must be enacted and brought into force immediately without any consultations being possible.

54 In view of the foregoing considerations, it must be concluded that Directive 83/189 is to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals.

55 The answer to the fifth and sixth questions must therefore be that Articles 8 and 9 of Directive 83/189 are to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

The first two questions

56 By its first and second questions the national court asks in substance whether Article 30 of the Treaty precludes national provisions such as Articles 4 and 12 of the 1990 Law and the 1991 Decree.

57 In view of the answers given to the third, fourth, fifth and sixth questions, it is not necessary to reply to the first two questions in so far as they relate to Article 12 of the 1990 Law and the 1991 Decree since those provisions are not enforceable against individuals. Therefore, only the part of the first question that inquires whether a provision such as Article 4 of the 1990 Law, which provides that no one may run a security firm without approval from the Home Affairs Ministry, is compatible with Article 30 of the Treaty need be answered.

58 Since such a provision imposes a condition for the establishment and carrying on of business as a security firm, it does not fall directly within the scope of Article 30 of the Treaty which concerns the free movement of goods between Member States. Furthermore, the case-file does not contain the slightest indication that such a provision has restrictive effects on the free movement of goods or is otherwise contrary to Community law.

59 The answer to the first preliminary question must therefore be that Article 30 of the Treaty does not preclude a national provision such as Article 4 of the 1990 Law.

Decision on costs

Costs

60 The costs incurred by the Belgian, German and Netherlands 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, in so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal de Commerce, Liège, by judgment of 20 June 1994, hereby rules:

1. A rule such as Article 4 of the Belgian Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services does not constitute a technical regulation within the meaning 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 by Council Directive 88/182/EEC of 22 March 1988, whereas provisions such as those contained in the Belgian Royal Decree of 14 May 1991 laying down the procedure for approval of the alarm systems and networks referred to in the Law of 10 April 1990 do constitute technical regulations and classification of a rule such as Article 12 of the Law of 10 April 1990 depends on the legal effects which it has under domestic law.

2. Articles 8 and 9 of Directive 83/189, as amended by Directive 88/182, are to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

3. Article 30 of the EC Treaty does not preclude a national provision such a Article 4 of the Law of 10 April 1990.

Judgment of the Court (Fourth Chamber) of 26 September 1996. - Criminal proceedings against Luciano Arcaro. - Reference for a preliminary ruling: Pretura circondariale di Vicenza - Italy. - Cadmium discharges - Interpretation of Council Directives 76/464/EEC and 83/513/EEC - Direct effect - Possibility for a directive to be relied on against an individual. - Case C-168/95.

European Court reports 1996 Page I-04705

Keywords

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1. Preliminary rulings ° Jurisdiction of the Court ° Identification of the subject-matter of the question referred

(EC Treaty, Art. 177)

2. Environment ° Water pollution ° Directives 76/464 and 83/513 ° Cadmium discharges ° Subject to prior authorization ° Exception for existing plant ° None ° Failure to transpose the directives ° Whether they may be relied on against an individual ° Not possible

(EC Treaty, Art. 189, third para.; Council Directives 76/464, Art. 3, and 83/513)

3. Acts of the institutions ° Directives ° Implementation by the Member States ° Need to ensure that directives are effective ° Obligations of the national courts ° Limits

(EC Treaty, Arts 5 and 189, third para.)

Summary

1. Where, under the procedure provided for by Article 177 of the Treaty, questions are formulated imprecisely, the Court may extract from all the information provided by the national court and from the documents concerning the main proceedings the points of Community law needing to be interpreted, having regard to the subject-matter of the dispute.

2. Article 3 of Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

In the absence of full transposition by a Member State, within the time allowed, of the directive in question and therefore of Article 3 thereof, and of Directive 83/513 on limit values and quality objectives for cadmium discharges, a public authority of that State may not rely on Article 3 of Directive 76/464 against an individual, since that possibility exists only for individuals and only in relation to "each Member State to which it is addressed".

3. Although there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court, the Member States' obligation under such a directive to achieve the result envisaged by the directive and their duty, under Article 5 of the Treaty, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the

authorities of the Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, the national court called upon to interpret a directive is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the Treaty.

However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive' s provisions.

Parties

In Case C-168/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Vicenza (Italy) for a preliminary ruling in the criminal proceedings before that court against

Luciano Arcaro

on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291 p. 1),

THE COURT (Fourth Chamber),

composed of: C.N. Kakouris (Rapporteur), President of the Chamber, P.J.G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: M.B. Elmer,

Registrar: H. von Holstein, Deputy Registrar

after considering the written observations submitted on behalf of the Commission of the European Communities by Laura Pignataro and Dominique Maidani, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

Grounds

1 By order of 22 April 1995, received at the Court on 30 May 1995, the Pretura Circondariale (District Magistrate' s Court), Vicenza, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged

into the aquatic environment of the Community (OJ 1976 L 179, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

2 Those questions have been raised in criminal proceedings brought against Luciano Arcaro pursuant to Articles 5, 7 and 18 of Legislative Decree No 133 of 27 January 1992 on industrial discharge of dangerous substances into the aquatic environment (Ordinary Supplement No 34 of GURI No 41 of 19 February 1992, and corrigendum published in GURI No 124 of 28 May 1992, hereinafter "the Decree").

3 Article 3 of Directive 76/464 provides that all discharges of substances in List I of its Annex "shall require prior authorization by the competent authority of the Member State concerned". That list includes substances particularly dangerous for the aquatic environment, including cadmium.

4 For that category of substances, discharge authorizations must be issued in accordance with Articles 3 and 5 of the same directive. According to those provisions, discharge authorizations must lay down in particular emission standards, namely the maximum concentration and maximum permissible quantity of a substance in a discharge, the conditions on which the discharge is authorized and the period in which it may be made.

5 According to Article 6(1) of Directive 76/464, emission standards must not exceed the value limits laid down by the Council.

6 In the case of cadmium, the national authorities are to observe the limit values, time-limits and monitoring procedures laid down in the Annexes to Directive 83/513.

7 However, Annex I (footnotes 1 and 7) to that directive provides that, as regards sectors not mentioned in that annex, limit values for cadmium discharges are to be fixed by the Council at a later stage. In the meantime, the Member States are to fix emission standards autonomously, in accordance with Directive 76/464, and those standards must not be less stringent than the most nearly comparable limit value in that annex.

8 In Italy, the Decree was adopted in order to implement a number of Community directives on discharges containing dangerous substances, including Directives 76/464 and 83/513.

9 It applies to discharges of dangerous substances included in the groups of substances as mentioned in List I and II in its annex A (Article 1). Annex B lays down the "limit values for emission standards" for certain of the dangerous substances referred to in List I of Annex A.

10 The Decree lays down the rules for authorization by local authorities of discharges of the substances in List I of Annex A. Those rules are based on a distinction between discharges from new industrial plant and discharges from industrial plant existing on 6 March 1992 or brought into operation before 6 March 1993.

11 All industrial plants, whether new or already existing, must, in order to be able to carry out discharge operations, obtain authorization (Article 5 of the Decree). In the case of both categories, local authorities, when issuing discharge authorizations, prescribe emission standards in conformity with the limit values laid down in Annex B. However, if the discharge concerns substances for which no limit value has yet been laid down in Annex B, the following rules apply.

12 In the case of new plant, prior authorization for discharge is compulsory and is issued in accordance with the tolerance limits laid down by Law No 319 of 10 May 1976 (GURI No 141

of 29 May 1976), as amended (Article 6(3) of the Decree). On the other hand, in the case of existing plant, Article 7(7) of the Decree provides that the Decree, and therefore the obligation to obtain authorization, is to be applicable only after adoption of the ministerial decrees provided for in Article 2(3)(b).

13 According to the case file, Annex B does not indicate the limit values for the cadmium discharges with which the main proceedings are concerned. Consequently, according to the Decree, the obligation to obtain authorization applies to such discharges only if they come from new plant.

14 Article 18 of the Decree lays down the penalties applicable in the event of infringements of its provisions.

15 It appears from the case file forwarded to the Court that Mr Arcaro, the legal representative of an undertaking whose main activity is the working of precious metals, is being prosecuted under Articles 5, 7 and 18 of the Decree for discharging cadmium into surface waters (the River Bacchiglione) without having submitted an application for the relevant authorization.

16 In proceedings before Pretura Circondariale di Vicenza, brought by the Public Prosecutor, Mr Arcaro submits, first, that his undertaking is an existing plant within the meaning of the Decree and that, having regard to the production of his undertaking, the system of authorization laid down in Article 7 of the Decree would be applicable to it only if emission limit values, corresponding to that production, had been adopted by ministerial decree.

17 The Pretore finds that the provisions of Article 7(1) and (7) of the Decree exclude the majority of existing plant from the system of authorization which it introduces.

18 However, in point 8 of its order for reference, the Pretore expresses doubts concerning the conformity of those provisions with the Community directives which they implement and which, according to the Pretore, require authorization for all discharges which are subject to them, without any distinction between new plant and existing plant. In this regard, the Pretore refers, by way of example, to Article 1(2)(d) and Article 3 of Directive 76/464, and to Article 3 of Directive 83/513.

19 In view of those considerations, the Pretore has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"(1) Does point 8 of this order for reference put forward a correct interpretation of the Community directives which Legislative Decree No 133/1992 is intended to implement?

(2) If Question 1 is answered in the affirmative, is it possible for direct effect to be given to the Community provisions, in the light of a correct interpretation of Community law, and at the same time for the national provisions which are incompatible therewith to be left unapplied even though the citizen' s legal position may as a result be impaired?

(3) If Question 2 is answered in the negative, what other method of procedure may be adopted under a correct interpretation of Community law to achieve the elimination from national legislation of provisions which are incompatible with those of Community law, where the direct application of the latter would result in impairment of the citizen' s legal position?"

The first question

20 This question is vaguely formulated since it concerns an interpretation of all the Community directives which the Decree is intended to implement and the provisions of Directives 76/464 and 83/513, mentioned more particularly in point 8 of the order for reference, are mentioned only by way of example.

21 However, according to settled case-law, where questions are formulated imprecisely, the Court may extract from all the information provided by the national court and from the documents concerning the main proceedings the points of Community law needing to be interpreted, having regard to the subject matter of the dispute (judgment in Case 251/83 Haug-Adrion [1984] ECR 4277, paragraph 9).

22 In the present case, as explained in paragraphs 15 and 16 of this judgment, the documents concerning the main proceedings show that those proceedings concern cadmium discharges made without authorization by an existing plant within the meaning of the Decree.

23 Since, as far as cadmium discharges are concerned, the relative provisions of Community law are contained in Directives 76/464 and 83/513, the first preliminary question must be understood as seeking to ascertain whether the relevant provisions of those directives are to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of prior authorization.

24 In this regard, it should be observed that Article 3 of Directive 76/464 provides that:

"With regard to the substances belonging to the families and groups of substances in List I ...:

1. all discharges into the waters ... which are liable to contain any such substance shall require prior authorization by the competent authority of the Member State concerned;

..."

List I, contained in the Annex to the directive, mentions, in point 6, cadmium.

25 It follows that any discharge of cadmium is subject to the issue of prior authorization, without there being any exception for discharges coming from plant existing before a certain date.

26 That interpretation is not contradicted by Article 3, point 3, nor by Article 6(4) of Directive 76/464.

27 The first of those provisions provides:

"With regard to the substances belonging to the families and groups of substances in List I ...:

3. in the case of existing discharges of any such substance into the waters referred to in Article 1, the dischargers must comply with the conditions laid down in the authorization within the periods stipulated therein. This period may not exceed the limits laid down in accordance with Article 6(4)."

28 Article 6(4) provides:

"For those substances included in the families and groups of substances referred to in paragraph 1, the deadlines referred to in point 3 of Article 3 shall be laid down by the Council in accordance with Article 12, taking into account the features of the industrial sectors concerned and, where appropriate, the types of products."

29 Consequently, although those provisions concern "existing discharges" of the substances in List I, they make no exception, in favour of a plant existing before a certain date, to the

obligation to obtain prior authorization; they simply refer to the time-limits which are to be laid down in the authorization for this type of discharge.

30 Moreover, that interpretation is not undermined by Directive 83/513, which, in Article 2(f) and (g), defines "existing plant" and "new plant". Thus, Article 2 provides:

"For the purposes of this Directive:

...

(f) 'existing plant' means an industrial plant which is operational on the date of notification of this Directive;

(g) 'new plant' means:

° an industrial plant which has become operational after the date of notification of this Directive,

° an existing industrial plant whose cadmium-processing capacity has been substantially increased after the date of notification of this Directive."

Nevertheless, that distinction is relevant only in relation to the first subparagraph of Article 3(4) of that directive, according to which "Member States may grant authorization for new plants only if those plants apply the standards corresponding to the best technical means available when".

31 It accordingly follows that that provision does not exempt the plants concerned from the obligation to obtain an authorization. On the contrary, it reinforces it.

32 The answer to the first question must therefore be that Article 3 of Directive 76/464 is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

The second question

33 By this question the national court wishes to ascertain in substance whether, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may rely on that Article 3 against an individual, although this may impair that individual' s position.

34 The Commission observes that the system for authorizing discharges provided for by Directive 76/464 and 85/513 entails the designation of competent national authorities for this purpose, having a real power of assessment. It concludes that the provisions of these directives cannot be regarded as unconditional, within the meaning of the case-law of the Court, and that they therefore have no direct effect. It also submits that, in any event, a directive cannot by itself create obligations for an individual nor be relied upon as such against an individual before a national court.

35 Having regard to a situation such as that with which the main proceedings are concerned, it is not necessary to examine whether Article 3 of the Directive is unconditional and sufficiently precise.

36 The Court has made it clear that the possibility of relying, before a national court, on an unconditional and sufficiently precise provision of a directive which has not been transposed

exists only for individuals and only in relation to "each Member State to which it is addressed". It follows that a directive may not by itself create obligations for an individual and that a provision of a directive may not therefore be relied upon as such against such a person (judgments in Case 152/84 Marshall [1986] ECR 723, paragraph 48, and in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9). The Court has stated that this case-law seeks to prevent a Member State from taking advantage of its own failure to comply with Community law (judgments in Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 22, and Case C-192/94 El Corte Inglés, not yet published in the ECR, paragraph 16).

37 In that same line of authority the Court has also ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (judgment in Case 14/86 Pretore di Salò [1987] ECR 2545).

38 The answer to the second question must therefore be that, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may not rely on that Article 3 against an individual.

The third question

39 By this question the national court essentially seeks to ascertain whether, upon a correct interpretation of Community law, there is a method of procedure allowing the national court to eliminate from national legislation provisions which are contrary to a provision of a directive which has not been transposed, where the latter provision may not be relied on before the national court.

40 It should be observed first of all that there is no such method of procedure in Community law.

41 It should be added that the Member States' obligation, arising under a directive, to achieve the result envisaged by the directive and their duty, under Article 5 of the Treaty, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the Treaty (see the judgments in Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20).

42 However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive' s provisions (see the judgment in Kolpinghuis Nijmegen, cited above, paragraphs 13 and 14).

43 The reply to the third question must therefore be that there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a

provision of a directive which has not been transposed where that provision may not be relied upon before the national court.

Decision on costs

Costs

44 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fourth Chamber),

in answer to questions referred to it by the Pretura Circondariale di Vicenza, by order of 22 April 1995, hereby rules:

1. Article 3 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

2. In the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges, a public authority of that State may not rely on that Article 3 against an individual.

3. There is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.

JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 (1)

(Freedom of movement for workers – Recognition of diplomas – Directives 89/48 and 92/51 – Primary and secondary school teachers – Holder of a diploma of post-secondary studies of two years' duration – Conditions for the exercise of the profession)

In Case C-102/02,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgericht Stuttgart (Germany) for a preliminary ruling in the proceedings pending before that court between

Ingeborg Beuttenmüller

and

Land Baden-Württemberg,

on the interpretation of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48 (OJ 1992 L 209, p. 25),

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans, A. Rosas (Rapporteur), A. La Pergola and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

–

Ms Beuttenmüller, by T. Weber, Rechtsanwalt,

–

the Land Baden-Württemberg, by J. Daur, acting as Agent,

–

the Austrian Government, by M. Fruhmann, acting as Agent,

–

the Commission of the European Communities, by M. Patakia and H. Kreppel, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2003,

gives the following

1

By order of 5 March 2002, received at the Court on 20 March 2002, the Verwaltungsgericht Stuttgart (Stuttgart Administrative Court) referred to the Court for a preliminary ruling six questions on the interpretation of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48 (OJ 1992 L 209, p. 25).

2

Those questions were raised in proceedings between Ms Beuttenmüller, an Austrian national, and the *Land* Baden-Württemberg concerning the refusal of the Oberschulamt Stuttgart (Stuttgart Secondary Education Office) to recognise her diploma of primary school teacher, obtained in Austria, as equivalent to the qualification required to work as a primary and secondary school teacher in that *Land*.

Law

Community rules

3

Under Article 39(2) EC, freedom of movement for workers is to 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.

Directive 89/48

4

It is apparent from the third recital of the preamble to Directive 89/48 that its purpose is to introduce a method of recognition of diplomas intended to enable European citizens to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training, provided they hold such a diploma preparing them for those activities awarded on completion of a course of studies lasting at least three years and issued in another Member State.

5

The fifth recital of the preamble to that directive states as follows:

'Whereas, for those professions for the pursuit of which the Community has not laid down the necessary minimum level of qualification, Member States reserve the option of fixing such a level with a view to guaranteeing the quality of services provided in their territory; whereas, however, they may not, without infringing their obligations laid down in Article 5 of the [EC]

Treaty, require a national of a Member State to obtain those qualifications which in general they determine only by reference to diplomas issued under their own national education systems, where the person concerned has already acquired all or part of those qualifications in another Member State; whereas, as a result, any host Member State in which a profession is regulated is required to take account of qualifications acquired in another Member State and to determine whether those qualifications correspond to the qualifications which the Member State concerned requires.'

6

Article 1(a) of that directive provides:

'For the purposes of this directive the following definitions shall apply:

(a)

diploma: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

–

which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions;

–

which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

–

which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications was received mainly in the Community, or the holder thereof has three years' professional experience certified by the Member State which recognised a third-country diploma, certificate or other evidence of formal qualifications.

The following shall be treated in the same way as a diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State.'

7

Article 3 of Directive 89/48 provides:

'Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that

profession on the same conditions as apply to its own nationals:

(a)

if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State; or

(b)

if the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession, within the meaning of Article 1(c) and the first subparagraph of Article 1(d), and possesses evidence of one or more formal qualifications:

–

which have been awarded by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of such State,

–

which show that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level of a Member State and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

–

which have prepared the holder for the pursuit of his profession.

The following shall be treated in the same way as the evidence of formal qualifications referred to in the first subparagraph: any formal qualifications or any set of such formal qualifications awarded by a competent authority in a Member State if it is awarded on the successful completion of training received in the Community and is recognised by that Member State as being of an equivalent level, provided that the other Member States and the Commission have been notified of this recognition.'

8

Article 4 of Directive 89/48 authorises the host Member State, notwithstanding Article 3 thereof, to require the applicant to provide evidence of professional experience, to complete an adaptation period not exceeding three years or to take an aptitude test. It lays down certain rules and conditions applicable to measures which that State may impose to make up for the shortfalls in education and training of the applicant ('the compensatory measures').

9

Pursuant to Article 8(1) of that directive:

'The host Member State shall accept as proof that the conditions laid down in Articles 3 and 4 are satisfied the certificates and documents issued by the competent authorities in the Member States, which the person concerned shall submit in support of his application to pursue the profession concerned.'

Directive 92/51

10

The complementary system for the recognition of professional education and training introduced by Directive 92/51 covers the levels of education and training which were not covered by the initial general system established by Directive 89/48 the scope of which is limited to higher education.

11

Article 1 of Directive 92/51 provides:

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

(a)

diploma: any evidence of education and training or any set of such evidence:

–

which has been awarded by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of that State,

–

which shows that the holder has successfully completed:

(i)

either a post-secondary course other than that referred to in the second indent of Article 1(a) of Directive 89/48/EEC, of at least one year’s duration or of equivalent duration on a part-time basis, one of the conditions of entry of which is, as a general rule, the successful completion of the secondary course required to obtain entry to university or higher education, as well as the professional training which may be required in addition to that post-secondary course;

(ii)

or one of the education and training courses in Annex C, and

–

which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by this evidence was received mainly in the Community, or outside the Community at teaching establishments which provide education and training in accordance with the laws, regulations or administrative provisions of a Member State, or that the holder thereof has three years’ professional experience certified by the Member State which recognised third-country evidence of education and training.

The following shall be treated in the same way as a diploma within the meaning of the first subparagraph: any evidence of education and training or any set of such evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State;

…

(g)

regulated education and training: any education and training which:

–

is specifically geared to the pursuit of a given profession, and

–

comprises a course or courses complemented, where appropriate, by professional training or probationary or professional practice, the structure and level of which are determined by the laws, regulations or administrative provisions of that Member State or which are monitored or approved by the authority designated for that purpose;

…'

12

Article 3 of that directive provides:

'Without prejudice to Directive 89/48/EEC, where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, as defined in this Directive or in Directive 89/48/EEC, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as those which apply to its own nationals:

(a)

if the applicant holds the diploma, as defined in this Directive or in Directive 89/48/EEC, required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State;

…

By way of derogation from the first subparagraph of this Article, the host Member State is not required to apply this Article where the taking up or pursuit of a regulated profession is subject in its country to possession of a diploma as defined in Directive 89/48/EEC, one of the conditions for the issue of which shall be the completion of a post-secondary course of more than four years' duration.'

13

Article 4 of Directive 92/51 allows the host Member State, notwithstanding Article 3 thereof, to require the applicant to provide evidence of specific professional experience, to complete an adaptation period not exceeding three years or to take an aptitude test. It lays down certain rules and conditions applicable to the compensatory measures which may be required. According to the first indent of Article 4(1)(a), where the duration of the education and training adduced in support of his application pursuant to Article 3(a) of that directive is at least one year less than that required in the host Member State, the period of professional experience required may not exceed 'twice the shortfall in duration of education and training where the shortfall relates to a post-secondary course and/or to a period of probationary practice carried out under the control of a supervising professional person and ending with an examination'.

14

Under Article 12(1) of Directive 92/51:

‘The host Member State shall accept as means of proof that the conditions laid down in Articles 3 to 9 are satisfied the documents issued by the competent authorities in the Member States, which the person concerned shall submit in support of his application to pursue the profession concerned.’

National law

15

In Germany, the regulation of the education, training and careers of teachers is essentially the responsibility of the *Länder*. According to the referring court, the following provisions applicable in Baden-Württemberg are relevant to the dispute in the main proceedings.

16

The rules on the recognition of qualifications for the teaching profession are set out in the Verordnung des Kultusministeriums zur Umsetzung der Richtlinie 89/48/EWG … für Lehrerberufe (Ministry of Education regulation for the teaching profession transposing Directive 89/48/EEC) of 15 August 1996 (GBl., p. 564, ‘the EU-EWR-LehrerVO’). That regulation was adopted on the basis of Paragraph 28a(1) of the Landesbeamtengesetz (Law on *Land* officials), in the version published on 19 March 1996 (GBl., p. 286, ‘the LBG’). That paragraph states:

‘Paragraph 28a – Career qualifications under provisions of European law

(1) The career qualification can also be acquired under

1. Directive 89/48/EEC … or

2. Directive 92/51/EEC …

The detailed rules governing this matter shall be enacted, by way of a regulation, by the ministries under the powers vested in them, in agreement with the Ministry of Internal Affairs and the Ministry of Finance.’

17

Paragraph 1 of the EU-EWR-LehrerVO states as follows:

‘Paragraph 1 – Recognition

1. A qualification for the teaching profession awarded or recognised in another Member State of the European Union or in another Contracting State to the Agreement on the European Economic Area after a period of higher education of at least three years’ duration, in the form of a diploma within the meaning of Directive 89/48/EEC … shall, on application, be recognised as a qualification to pursue the profession of teacher in State schools in Baden-Württemberg, where

(1) the applicant is a national of a Member State of the European Union or of another Contracting State to the Agreement on the European Economic Area,

(2) the qualification comprises at least two of the subjects stipulated for the teaching profession in question in Baden-Württemberg,

(3) the applicant’s written and spoken knowledge of the German language is of the standard necessary to teach in Baden-Württemberg,

(4) the education and training required for the applicant's diploma within the meaning of Article 3, first paragraph, under (a), of Directive 89/48/EEC does not reveal any substantial deficiencies as regards particular specialisation, teaching methodology, education theory or teaching practice as compared to the education and training in Baden-Württemberg, and

(5) the duration of the education and training necessary for the diploma within the meaning of Article 3, first paragraph, under (a), of Directive 89/48/EEC is not more than one year shorter than the duration of education and training required for the pursuit of the teaching profession in the kind of school in question in Baden-Württemberg.

2. If the content of the education and training does not meet the requirements in subparagraph 1(4), the applicant may be required either to complete an adaptation period or to pass an aptitude test, as the applicant may choose.

3. If the duration of the education and training does not meet the requirements in subparagraph 1(5), the applicant may be required to adduce evidence of professional experience.

4. The applicant may only be required either to comply with a measure under subparagraph 2 or to adduce evidence under subparagraph 3. If there should be a shortfall with regard to both content (subparagraph 1(4)) and duration (subparagraph 1(5)), the applicant may be required to make good only the content shortfall in accordance with subparagraph 2.'

18

Paragraph 5 of the EU-EWR-LehrerVO provides:

'Paragraph 5 – Decisions

1. The applicant shall be informed in writing of the decision on the application within four months of submission of full documentation; that period shall be extended by the amount of time stipulated for the submission of any additional documentation which may be required. The decision must give reasons and contain formal notice of the right of appeal.

2. The notification of the decision shall state the classification given to the applicant's professional activity, education and training to work as a teacher in schools in Baden-Württemberg. It shall also contain:

(1) a determination as to whether there is a shortfall of more than one year compared to the length of education and training required for the pursuit of the profession of teacher in Baden-Württemberg,

(2) a determination with regard to substantial shortfalls in the subjects shown in the evidence of qualifications adduced or of any substantial areas of professional activity not covered, together with a list of missing subject areas,

(3) information on

(a)

the length and material content of any adaptation period and

(b)

the subject-matter of any aptitude test.'

19

Paragraph 6 of the EU-EWR-LehrerVO provides as follows:

‘Paragraph 6 – Recognition

1. If the investigation reveals no shortfall, if the aptitude test or adaptation period has been successfully completed, or if the necessary professional experience has been proven in the case of a shortfall in duration and if the requisite knowledge of the German language is also proven under Paragraph 2, the teaching qualification shall be recognised. The applicant shall receive a certificate from the Ministry of Education confirming that finding.

2. The recognition decision shall state that recognition does not give rise to any entitlement to employment.’

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

20

Ms Beuttenmüller, the claimant in the main proceedings, was born in 1958. After obtaining her school-leaving diploma, she followed a two-year course at the Archdiocese of Vienna College of Education (Austria), specialising in foreign-language and art teaching and on 6 June 1978 she obtained a diploma in primary school teaching.

21

From 1978 to 1988, Ms Beuttenmüller was employed as a primary school teacher in Austria. She went on maternity and unpaid leave from 1 February 1981.

22

Since 1991, Ms Beuttenmüller has been employed as a teacher in *Land* Baden-Württemberg, working first in a church-maintained establishment for young migrants. Since 6 December 1993, she has been employed by *Land* Baden-Württemberg as a teacher in its schools.

23

Until 30 July 1996, Ms Beuttenmüller was on grade Vb of the salary scale fixed by the Bundesangestelltentarifvertrag (federal collective agreement on public sector employees, ‘the BAT’), in accordance with the Richtlinie des Finanzministeriums Baden-Württemberg über die Eingruppierung der im Angestelltenverhältnis beschäftigten Lehrkräfte des Landes (Baden-Württemberg Ministry of Finance guidelines on the grading of teaching staff employed by the *Land*). From that date, she was placed on the higher grade IVb of the BAT.

24

In a letter of 16 March 1998, Ms Beuttenmüller applied to the Oberschulamt Stuttgart for the primary school teaching certificate awarded to her in Austria to be treated in the same way as a teaching certificate awarded in Baden-Württemberg and for her promotion to grade III of the BAT.

25

The Oberschulamt Stuttgart rejected that application in a decision notified to Ms Beuttenmüller on 26 August 1999. On 21 November 2000, the Oberschulamt Stuttgart also rejected the complaint brought by Ms Beuttenmüller against that decision.

26

In the proceedings which Ms Beuttenmüller brought before the Verwaltungsgericht Stuttgart, she claimed that the court should:

–

primarily, 'annul the decision of the Oberschulamt Stuttgart of 26 August 1999 in the form of the decision of the Oberschulamt Stuttgart of 21 November 2000 in respect of the complaint and to order the defendant to grant the claimant's application that her teaching qualification awarded in Austria after a period of education and training of two years' duration be treated as equivalent to the primary and junior secondary school teaching qualification in Baden-Württemberg';

–

in the alternative, 'annul the decision of the Oberschulamt Stuttgart of 26 August 1999 in the form of the decision of the Oberschulamt Stuttgart of 21 November 2000 in respect of the complaint, and to declare that the defendant is required to enable the applicant, by means of the corresponding measures of equivalence (adaptation periods and aptitude tests, amongst others) to satisfy the conditions for the equivalence applied for'.

27

In the order for reference, the Verwaltungsgericht Stuttgart states that the rejection of Ms Beuttenmüller's application is in accordance with the relevant national provisions. The application did not satisfy the condition, which is compulsory under the EU-EWR-LehrerVO, that the applicant must have completed a period of post-secondary education and training of at least three years' duration. There is no need even to decide whether the Archdiocese of Vienna College of Education is to be regarded as an establishment of higher education or at least as another establishment of similar level, within the meaning of the second indent of Article 1(a) of Directive 89/48.

28

However, the Verwaltungsgericht Stuttgart admits that entitlement to recognition or equivalence of Ms Beuttenmüller's qualification awarded in Austria can be based directly on the two directives cited at Paragraph 28a of the LBG, namely Directives 89/48 and 92/51. It considers that, in that case, several difficulties in interpretation arise in relation to the relevant provisions of those two directives.

29

In respect of Directive 89/48, it considers that the equivalence clause contained in the second subparagraph of Article 1(a) thereof could apply to Ms Beuttenmüller's period of education and training of two years' duration only. According to an opinion of the Austrian Federal Ministry of Education and Cultural Affairs of 10 August 1998, which the applicant placed on the file in the administrative proceedings, the education and training of primary school teachers in Austrian colleges of education was extended from two to three years of study with effect from 1 September 1985. Persons who had completed the 'old' two-year education and training courses are afforded the same rights in respect of the taking up and pursuit of the profession as those who have completed the 'new' three-year course of education and training. According to that opinion, 'the conditions for the applicability of the equal-treatment provision of Directive [89/48] appear to be satisfied in the case of the two-year period of education and training'.

30

In that context, the Verwaltungsgericht Stuttgart also cites the following passage from an opinion of the Commission of the European Communities of 4 November 1998 which Ms Beuttenmüller adduces in evidence:

'If a course of education and training is replaced by a course of study at a higher-education establishment of three years' duration, holders of the "earlier" diploma may, in the Commission's view, benefit from Directive 89/48/EEC if there are provisions of national law in existence which expressly recognise that their education and training is considered to be of a level equivalent to the education and training for which the "new" diploma is awarded and confers the same rights in respect of the pursuit of the profession'.

31

However, the Verwaltungsgericht Stuttgart harbours doubts about the applicability of the equivalence clause in Ms Beuttenmüller's case. It points out, first, that she received her entire education and training in Austria. In its view, the second subparagraph of Article 1(a) of Directive 89/48 seems to refer to education and training received in another Member State and recognised as being of an equivalent level in that Member State, in this case, the Austrian Republic.

32

Second, the referring court considers that the opinion of the Austrian Federal Ministry of Education and Cultural Affairs of 10 August 1998 is not binding. The assertion that persons who have successfully completed the 'old' course are afforded the same rights in respect of the pursuit of the profession of primary school teacher in Austria as persons who have successfully completed the 'new' course of education and training is undermined by the content of a letter of 8 April 1999 from the Vienna Stadtschulrat (City School Board) to the claimant. According to the referring court, it is apparent from that letter that, whilst both kinds of education and training are recognised to be of an equivalent level for recruitment purposes, only the three-year course of education and training to become a teacher in primary and junior secondary schools in Austria confers entitlement to a grade L2 a2 salary in the relevant pay scale. Teachers who have completed only a two-year course of education and training must successfully complete further training and pass further examinations in certain subjects on the curriculum of education colleges.

33

The Verwaltungsgericht Stuttgart states that, as at the date of the order for reference, Directive 92/51 has not been transposed into national law. It therefore discusses the possibility of directly applying the provisions of that directive. Moreover, it raises the question whether the probationary training period may be taken into account for the purposes of showing that the total period of post-secondary education and training required for access to the teaching profession in Baden-Württemberg exceeds four years. In that case, the final subparagraph of Article 3 of Directive 92/51 would preclude application of the rules laid down in that article.

34

In the light of all the foregoing considerations, the Verwaltungsgericht Stuttgart decided to stay proceedings and refer to the Court for a preliminary ruling the following questions:

'1. Is Article 3, in conjunction with Article 4, of Directive 89/48/EEC … directly applicable so

that a national of a Member State may rely directly on the provisions of the directive where it has not been correctly transposed into national law?

2. Is Article 3, in conjunction with Article 4, of Directive 92/51/EEC … directly applicable so that, in the absence of implementing measures enacted within the period prescribed for that purpose, a national of a Member State may rely on those provisions of the directive as against all national provisions that are not in conformity with the directive?

If the answer to question 1 and/or question 2 is in the affirmative:

3. Does Council Directive 89/48/EEC … or Directive 92/51/EEC … preclude national legislation (in this instance, the EU-EWR-LehrerVO, transposing Directive 89/48/EEC in respect of the teaching profession, …) which makes recognition of a professional teaching qualification awarded or recognised in another Member State of the European Union

(a) conditional, without exception, on completion of higher education and training of at least three years' duration,

(b) require the qualification to comprise at least two of the subjects stipulated for the teaching profession in question in Baden-Württemberg?

If the answer to question 1 is in the affirmative:

4. Is the second subparagraph of Article 1(a) of Directive 89/48/EEC to be interpreted as meaning that the qualification for the profession of primary school teacher awarded on the basis of the former two-year system of education and training in Austria is to be treated in the same way as a diploma within the meaning of the first subparagraph of Article 1(a) of Directive 89/48/EEC where the competent authority in Austria confirms that the examination certificate awarded following education and training of two years' duration is recognised, for the purposes of the application of the second subparagraph of Article 1(a) of Directive 89/48/EEC, as being of a level equivalent to the diploma (examination certificate) currently awarded after three years' study and confers the same rights in Austria in respect of the taking up or pursuit of the profession of primary school teacher?

If the answer to question 2 is in the affirmative:

5. Is [the final subparagraph of] Article 3 of Directive 92/51/EEC to be interpreted, with regard to the recognition of professional teaching qualifications, as meaning that the prerequisite of a "post-secondary course of more than four years' duration", specified in that provision, only encompasses the prescribed higher education and training (higher-education studies) or as meaning that the probationary period of teaching practice ("Lehramtsreferendariat") counts towards the "post-secondary course of more than four years' duration"?

6. If Article 3, first subparagraph, of Directive 92/51/EEC applies to professional teaching qualifications awarded after only two years' (higher) education and training in Austria:

In the event of failure to transpose Directive 92/51/EEC within the period prescribed in Article 17 thereof, does Article 3(a) of that directive give rise to an entitlement to have a teaching qualification awarded in a Member State treated in the same way as the corresponding qualification for a teaching career in the host Member State without the host Member State being permitted – where the particular conditions are fulfilled – first of all to require compensatory measures to be applied under Article 4 of the directive?'

The questions referred for a preliminary ruling

35

By its questions, the referring court asks essentially whether a national of a Member State who holds a qualification for entry to the teaching profession, obtained in her Member State of origin following a two-year period of education and training, may rely directly on the provisions of Directive 89/48 or Directive 92/51 in seeking recognition by the competent authority of the host Member State of her entitlement to pursue the profession of teacher in the schools of that State under the same conditions as the nationals of that State.

36

It should be noted as a preliminary point that, as is apparent in particular from the first recital of the preambles to Directives 89/48 and 92/51, the primary objective of those directives is the abolition of obstacles to freedom of movement for persons and services within the Community. Those recitals emphasise that, amongst other things, freedom of movement for persons and services entails, for nationals of the Member States, the possibility of pursuing a profession, whether in a self-employed or employed capacity, in a Member State other than that in which they acquired their professional qualifications. It also follows from the third and fourth recitals of the preamble to Directive 89/48 that the introduction of a general system of recognition of diplomas is intended to facilitate the pursuit by Community citizens of all professional activities which in the host Member State are dependent upon the completion of a particular education and training. Recital 18 of the preamble to Directive 92/51 moreover confirms that the aim of the general system of recognition of diplomas implemented by that directive, like the first general system implemented by Directive 89/48, is to eliminate obstacles to the taking up of regulated professions.

37

Since it is necessary to determine whether, in circumstances such as those in the main proceedings, the conditions for the direct application of the relevant provisions of Directive 89/48 are met, it is first necessary to examine the fourth question referred for a preliminary ruling, concerning the interpretation of the second subparagraph of Article 1(a) of that directive. As is apparent from its title, this lays down a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, whereas, in the present case, the claimant in the main proceedings followed a period of education and training in Austria of just two years. Accordingly, if the reply to the fourth question is in the negative, the applicant cannot rely on the rights conferred by that directive.

The fourth question

38

By this question, the referring court asks whether the second subparagraph of Article 1(a) of Directive 89/48 should be interpreted as meaning that a qualification for the profession of teacher such as that formerly awarded on the basis of a two-year period of education and training in Austria is to be treated in the same way as a diploma within the meaning of the first subparagraph of that provision, where the competent authority of that State certifies that the diploma awarded following education and training of two years' duration is recognised as being of a level equivalent to the diploma currently awarded after three years' study and confers the same rights in that Member State in respect of the taking up or pursuit of the profession of

teacher.

39

According to Ms Beuttenmüller, the Austrian Government and the Commission, the reply to that question should be in the affirmative, whilst the *Land* Baden-Württemberg appears to submit that a two-year period of education and training completed in an Austrian college of education cannot fall within the equivalence clause laid down by the second subparagraph of Article 1(a) of Directive 89/48. In any event it considers that that provision does not apply in the dispute in the main proceedings. Ms Beuttenmüller and the Austrian Government are of the opposite view. The Commission, for its part, submits that it is for the national court to determine whether the conditions to which that directive subjects the equivalence of diplomas are satisfied in the dispute in the main proceedings.

40

It should be noted in this connection that the term 'diploma' for the purposes of Directive 89/48 is defined in Article 1(a) thereof, which has two subparagraphs. The first subparagraph sets out the conditions which must be satisfied by diplomas, certificates or other evidence of formal qualifications in order to fall within the definition of 'diploma'. Amongst those conditions should be noted that concerning the minimum period of post-secondary study to which such a diploma attests. Under the second subparagraph of that provision, any diploma, certificate or other evidence of formal qualification which does not satisfy the conditions of the first subparagraph is nevertheless to be treated in the same way as a diploma within the meaning of that subparagraph provided that it satisfies certain conditions. It must have been awarded by a competent authority in a Member State on successful completion of education and training received in the Community. Furthermore, such education and training must have been recognised by that competent authority as being of an equivalent level and the diploma, certificate or other evidence of formal qualifications must confer the same rights in respect of the taking up and pursuit of a regulated profession in that Member State.

41

It must be noted that the conditions referred to in the preceding paragraph are satisfied by a diploma such as that awarded in Austria upon completion of a two-year period of education and training received entirely within that Member State provided that the competent authority certifies that that diploma is regarded as equivalent to the diploma currently granted after three years' study and confers the same rights in respect of the taking up and pursuit of the profession of teacher in that State. The expression 'education and training received in the Community' covers both education and training received entirely in the Member State which awarded the diploma or certificate in question and that received partly or wholly in another Member State.

42

That interpretation of the second subparagraph of Article 1(a) of Directive 89/48, which follows directly from the wording of that provision is, moreover, corroborated by the 'Report to the European Parliament and to the Council on the state of application of the general system for the recognition of higher-education diplomas made in accordance with Article 13 of Directive 89/48/EEC (COM(96) 46 final)', which was presented by the Commission on 15 February 1996. According to point III(v) of that report, the second subparagraph of Article 1(a) of that directive was included to take account of persons who had not undergone three years of higher education and training, but who hold qualifications giving them the same professional rights as

if they had completed such a course. It is apparent from point III(vi) of that report that that situation exists in several Member States. It is moreover apparent from this that that provision also applies where, in a Member State, a course of education and training which does not fall within the first subparagraph of Article 1(a) is replaced by one leading to a diploma within the meaning of that subparagraph, provided that national legislation explicitly recognises that the old education and training was of an equivalent level to that of the new education and training and that it confers on the holders of the 'old' diplomas the same rights to take up and pursue the profession in question as those of the holders of the new diplomas.

43

With regard to the doubts raised by the referring court and the *Land* Baden-Württemberg in the course of the present proceedings concerning the verification of the final condition laid down by the second subparagraph of Article 1(a) of Directive 89/48, it is not for the Court to determine that question by way of a preliminary ruling. It is for the national court to determine in the light of the evidence submitted by the person concerned pursuant to Article 8(1) of that directive, and the relevant national provisions for the assessment of such evidence, whether that condition must be regarded as satisfied in the main proceedings.

44

It should, however, be stated, as the Austrian Government rightly pointed out, that that condition concerns the right to pursue a regulated profession and not the remuneration and other employment conditions applicable in the Member State which recognises the equivalence of the old and new education and training. The reference in the second subparagraph of Article 1(a) of Directive 89/48 to 'the same rights in respect of the … pursuit of a regulated profession' is intended specifically to take account of the situation of those who retain the right to pursue the profession in question even if the diplomas or certificates which they hold no longer entitle them to take up that profession in the territory of the Member State which awarded or recognised them. That interpretation is in accordance with the objective of the protection of acquired rights which underpins the second subparagraph of Article 1(a) of Directive 89/48. It is also confirmed by the use of the conjunction 'or' in the wording of that provision, which distinguishes between, on the one hand, 'the taking up … of a regulated profession' and on the other, the 'pursuit' thereof.

45

The reply to the fourth question must therefore be that the second subparagraph of Article 1(a) of Directive 89/48 must be interpreted as meaning that a qualification for the profession of teacher, such as that formerly awarded on the basis of a two-year period of education and training in Austria, is to be treated in the same way as a diploma within the meaning of the first subparagraph of that provision where the competent authority of that Member State certifies that the diploma awarded following education and training of two years' duration is recognised as being of a level equivalent to the diploma currently awarded after three years' study and confers the same rights in that Member State in respect of the taking up or pursuit of the profession of teacher. It is for the national court to determine, in the light of the evidence submitted by the applicant in accordance with Article 8(1) of that directive and the national provisions applicable to the assessment of such evidence, whether the final condition laid down by the second subparagraph of Article 1(a) must be regarded as satisfied in the case in the main proceedings. That condition concerns the right to take up a regulated profession and not the remuneration and other employment conditions applicable in the Member State which recognises the equivalence of the old and new education and training.

The first and third questions

46

By its first and third questions, which should be considered together, the referring court asks essentially whether Article 3 in conjunction with Article 4 of Directive 89/48 may be relied on by a national of a Member State as against national provisions which do not comply with that directive and whether that directive precludes provisions such as those contained in the EU-EWR-LehrerVO, which transpose that directive as regards the teaching profession, in that, in order to recognise a qualification for the teaching profession awarded or recognised in another Member State, those national provisions require without exception the completion of higher education and training of at least three years' duration and comprising at least two of the subjects stipulated for the teaching profession in question in the host Member State.

47

Ms Beuttenmüller, the Austrian Government and the Commission consider that the EU-EWR-LehrerVO incorrectly transposes Directive 89/48 and submit that Article 3(a) thereof may be relied upon by a national of a Member State for the purpose of having national provisions which are incompatible with that directive disapplied. The *Land* Baden-Württemberg for its part submits that the EU-EWR-LehrerVO satisfies the requirements of that directive in all respects and, consequently, the provisions of the directive cannot be applied directly.

48

It should be borne in mind that Article 3(a) of Directive 89/48 provides that the competent authority of the host Member State may not, on grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue a regulated profession on the same conditions as apply to its nationals if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State.

49

As stated in paragraph 40 of the present judgment, the term 'diploma' within the meaning of Directive 89/48, used inter alia in Article 3(a) thereof, covers not only diplomas, certificates or other evidence of formal qualifications which satisfy the conditions laid down by the first subparagraph of Article 1(a) of that directive, but also those which are to be treated in the same way as diplomas, certificates or other evidence of formal qualifications pursuant to the second subparagraph of that provision. Consequently, in accordance with Article 3(a), the competent authority of the host Member State is required to recognise the professional qualifications giving the right to take up a regulated profession where the applicant holds a diploma treated in the same way pursuant to the second subparagraph of Article 1(a) of that directive, even if that diploma is awarded upon successful completion of a period of education and training of less than three years and/or where the corresponding studies were not followed in a higher-education establishment or another establishment of a similar level.

50

It follows that Directive 89/48, in particular Article 3(a) thereof, precludes national provisions such as those set out in the EU-EWR-LehrerVO which require, without exception, for the purposes of the recognition of professional teaching qualifications that a teacher complete higher education and training of at least three years' duration.

51

Directive 89/48 also precludes national provisions which make the recognition of a professional qualification acquired in another Member State dependent upon that education and training having a particular content, such as the provisions laid down by the EU-EWR-LehrerVO which require that the education and training demonstrated by the applicant cover two of the subjects stipulated for the teaching profession in Baden-Württemberg.

52

The Commission rightly pointed out that the system of mutual recognition of diplomas established by Directive 89/48 does not imply that diplomas awarded by the other Member States certify an education and training similar or comparable to that required in the host Member State. According to that system, a diploma is not recognised on the basis of the intrinsic value of the education and training to which it attests, but because it gives the right to take up a regulated profession in the Member State where it was awarded or recognised. Differences in the organisation or content of teacher education and training acquired in another Member State by comparison with that provided in the host Member State are not therefore sufficient to justify a refusal to recognise the professional qualification concerned. At most, where those differences are substantial, they may justify the host Member State requiring that the applicant satisfy one or other of the compensatory measures set out in Article 4 of the directive.

53

It is not in dispute in the main proceedings that Paragraph 1(1)(2) of the EU-EWR-LehrerVO makes recognition of a teaching qualification dependent upon the education and training acquired in another Member State covering at least two of the subjects stipulated in the host Member State, even if the applicant wishes to teach only one subject covered by her education and training. That requirement is likely to prevent a great number of Community nationals from entering the teaching profession in the host Member State in question, even though they have the qualifications necessary to pursue that profession in their Member State of origin. Furthermore, it amounts to requiring that the education and training acquired in a Member State other than the host Member State be similar or comparable to that provided in the latter State, which is clearly contrary to the system of recognition of diplomas established by Directive 89/48 and the express wording of Article 3(a) thereof.

54

According to the Court's case-law, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29; Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51; and Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 98).

55

In that regard, Article 3(a) of Directive 89/48 is a provision the subject-matter of which is unconditional and sufficiently precise. Individuals are therefore entitled to rely upon that provision before a national court in order to have national provisions inconsistent with the directive disapplied.

56

With regard to Article 4 of Directive 89/48, it should be noted that in the case in the main proceedings, no compensatory measure under that article was imposed on Ms Beuttenmüller by the competent authority of the host Member State. In those circumstances, it is not appropriate for the Court to rule on the interpretation of that provision.

57

In the light of the foregoing considerations, the answer to the first and third questions must be that Article 3(a) of Directive 89/48 may be relied upon by a national of a Member State as against national provisions inconsistent with that directive. That directive precludes such provisions where, for the purpose of recognising a professional teaching qualification awarded or recognised in a Member State other than the host Member State, they require, without exception, completion of a period of higher education and training of at least three years' duration and covering at least two of the subjects stipulated for the teaching profession in the host Member State.

The second, fifth and sixth questions

58

By its second, fifth and sixth questions, which should be examined together and which concern the interpretation of Articles 3 and 4 of Directive 92/51, the referring court asks essentially whether, in the absence of implementing measures enacted within the period prescribed in the first subparagraph of Article 17(1) of that directive, a national of a Member State may rely on Article 3(a) of that directive in order to obtain in the host Member State recognition of a professional teaching qualification such as that awarded in Austria following education and training of two-years' duration or whether, on the contrary, that possibility is excluded by reason of the application in the case in the main proceedings of the derogation laid down by the final subparagraph of Article 3 or is conditional upon the applicant first complying with any compensatory measures that may be required pursuant to Article 4 of that directive.

59

It should be borne in mind that, according to the information contained in the order for reference, the *Land* Baden-Württemberg failed to transpose Directive 92/51, which, according to the first subparagraph of Article 17(1), the Member States should have been transposed before 18 June 1994. Furthermore, it follows from Article 3(a) of that directive, the purpose and subject-matter of which are similar to those of Article 3(a) of Directive 89/48, that the competent authority of the host Member State must recognise the equivalence of a professional teaching qualification held by a national of a Member State if the applicant holds a diploma, as defined by Directive 92/51 or 89/48, which is required by a Member State for the taking up or pursuit of that profession in its territory. As is apparent from Article 1(a) of Directive 92/51, for the purposes of that directive, a diploma is any evidence of education and training which shows that the holder has successfully completed inter alia a post-secondary course other than that referred to in the second indent of Article 1(a) of Directive 89/48, of at least one year's duration.

60

In those circumstances, a national of a Member State can rely on Article 3(a) of Directive 92/51 to obtain recognition in the host Member State of a professional teaching qualification such as that awarded in Austria upon completion of a two-year period of education and training. It

should however be pointed out that, where such a professional qualification also meets all the requirements laid down by the second subparagraph of Article 1(a) of Directive 89/48 in order to be treated in the same way as a diploma under the first subparagraph of that provision, the competent authority of the Member State must grant recognition under Article 3(a) of Directive 89/48 and not under Article 3(a) of Directive 92/51.

61

The *Land* Baden-Württemberg submits, however, that Article 3 of Directive 92/51 does not apply in the case in the main proceedings because of the derogation laid down by the final subparagraph of that article. According to that provision, the host Member State is not required to apply that article where the taking up or pursuit of a regulated profession is subject in its country to possession of a diploma as defined in Directive 89/48, one of the conditions for the issue of which is the completion of a post-secondary course of more than four years' duration. The *Land* Baden-Württemberg submits in that context that the pursuit of the profession of teacher in its primary or junior secondary schools necessitates a three-year period of study in a higher college of education and a preparatory probationary period of at least 18 months following those studies. Therefore, it does involve a post-secondary course of more than four years' duration within the meaning of the last subparagraph of Article 3 of Directive 92/51.

62

That interpretation cannot be upheld.

63

First, as the Advocate General pointed out in point 87 of his Opinion, a Member State which has failed to fulfil its obligation to transpose the provisions of a directive into national law can no more rely, as against Community citizens, upon the limitations laid down by those provisions than it can require that they perform the obligations laid down by that directive.
The *Land* Baden-Württemberg cannot therefore rely upon the derogation laid down by the final subparagraph of Article 3 of Directive 92/51 as against an individual since it has failed to transpose that directive.

64

Second, the interpretation of the final subparagraph of Article 3 of Directive 92/51 put forward by the *Land* Baden-Württemberg is, in any event, incorrect. It is apparent from several provisions of that directive, in particular Article 1(g) and the first indent of Article 4(1)(a) thereof, that the term 'post-secondary course' is distinct from that of 'probationary practice', even though professional training may consist of a post-secondary course plus a period of probationary practice. There is no evidence to suggest that the final subparagraph of Article 3 of that directive does not take account of that distinction. Furthermore, a provision which derogates from the general principle established by that directive, that the host Member State may not refuse the right to take up a regulated profession to a national of a Member State who possesses the qualification required by a Member State other than the host Member State in order to take up that profession, must be interpreted strictly (see, by analogy, *Kügler*, paragraph 28). Consequently, the final subparagraph of Article 3 of Directive 92/51 must be regarded as referring only to the duration of the post-secondary course and the period of probationary practice may not be included in the calculation of the minimum period of four years, which is one of the conditions for the application of that derogation.

65

As for making the recognition of a professional qualification conditional upon the applicant first complying with the compensatory measures that may be required pursuant to Article 4 of Directive 92/51, it follows from paragraph 63 of the present judgment that, where a Member State has failed to fulfil its obligation to transpose the provisions of a directive into national law, it cannot require individuals to perform the obligations laid down by those provisions. The *Land* Baden-Württemberg cannot therefore refuse to recognise the equivalence of the diploma held by the claimant in the main proceedings by relying on any obligation on the part of that applicant first to submit to compensatory measures.

66

Furthermore, it should be emphasised that the competent authority of the host Member State did not impose any of the compensatory measures referred to in Article 4 of Directive 92/51 on Ms Beuttenmüller. In those circumstances, as has already been stated at paragraph 56 of the present judgment in respect of Article 4 of Directive 89/48, it is not appropriate for the Court to rule on the interpretation of the equivalent provision of Directive 92/51.

67

In the light of all of the foregoing, the reply to the second, fifth and sixth questions must be that in the absence of implementing measures enacted within the period prescribed in the first subparagraph of Article 17(1) of Directive 92/51, a national of a Member State may rely on Article 3(a) of that directive in order to obtain in the host Member State recognition of a professional teaching qualification such as that awarded in Austria following education and training of two years' duration. In circumstances such as those in the case in the main proceedings, that possibility is neither excluded by reason of the application of the derogation laid down by the final subparagraph of Article 3 of that directive nor is it conditional upon the applicant first complying with any compensatory measures that may be required pursuant to Article 4 of that directive.

Costs

68

The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Stuttgart by order of 5 March 2002, hereby rules:

1.

The second subparagraph of Article 1(a) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years'

duration must be interpreted as meaning that a qualification for the profession of teacher, such as that formerly awarded on the basis of a two-year period of education and training in Austria, is to be treated in the same way as a diploma within the meaning of the first subparagraph of that provision where the competent authority of that Member State certifies that the diploma awarded following education and training of two years' duration is recognised as being of a level equivalent to the diploma currently awarded after three years' study and confers the same rights in that Member State in respect of the taking up or pursuit of the profession of teacher. It is for the national court to determine, in the light of the evidence submitted by the applicant in accordance with Article 8(1) of that directive and the national provisions applicable to the assessment of such evidence, whether the final condition laid down by the second subparagraph of Article 1(a) must be regarded as satisfied in the case in the main proceedings. That condition concerns the right to take up a regulated profession and not the remuneration and other employment conditions applicable in the Member State which recognises the equivalence of the old and new education and training.

2.

Article 3(a) of Directive 89/48 may be relied upon by a national of a Member State as against national provisions inconsistent with that directive. That directive precludes such provisions where, for the purpose of recognising a professional teaching qualification awarded or recognised in a Member State other than the host Member State, they require, without exception, completion of a period of higher education and training of at least three years' duration and covering at least two of the subjects stipulated for the teaching profession in the host Member State.

3.

In the absence of implementing measures enacted within the period prescribed in the first subparagraph of Article 17(1) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48, a national of a Member State may rely on Article 3(a) of that directive in order to obtain in the host Member State recognition of a professional teaching qualification such as that awarded in Austria following education and training of two years' duration. In circumstances such as those in the case in the main proceedings, that possibility is neither excluded by reason of the application of the derogation laid down by the final subparagraph of Article 3 of that directive nor is it conditional upon the applicant first complying with any compensatory measures that may be required pursuant to Article 4 of that directive.

JUDGMENT OF THE COURT (Grand Chamber)

22 November 2005 (*)

(Directive 1999/70/EC – Clauses 2, 5 and 8 of the Framework Agreement on fixed-term work – Directive 2000/78/EC – Article 6 – Equal treatment as regards employment and occupation – Age discrimination)

In Case C-144/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht München (Germany), made by decision of 26 February 2004, registered at the Court on 17 March 2004, in the proceedings

Werner Mangold

v

Rüdiger Helm,

THE COURT (Grand Chamber),

composed of P. Jann, President of the First Chamber, acting as President, C.W.A. Timmermans, A. Rosas and K. Schiemann, Presidents of Chambers, R. Schintgen (Rapporteur), S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, E. Juhász, G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: A. Tizzano,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2005,

after considering the observations submitted on behalf of:

– Mr Mangold, by D. Hummel and B. Karthaus, Rechtsanwälte,

– Mr Helm, by himself, Rechtsanwalt,

– the German Government, by M. Lumma, acting as Agent,

– the Commission of the European Communities, by N. Yerrell and S. Grünheid and by D. Martin and H. Kreppel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Clauses 2, 5 and 8 of the Framework Agreement on fixed-term contracts concluded on 18 March 1999 ('the Framework Agreement'), put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), and of Article 6 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 the course of proceedings brought by Mr Mangold against Mr Helm concerning a fixed-term contract by which the former was employed by the latter ('the contract').

Legal context

The relevant provisions of Community law

The Framework Agreement

3 According to Clause 1, '[t]he purpose of this Framework Agreement is to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

4 Clause 2(1) of the Framework Agreement provides:

'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'

5 Under Clause 5(1) of the Framework Agreement:

'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.'

6 Clause 8(3) of the Framework Agreement provides that:

'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.'

Directive 2000/78

7 Directive 2000/78 was adopted on the basis of Article 13 EC. The 1st, 4th, 8th and 25th recitals in the preamble to that directive are worded as follows:

'(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.

…

(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.

…

(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.

…

(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.'

8 According to Article 1, 'the purpose of … Directive [2000/78] 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'.

9 Article 2 of Directive 2000/78, headed 'Concept of discrimination', states in subparagraphs 1 and 2(a) that:

'(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.'

10 Article 3 of Directive 2000/78, headed 'Scope', provides in subparagraph 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;

…

(c) employment and working conditions, including dismissals and pay;

…'.

11 Article 6(1) of Directive 2000/78 provides:

'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.'

12 In accordance with the first paragraph of Article 18 of Directive 2000/78, the Member States were to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 2 December 2003 at the latest. However, under the second paragraph of that article:

'In order to take account of particular conditions, Member States may, if necessary, have an additional period of three years from 2 December 2003, that is to say a total of six 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.'

13 The Federal Republic of Germany having requested such an additional period for the implementation of the directive, so far as that Member State is concerned the period allowed will not expire until 2 December 2006.

The relevant provisions of national law

14 Paragraph 1 of the Beschäftigungsförderungsgesetz (Law to promote employment), as amended by the law of 25 September 1996 (BGBl. 1996 I, p. 1476) ('the BeschFG 1996'), provided:

‘(1) Fixed-term employment contracts shall be authorised for a maximum term of two years. Within that maximum limit of two years a fixed-term contract may be renewed three times at most.

(2) Fixed-term employment contracts shall be authorised exempt from the condition set out in paragraph 1 if the employee has reached the age of 60 when the fixed-term employment contract begins.

(3) Employment contracts within the meaning of paragraphs 1 and 2 shall not be authorised where there is a close connection with a previous employment contract of indefinite duration or with a previous fixed-term employment contract within the meaning of paragraph 1 concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than four months.

(4) The possibility of limiting the term of employment contracts for other reasons shall remain unaltered.

…’.

15 By virtue of Paragraph 1(6) of the BeschFG 1996, those rules were applicable until 31 December 2000.

16 Directive 1999/70 implementing the Framework Agreement was transposed into German law by the Law on part-time working and fixed-term contracts amending and repealing provisions of employment law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 (BGBl. 2000, p. 1966, ‘the TzBfG’). That law entered into force on 1 January 2001.

17 Paragraph 1 of the TzBfG, headed ‘Objective’, provides that:

‘This law is intended to encourage part-time working, to fix the conditions in which fixed-term contracts may be concluded and to prevent discrimination against workers employed part-time and workers employed under a fixed-term contract.’

18 Paragraph 14 of the TzBfG, which regulates fixed-term contracts, provides that:

‘(1) A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where:

1. the operational manpower requirements are only temporary,
2. the fixed term follows a period of training or study in order to facilitate the employee’s entry into subsequent employment,
3. one employee replaces another,
4. the particular nature of the work justifies the fixed term,
5. the fixed term is a probationary period,
6. reasons relating to the employee personally justify the fixed term,
7. the employee is paid out of budgetary funds provided for fixed-term employment and he is employed on that basis, or
8. the term is fixed by common agreement before a court.

(2) The term of an employment contract may be limited in the absence of objective reasons for a maximum period of two years. Within that maximum period a fixed-term contract may be renewed three times at most. The conclusion of a fixed-term employment contract within the meaning of the first sentence shall not be authorised if that contract is immediately preceded by an employment relationship of fixed or indefinite duration with the same employer. A collective agreement may fix the number or renewals or the maximum duration of the fixed term in derogation from the first sentence.

(3) The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months.

(4) The limitation of the term of an employment contract must be fixed in writing in order to be enforceable.'

19 Paragraph 14(3) of the TzBfG has been amended by the First Law for the provision of modern services on the labour market of 23 December 2002 (BGBl. 2002 I, p. 14607, 'the Law of 2002'). The new version of that provision, which took effect on 1 January 2003, is henceforth worded as follows:

'A fixed-term employment contract shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58. It shall not be permissible to set a fixed term where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months. Until 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58.'

The main proceedings and the questions referred for a preliminary ruling

20 On 26 June 2003 Mr Mangold, then 56 years old, concluded with Mr Helm, who practises as a lawyer, a contract that took effect on 1 July 2003.

21 Article 5 of that contract provided that:

'1. The employment relationship shall start on 1 July 2003 and last until 28 February 2004.

2. The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers (the provisions of the fourth sentence, in conjunction with those of the fourth sentence, of Paragraph 14(3) of the TzBfG …), since the employee is more than 52 years old.

3. The parties have agreed that there is no reason for the fixed term of this contract other than that set out in paragraph 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.'

22 According to Mr Mangold, paragraph 5, inasmuch as it limits the term of his contract, is, although such a limitation is in keeping with Paragraph 14(3) of the TzBfG, incompatible with the Framework Agreement and with Directive 2000/78.

23 Mr Helm argues that Clause 5 of the Framework Agreement requires the Member States to introduce measures to prevent abuse arising from the use of successive fixed-term contracts of employment, in particular, by requiring objective reasons justifying the renewal of such contracts, or by fixing the maximum total duration of such fixed-term employment relationships or contracts, or by limiting the number of renewals of such contracts or relationships.

24 He takes the view that even if the fourth sentence of Paragraph 14(3) of the TzBfG does not expressly lay down such restrictions in respect of older workers, there is in fact an objective reason, within the meaning of Clause 5(1)(a) of the Framework Agreement, that justifies the conclusion of a fixed-term contract of employment, which is the difficulty those workers have in finding work having regard to the features of the labour market.

25 The Arbeitsgericht München is doubtful whether the first sentence of Paragraph 14(3) of the TzBfG is compatible with Community law.

26 First, that court considers that that provision is contrary to the prohibition of 'regression' (reduction of protection) laid down in Clause 8(3) of the Framework Agreement in that, on the transposition into national law of Directive 1999/70, that provision lowered from 60 to 58 the age of persons excluded from protection against the use of fixed-term contracts of employment where that use is not justified by an objective reason and, in consequence, the general level of protection enjoyed by that class of workers. Such a provision is also, in its opinion, contrary to Clause 5 of the Framework Agreement which seeks to prevent abuse of such contracts, in that it lays down no restriction on the conclusion of such contracts by many workers falling into a class categorised by age only.

27 Second, the national court is uncertain whether rules such as those contained in Paragraph 14(3) of the TzBfG are compatible with Article 6 of Directive 2000/78, in that the lowering, by the Law of 2002, from 58 to 52 of the age at which it is authorised to conclude fixed-term contracts, with no objective justification, does not guarantee the protection of older persons in work. Nor is the principle of proportionality observed.

28 It is true that the national court finds that, on the date of the conclusion of the contract, namely, 26 June 2003, the period prescribed for transposition of Directive 2000/78 into national law had not yet expired. None the less, it notes that, in accordance with paragraph 45 of the judgment in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, a Member State to which a directive is addressed may not, during the period prescribed for transposition, adopt measures that may seriously compromise the attainment of the result prescribed by the directive.

29 Now, in the case in the main proceedings, the Law of 2002's amendment of Paragraph 14(3) of the TzBfG came into force on 1 January 2003, that is to say, after Directive 2000/78 was published in the *Official Journal of the European Communities,* but before the period allowed by Article 18 of that directive for its transposition had expired.

30 Third, the Arbeitsgericht München raises the question whether the national court is bound, in proceedings between individuals, to set aside rules of domestic law incompatible with Community law. In this respect it considers that the primacy of Community law must lead the court to find that Paragraph 14(3) of the TzBfG is inapplicable in its entirety and that,

therefore, it is necessary to apply the fundamental rule laid down in Paragraph 14(1), in accordance with which there must be some objective reason for the conclusion of a fixed-term contract of employment.

31 Those were the circumstances in which the Arbeitsgericht München decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1(a) Is Clause 8(3) of the Framework Agreement … to be interpreted, when transposed into domestic law, as prohibiting a reduction of protection following from the lowering of the age limit from 60 to 58?

1(b) Is Clause 5(1) of the Framework Agreement … to be interpreted as precluding a provision of national law which – like the provision at issue in this case – does not contain any of the three restrictions set out in paragraph 1 of that clause?

2. Is Article 6 of … Directive 2000/78 … to be interpreted as precluding a provision of national law which, like the provision at issue in this case, authorises the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 and over, contrary to the principle requiring justification on objective grounds?

3. If one of those three questions is answered in the affirmative: must the national court refuse to apply the provision of domestic law which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds?'

Admissibility of the reference for a preliminary ruling

32 At the hearing the admissibility of the reference for a preliminary ruling was challenged by the Federal Republic of Germany, on the grounds that the dispute in the main proceedings was fictitious or contrived. Indeed, in the past Mr Helm has publicly argued a case identical to Mr Mangold's, to the effect that Paragraph 14(3) of the TzBfG is unlawful.

33 It is first of all to be noted in that respect that, pursuant to Article 234 EC, where a question on the interpretation of the Treaty or of subordinate acts of the institutions of the Community is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon (see, inter alia, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 22).

34 In the context of that procedure for making a reference, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgment (Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23; C-146/93 *McLachlan* [1994] ECR I-3229, paragraph 20; Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 10; and C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 43.

35 Consequently, where the question submitted by the national court concerns the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20; *Leclerc-Siplec*, paragraph 11; Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 10; and *Inspire Art*, paragraph 44).

36 Nevertheless, the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Case 149/82 *Robards* [1983] ECR 171, paragraph 19; *Meilicke*, paragraph 25; and *Inspire Art*, paragraph 45).

37 It is in the light of that function that the Court has considered that it has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings.

38 However, in the case in the main proceedings, it hardly seems arguable that the interpretation of Community law sought by the national court does actually respond to an objective need inherent in the outcome of a case pending before it. In fact, it is common ground that the contract has actually been performed and that its application raises a question of interpretation of Community law. The fact that the parties to the dispute in the main proceedings are at one in their interpretation of Paragraph 14(3) of the TzBfG cannot affect the reality of that dispute.

39 The order for reference must, therefore, be regarded as admissible.

Concerning the questions referred for a preliminary ruling

On Question 1(b)

40 In Question 1(b), which it is appropriate to consider first, the national court asks whether, on a proper construction of Clause 5 of the Framework Agreement, it is contrary to that provision for rules of domestic law such as those at issue in the main proceedings to contain none of the restrictions provided for by that clause in respect of the use of fixed-term contracts of employment.

41 Here it is to be noted that Clause 5(1) of the Framework Agreement is supposed to 'prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

42 Now, as the parties to the main proceedings confirmed at the hearing, the contract is the one and only contract concluded between them.

43 In those circumstances, interpretation of Clause 5(1) of the Framework Agreement is obviously irrelevant to the outcome of the dispute before the national court and, accordingly, there is no need to answer Question 1(b).

On Question 1(a)

44 By Question 1(a), the national court seeks to ascertain whether on a proper construction of Clause 8(3) of the Framework Agreement, domestic legislation such as that at issue in the main proceedings which, on transposing Directive 1999/70, lowered from 60 to 58 the age above which fixed-term contracts of employment may be concluded without restrictions, is contrary to that provision.

45 As a preliminary point, it is to be noted that, in the case in the main proceedings, the contract was concluded on 26 June 2003, that is to say, when the TzBfG, as amended by the Law of 2002 which lowered the age above which it is permissible to conclude fixed-

term contracts of employment from 58 to 52, was in force. In the instant case, it is common ground that Mr Mangold was engaged by Mr Helm at the age of 56.

46 Nevertheless, the national court considers that an interpretation of Clause 8(3) would be helpful to it in assessing the validity of the lawfulness of Paragraph 14(3) of the TzBfG, in its original version, in so far as, if that latter provision should not be in keeping with Community law, the result would be that its amendment by the Law of 2002 would be invalid.

47 In any case, it is to be declared that the German legislature had already, when Directive 1999/70 was transposed into domestic law, lowered from 60 to 58 the age at which fixed-term contracts of employment might be concluded.

48 According to Mr Mangold, that reduction of protection, like that under the Law of 2002, is contrary to Clause 8(3) of the Framework Agreement.

49 In contrast, the German Government takes the view that that lowering of the relevant age was offset by giving workers bound by a fixed-term contract new social guarantees, such as the laying down of a general prohibition of discrimination and the extending to small businesses, and to short-term employment relationships, of the restrictions provided for in respect of recourse to that kind of contract.

50 In this connection, it appears from the very wording of Clause 8(3) of the Framework Agreement that implementation of the agreement cannot provide the Member States with valid grounds for reducing the general level of protection for workers previously guaranteed in the domestic legal order in the sphere covered by that agreement.

51 The term 'implementation', used without any further precision in Clause 8(3) of the Framework Agreement, does not refer only to the original transposition of Directive 1999/70 and especially of the Annex thereto containing the Framework Agreement, but must also cover all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted.

52 In contrast, reduction of the protection which workers are guaranteed in the sphere of fixed-term contracts is not prohibited as such by the Framework Agreement where it is in no way connected to the implementation of that agreement.

53 Now, it is clear from both the order for reference and the observations submitted by the German Government at the hearing that, as the Advocate General has noted in paragraphs 75 to 77 of his Opinion, the successive reductions of the age above which the conclusion of a fixed-term contract is permissible without restrictions are justified, not by the need to put the Framework Agreement into effect but by the need to encourage the employment of older persons in Germany.

54 In those circumstances, the reply to be given to Question 1(a) is that on a proper construction of Clause 8(3) of the Framework Agreement, domestic legislation such as that at issue in the main proceedings which, for reasons connected with the need to encourage employment and irrespective of the implementation of that agreement, has lowered the age above which fixed-term contracts of employment may be concluded without restrictions, is not contrary to that provision.

On the second and third questions

55 By its second and third questions, which may appropriately be considered together, the national court seeks in essence to ascertain whether Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. If so, the national court asks what conclusions it must draw from that interpretation.

56 In this regard, it is to be noted that, in accordance with Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination on any of the grounds referred to in that article, which include age, as regards employment and occupation.

57 Paragraph 14(3) of the TzBfG, however, by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, introduces a difference of treatment on the grounds directly of age.

58 Specifically with regard to differences of treatment on grounds of age, Article 6(1) of Directive 2000/78 provides that the Member States may provide that such differences of treatment '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'. According to subparagraph (a) of the second paragraph of Article 6(1), those differences may include inter alia 'the setting of special conditions on access to employment and vocational training, employment and occupation … for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection' and, under subparagraphs (b) and (c), the fixing of conditions of age in certain special circumstances.

59 As is clear from the documents sent to the Court by the national court, the purpose of that legislation is plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work.

60 The legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, as indeed the Commission itself has admitted.

61 An objective of that kind must as a rule, therefore, be regarded as justifying, 'objectively and reasonably', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age laid down by Member States.

62 It still remains to be established whether, according to the actual wording of that provision, the means used to achieve that legitimate objective are 'appropriate and necessary'.

63 In this respect the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.

64 However, as the national court has pointed out, application of national legislation such as that at issue in the main proceedings leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an

indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.

65 In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (see, to that effect, Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39). Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78.

66 The fact that, when the contract was concluded, the period prescribed for the transposition into domestic law of Directive 2000/78 had not yet expired cannot call that finding into question.

67 First, the Court has already held that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (*Inter-Environnement Wallonie*, paragraph 45).

68 In this connection it is immaterial whether or not the rule of domestic law in question, adopted after the directive entered into force, is concerned with the transposition of the directive (see, to that effect, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraphs 58 and 59).

69 In the case in the main proceedings the lowering, pursuant to Paragraph 14(3) of the TzBfG, of the age above which it is permissible to conclude fixed-term contracts from 58 to 52 took place in December 2002 and that measure was to apply until 31 December 2006.

70 The mere fact that, in the circumstances of the case, that provision is to expire on 31 December 2006, just a few weeks after the date by which the Member State must have transposed the directive, is not in itself decisive.

71 On the one hand, it is apparent from the very wording of the second subparagraph of Article 18 of Directive 2000/78 that where a Member State, like the Federal Republic of Germany in this case, chooses to have recourse to an additional period of three years from 2 December 2003 in order to transpose the directive, that Member State 'shall report annually to the Commission on the steps it is taking to tackle age … discrimination and on the progress it is making towards implementation'.

72 That provision implies, therefore, that the Member State, which thus exceptionally enjoys an extended period for transposition, is progressively to take concrete measures for the purpose of there and then approximating its legislation to the result prescribed by that directive. Now, that obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for implementation of the directive, to adopt measures incompatible with the objectives pursued by that act.

73 On the other hand, as the Advocate General has observed in point 96 of his Opinion, on 31 December 2006 a significant proportion of the workers covered by the legislation at issue in the main proceedings, including Mr Mangold, will already have reached the age of 58 and will therefore still fall within the specific rules laid down by Paragraph 14(3) of the TzBfG, with the result that that class of persons becomes definitively liable to be excluded from the safeguard of stable employment by the use of a fixed-term contract of employment, regardless of the fact that the age condition fixed at 52 will cease to apply at the end of 2006.

74 In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole 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', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with Paragraph 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive 1999/70 (see also, in this respect, paragraphs 51 and 64 above), and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle (Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 30 to 32).

76 Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.

77 In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30).

78 Having regard to all the foregoing, the reply to be given to the second and third questions must be that Community law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.

It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law

which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

Costs

79 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. On a proper construction of Clause 8(3) of the Framework Agreement on fixed-term contracts concluded on 18 March 1999, put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, domestic legislation such as that at issue in the main proceedings, which for reasons connected with the need to encourage employment and irrespective of the implementation of that agreement, has lowered the age above which fixed-term contracts of employment may be concluded without restrictions, is not contrary to that provision.

2. Community law and, more particularly, Article 6(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 precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.

It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

JUDGMENT OF THE COURT (Grand Chamber)

6 March 2007 (*)

(Freedom of establishment – Freedom to provide services – Interpretation of Articles 43 EC and 49 EC – Games of chance – Collection of bets on sporting events – Licensing requirement – Exclusion of certain operators by reason of their type of corporate form – Requirement of police authorisation – Criminal penalties)

In Joined Cases C-338/04, C-359/04 and C-360/04,

REFERENCES for a preliminary ruling under Article 234 EC, by the Tribunale di Larino (Italy) (Case C-338/04) and the Tribunale di Teramo (Italy) (Cases C-359/04 and C-360/04), by decisions of 8 July 2004 and 31 July 2004, received at the Court on 6 August 2004 and 18 August 2004 respectively, in the criminal proceedings before those courts against

Massimiliano Placanica (Case C-338/04),

Christian Palazzese (Case C-359/04),

Angelo Sorricchio (Case C-360/04),

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Presidents of Chambers), J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann (Rapporteur), G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 March 2006,

after considering the observations submitted on behalf of:

– Mr Placanica and Mr Palazzese, by D. Agnello, avvocatessa,

– Mr Sorricchio, by R.A. Jacchia, A. Terranova, I. Picciano and F. Ferraro, avvocati,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by A. Cingolo and F. Sclafani, Avvocati dello Stato (Cases C-338/04, C-359/04 and C-360/04),

– the Belgian Government, initially by D. Haven and subsequently by M. Wimmer, acting as Agents, assisted by P. Vlaemminck and S. Verhulst, advocaten (Case C-338/04),

– the German Government, by C.-D. Quassowski and C. Schulze-Bahr, acting as Agents (Case C-338/04),

– the Spanish Government, by F. Díez Moreno, acting as Agent (Cases C-338/04, C-359/04 and C-360/04),

– the French Government, by G. de Bergues and C. Bergeot-Nunes, acting as Agents (Case C-338/04),

– the Austrian Government, by H. Dossi, acting as Agent (Cases C-338/04, C-359/04 and C-360/04),

– the Portuguese Government, by L.I. Fernandes and A.P. Barros, acting as Agents (Cases C-338/04, C-359/04 and C-360/04), assisted by J.L. da Cruz Vilaça, advogado (Case C-338/04),

– the Finnish Government, by T. Pynnä, acting as Agent (Case C-338/04),

– la Commission of the European Communities, by E. Traversa, acting as Agent (Cases C-338/04, C-359/04 and C-360/04),

after hearing the Opinion of the Advocate General at the sitting on 16 May 2006,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of Articles 43 EC and 49 EC.

2 The references have been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in Case C-67/98 *Zenatti* [1999] ECR I-7289 and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031.

Legal context

3 Italian legislation essentially provides that participation in the organising of games of chance, including the collection of bets, is subject to possession of a licence and a police authorisation. Any infringement of that legislation carries criminal penalties of up to three years' imprisonment.

Licences

4 Until 2002 the awarding of licences for the organising of bets on sporting events was managed by the Italian National Olympic Committee (Comitato olimpico nazionale italiano (CONI)) and the National Union for the Improvement of Horse Breeds (Unione nazionale per l'incremento delle razze equine (UNIRE)), which had the authority to organise bets relating to sporting events organised or conducted under their supervision. That resulted from Legislative Decree No 496 of 14 April 1948 (GURI No 118 of 14 April 1948), read in conjunction with Article 3(229) of Law No 549 of 28 December 1995 (GURI No 302 of 29 December 1995, Ordinary Supplement) and Article 3(78) of Law No 662 of 23 December 1996 (GURI No 303 of 28 December 1996, Ordinary Supplement).

5 Specific rules for the award of licences were laid down, in the case of CONI, by Decree No 174 of the Ministry of Economic Affairs and Finance of 2 June 1998 (GURI No 129 of 5 June 1998; 'Decree No 174/98') and, in the case of UNIRE, by Decree No 169 of the President of the Republic of 8 April 1998 (GURI No 125 of 1 June 1998; 'Decree No 169/98').

6 Decree No 174/98 provided that the award of licences by CONI was to be made by means of calls for tender. When awarding the licences, CONI had, in particular, to make sure that the share ownership of the licence holders was transparent and that the outlets for collecting and taking bets were rationally distributed across the national territory.

7 In order to ensure transparency of share ownership, Article 2(6) of Decree No 174/98 provided that where the licence holder took the form of a company, shares carrying voting rights had to be issued in the name of natural persons, general partnerships or limited partnerships, and could not be transferred by simple endorsement.

8 Similar provision was made with regard to the award of licences by UNIRE.

9 In 2002, following a number of legislative initiatives, the competences of CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance.

10 Pursuant to an amendment introduced at that time by Article 22(11) of Law No 289 of 27 December 2002 (GURI No 305 of 31 December 2002, Ordinary Supplement; 'the 2003 Finance Law') all companies – without any limitation as to their form – may now take part in tender procedures for the award of licences.

Police authorisation

11 Police authorisation may be granted only to those who hold a licence or authorisation granted by a Ministry or other body to which the law reserves the right to organise or manage betting. Those conditions are laid down in Article 88 of Royal Decree No 773, approving a single text of the laws on public security (Regio Decreto No 773, Testo unico delle leggi di pubblica sicurezza), of 18 June 1931 (GURI No 146 of 26 June 1931), as amended by Article 37(4) of Law No 388 of 23 December 2000 (GURI No 302 of 29 December 2000, Ordinary Supplement; 'the Royal Decree').

12 Furthermore, by virtue of Article 11 of the Royal Decree, read in conjunction with Article 14 thereof, a police authorisation may not be issued to a person who has had certain penalties imposed on him or who has been convicted of certain offences, in particular offences reflecting a lack of probity or good conduct, and infringements of the betting and gaming legislation.

13 Once authorisation has been granted, the holder must, pursuant to Article 16 of the Royal Decree, permit law enforcement officials access at any time to the premises where the authorised activity is pursued.

Criminal penalties

14 Article 4 of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989) as amended by Article 37(5) of Law No 388 ('Law No 401/89') provides as follows in respect of criminal penalties for malpractice in the organising of games of chance:

'1. Any person who unlawfully participates in the organising of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, or by organisations under the authority of CONI, or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organising of betting on other contests between people or animals, or on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000. …

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein,

shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

…

4a. The penalties laid down in this article shall be applicable to any person who, without the concession, authorisation or licence required by Article 88 of [the Royal Decree], carries out activities in Italy for the purposes of accepting or collecting, or, in any case, of assisting the acceptance or in any way whatsoever the collection, including by telephone or by data transfer, of bets of any kind accepted by any person in Italy or abroad.

…'

Case-law of the Corte suprema di cassazione

15 In its judgment No 111/04 of 26 April 2004 in *Gesualdi*, the Corte suprema di cassazione (Supreme Court of Cassation) (Italy) was called upon to determine whether the Italian betting and gaming legislation is compatible with Articles 43 EC and 49 EC. On completion of its analysis, that court reached the conclusion that the Italian legislation does not conflict with Articles 43 EC and 49 EC.

16 In *Gesualdi*, the Corte suprema di cassazione noted that, for several years, the Italian legislature had been pursuing a policy of expansion in the betting and gaming sector with the manifest aim of increasing tax revenue, and that the Italian legislation could not be justified by reference to the aim of protecting consumers or of limiting their propensity to gamble or of limiting the availability of games of chance. Rather, the Corte suprema di cassazione identified as the true purpose of the Italian legislation a desire to channel betting and gaming activities into systems that are controllable, with the objective of preventing their exploitation for criminal purposes. That is why the Italian legislation provided for the control and supervision of the persons who operate betting and tipster contests, as well as the premises in which they do so. In the view of the Corte suprema di cassazione, that objective is sufficient in itself to justify the restrictions on the freedom of establishment and the freedom to provide services.

17 As regards the conditions designed to ensure the transparency of the share ownership of licence holders – the principal effect of which is to exclude from tender procedures for licences companies whose individual shareholders are not always identifiable at any given moment – the Corte suprema di cassazione found in *Gesualdi* that the Italian legislation did not discriminate against foreign companies at all, even indirectly, since it had the effect of excluding not only the foreign companies whose shareholders cannot be precisely identified, but also all the Italian companies whose shareholders cannot be precisely identified.

The main proceedings and the questions referred for a preliminary ruling

The award of licences

18 According to the documents before the Court, CONI – acting in accordance with the Italian legislation – launched a call for tenders on 11 December 1998 for the award of 1 000 licences for sports betting operations, that being the number of licences considered on the basis of a specific assessment to be sufficient for the whole of the national territory. At the same time, a call for tenders in respect of 671 new licences for the taking of bets on competitive horse events was organised by the Ministry of Economic Affairs and Finance in agreement with the Ministry of Agricultural and Forestry Policy, and 329 existing licences were automatically renewed.

19 The application of the provisions concerning the transparency of share ownership that were in force at the time of those calls for tender had primarily the effect of excluding the participation of operators in the form of companies whose shares were quoted on the regulated markets, since in their case the precise identification of individual shareholders was not possible on an ongoing basis. Following those calls for tender, a number of licences – valid for six years and renewable for a further six years – were awarded in 1999.

Stanley International Betting Ltd

20 Stanley International Betting Ltd ('Stanley') is a company incorporated under English law and a member of the group Stanley Leisure plc ('Stanley Leisure'), a company incorporated under English law and quoted on the London (United Kingdom) stock exchange. Both companies have their head office in Liverpool (United Kingdom). Stanley Leisure operates in the betting and gaming sector and is the fourth biggest bookmaker and the largest casino operator in the United Kingdom.

21 Stanley is one of Stanley Leisure's operational conduits outside the United Kingdom. It is duly authorised to operate as a bookmaker in the United Kingdom by virtue of a licence issued by the City of Liverpool. It is subject to controls by the British authorities in the interests of public order and safety; to internal controls over the lawfulness of its activities; to controls carried out by a private audit company; and to controls carried out by the Inland Revenue and the United Kingdom customs authorities.

22 In the hope of obtaining licences for at least 100 betting outlets in Italy, Stanley investigated the possibility of taking part in the tendering procedures, but realised that it could not meet the conditions concerning the transparency of share ownership because it formed part of a group quoted on the regulated markets. Accordingly, it did not participate in the tendering procedure and holds no licence for betting operations.

Data transmission centres

23 Stanley operates in Italy through more than 200 agencies, commonly called 'data transmission centres' (DTCs). The DTCs supply their services in premises open to the public in which a data transmission link is placed at the disposal of bettors so that they can access the server of Stanley's host computer in the United Kingdom. In that way, bettors are able – electronically – to forward sports bets proposals to Stanley (chosen from lists of events, and the odds on them, supplied by Stanley), to receive notice that their proposals have been accepted, to pay their stakes and, where appropriate, to receive their winnings.

24 The DTCs are run by independent operators who have contractual links to Stanley. Mr Placanica, Mr Palazzese and Mr Sorricchio, the defendants in the main proceedings, are all DTC operators linked to Stanley.

25 According to the case-file forwarded by the Tribunale (District Court) di Teramo (Italy), Mr Palazzese and Mr Sorricchio applied, before commencing their activities, to Atri Police Headquarters for police authorisation in accordance with Article 88 of the Royal Decree. Those applications met with no response.

The reference for a preliminary ruling from the Tribunale di Larino (Case C-338/04)

26 Accusing Mr Placanica of the offence set out in Article 4(4a) of Law No 401/89 in that, as a DTC operator for Stanley, Mr Placanica had pursued the organised activity of collecting bets without the required police authorisation, the Public Prosecutor brought criminal proceedings against him before the Tribunale di Larino (Italy).

27 That court expresses misgivings as to the soundness of the conclusion reached by the Corte suprema di cassazione in *Gesualdi*, with regard to the compatibility of Article 4(4a) of Law No 401/89 with Community law. The Tribunale di Larino is uncertain whether the public order objectives invoked by the Corte suprema di cassazione justify the restrictions at issue.

28 Accordingly, the Tribunale di Larino decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the Court of Justice consider Article 4(4a) of Law No 401/89 to be compatible with the principles enshrined in Article 43 [EC] et seq. and 49 [EC] concerning the freedom of establishment and the freedom to provide cross-border services, having regard to the difference between the interpretation emerging from the decisions of the Court … (in particular the judgment in *Gambelli and Others*) and the decision of the Corte Suprema di Cassazione, Sezione Uniti, in Case No 23271/04? In particular, the Court is requested to rule on the applicability in Italy of the rules on penalties referred to in the indictment and relied upon against [Mr] Placanica.'

The references for a preliminary ruling from the Tribunale di Teramo (Cases C-359/04 and C-360/04)

29 The Atri police authorities charged Mr Palazzese and Mr Sorricchio with pursuing, without a licence or a police authorisation, an organised activity with a view to facilitating the collection of bets, and placed their premises and equipment under preventive seizure on the basis of Article 4(4a) of Law No 401/89. Upon confirmation of the seizure measures by the Public Prosecutor, Mr Palazzese and Mr Sorricchio each brought an action challenging those measures before the Tribunale di Teramo.

30 In the view of that court, the restrictions imposed on companies quoted on the regulated markets, which prevented them in 1999 from taking part in the last tender procedure for the award of licences for the operation of betting activities, are incompatible with the principles of Community law because they discriminate against operators who are not Italian. In consequence – like the Tribunale di Larino – the Tribunale di Teramo has doubts as to whether the judgment in *Gesualdi* is sound.

31 In those circumstances, the Tribunale di Teramo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'The District Court [of Teramo] needs to know, in particular, whether [the first paragraph of Article 43 EC and the first paragraph of Article 49 EC] may be interpreted as allowing the Member States to derogate temporarily (for 6 to 12 years) from the freedom of establishment and the freedom to provide services within the European Union, and to legislate as follows, without undermining those Community principles:

– allocating to certain persons licences for the pursuit of certain activities involving provision of services, valid for 6 or 12 years, on the basis of a body of rules which excluded from the tender procedure certain kinds of (non-Italian) competitors;

– amending that system, after subsequently noting that it was not compatible with the principles enshrined in Articles 43 [EC] and 49 [EC], so as to allow in future the participation of those persons who had been excluded;

– not revoking the licences granted on the basis of the earlier system which, as stated, infringed the principles of freedom of establishment and of free movement of services or

setting up a new tender procedure pursuant to the new rules which now comply with the abovementioned principles;

– continuing, on the other hand, to bring criminal proceedings against anyone carrying on business via a link with operators who, [despite] being entitled to pursue such an activity in the Member State of origin, were nevertheless unable to seek an operating licence precisely because of the restrictions contained in the earlier licensing rules, later repealed?'

32 By order of the President of the Court of 14 October 2004, Cases C-359/04 and C-360/04 were joined for the purposes of the written and oral procedures and of the judgment. By a second order of the President of the Court of 27 January 2006, Case C-338/04 was joined with Joined Cases C-359/04 and C-360/04 for the purposes of the oral procedure and of the judgment.

Admissibility of the questions referred for a preliminary ruling

33 In Case C-338/04, all the Governments which lodged observations – with the exception of the Belgian Government – call in question the admissibility of the question referred. With regard to Cases C-359/04 and C-360/04, the Italian and Spanish Governments question the admissibility of the question referred. With regard to Case C-338/04, the Portuguese and Finnish Governments submit that the reference from the Tribunale di Larino does not contain sufficient information to enable a reply to be given whereas, according to the Italian, German, Spanish and French Governments, the question referred concerns the interpretation of national law, not Community law, and in consequence calls for the Court to rule on the compatibility with Community law of rules of national law. The Italian and Spanish Governments express the same reservation as regards the admissibility of the question referred in Cases C-359/04 and C-360/04.

34 Concerning the information that must be provided to the Court in the context of a reference for a preliminary ruling, it should be noted that that information does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the Governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice. For those purposes, according to settled case-law, it is firstly necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Secondly, the referring court must set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In consequence, it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (see to that effect, inter alia, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraphs 45 to 47; and Case C-506/04 *Wilson* [2006] ECR I-0000, paragraphs 38 and 39).

35 The reference from the Tribunale di Larino (Case C-338/04) meets those requirements. In so far as the national legal context, and the arguments relied upon by the parties are in essence identical to those in *Gambelli and Others*, a reference to that judgment was sufficient to enable the Court, as well as the Governments of Member States and the other interested parties, to identify the subject-matter of the dispute.

36 Admittedly, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (see, in particular, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 19, and *Wilson*, paragraphs 34 and 35).

37 In that regard, the Advocate General pointed out, quite correctly, at point 70 of his Opinion that, on a literal reading of the question referred for a preliminary ruling by the Tribunale di Larino (Case C-338/04), the Court is being asked to rule on the compatibility with Community law of a provision of national law. Nevertheless, although the Court cannot answer that question in the terms in which it is framed, there is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.

38 As for the question referred for a preliminary ruling by the Tribunale di Teramo (Cases C-359/04 and C-360/04), this identifies with precision the effects of a number of national legislative developments and asks the Court whether those effects are compatible with the EC Treaty. It follows that, by that question, the Court is not being called upon to rule on the interpretation of national law or on the compatibility of national law with Community law.

39 The questions referred must therefore be declared admissible.

The questions referred for a preliminary ruling

40 It is clear from the case-files forwarded to the Court that an operator wishing to pursue, in Italy, an activity in the betting and gaming sector must comply with national legislation characterised by the following elements:

– the obligation to obtain a licence;

– a method of awarding those licences, by means of a tender procedure excluding certain types of operator and, in particular, companies whose individual shareholders are not always identifiable at any given moment;

– the obligation to obtain a police authorisation; and

– criminal penalties for failure to comply with the legislation at issue.

41 By the questions referred, which it is appropriate to consider together, the national courts essentially ask whether Articles 43 EC and 49 EC preclude national legislation on betting and gaming, such as that at issue in the main proceedings, in so far as it contains such elements.

42 The Court has already ruled that, in so far as the national legislation at issue in the main proceedings prohibits – on pain of criminal penalties – the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the freedom of establishment and the freedom to provide services (see *Gambelli and Others*, paragraph 59 and the operative part).

43 In the first place, the restrictions imposed on intermediaries such as the defendants in the main proceedings constitute obstacles to the freedom of establishment of companies

established in another Member State, such as Stanley, which pursue the activity of collecting bets in other Member States through an organisation of agencies such as the DTCs operated by the defendants in the main proceedings (see *Gambelli and Others*, paragraph 46).

44 Secondly, the prohibition imposed on intermediaries such as the defendants in the main proceedings, under which they are forbidden to facilitate the provision of betting services in relation to sporting events organised by a supplier, such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, constitutes a restriction on the right of that supplier freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services (see *Gambelli and Others*, paragraph 58).

45 In those circumstances, it is necessary to consider whether the restrictions at issue in the main proceedings may be recognised as exceptional measures, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see *Gambelli and Others*, paragraph 60).

46 On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 57 to 60; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 32 and 33; *Zenatti*, paragraphs 30 and 31; and *Gambelli and Others*, paragraph 67).

47 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (*Gambelli and Others*, paragraph 63).

48 However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality.

49 The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect *Gebhard*, paragraph 37, as well as *Gambelli and Others*, paragraphs 64 and 65, and Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 25).

The licensing requirement

50 Before an operator can be active in the betting and gaming sector in Italy, it must obtain a licence. Under the licensing system in use, the number of operators is limited. So far as concerns the taking of bets, the number of licences for the management of sports bets on competitive events not involving horses is limited to 1 000, as is the number of licences for the acceptance of bets on competitive horse events.

51 It should be made clear from the outset that the fact that that number of licences for each of those two categories was, according to the documents before the Court, considered on the

basis of a specific assessment to be 'sufficient' for the whole of the national territory could not of itself justify the obstacles to the freedom of establishment and the freedom to provide services brought about by that limitation.

52 As regards the objectives capable of justifying those obstacles, a distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand – in so far as games of chance are permitted – the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.

53 With regard to the first type of objective, it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and systematic manner (see, to that effect, *Zenatti*, paragraphs 35 and 36, and *Gambelli and Others*, paragraphs 62 and 67).

54 It is, however, common ground in the present case, according to the case-law of the Corte suprema di cassazione, that the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector, with the aim of increasing tax revenue, and that no justification for the Italian legislation is to be found in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling.

55 Indeed it is the second type of objective, namely that of preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems, that is identified, both by the Corte suprema di cassazione and by the Italian Government in its observations before the Court, as the true goal of the Italian legislation at issue in the main proceedings. Viewed from that perspective, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated. As the Belgian and French Governments, in particular, have pointed out, in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.

56 The Italian Government also referred to a number of factual elements, including, notably, an investigation into the betting and gaming sector, carried out by the Sixth Permanent Committee (Finance and the Treasury) of the Italian Senate. That investigation led to the conclusion that the activities of clandestine betting and gaming, prohibited as such, are a considerable problem in Italy, which it may be possible to solve through the expansion of authorised and regulated activities. Thus, according to that investigation, half the total turnover figure for the betting and gaming sector in Italy is generated by illegal activities. It was also thought that, by extending the betting and gaming activities permitted by law, it might be possible to recover from those illegal activities a proportion of that turnover figure at least equivalent in value to the amount generated by the activities permitted by law.

57 A licensing system may, in those circumstances, constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes. However, as regards the limitation of the total number of such licences, the Court does not have sufficient facts before it to be able to assess that limitation, as such, in the light of the requirements flowing from Community law.

58 It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to the objective invoked by the Italian Government, namely, that of preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality.

The tender procedures

59 The Tribunale di Teramo (Cases C-359/04 and C-360/04) expressly refers to the exclusion of companies whose individual shareholders are not always identifiable at any given moment, and thus of all companies quoted on the regulated markets, from tender procedures for the award of licences. The Commission of the European Communities has pointed out that the effect of that restriction is to exclude from those tender procedures the leading Community operators in the betting and gaming sector – operators in the form of companies whose shares are quoted on the regulated markets.

60 By way of a preliminary point, it should be noted that the question of the lawfulness of the conditions imposed in the context of the 1999 tender procedures is far from having been made redundant by the legislative amendments introduced in 2002 and allowing from then on all companies – with no limitation as to their form – to participate in tender procedures for the award of licences. Indeed, as the Tribunale di Teramo pointed out, since the licences awarded in 1999 were valid for six years and renewable for an additional period of six years, and meanwhile no new tender procedure has been planned, the exclusion from the betting and gaming sector of companies quoted on the regulated markets, and of intermediaries such as the defendants in the main proceedings who might act on behalf on such companies, is liable to produce effects until the year 2011.

61 The Court has already ruled that, even if the exclusion from tender procedures is applied without distinction to all companies quoted on the regulated markets which could be interested in those licences – regardless of whether they are established in Italy or in another Member State – in so far as the lack of foreign operators among the licensees is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment (see *Gambelli and Others*, paragraph 48).

62 Independently of the question whether the exclusion of companies quoted on the regulated markets applies, in fact, in the same way to operators established in Italy and to those from other Member States, that blanket exclusion goes beyond what is necessary in order to achieve the objective of preventing operators active in the betting and gaming sector from being involved in criminal or fraudulent activities. Indeed, as the Advocate General pointed out in point 125 of his Opinion, there are other ways of monitoring the accounts and activities of operators in the betting and gaming sector which impinge to a lesser extent on the freedom of establishment and the freedom to provide services, one such possibility being the gathering of information on their representatives or their main shareholders. Support for that observation is to be found in the fact that the Italian legislature believed it possible to repeal the exclusion completely by the 2003 Finance Law without, however, adopting other restrictive measures in its place.

63 As regards the consequences flowing from the unlawful nature of the exclusion of a certain number of operators from tender procedures for the award of existing licences, it is for

the national legal order to lay down detailed procedural rules to ensure the protection of the rights which those operators derive by direct effect of Community law, provided, however, that those detailed rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by Community law (principle of effectiveness) (see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-0000, paragraph 57). In that connection, appropriate courses of action could be the revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences. In any case, it should nevertheless be noted that, in the absence of a procedure for the award of licences which is open to operators who have been unlawfully barred from any possibility of obtaining a licence under the last tender procedure, the lack of a licence cannot be a ground for the application of sanctions to such operators.

64 Articles 43 EC and 49 EC must therefore be interpreted as precluding national legislation such as that at issue in the main proceedings, which excludes – and, moreover, continues to exclude – from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

The police authorisation requirement

65 The requirement that operators active in the betting and gaming sector, as well as their premises, be subject to ex ante controls as well as to ongoing supervision clearly contributes to the objective of preventing the involvement of those operators in criminal or fraudulent activities and appears to be a measure that is entirely commensurate with that objective.

66 However, it is clear from the documents before the Court that the defendants in the main proceedings were ready to obtain police authorisations and to submit to such controls and to such supervision. Nevertheless, since a police authorisation is issued only to licence holders, it would have been impossible for the defendants in the main proceedings to obtain it. On that point, it is also clear from the case-files that, before commencing their activities, Mr Palazzese and Mr Sorricchio had applied for police authorisation in accordance with Article 88 of the Royal Decree, but that their applications met with no response.

67 As the Advocate General pointed out at point 123 of his Opinion, the procedure for granting police authorisations is, in consequence, vitiated by the defects identified above, which taint the award of the licences. Accordingly, the lack of a police authorisation cannot, in any case, be a valid ground for complaint in respect of persons such as the defendants in the main proceedings, who were unable to obtain authorisations because the grant of an authorisation presupposed the award of a licence – a licence which, contrary to Community law, those persons were unable to obtain.

The criminal penalties

68 Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law (see Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 17).

69 The case-law has also made it quite clear that a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of Community law (see, to that effect, Case 5/83 *Rienks* [1983] ECR 4233, paragraphs 10 and 11).

70 It appears that persons such as the defendants in the main proceedings, in their capacity as DTC operators linked to a company organising bets which is quoted on the regulated markets and which is established in another Member State, had no way of being able to obtain the licences or police authorisation required under Italian legislation because, contrary to Community law, Italy makes the grant of police authorisations subject to possession of a licence and, at the time of the last tender procedure in the case which is the subject of the main proceedings, had refused to award licences to companies quoted on the regulated markets. In consequence, Italy cannot apply criminal penalties to persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation.

71 Articles 43 EC and 49 EC must therefore be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a criminal penalty on persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons.

72 In the light of the foregoing, it is appropriate to state in answer to the questions referred for a preliminary ruling that:

1. National legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorisation issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively.

2. It is for the national courts to determine whether, in so far as national legislation limits the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.

3. Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes – and, moreover, continues to exclude – from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

4. Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a criminal penalty on persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. 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. National legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorisation issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services, provided for in Articles 43 EC and 49 EC respectively.

2. It is for the national courts to determine whether, in so far as national legislation limits the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.

3. Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes – and, moreover, continues to exclude – from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

4. Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a criminal penalty on persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons.

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

10 February 2009 (*)

(Failure of a Member State to fulfil obligations – Article 28 EC – Concept of 'measures having equivalent effect to quantitative restrictions on imports' – Prohibition on mopeds, motorcycles, motor tricycles and quadricycles towing a trailer in the territory of a Member State – Road safety – Market access – Obstacle – Proportionality)

In Case C-110/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 March 2005,

Commission of the European Communities, represented by D. Recchia and F. Amato, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and T. von Danwitz, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, A. Borg Barthet, J. Malenovský, U. Lõhmus (Rapporteur), A. Arabadjiev and C. Toader, Judges,

Advocate General: P. Léger, later Y. Bot,

Registrar: L. Hewlett, Principal Administrator, later M. Ferreira, Principal Administrator,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 5 October 2006,

having regard to the order of 7 March 2007 re-opening the oral procedure and further to the hearing on 22 May 2007,

having regard to the written and oral observations submitted by:

– the Commission of the European Communities, by D. Recchia and F. Amato, acting as Agents,

– the Italian Republic, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

– the Czech Republic, by T. Boček, acting as Agent,

– the Kingdom of Denmark, by J. Bering Liisberg, acting as Agent,

– the Federal Republic of Germany, by M. Lumma, acting as Agent,

– the Hellenic Republic, by N. Dafniou, acting as Agent,

– the French Republic, by G. de Bergues and R. Loosli, acting as Agents,

– the Republic of Cyprus, by K. Lykourgos and A. Pantazi-Lamprou, acting as Agents,

– the Kingdom of the Netherlands, by H.G. Sevenster and C. ten Dam, acting as Agents,

– the Kingdom of Sweden, by A. Kruse, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2008,

gives the following

Judgment

1 In its application, the Commission of the European Communities asks the Court to find that, by maintaining rules which prohibit mopeds, motorcycles, tricycles and quadricycles ('motoveicoli', hereinafter 'motorcycles') from towing a trailer, the Italian Republic has failed to fulfil its obligations under Article 28 EC.

Legal context

Community rules

2 Council Directive 92/61/EEC of 30 June 1992 relating to the type-approval of two or three-wheel motor vehicles (OJ 1992 L 225, p. 72) laid down uniform definitions and the procedure for granting Community type-approval or component type-approval in respect of certain types of vehicle covered by the directive. Article 1(1) and (2) thereof provide as follows:

'1. This Directive applies to all two or three-wheel motor vehicles, twin-wheeled or otherwise, intended to travel on the road, and to the components or separate technical units of such vehicles.

…

2. The vehicles referred to in paragraph 1 shall be subdivided into:

– moped[s], i.e. two or three-wheel vehicles fitted with an engine having a cylinder capacity not exceeding 50 cm³ if of the internal combustion type and a maximum design speed of not more than 45 km/h,

– motorcycles, i.e. two-wheel vehicles with or without sidecar, fitted with an engine having a cylinder capacity of more than 50 cm³ if of the internal combustion type and/or having a maximum design speed of more than 45 km/h,

– motor tricycles, i.e. vehicles with three symmetrically arranged wheels fitted with an engine having a cylinder capacity of more than 50 cm³ if of the internal combustion type and/or a maximum design speed of more than 45 km/h.'

3 It is apparent from Article 1(3) that Directive 92/61 also applied to motor vehicles with four wheels, namely 'quadricycles', which were to be considered to be mopeds or motor tricycles depending on their technical characteristics.

4 The sixth recital in Council Directive 93/93/EEC of 29 October 1993 on the masses and dimensions of two or three-wheel motor vehicles (OJ 1993 L 311, p. 76), which is intended to harmonise imperative technical requirements in order to enable the type-approval and component type-approval procedures laid down in Directive 92/61 to be applied, states the following:

'Whereas the provisions of this Directive should not oblige those Member States which do not allow two-wheel motor vehicles on their territory to tow a trailer to amend their rules'.

5 The purpose of Directive 97/24/EC of the European Parliament and of the Council of 17 June 1997 on certain components and characteristics of two or three-wheel motor vehicles (OJ 1997 L 226, p. 1) is to further harmonise certain technical requirements of such vehicles, including coupling devices and attachments. The 12th recital in this directive states as follows:

'Whereas … the object of the requirements of this Directive should not be to oblige those Member States which do not allow two or three-wheel motor vehicles in their territory to tow a trailer to amend their rules'.

National legislation

6 In Italy, Article 53 of Legislative Decree No 285 of 30 April 1992 (GURI, ordinary supplement, No 114 of 18 May 1992, 'the Highway Code') defines motorcycles as motor vehicles with two, three or four wheels. Only four-wheeled vehicles may be called 'motor quadricycles'.

7 Pursuant to Article 54 of the Highway Code, automobiles ('autoveicoli') are motor vehicles with at least four wheels, excluding the vehicles defined in Article 53 of the Code.

8 Pursuant to Article 56 of the Highway Code, only automobiles, trolleybuses (vehicles with an electric motor not travelling on rails which take their energy from an overhead contact line) and automobile tractors (three wheeled motor vehicles intended to tow semi-trailers) are allowed to tow trailers.

II – The pre-litigation procedure

9 As a result of a complaint lodged by an individual concerning the Italian Republic and an informal inquiry by the Commission, the latter, on 3 April 2003, sent a formal notice to the Member State in which it argued that the prohibition on motorcycles towing trailers constituted a failure to fulfil obligations under Article 28 EC.

10 In a letter of 13 June 2003, the Italian Republic gave a commitment to make the requisite changes to the national rules and to remove the obstacle to imports raised in the formal notice mentioned above.

11 Since it received no further communication concerning the making of such changes, the Commission, on 19 December 2003, sent a reasoned opinion to the Italian Republic calling on it to submit its observations within a period of two months as from receipt of that notice.

12 Having received no reply to that notice, the Commission decided to institute the present proceedings.

Procedure before the Court

13 By decision of 11 July 2006, the Court assigned the case to the Third Chamber. Since none of the parties applied to submit oral arguments, the Court decided to rule without holding a hearing. Advocate General Léger delivered his Opinion on 5 October 2006, after which the oral procedure was closed.

14 Pursuant to Article 44(4) of the Rules of Procedure, the Third Chamber, on 9 November 2006, decided to refer the case back to the Court in order that it might be reassigned to a formation composed of a greater number of judges.

15 By order of 7 March 2007, the Court ordered the re-opening of the oral procedure and the holding of a hearing. The parties to the case and, pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice, the Member States other than the Italian

Republic were invited to answer the question of the extent to which and the conditions under which national provisions which govern not the characteristics of goods but their use, and which apply without distinction to domestic and imported goods, are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC.

The action

Observations submitted on the Court's question

16 The parties to the case as well as the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Kingdom of the Netherlands and the Kingdom of Sweden submitted written or oral observations to the Court on the question.

17 In the Commission's view, it is possible to identify two categories of rules concerning the use of a product, namely, first, those which make use of the product subject to compliance with certain conditions specific to the product or which limit that use in space or time and, second, those which lay down absolute, or almost absolute, prohibitions of the use of the product.

18 The Commission proposes to apply to the first category of rules the criteria set out in paragraph 5 of the judgment in Case 8/74 *Dassonville* [1974] ECR 837 and to consider each case separately. With regard to the second category of rules, once they impose an absolute prohibition on the use of a certain product or a prohibition which permits only limited or exceptional use of it, they constitute, by definition, measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC. The Commission considers that it is neither appropriate nor necessary to extend the criteria set out in paragraphs 16 and 17 of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 to rules concerning the use of a product and thereby create an additional category of measures which are not within the scope of Article 28 EC.

19 The Italian Republic argues that a rule concerning use is covered by Article 28 EC only if it prohibits all uses of a product or its only use, if the product only has one. On the other hand, if there is a discretion as to the possible uses of the product, the situation no longer falls under Article 28 EC.

20 The Czech Republic argues that it is inappropriate to draw rigid distinctions between different categories of measures and to apply different legal criteria depending on the category into which they fall because the introduction of any new category of measures inevitably implies difficulties in regard to its definition.

21 Like the Commission, that Member State points out that the criteria introduced by *Keck and Mithouard*, for selling arrangements for products should not be extended to rules concerning the use of products because the application of those criteria has not been without difficulty in the Court's case-law and they have not really been necessary. Indeed, the provisions declared to govern selling arrangements could have been defended by the national authorities even in the absence of the criteria laid down in that judgment.

22 On the other hand, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Cyprus and the Kingdom of Sweden consider that the case-law commencing with *Keck and Mithouard*, should be applied by analogy to a national provision which restricts or prohibits certain forms of use of a product. They therefore propose that a national provision should not fall under Article 28 EC in so far as it is

not connected with the product, it applies to all economic operators concerned who pursue their activities in the national territory and it affects in the same manner, in law and in fact, national products and those coming from other Member States.

23 By contrast, those same Member States point out that a derogation from those criteria would be necessary if it was established that restrictive national provisions simply prohibited the use of a particular product or permitted only a limited use thereof, thereby restricting its access to the market.

24 In the view of the Kingdom of Denmark, it is important to note that national rules which limit the freedom of action of an individual or an undertaking in regard to a particular product are not all prohibited. With regard to the criterion that a national rule may not prevent a product's access to the market, it considers that it is difficult to determine from what point a restriction on the use of a product may be regarded as so restrictive that it hinders such access. It is of the opinion that it is for the national courts to decide to what extent the person who challenges such a rule has established that access to the market has been hindered by the application thereof.

25 The Federal Republic of Germany considers that rules concerning the use of a product constitute the other side of those concerning selling arrangements in the sense that some of the forms of use may be regarded as selling arrangements and vice versa. In it's view, the principles flowing from *Keck and Mithouard*, should apply in the same fashion to rules concerning the use of a product in so far as those rules do not involve discrimination, ensure equal opportunity in regard to competition between products manufactured in the Member State having laid down such rules and those coming from other Member States and not hinder, completely or almost completely, access to the market of the said Member State for those products.

26 The Hellenic Republic considers that the use of a product is not, in itself, apt to hinder intra-Community trade. If, however, use is a relevant factor inherent in placing the product in circulation, a matter which must be considered in each individual case, the obstacle to its use would fall within the scope of Article 28 EC.

27 The French Republic considers that national rules concerning the use of a product and those concerning selling arrangements for that product are comparable in regard to both the nature and the degree of their effect on intra-Community trade inasmuch as those rules give rise to effects, in principle, only after the importation of the product and by way of consumer behaviour. The same criteria must therefore apply to both types of provision.

28 The Republic of Cyprus, although sharing the reserves expressed by other Member States concerning the introduction of a new, essentially economic, criterion, argues that if the case-law flowing from *Keck and Mithouard*, is not extended to measures governing the use of a product, any measure concerning use could be assimilated to a prohibition under the rule laid down in *Dassonville*. In it's view, the Court's analysis should concentrate on the question whether the measure at issue is likely to preclude, in whole or in part, access of goods to the national market.

29 The Kingdom of Sweden considers that a national measure which prohibits a form of use of a product comes within the scope of Article 28 EC if the measure is drawn up in such a way as to prevent, in practice, the product's access to the market.

30 The Kingdom of the Netherlands argues that national measures must be examined first in regard to the question whether their repercussions on the free movement of goods are not too

uncertain and too indirect. In other words, it must be asked whether there is a causal link between the measures and the effect on intra-Community trade. Many rules concerning the use of a product could be upheld under this first test, which constitutes a filter permitting them to avoid the scope of Article 28 EC.

31 With regard to the extension of the case-law commencing with *Keck and Mithouard*, to rules concerning the use of a product, the Kingdom of the Netherlands puts forward arguments both for and against such an extension. On the positive side, such an approach would first of all allow all rules intended to protect interests of a non-economic nature to fall outside the scope of Article 28 EC. Secondly, such an approach would follow the Court's earlier case-law and permit the national courts to make a reasonably abstract application which would increase legal certainty and promote consistency in the case-law. Finally, it would prevent misuse of the exception flowing from *Keck and Mithouard* in the case of rules which lead to a prohibition of the use of a product or permit it only to a limited extent.

32 With regard to arguments against extension of the said case-law to rules concerning the use of a product, it considers, first, that it is difficult to define forms of use of a product clearly as a category. It also considers that a new category of exceptions could create confusion for the national courts because different criteria apply depending on the category into which a given provision falls. Finally, it argues that there are still exceptions among rules concerning the use of a product, namely the cases in which a measure fulfils the criteria for the exception even though it will have serious repercussions on trade between the Member States.

Preliminary observations

33 It should be recalled that, according to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 28 EC (see, in particular, *Dassonville*, paragraph 5).

34 It is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets (see, to that effect, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 26; Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraphs 6, 14 and 15; and *Keck and Mithouard*, paragraphs 16 and 17).

35 Hence, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike (see, to that effect, '*Cassis de Dijon*', paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67).

36 By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from *Dassonville*, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see *Keck and Mithouard*, paragraphs 16 and 17).

37 Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35 of the present judgment. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept.

The failure to fulfil obligations

38 The Commission's complaints concerning Article 56 of the Highway Code must be considered in the light of the principles set out in paragraphs 33 to 37 of the present judgment.

Arguments of the parties

39 In support of its action, the Commission claims that the effect of the prohibition laid down in Article 56 of the Highway Code is to prevent the use of trailers lawfully produced and marketed in the Member States where there is no such prohibition and to hinder their importation into, and sale in, Italy.

40 Therefore, that prohibition constitutes, in the Commission's view, an obstacle to imports within the meaning of Article 28 EC and may be regarded as compatible with the EC Treaty only if justified under Article 30 EC or by an overriding reason relating to the public interest. However, the Italian Republic put forward no justification nor any overriding reason relating to the public interest during the pre-litigation procedure. On the contrary, the Member State admitted the existence of the prohibition and the obstacle to imports which flowed from it and undertook to remove it.

41 The Italian Republic points out, in regard to the alleged obstacle to imports, that the infringement complained of refers to a prohibition on motorcycles registered in Italy towing a trailer and not the refusal to register such a vehicle or a trailer manufactured in another Member State and intended to be marketed in Italy. It considers that the Commission is confusing the legal conditions for circulation, in Italy, of a vehicle specifically type-approved in another Member State or in a non-member country with the marketing of the same vehicle in Italy.

42 The Italian Republic also contends that the Commission's conclusion is based on an erroneous premise. Article 56 of the Highway Code is a means of exercising a power of derogation expressly granted to the Member States in the sixth recital in Directive 93/93. Until there has been harmonisation at Community level both of the technical requirements for type-approval of trailers and the rules concerning registration and circulation of them on the road, mutual recognition of such trailers remains at the discretion of the Member States.

43 In its reply, the Commission submits that the recitals in a directive are not binding and that it is neither the purpose nor the effect of the sixth recital in Directive 93/93 to declare compatible with Community law national provisions such as those in Article 56 of the Highway Code. That recital determines the scope of Directive 93/93 by excluding therefrom rules concerning trailers intended to be towed by two-wheeled vehicles, without stating whether or not any prohibition which might be laid down is compatible with the rules in the Treaty. The

Commission also draws attention to the principle of the primacy of the provisions of the Treaty over secondary legislation, which the Court has recognised on several occasions.

44 In addition, the Commission observes that the absence of harmonised rules in no way justifies the infringement of a fundamental freedom guaranteed by the Treaty.

45 In its rejoinder, the Italian Republic contends that, given the possibilities for using motorcycles and trailers, which may be used separately, those products cannot be regarded as the subject of quantitative restrictions on imports within the meaning of Article 28 EC.

46 Moreover, the prohibition at issue affects only the product as such, irrespective of the place of production and the nationality of the manufacturer, and does not therefore constitute a means of protecting Italian products or rules which discriminate against products manufactured in the other Member States. In Italy, no motorcycle can obtain type-approval to tow a trailer and no trailer to be towed by a motorcycle. Since the consequence of the prohibition on using such vehicles and trailers together is that Italian undertakings have no interest in manufacturing motorcycles equipped to tow trailers or trailers intended solely to be towed by such vehicles, the effect of the prohibition is to exclude products with such characteristics from the Italian market.

47 The Italian Republic refers to the Convention on Road Traffic, concluded in Vienna on 8 November 1968, which provides, in point 3(a) of Annex I thereto, that 'Contracting Parties may refuse to admit to their territories in international traffic the following combinations of vehicles in so far as the use of such combinations is prohibited by their domestic legislations: … Motor cycles with trailers'. However, it makes clear that it did not avail itself of that possibility and that motorcycles that are registered in other Member States are allowed to tow a trailer in Italian territory since they are considered to be in international traffic within the meaning of the said Convention.

48 The Italian Republic also refers to the 12th recital in Directive 97/24, which has essentially the same content as the 6th recital in Directive 93/93. It points out that the reservation granted to the Member States in that recital corresponds to the fact that, by reason of the different contours of the national territories, the technical characteristics of vehicles are important from the point of view of road safety. In the Member State's view, in the absence of rules for type-approval of the two products used together (towing vehicle and trailer), there are no safety conditions necessary for road traffic.

Findings of the Court

49 In order to assess whether the Commission's complaint is well founded, it should be pointed out that, although Article 56 of the Highway Code concerns a prohibition on using a motorcycle and a trailer together in Italy, the national provision must be considered, in particular, from the angle of the restriction that it could represent for free movement of trailers. Although it is not disputed that motorcycles can easily be used without a trailer, the fact remains that the latter is of little use without a motor vehicle that may tow it.

50 It is common ground that Article 56 of the Highway Code applies without regard to the origin of trailers.

51 The Commission has not specified whether its action concerns solely trailers which are specially designed for motorcycles or if it also covers other types of trailers. Those two types of trailers must therefore be distinguished when assessing the alleged failure to fulfil obligations.

52 With regard, first, to trailers not specially designed for motorcycles but intended to be towed by automobiles or other types of vehicle, it should be noted that the Commission has not established that the prohibition laid down in Article 56 of the Highway Code hinders access to the market for that type of trailer.

53 The Commission's action must therefore be dismissed in so far as it concerns trailers which are not specially designed to be towed by motorcycles and are legally produced and marketed in Member States other than the Italian Republic.

54 Secondly, the failure to fulfil obligations alleged by the Commission in regard to trailers which are specially designed to be towed by motorcycles and are legally produced and marketed in Member States other than the Italian Republic remains to be examined.

55 In its reply to the Court's written question, the Commission claimed, without being contradicted by the Italian Republic, that, in the case of trailers specially designed for motorcycles, the possibilities for their use other than with motorcycles are very limited. It considers that, although it is not inconceivable that they could, in certain circumstances, be towed by other vehicles, in particular, by automobiles, such use is inappropriate and remains at least insignificant, if not hypothetical.

56 It should be noted in that regard that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State.

57 Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer (see, by analogy, Case C-265/06 *Commission* v *Portugal* [2008] ECR I-0000, paragraph 33, concerning the affixing of tinted film to the windows of motor vehicles). Thus, Article 56 of the Highway Code prevents a demand from existing in the market at issue for such trailers and therefore hinders their importation.

58 It follows that the prohibition laid down in Article 56 of the Highway Code, to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than the Italian Republic, constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, unless it can be justified objectively.

59 Such a prohibition may be justified on one of the public interest grounds set out in Article 30 EC or in order to meet imperative requirements (see, in particular Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 29, and Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, paragraph 21). In either case, the national provision must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it (Case C-54/05 *Commission* v *Finland* [2007] ECR I-2473, paragraph 38, and Case C-297/05 *Commission* v *Netherlands* [2007] ECR I-7467, paragraph 75).

60 In the present case, the justification put forward by the Italian Republic relates to the need to ensure road safety, which, according to the case-law, constitutes an overriding reason relating to the public interest capable of justifying a hindrance to the free movement of goods (see, in particular, Case C-55/93 *van Schaik* [1994] ECR I-4837, paragraph 19; Case C-314/98 *Snellers* [2000] ECR I-8633, paragraph 55; *Commission* v *Finland*, paragraph 40, *Commission* v *Netherlands*, paragraph 77, *Commission* v *Portugal*, paragraph 38; and C-170/07 *Commission* v *Poland* [2008] ECR I-0000, paragraph 49).

61 In the absence of fully harmonising provisions at Community level, it is for the Member States to decide upon the level at which they wish to ensure road safety in their territory, whilst taking account of the requirements of the free movement of goods within the European Community (see, to that effect, Case 50/83 *Commission* v *Italy* [1984] ECR 1633, paragraph 12, and, by analogy, Case C-131/93 *Commission* v *Germany* [1994] ECR I-3303, paragraph 16).

62 According to settled case-law, it is for the competent national authorities to show that their rules fulfil the criteria set out in paragraph 59 of the present judgment (see, to that effect, *Commission* v *Netherlands*, paragraph 76, *Commission* v *Portugal*, paragraph 39, and Case C-286/07 *Commission* v *Luxembourg* [2008] ECR I-0000, paragraph 37).

63 With regard, first, to whether the prohibition laid down in Article 56 of the Highway Code is appropriate, the Italian Republic contends that it introduced the measure because there were no type-approval rules, whether at Community level or national level, to ensure that use of a motorcycle with a trailer was not dangerous. In the absence of such a prohibition, circulation of a combination composed of a motorcycle and an unapproved trailer could be dangerous both for the driver of the vehicle and for other vehicles on the road, because the stability of the combination and its braking capacity would be affected.

64 In that regard, it must be held that the prohibition in question is appropriate for the purpose of ensuring road safety.

65 With regard, second, to whether the said prohibition is necessary, account must be taken of the fact that, in accordance with the case-law of the Court referred to in paragraph 61 of the present judgment, in the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate (see, by analogy, Case C-262/02 *Commission* v *France* [2004] ECR I-6569, paragraph 37, and Case C-141/07 *Commission* v *Germany* [2008] ECR I-0000, paragraph 51).

66 In the present case, the Italian Republic contends, without being contradicted on this point by the Commission, that the circulation of a combination composed of a motorcycle and a trailer is a danger to road safety. Whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see, by analogy, Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 58).

67 Although it is possible, in the present case, to envisage that measures other than the prohibition laid down in Article 56 of the Highway Code could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer, such as those mentioned in point 170 of the Advocate General's Opinion, the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.

68 Moreover, it should be noted that neither the terms of the International Convention on Road Traffic nor those of the recitals in Directives 93/93 and 97/24, referred to by the Italian Republic, allow the presumption that road safety could be ensured at the same level as envisaged by the Italian Republic by a partial prohibition of the circulation of such a combination or by a road traffic authorisation issued subject to compliance with certain conditions.

69 In the light of those factors, it must be held that the prohibition on motorcycles towing trailers specially designed for them and lawfully produced and marketed in Member States other than the Italian Republic must be regarded as justified by reasons relating to the protection of road safety.

70 The Commission's action must therefore be dismissed.

Costs

71 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

18 November 2010 (*)

(Social policy – Equal treatment of men and women in matters of employment and occupation – Directive 76/207/EEC – Article 3(1)(c) – National rules facilitating the dismissal of workers who have acquired the right to draw their retirement pension – Objective of promoting employment of younger persons – National rules setting the age conferring entitlement to a retirement pension at 60 years for women and 65 years for men)

In Case C-356/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 4 August 2009, received at the Court on 4 September 2009, in the proceedings

Pensionsversicherungsanstalt

v

Christine Kleist,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev (Rapporteur), A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 2 September 2010,

after considering the observations submitted on behalf of:

– Pensionsversicherungsanstalt, by A. Ehm, Rechtsanwalt,

– Mrs Kleist, by H. Forcher-Mayr, Rechtsanwalt,

– the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207').

2 The reference has been made in proceedings between Mrs Kleist and her employer, the Pensionsversicherungsanstalt ('the pension insurance institution'), concerning the conditions for termination of her contract of employment.

Legal context

European Union law

3 Directive 76/207, which has been repealed with effect from 15 August 2009 by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23), provided in Article 2:

‘1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

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

– direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

– indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

…’

4 Article 3(1)(c) of Directive 76/207 states that ‘application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to … employment and working conditions, including dismissals, as well as pay as provided for in [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 (OJ 1975 L 45, p. 19).

5 Article 7(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24), provides:

‘This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of [pensionable] age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

…’

National law

6 Paragraphs 1 to 3 of the Federal Constitutional Law on Different Pensionable Ages for Male and Female Insured Persons (Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von männlichen und weiblichen Sozialversicherten) of 29 December 1992 (BGBl. 832/1992) are worded as follows:

‘Paragraph 1. Statutory provisions which lay down different pensionable ages for males and females covered by statutory social insurance are permissible.

Paragraph 2. From 1 January 2019, the pensionable age for early retirement pensions shall be raised for female insured persons by six months on 1 January each year until 2028.

Paragraph 3. From 1 January 2024, the pensionable age for retirement pensions shall be raised for female insured persons by six months on 1 January each year until 2033.’

7 The General Law on Social Security (Allgemeines Sozialversicherungsgesetz) of 9 September 1955 (BGBl. 189/1955), as amended (‘the ASVG’), applies, pursuant to Paragraph 270 thereof, to both salaried employees and other workers. Paragraph 253(1) of the ASVG provides that, when insured persons have attained the normal pensionable age, which is 65 years for men and 60 for women, they are entitled to draw a retirement pension if the qualifying period laid down in Paragraph 236 has been met.

8 It is apparent from the order for reference that under Austrian law the statutory retirement pension (granted under the ASVG) cannot be reduced because an employment relationship is maintained or activity as a self-employed person is engaged in beyond the age conferring entitlement to draw that pension.

9 The collective agreement applicable in the main proceedings is Staff Regulations B for Doctors and Dentists employed by Austria’s Social Security Providers (Dienstordnung B für die Ärzte und Dentisten bei den Sozialversicherungsträgern Österreichs; ‘the DO.B’). This collective agreement lays down a special regime governing dismissal under which employees whose length of service with the body that employs them is 10 years or more can be dismissed only on certain specified grounds.

10 Paragraph 134 of the DO.B is worded as follows:

‘…

(2) Doctors with protection from dismissal have the right to retire if:

…

2. [they have] an entitlement to draw a retirement pension under Paragraph 253 of the ASVG …

…

(4) The board can retire a doctor with protection from dismissal if the doctor:

1. fulfils the conditions pursuant to subparagraph 2, … point … 2 …

…’

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

11 Mrs Kleist, who was born in February 1948, was employed as chief physician by the pension insurance institution.

12 The pension insurance institution took the decision to terminate the employment of all its employees, whether male or female, who satisfied the conditions for retiring them under the DO.B. By letter of 9 January 2007, Mrs Kleist informed her employer that she did not intend to retire at the age of 60 but wished to work until she was 65. Her employer informed her, however, by letter of 6 December 2007, of its decision to retire her from 1 July 2008.

13 Mrs Kleist challenged her dismissal before the Landesgericht Innsbruck (Regional Court, Innsbruck). The judgment delivered by that court on 14 March 2008 finding against Mrs Kleist was set aside by a judgment delivered on 22 August 2008 by the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck) sitting as an appellate court in matters of employment and welfare law. The pension insurance institution then appealed on a point of law to the Oberster Gerichtshof (Supreme Court).

14 The Oberster Gerichtshof pointed out that the regime governing dismissals established by the DO.B derogates from the general regime laid down by Austrian law in that the latter provides that reasons are not, in principle, required for the unilateral termination of an employment relationship. It stated, however, that that does not preclude the application of the general protection against unlawful dismissal which is afforded, under certain conditions, by Austrian law in cases where such termination has an adverse effect on the worker’s fundamental interests and the employer is unable to substantiate the termination on the basis of operational reasons or reasons relating to the worker personally.

15 The Oberster Gerichtshof then stated that, in determining whether the termination has an adverse effect on the worker’s fundamental interests, account is taken of the social cover that he enjoys, including in relation to the drawing of a retirement pension. The same criterion is used in the context of the provision of the DO.B at issue in the main proceedings, a provision which allows the employer not to apply to workers in receipt of a retirement pension protection against dismissal that is enhanced in comparison with the protection resulting from the statutory regime, thereby opening up the possibility of taking on younger workers.

16 The Oberster Gerichtshof inquired whether the criterion of the worker’s social situation, to which recourse is thus had by Austrian law in the field of dismissal, must be taken into account, just like the criterion of age, when assessing if the workers’ situations are comparable. It observed that men and women are treated in the same way in this regard, in that they lose the enhanced protection against dismissal afforded by the DO.B if they have social cover.

17 The Oberster Gerichtshof considered that, as regards in particular the extent of the Member States’ discretion in shaping employment policy measures, the points of law raised by the case before it had not been explained by the Court of Justice’s case-law sufficiently to enable it to give judgment.

18 In that context, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 3(1)(c) of Directive [76/207] to be interpreted – in the context of a system of employment law in which the general protection of employees against dismissal is determined by their social (financial) dependence on the job – as precluding a provision of a collective agreement offering special protection against dismissal, over and above the statutory general protection against dismissal, only until that point in time at which, in a typical case, there is social (financial) cover in the form of a retirement pension if men and women become entitled to draw that retirement pension at different times?

2. In the context of such a system of employment law, does Article 3(1)(c) of Directive [76/207] preclude a decision by a public employer terminating the employment of a female employee just a few months after she acquires the financial cover of a retirement pension, in order to employ new workers who are already pressing to join the job market?’

Consideration of the questions

19 By its questions, which it is appropriate to examine together, the national court asks, in essence, whether Article 3(1)(c) of Directive 76/207 must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit a public employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute discrimination on the grounds of sex prohibited by that directive.

Observations submitted to the Court

20 According to Mrs Kleist, by permitting an employer to retire a female employee when she has attained the age entitling her to draw a retirement pension, namely the age of 60 years, when the right to draw a retirement pension is acquired at a different time depending on whether the employee is a man or a woman, the rules at issue in the main proceedings constitute discrimination on the grounds of sex. Article 3(1)(c) of Directive 76/207 must be interpreted as precluding such rules.

21 Mrs Kleist requests the Court also to rule on the interpretation 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). She submits that this directive precludes national rules such as those at issue in the main proceedings because they result, in addition, in direct discrimination on the grounds of age.

22 The pension insurance institution contends that the rules at issue in the main proceedings establish a difference in treatment which is indirectly based on sex; the difference is justified in light of the objective of promoting employment of younger persons and therefore does not constitute unlawful discrimination. It further submits that a situation should be avoided in which women can concurrently receive both their salary and their statutory pension whilst that possibility is not open to men.

23 The European Commission submits that Article 3(1)(c) of Directive 76/207 must be interpreted as precluding a provision of a collective agreement from offering special protection against dismissal, over and above the statutory general protection against dismissal, only until that point in time at which there is social cover providing the employee with financial resources, in a typical case, in the form of a retirement pension, if men and women become entitled to draw that retirement pension at different times. The objective of promoting employment of younger persons cannot justify such rules.

The Court’s reply

24 A preliminary point to note is that the conditions for payment of a retirement pension and the conditions governing termination of employment are separate issues (see, to this effect, Case 152/84 *Marshall* [1986] ECR 723, paragraph 32).

25 In the case of the latter, Article 3(1)(c) of Directive 76/207 provides that application of the principle of equal treatment in relation to dismissals means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies.

26 The term ‘dismissal’ contained in that provision, a term which must be given a wide meaning, covers an age limit set for the compulsory dismissal of workers pursuant to an employer’s general policy concerning retirement, even if the dismissal involves the grant of a retirement pension (see, by analogy, *Marshall*, paragraph 34, and Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 36).

27 It follows that, since Mrs Kleist was retired by her employer, in accordance with the decision taken by it to dismiss all its employees who acquired the right to draw a retirement pension, the main proceedings concern dismissal within the meaning of Article 3(1)(c) of Directive 76/207.

28 It should be observed at the outset that the Court has held that a general policy concerning dismissal involving the dismissal of a female employee solely because she has attained or passed the qualifying age for a retirement pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to Directive 76/207/EEC (see, to this effect, *Marshall*, paragraph 38).

29 In this connection, it should be noted, first, that under the first indent of Article 2(2) of Directive 76/207 direct discrimination occurs where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

30 In the present instance, it is apparent from Paragraph 134(2)(2) and (4)(1) of the DO.B that doctors with protection from dismissal can nevertheless be dismissed when they acquire the right to draw a retirement pension under Paragraph 253 of the ASVG. Pursuant to Paragraph 253(1) of the ASVG, men acquire that right when they have attained 65 years of age and women when they have attained 60 years of age. The effect of this is that female workers can be dismissed when they have attained 60 years of age whilst male workers cannot be dismissed until they have attained 65 years of age.

31 Since the criterion used by such provisions is inseparable from the workers' sex, there is, contrary to the assertions of the pension insurance institution, a difference in treatment that is directly based on sex.

32 Second, it must be examined whether, in a context such as that governed by those provisions, female workers of 60 to 65 years of age are in a comparable situation, within the meaning of the first indent of Article 2(2) of Directive 76/207, to that of male workers in the same age bracket.

33 The national court inquires, in essence, whether the circumstance that female workers of 60 to 65 years of age have social cover by virtue of the statutory retirement pension is such as to make their situation specific vis-à-vis the situation of male workers in the same age bracket, who do not have such cover.

34 The comparability of such situations must be examined having regard inter alia to the object of the rules establishing the difference in treatment (see, to this effect, Case C-19/02 *Hlozek* [2004] ECR I-11491, paragraph 46, and, by analogy, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 26).

35 In the case in the main proceedings, the rules establishing the difference in treatment at issue are designed to govern the circumstances in which employees can lose their job.

36 In the context of that case, contrary to the position in the cases which gave rise to the judgments in Case C-132/92 *Roberts* [1993] ECR I-5579 (paragraph 20) and in *Hlozek* (paragraph 48), the advantage accorded to female workers of being able to claim a retirement pension from an age five years younger than that set for male workers is not directly connected with the object of the rules establishing a difference in treatment.

37 That advantage cannot place female workers in a specific situation vis-à-vis male workers, as men and women are in identical situations so far as concerns the conditions governing termination of employment (see, to this effect, Case 151/84 *Roberts* [1986] ECR 703, paragraph 36).

38 Furthermore, as is apparent from the order for reference, the circumstance referred to in paragraph 33 of the present judgment results from the fact that the Republic of Austria wished to establish, in accordance with the exception laid down in Article 7(1)(a) of Directive 79/7 to the principle of equal treatment, a regime prescribing a different statutory pensionable age for men and women in order to compensate for the disadvantage suffered by women socially, in relation to the family and economically.

39 The Court has repeatedly held that, given the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex, provided for in that provision, must be interpreted strictly, so as to be applicable only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the possible consequences thereof for other social security benefits (see, to this effect, *Marshall*, paragraph 36; Case C-207/04 *Vergani* [2005] ECR I-7453, paragraph 33; and Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 36).

40 Since, as is apparent from paragraph 27 of the present judgment, the rules at issue in the main proceedings concern the subject of dismissal within the meaning of Article 3(1)(c) of Directive 76/207, and not the consequences referred to in Article 7(1)(a) of Directive 79/7, the exception is not applicable to those rules.

41 Third, Directive 76/207 draws a distinction between discrimination directly on grounds of sex and 'indirect' discrimination inasmuch as only provisions, criteria or practices liable to constitute indirect discrimination can, by virtue of the second indent of Article 2(2) of that directive, avoid being classified as discriminatory if they are 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. Such a possibility is not, by contrast, provided for in respect of differences in treatment liable to constitute direct discrimination within the meaning of the first indent of Article 2(2) of the directive.

42 In those circumstances, given that (i) the difference in treatment established by rules such as those at issue in the main proceedings is directly on grounds of sex, whilst, as is apparent from paragraph 37 of the present judgment, the situations of men and women are identical in the present instance, and (ii) Directive 76/207 contains no exception, applicable in the present case, to the principle of equal treatment, it must be concluded that that difference in treatment constitutes direct discrimination on grounds of sex (see, to this effect, *Vergani*, paragraph 34).

43 That difference in treatment cannot therefore be justified by the objective, relied upon by the pension insurance institution, of promoting employment of younger persons.

44 As regards, finally, the possibility that there is discrimination on the grounds of age within the meaning of Directive 2000/78, it should be recalled that, in proceedings under 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 (see, inter alia, Case C-45/09 *Rosenbladt* [2010] ECR I-0000, paragraph 32).

45 Since the national court has not asked the Court to interpret that directive and the order for reference does not even reveal that such discrimination has been pleaded in the main proceedings, examination of this issue does not appear to be of use for disposing of those proceedings.

46 The answer to the questions referred therefore is that Article 3(1)(c) of Directive 76/207 must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute direct discrimination on the grounds of sex prohibited by that directive.

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 (Second Chamber) hereby rules:

Article 3(1)(c) of 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute direct discrimination on the grounds of sex prohibited by that directive.

[Signatures]

JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 (*)

(Freedom to provide services – Freedom of establishment – Competition rules – Cabotage transport operations – National transportation of persons by bus service – Application to operate a service – Licence – Authorisation – Conditions – Requirement of a seat or permanent establishment in the national territory – Reduction of income compromising the profitability of a service already licensed)

In Case C-338/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Verwaltungssenat Wien (Austria), made by decision of 29 July 2009, received at the Court on 24 August 2009, in the proceedings

Yellow Cab Verkehrsbetriebs GmbH

v

Landeshauptmann von Wien,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász (Rapporteur) and T. von Danwitz, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Yellow Cab Verkehrsbetriebs GmbH, by W. Punz, Rechtsanwalt,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Commission of the European Communities, by G. Braun, N. Yerrell and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the relevant provisions of European Union law on the freedom of establishment, the freedom to provide services and competition, applicable in the transport sector.

2 The reference has been made in proceedings between Yellow Cab Verkehrsbetriebs GmbH ('Yellow Cab'), established in Munich (Germany), and the Landeshauptmann von Wien (first

minister of Vienna), concerning the rejection of the application made by that company for authorisation to operate a bus service within the territory of the City of Vienna (Austria).

Legal context

European Union legislation

3 On the basis of Article 71(1)(a) EC, now Article 91(1)(a) TFEU, which empowered the Council of the European Union to establish, in accordance with the procedure laid down in that provision, common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States, the Council adopted Regulation (EEC) No 684/92 of 16 March 1992 on common rules for the international carriage of passengers by coach and bus (OJ 1992 L 74, p. 1), which was amended by Council Regulation (EC) No 11/98 of 11 December 1997 (OJ 1998 L 4, p. 1) ('Regulation No 684/92').

4 Article 7(4) of Regulation No 684/92, entitled 'Authorisation procedure' provides:

'Authorisation shall be granted unless:

…

(d) it is shown that the service in question would directly compromise the existence of regular services already authorised, except in cases in which the regular services in question are carried out by a single carrier or group of carriers only;

(e) it appears that the operation of services covered by the application is aimed only at the most lucrative of the services existing on the links concerned;

…'

5 On the basis of Article 71(1)(b) EC, now Article 91(1)(b) TFEU, which empowered the Council to establish the conditions under which non-resident carriers may operate transport services within a Member State, the Council adopted Regulation (EC) No 12/98 of 11 December 1997 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (OJ 1998 L 4, p. 10), Article 1 of which states:

'Any carrier who operates road passenger transport services for hire or reward, and who holds the Community licence provided for in Article 3a of Council Regulation (EEC) No 684/92 …, shall be permitted, under the conditions laid down in this Regulation and without discrimination on grounds of the carrier's nationality or place of establishment, temporarily to operate national road passenger services for hire or reward in another Member State, hereinafter referred to as the "host Member State", without being required to have a registered office or other establishment in that State.

Such national transport services are hereinafter referred to as "cabotage transport operations".'

6 Article 2 of that regulation states the following:

'For the purposes of this Regulation:

(1) "Regular services" means services which provide for the carriage of passengers at specified intervals along specified routes, passengers being taken up and set down at

predetermined stopping points. Regular services shall be open to all – subject, where appropriate, to compulsory reservation.

The fact that the operating conditions of the service may be adjusted shall not affect its classification as a regular service.

(2) "Special regular services" means regular services which provide for the carriage of specified categories of passengers, to the exclusion of other passengers, at specified intervals along specified routes, passengers being taken up and set down at predetermined stopping points.

Special regular services shall include:

(a) the carriage of workers between home and work;

(b) carriage to and from the educational institution for school pupils and students;

(c) the carriage of soldiers and their families between their homes and the area of their barracks.

The fact that a special service may be varied according to the needs of users shall not affect its classification as a regular service.

(3) "Occasional services" means services which do not fall within the definition of regular services, including special regular services, and whose main characteristic is that they carry groups constituted on the initiative of a customer or of the carrier himself. These services shall not cease to be occasional services solely because they are provided at certain intervals.

…'

7 Article 3 of the regulation provides:

'Cabotage transport operations shall be authorised for the following services:

(1) special regular services provided that they are covered by a contract concluded between the organiser and the carrier;

(2) occasional services;

(3) regular services, provided they are performed by a carrier not resident in the host Member State in the course of a regular international service in accordance with Regulation (EEC) No 684/92.

Cabotage transport cannot be performed independently of such international service.

Urban and suburban services shall be excluded from the scope of this point.

"Urban and suburban services" means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and the surrounding areas.'

8 Regulations Nos 684/92 and 12/98 were repealed, with effect from 4 December 2011, by Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services,

and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88). Therefore, Regulations Nos 684/92 and 12/98 are applicable *rationetemporis* to the facts in the main proceedings.

9 Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1) ('Regulation No 1191/69'), which is applicable *ratione temporis* to the facts in the main proceedings, contains the following definition in Article 2(1) thereof:

'"Public service obligations" means obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions.'

10 Regulation No 1191/69 was repealed, with effect from 3 December 2009, by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1). Article 2(e) of that regulation contains a definition of 'public service obligation', whose content is essentially the same as that of Article 2(1) of Regulation No 1191/69.

National legislation

11 Paragraph 1 of the Austrian law on motor vehicle services (Kraftfahrliniengesetz, BGBl. I, 203/1999), in the version applicable to the case in the main proceedings (BGBl. I, 153/2006) ('the KflG'), entitled 'Definitions, content and scope of licences', provides:

'1. Motor vehicle services are services which provide for the carriage of passengers by motor vehicles operated by transport undertakings on specified routes and on a regular basis, in which passengers may be taken up and set down at predetermined stopping points. Motor vehicle services shall be open to all – subject, where appropriate, to compulsory reservation.

…

3. National and cross-border motor vehicles services as for the purposes of subparagraph 1 require a licence and cross-border motor vehicle services which terminate in the territory of a Member State … or a State party to the Agreement on the European Economic Area or Switzerland require authorisation which is the equivalent of a licence.'

12 Paragraph 2 of the KflG, entitled 'Obligation to apply for a licence and authorisation, content of a licence application', provides that the grant of a licence or authorisation requires that an application be made by the transport operator directly to the competent authority, and sets out the information which that application must contain, such as the identity and place of establishment of the applicant, his reliability, his technical expertise, his financial capacity, the route of the service applied for, the desired duration of the licence, the transport fares to be charged and the fittings of the vehicles to be used.

13 Paragraph 3(1) of that law, entitled 'Supervisory authorities', states that the Landeshauptmann is responsible for granting the licences provided for in Paragraph 1 of the KflG.

14 Paragraph 7(1) of the KflG, entitled 'Conditions and grounds of exclusion from the grant of a licence', provides:

‘A licence is to be granted where:

(1) the licence applicant or, where necessary, the operator provided for in Paragraph 10(5), is reliable and suitably qualified and the licence applicant is, in addition, of appropriate financial standing;

(2) the licence applicant, as a natural person, has Austrian nationality and the undertaking (Paragraph 1(2)(2)) has its registered office in Austria. Nationals of other Member States … or other States party to the Agreement on the European Economic Area which also have a registered office or a permanent branch in Austria are to be treated in the same way as Austrian licence applicants;

(3) the type of route ensures that the relevant transport requirements are met in an appropriate and economic manner, and

(4) the grant of a licence is not otherwise contrary to the public interest. This ground for exclusion obtains in particular where

…

(b) the motor vehicle service applied for might jeopardise the performance of transport functions by the transport undertaking in whose transport area (Paragraph 14(1) to (3)) the service applied for falls in full or in part, or

(c) the motor vehicle service applied for anticipates an organisation of transport, which is more consistent with the public need, by the transport undertakings in whose transport area (Paragraph 14(4)) the service applied for falls in full or in part, and one of those undertakings makes the necessary improvement to transport provision within an appropriate period of time, not exceeding six months, to be fixed by the supervisory authority.’

15 Paragraph 14 of the KflG, entitled ‘Transport area’, states the following:

‘1. The transport area referred to in Paragraph 7(1)(4)(b) shall extend to cover situations in which a motor vehicle service applied for may have the effect of jeopardising public transport which has already been licensed.

2. Performance of transport functions is jeopardised where a transport undertaking is seriously affected as regards the provision of its public transport. This is the case where it suffers a drop in revenue which substantially calls into question the profitability of the jeopardised service.

3. If a transport undertaking claims that it is suffering from a drop in revenue which substantially calls into question the balance of its commercial operation as a result of the grant of a new licence or a licence with an amended route, it shall submit to the supervisory authority the information, some of which may be confidential, which shall enable that authority to evaluate the effects which the drop in revenue will have on the profitability of the service concerned.

4. “Transport area” as referred to in Paragraph 7(1)(4)(c) is to be understood as meaning the area within which the existing motor vehicle service meets the transport requirement.’

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

16 On 25 January 2008, Yellow Cab applied to the Landeshauptmann von Wien, pursuant to the KflG, for authorisation to operate a fixed-route bus service exclusively within the territory of the City of Vienna.

17 Another company operates a bus service on almost all of that route, pursuant to a licence granted on 17 May 2005.

18 Yellow Cab's application was rejected by the competent administrative authority, essentially on the following grounds. First, Yellow Cab is established in another Member State and does not have a seat or permanent establishment in Austrian territory, contrary to Paragraph 7(1)(2) of the KflG. Second, the undertaking which currently operates a bus service on the same route as the one applied for by Yellow Cab was consulted in accordance with Paragraph 7(1)(4)(b) of the KflG and stated that it would no longer be possible to operate that service in sustainable economic conditions if the licence applied for were granted.

19 Yellow Cab appealed against that decision before the Unabhängiger Verwaltungssenat Wien (Independent Administrative Chamber, Vienna), which harbours doubts as to the compatibility of the national legislation at issue with the rules of the EC Treaty on freedom of establishment, freedom to provide services and competition.

20 Yellow Cab states, in essence, that the requirement of a seat or permanent establishment within Austrian territory in order to be licensed to operate a regular bus service constitutes a specific obstacle only for applicants who do not originate in Austria, in so far as Austrian applicants, whether natural or legal persons, are in principle established within the territory of the Republic of Austria. Even though regular passenger transport services are in the public interest, the national court doubts whether it is necessary to restrict the freedom of establishment and the freedom to provide services to such an extent.

21 Furthermore, in so far as concerns the requirement that the new service applied for must not jeopardise the economic viability of an already licensed service, the national court considers that the relevant provision of the national legislation protects from competition above all undertakings which have operated poorly and in an unprofitable manner the transport services which they have been licensed to operate. The national court points out that, in the present case, the applicant undertaking was proposing, for practically the same bus service, a significantly lower price than that currently charged by the competing undertaking which is already licensed.

22 Finally, the national court points out that, although the Treaty provisions on competition are aimed primarily at undertakings, the Member States must also refrain from taking any measures which may render ineffective the competition rules applicable to undertakings. The result of the national legislation at issue in the main proceedings is to prevent an undertaking, which is in a position to offer a regular bus service at more competitive prices, from gaining access to the market, even though a system of transport services functioning correctly and at competitive prices would satisfy a significant public interest.

23 In the light of those considerations, the Unabhängiger Verwaltungssenat Wien decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it compatible with the freedom of establishment and the freedom to provide services within the meaning of Article [49 et seq. TFEU and Article 56 et seq. TFEU] and with EU competition law for the purposes of Article [101 et seq. TFEU] for a

provision of national law relating to the grant of authorisation to operate a motor vehicle service, and thus to provide public transport, where fixed stopping points are called at regularly in accordance with a timetable, to lay down the following as conditions for such authorisation:

(a) that the EU undertaking making the application must already have a registered office or a branch in the State of the authorising authority before commencing operation of the service and in particular at the time the licence is granted;

(b) that the EU undertaking making the application must already have a registered office or a branch in the State of the authorising authority at the latest from the time operation of the service commences?

2. Is it compatible with the freedom of establishment and the freedom to provide services within the meaning of Article [49 et seq. TFEU and Article 56 et seq. TFEU] and with EU competition law for the purposes of Article [101 et seq. TFEU] for a provision of national law relating to the grant of authorisation to operate a motor vehicle service, and thus to provide public transport where fixed stops are called at regularly in accordance with a timetable, to provide that authorisation is to be refused where, if the motor vehicle service applied for commences, the revenues of a competing undertaking running on a partially or entirely identical short route will be so substantially reduced by this service that the continued running of the service operated by the competing undertaking will no longer be economically viable?'

Consideration of the questions referred

Preliminary observations

24 It should be pointed out at the outset that, in its two questions, the national court refers in particular to the European Union competition law laid down in Article 101 et seq. TFEU.

25 It should be noted, in that regard, that, although it is true that Articles 101 TFEU and 102 TFEU are concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 4(3) TEU, which lays down a duty to cooperate, none the less require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 45 and the case-law cited, and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 46).

26 The Court has held that Articles 4(3) TEU and 101 TFEU are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see *CIF*, paragraph 46 and the case-law cited, and *Cipolla and Others*, paragraph 47).

27 However, the national legislation at issue in the main proceedings does not fall within any of those cases. Consequently, there is no need to examine the present reference for a preliminary ruling from the point of view of European Union competition law.

The first question

28 By this question, the national court essentially asks whether the provisions of European Union law on the freedom to provide services and the freedom of establishment must be interpreted as opposing the legislation of a Member State, such as that at issue in the main proceedings, which, for the purposes of the grant of authorisation to operate a public urban bus service, where fixed stopping points are called at regularly in accordance with a timetable, requires applicant economic operators, even those established in other Member States, to hold a seat or another establishment in the territory of that Member State.

29 In order to answer that question, it is to be stressed that free movement of services in the transport sector is not governed by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article 58(1) TFEU, according to which '[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport' (see, to that effect, Case 4/88 *Lambregts Transportbedrijf* [1989] ECR 2583, paragraph 9).

30 Application of the principles governing freedom to provide services must therefore be achieved, according to the Treaty, by introducing a common transport policy (see Case C-17/90 *Pinaud Wieger* [1991] ECR I-5253, paragraph 7).

31 It should also be noted that the transport at issue in the main proceedings does not fall within the scope of the provisions adopted by the Council, on the basis of Article 71(1) EC, in order to liberalise transport services.

32 First, it is not disputed that the operation of the bus service envisaged by Yellow Cab does not constitute international transport and thus does not fall within the scope of Regulation No 684/92. Second, as regards Regulation No 12/98, it needs to be pointed out that the conditions for its application are not met in the case in the main proceedings, given that the regular transport services envisaged by Yellow Cab do not constitute the national segment of a regular international service, for the purposes of Article 3(3) of that regulation, and that, since they are intended to be provided exclusively within the territory of the City of Vienna, they constitute urban or suburban services which are excluded from the scope of the regulation by means of Article 3(3) thereof.

33 In those circumstances, the national legislation at issue in the main proceedings falls to be assessed in the light of the provisions of the TFEU on freedom of establishment, which are applicable directly to transport, and not on the basis of the Title of that Treaty on transport.

34 In that regard, it must be pointed out that the requirement of a seat or another establishment in the territory of the host Member State cannot logically constitute, as such, a barrier to, or restriction on, the freedom of establishment. As rightly pointed out by the Austrian Government, that obligation does not impose the slightest restriction on the freedom of economic operators established in other Member States to create agencies or other establishments in that territory.

35 Therefore, what is important in a situation such as that in the case in the main proceedings is to examine whether the detailed rules surrounding the requirement of a seat or another establishment in the territory of the host Member State, as a prerequisite for obtaining authorisation to operate a regular bus service, may constitute a barrier to the exercise of the right of establishment.

36 In that regard, the national court makes reference, firstly, to the fact that interested foreign business operators are required to hold a seat or another establishment in the territory of the host Member State before authorisation to operate is granted and, secondly, to the

fact that they must satisfy that requirement after authorisation has been granted and, at the latest, from the time operation of the authorised regular service commences.

37 However, requiring an economic operator, established in another Member State and wishing to obtain authorisation to operate a regular bus service in the host Member State, to hold a seat or another establishment in the territory of that State even before authorisation has been granted to operate that service has a dissuasive effect. An economic operator exercising ordinary care would not be willing to make investments, which may well be significant, if completely unsure whether such authorisation will be granted or not.

38 It should be added that the restriction brought about by such a requirement does not appear to be justified in any way by the objectives claimed by the Austrian Government relating to the need to ensure equal conditions for competition in the operation of bus services, and to ensure that the social and employment law in force in Austria is respected.

39 Consequently, such a requirement constitutes a restriction which is contrary to the rules of the European Union on the right of establishment.

40 By contrast, a requirement to be established in Austrian territory is not contrary to European Union law where it is applied after authorisation to operate has been granted and before the business operator commences operation of the service.

41 In the light of the foregoing considerations, the answer to the first question is that Article 49 TFEU must be interpreted as opposing the legislation of a Member State, such as that at issue in the main proceedings, which, for the purposes of the grant of authorisation to operate a public urban bus service, where fixed stopping points are called at regularly in accordance with a timetable, requires applicant economic operators established in another Member State to hold a seat or another establishment in the territory of the host Member State even before being authorised to operate that service. By contrast, Article 49 TFEU must be interpreted as not precluding national legislation which provides for an establishment requirement where such a requirement does not apply until after that authorisation has been granted and before the applicant commences operation of that service.

The second question

42 By this question, the national court asks whether the provisions of European Union law on freedom to provide services and freedom of establishment must be interpreted as opposing national legislation, such as that at issue in the main proceedings, which provides that the authorisation applied for to operate an urban bus service, where fixed stops are called at regularly in accordance with a timetable, must be refused where the income of a competing undertaking, which has already been granted authorisation to operate a transport service using a route which is partially or entirely identical to the service applied for, would be so substantially reduced as a consequence of the grant of that authorisation, that the continued running of the licensed service would no longer be economically viable.

43 In the light of the reasoning in paragraphs 29 to 33 above, this question must be examined exclusively from the point of view of freedom of establishment.

44 It should be noted, at the outset, that, according to the information provided in the file, the bus services at issue in the main proceedings are primarily aimed at tourists, with the result that the obligations inherent in the operation of such services are not public service obligations within the meaning of the definition in Article 2(1) of Regulation No 1191/69.

45 National legislation, such as that at issue in the main proceedings, which requires authorisation to be obtained in order to operate a tourist bus service, constitutes, in principle, a restriction of freedom of establishment within the meaning of Article 49 TFEU, in that it seeks to restrict the number of service providers, notwithstanding the alleged absence of discrimination on grounds of the nationality of the persons concerned (see, by analogy, Case C-160/07 *Hartlauer* [2009] ECR I-1721, paragraphs 36 and 39).

46 Consequently, it is necessary to examine whether the legislation at issue in the main proceedings may be justified objectively.

47 It needs to be pointed out that, as is apparent from the documents before the Court, Paragraph 7(1)(4) of the KflG, entitled 'Conditions and grounds of exclusion from the grant of a licence', refers to incompatibility with the public interest as a criterion for refusal to grant authorisation to operate and refers, in points (b) and (c) thereof, to situations in which that ground of exclusion applies in particular. A drop in revenue of an authorised transport services undertaking which would substantially call into question the profitability of its commercial operation is referred to in Paragraph 14 of that law, entitled 'Transport area'.

48 The second question, as formulated, concerns the decisive role of the criterion based on such a drop in revenue and on how the operation of the undertaking concerned would be rendered unprofitable if a new operator were granted authorisation.

49 Therefore, the Court's analysis will take account of both the wording of the relevant provisions of the KflG and the interpretation of that law, as resulting from the wording of the second question.

50 In that regard, as the Commission rightly observes, the operation of bus services such as those at issue in the case in the main proceedings may serve an objective in the general interest, such as promotion of tourism, road safety by channelling tourist traffic to set routes, or protection of the environment by offering a collective mode of transport as an alternative to individual means of transport.

51 By contrast, the objective of ensuring the profitability of a competing bus service, as a reason of a purely economic nature, cannot, in accordance with the settled case-law, constitute an overriding reason in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see Case C-384/08 *Attanasio Group* [2010] ECR I-0000, paragraph 55 and the case-law cited).

52 As regards, in particular, the interest in preventing the authorisation of a transport service from directly compromising the existence of regular services already authorised, it should be noted that, under Regulation No 684/92, such an interest may justify the refusal of such authorisation, as is apparent from Article 7(4)(d) thereof. However, since that provision does not apply in the circumstances of the dispute in the main proceedings, it cannot be accepted that, outside that regulatory framework and where an application to operate a tourist bus service has been made, objectives similar to those provided for in that provision may justify a restriction on freedom of establishment.

53 In so far as concerns the examination of proportionality, it should be noted that a prior administrative authorisation scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings. Also, if a prior administrative authorisation scheme is to

be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion (*Hartlauer*, paragraph 64 and the case-law cited).

54 Therefore, if the national legislation at issue in the main proceedings is interpreted as meaning that the assessment of an application for authorisation is to be carried out by the competent national authority on the sole basis of the statements made by the authorised service provider in relation to the profitability of his undertaking, even though that undertaking is a direct potential competitor of the undertaking applying for authorisation, such a means of assessment would be contrary to the rules of the European Union for it would be liable to affect the objectivity and impartiality of the treatment of the application for authorisation (see, to that effect, *Hartlauer*, paragraph 69).

55 In the light of the foregoing considerations, the answer to the second question is that Article 49 TFEU must be interpreted as opposing national legislation which provides for the refusal of the grant of authorisation to operate a tourist bus service as a result of the reduced profitability of a competing undertaking which has been authorised to operate a service which is partially or entirely identical to the one applied for, on the sole basis of the statements of that competing undertaking.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 49 TFEU must be interpreted as opposing the legislation of a Member State, such as that at issue in the main proceedings, which, for the purposes of the grant of authorisation to operate a public urban bus service, where fixed stopping points are called at regularly in accordance with a timetable, requires applicant economic operators established in another Member State to hold a seat or another establishment in the territory of the host Member State even before being authorised to operate that service. By contrast, Article 49 TFEU must be interpreted as not precluding national legislation which provides for an establishment requirement where such a requirement does not apply until after that authorisation has been granted and before the applicant commences operation of that service.**

2. **Article 49 TFEU must be interpreted as opposing national legislation which provides for the refusal of the grant of authorisation to operate a tourist bus service as a result of the reduced profitability of a competing undertaking which has been authorised to operate a service which is partially or entirely identical to the one applied for, on the sole basis of the statements of that competing undertaking.**

JUDGMENT OF THE COURT (Second Chamber)

8 September 2011 (*)

(Directive 2000/78/EC – Articles 2(2) and 6(1) – Charter of Fundamental Rights of the European Union – Articles 21 and 28 – Collective agreement on pay for public sector contractual employees of a Member State – Pay determined by reference to age – Collective agreement abolishing the determination of pay by reference to age – Maintenance of established rights)

In Joined Cases C-297/10 and C-298/10,

REFERENCES for preliminary rulings under Article 267 TFEU from the Bundesarbeitsgericht (Germany), made by decisions of 20 May 2010, received at the Court on 16 June 2010, in the proceedings

Sabine Hennigs (C-297/10)

v

Eisenbahn-Bundesamt

and

Land Berlin (C-298/10)

v

Alexander Mai,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 26 May 2011,

after considering the observations submitted on behalf of:

– Ms Hennigs, by M. Peiseler and A. Seulen, Rechtsanwälte,

– Mr Mai, by H.-W. Behm, Rechtsanwalt,

– Land Berlin, by J. Zeisberg, Rechtsanwalt,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Belgian Government, by M. Jacobs and C. Pochet, acting as Agents,

– the European Commission, by V. Kreuschitz and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation of Articles 21 and 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), the principle of non-discrimination on grounds of age, and 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 references were made in the course of proceedings between two public sector contractual employees, Ms Hennigs and Mr Mai, and their respective employers, the Eisenbahn-Bundesamt and the *Land* of Berlin, concerning the determination of their pay.

Legal context

European Union legislation

3 Recitals 9, 11, 25 and 36 in the preamble to 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 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.

…

(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.

…

(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.'

4 According to Article 1 of Directive 2000/78, 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'.

5 Article 2 of the directive 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 …'

6 Under Article 3(1)(c) of the directive, it applies to all persons, as regards both the public and private sectors, including public bodies, in relation inter alia to employment and working conditions, including pay.

7 Article 6 of the directive reads:

'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;

…'

8 Article 16 of the directive states:

'Member States shall take the necessary measures to ensure that:

…

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements … are, or may be, declared null and void or are amended.'

9 Article 18 of the directive states:

'Member States … 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. …

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. …'

10 The Federal Republic of Germany made use of that option, so that the provisions of Directive 2000/78 relating to discrimination on grounds of age and disability were to be transposed in that Member State by 2 December 2006 at the latest.

National legislation

Federal legislation on equal treatment

11 The General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897, 'the AGG') transposed Directive 2000/78.

12 Paragraph 10 of the AGG, 'Permissible difference of treatment on grounds of age', provides:

'Paragraph 8 notwithstanding, a difference of treatment on grounds of age is also permissible if it is objective and reasonable and justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

…

2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.

…'

Collective agreements applicable to contractual employees in the public sector

13 According to the referring court, the pay of contractual employees in the public sector is determined by the social partners by means of collective agreements.

– Collective agreements applicable to contractual employees of the *Land* of Berlin (Case C-298/10)

14 At the material time for the main proceedings, employment relationships of contractual employees of the *Land* of Berlin were governed by the Federal Collective Agreement for contractual employees (Bundes-Angestelltentarifvertrag) of 23 February 1961 ('the BAT'). The BAT had been concluded for federal contractual employees but also applied to contractual employees of the *Länder* and municipalities.

15 The BAT had been supplemented by Collective Pay Agreement No 35 pursuant to the BAT (Vergütungstarifvertrag Nr. 35 zum BAT).

16 Paragraph 27 of the BAT reads as follows:

'A. Employees covered by Annex 1a

…

1. In the collective pay agreement, basic pay in the salary groups shall be determined according to age categories. The basic pay of the first age category (initial basic pay) shall be paid from the start of the month in which an employee in salary groups III to X reaches

the age of 21 and in salary groups I to IIb the age of 23. Every two years, the employee shall receive the basic pay of the next age category, until he reaches the basic pay of the last age category (final basic pay).

2. If an employee in salary groups III to X is appointed at the latest at the end of the month in which he reaches the age of 31, he shall receive the basic pay of his age category. If the employee is appointed at a later date, he shall receive the basic pay of the age category which results when the age reached on appointment is reduced by half the number of years completed since the employee reached the age of 31. From the start of each month in which the employee reaches an odd-numbered age, he shall receive the basic pay of the next age category until he reaches the final basic pay. For employees in salary groups I to IIb, the first to third sentences apply *mutatis mutandis*, with 35 years of age being substituted for 31 years of age.

…'

17 Paragraph 27(C) of the BAT provides that professional experience acquired before the employee is appointed may under certain conditions be taken into account to place him in a higher category than would normally have been allocated him on grounds of age.

18 The referring court explains, with reference to the BAT, that basic pay is calculated by salary group. Group X is the lowest and group I the highest. The classification of an employee in one of salary groups I to IIa in principle requires a university degree. As regards age categories, the court states, by way of example, that for groups I to Ib final basic salary is attained with age category 47, in other words when the employee reaches the age of 47. The BAT further provides that basic pay is supplemented by a 'local' supplement intended to cover part of the employee's financial burdens associated with his family status.

19 The referring court states that Annex 1c to Collective Pay Agreement No 35 pursuant to the BAT laid down the initial and final basic pay for employees in groups I to X from 1 May 2004. The court also states that the BAT remained in force for contractual employees of the *Land* of Berlin until 1 April 2010.

– Collective agreements applicable to federal contractual employees (Case C-297/10)

20 The employment relationships of federal contractual employees were governed until 1 October 2005 by the BAT and Collective Pay Agreement No 35 pursuant to the BAT.

21 From that date the BAT and Collective Pay Agreement No 35 pursuant to the BAT were replaced for federal and municipal employees by the Collective Agreement for the public service (Tarifvertrag für den öffentlichen Dienst, 'the TVöD').

22 The TVöD no longer provides for age categories or the 'local' supplement. The single system of pay is based on criteria such as the activity, professional experience, and performance. The activity determines the salary group and professional experience and performance determine the step.

23 From 1 October 2005, federal contractual agents were reclassified in the new pay scheme under the TVöD. The details of the reclassification are governed by the Collective Agreement on the transfer of federal employees to the TVöD and laying down transitional rules (Tarifvertrag zur Überleitung der Beschäftigten des Bundes in den TVöD und zur Regelung des Übergangsrechts, 'the TVÜ-Bund').

24 The reclassification of the contractual employees covered by the BAT took place in two stages.

25 In accordance with Paragraph 5 of the TVÜ-Bund, in a first stage, a figure for reference pay was calculated on the basis of the remuneration received in September 2005. The referring court states that that form of transfer allowed the employee to receive remuneration corresponding to his previous pay, so that his established rights were preserved.

26 Under Paragraph 6 of the TVÜ-Bund, for a period of two years, on the basis of the reference pay, an individual intermediate step was allocated to contractual employees within the salary group in which they were classified. As from 1 October 2007, the reclassification became final, with the employee moving from the individual intermediate step to the next higher normal step within the salary group.

27 Since the final reclassification of the employees, their pay has followed the criteria laid down by the TVöD.

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

Case C-298/10

28 Mr Mai, who was born on 28 December 1967, was employed as a contractual employee of the *Land* of Berlin from 16 March 1998 to 31 March 2009. He worked as the manager of a care home. He was classified in BAT group Ia and received basic pay in the gross monthly sum of EUR 3 336.09. The gross monthly sum of basic pay for age category 47 in that salary group was EUR 3 787.14.

29 Mr Mai asked his employer to pay him on the basis of age category 47, although he had not reached the age of 47. He takes the view that the gradation of basic pay by age categories constitutes discrimination on grounds of age against younger employees. He brought proceedings seeking payment by the *Land* of Berlin of a salary corresponding to age category 47 in BAT salary group Ia from 1 September 2006 to 31 March 2009.

30 In those proceedings the *Land* of Berlin appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court). According to that court, Mr Mai is claiming a salary that is not in accordance with the BAT. His claim could succeed only if it were accepted that the calculation of basic pay by reference to age categories constitutes discrimination on grounds of age and is contrary to Article 21 of the Charter and to Directive 2000/78.

31 The Bundesarbeitsgericht observes that Article 6(1)(b) of Directive 2000/78 provides that a difference of treatment on grounds of age may be accepted if it consists inter alia in fixing conditions of age for access to certain advantages linked to employment.

32 It says that the age categories laid down by the BAT may be regarded as representing professional experience. However, professional experience does not always increase with length of service. Sometimes it even diminishes. In that case the criterion of age does not in general reflect professional experience.

33 The Bundesarbeitsgericht raises the question whether the fact that the BAT is a collective agreement negotiated by the social partners changes the approach to be taken to the issue, in view of Article 28 of the Charter, which recognises the right of collective bargaining and to conclude collective agreements.

34 In those circumstances, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do rules on pay in a collective agreement for public sector contractual employees which, like Paragraph 27 of the [BAT] in conjunction with Collective Pay Agreement No 35 pursuant to the BAT, determine basic pay in the individual salary groups by age categories infringe the prohibition of age discrimination in primary law (now Article 21(1) of the Charter) as given expression by Directive 2000/78, taking into account also the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter)?'

Case C-297/10

35 Ms Hennigs has since 1 February 2004 been employed as a civil engineer by the Eisenbahn-Bundesamt, which is a federal authority.

36 Under the BAT, she was classified in salary group IVa in Annex Ia. As she was aged 41 when she started work, she was assigned to age category 35, in accordance with Paragraph 27(A)(2) of the BAT.

37 On being transferred from the BAT to the TVöD, Ms Hennigs was reclassified on the basis of reference pay of a total of EUR 3 185.33 calculated by reference to age category 37. As a result, she was placed in salary group 11, in an individual intermediate step between steps 3 and 4. From 1 October 2007 she was classified in step 4 in salary group 11, which entitled her to basic gross monthly pay of EUR 3 200.

38 Ms Hennigs contests not her salary group but her step within that group. She submits that if she had been classified in step 5 in salary group 11 she would have received a further EUR 435 a month gross. She therefore brought proceedings seeking to be so classified.

39 She submits that the system of age categories laid down by the BAT constituted discrimination on grounds of age and the TVöD continues that discrimination.

40 The Bundesarbeitsgericht, hearing the appeal on a point of law brought by Ms Hennigs, observes that the classification sought by her, in step 5 in salary group 11, would mean that her reclassification was not based on the pay resulting from the application of the BAT. That would be possible only if the BAT, in providing for pay to be calculated by reference to age categories, were unlawful because it breached the prohibition of discrimination on grounds of age. The court refers in this respect to Case C-298/10.

41 As regards the TVÜ-Bund, the Bundesarbeitsgericht raises the question of the degree of latitude available to the social partners in moving from an age-related pay scheme in a collective agreement to one based on other criteria but taking over some elements of the previous pay scheme. It also asks whether the fundamental right of collective bargaining should be taken into account in assessing the lawfulness of the aim pursued. Should the transitional measures be contrary to the prohibition of discrimination on grounds of age, the court asks whether the social partners should immediately have ended the discriminatory system under the BAT or whether they could maintain certain discriminatory provisions in part, on a transitional basis, in order to preserve temporarily the established rights of the employees concerned, and abolish those provisions progressively. Those issues are the subject of Questions 2 and 3.

42 The Bundesarbeitsgericht asks whether the disproportionate costs the employer would have to bear if the causes of the discrimination were immediately abolished could be a

justification for temporarily maintaining the discriminatory provisions. This issue is the subject of Question 4.

43 By Question 5 the Bundesarbeitsgericht asks as to the period available to the social partners to put an end to a discriminatory collective agreement, having regard to the principle of the protection of the legitimate expectations of employees as regards the existing collective system.

44 In those circumstances, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling, the first of which is the same as the question referred in Case C-298/10:

‘1. Do rules on pay in a collective agreement for public sector contractual employees which, like Paragraph 27 of the [BAT] in conjunction with Collective Pay Agreement No 35 pursuant to the BAT, determine basic pay in the individual salary groups by age categories infringe the prohibition of age discrimination in primary law (now Article 21(1) of the Charter) as given expression by Directive 2000/78, taking into account also the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter)?

2. If Question 1 is answered in the affirmative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

(a) Does the right of collective bargaining give the parties to a collective agreement latitude to eliminate such discrimination by transferring the employees to a new collective pay structure based on activity, performance and professional experience, while preserving their established rights acquired in the old collective system?

(b) Must Question 2(a) in any event be answered in the affirmative if the final allocation of the transferred employees to the steps within a salary group of the new collective pay structure does not depend solely on the age category attained in the old collective system and if the employees who are admitted to a higher step in the new system typically have more professional experience than the employees allocated to a lower step?

3. If Questions 2(a) and (b) are answered in the negative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

(a) Is indirect discrimination on grounds of age justified by the fact that it is a legitimate aim to preserve established social rights and because temporarily continuing to treat older and younger employees differently under transitional rules is an appropriate and necessary means of achieving that aim, if that difference of treatment is gradually phased out and the only alternative in practice would be to reduce the pay of older employees?

(b) Taking into account the right to collective bargaining and the associated autonomy in collective bargaining, must Question 3(a) be answered in the affirmative in any event if parties to a collective agreement agree on such transitional rules?

4. If Questions 3(a) and (b) are answered in the negative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

   Must an infringement of the prohibition in primary law of discrimination on grounds of age which characterises a collective pay system and makes it invalid as a whole, even taking into account the associated additional costs for the employer concerned and the right to collective bargaining of the parties to the collective agreement, always only be eliminated by taking the highest age category as a basis in each case when applying the rules on pay in the collective agreement until new rules that are in conformity with Union law come into force?

5. If Question 4 is answered in the negative by the Court of Justice … or by the Bundesarbeitsgericht on the basis of the guidelines set out by the Court of Justice in its preliminary ruling:

   Having regard to the right to collective bargaining of the parties to a collective agreement, would it be compatible with the Union law prohibition of discrimination on grounds of age and the requirement for an effective sanction in the event of a breach of that prohibition to set the parties to a collective agreement a manageable deadline (for instance, six months) for retrospectively remedying the invalidity of the pay system they have agreed, and to stipulate that, in the event that no new rules in conformity with Union law are introduced within the deadline, the highest age category will be taken as a basis in each case when applying the collective agreement, and, if so, what temporal margin for the retrospective effect of the new rules that are in conformity with Union law could be allowed to the parties to a collective agreement?'

45 By order of 24 September 2010, the President of the Court ordered Cases C-297/10 and C-298/10 to be joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

Preliminary observations

46 By its questions the referring court asks the Court to interpret the principle of non-discrimination on grounds of age, enshrined in primary law in Article 21 of the Charter, as given specific expression by Directive 2000/78.

47 The Court has recognised the existence of a prohibition of discrimination on grounds of age which must be regarded as a general principle of European Union law and was given specific expression by Directive 2000/78 in the field of employment and occupation (see, to that effect, Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraph 21). The prohibition of all discrimination inter alia on grounds of age appears in Article 21 of the Charter, which, from 1 December 2009, has the same legal status as the Treaties.

48 To answer the questions, it must be ascertained whether the measures at issue in the main proceedings fall within the scope of Directive 2000/78.

49 It is apparent both from its title and preamble and from its content and purpose that that directive is intended to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on any of the grounds mentioned in Article 1, which

include age (see Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECR I-0000, paragraph 19).

50 Article 3(1)(c) of Directive 2000/78 states that the directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation inter alia to employment and working conditions, including pay.

51 According to the information provided by the referring court, the measures at issue in the main proceedings govern the scheme of pay for contractual employees in the public sector. Those measures thus affect those employees' conditions of pay within the meaning of Article 3(1)(c) of Directive 2000/78.

Question 1 in Case C-297/10 and the single question in Case C-298/10

52 By its first question in Case C-297/10 and its single question in Case C-298/10, which are worded identically, the referring court seeks essentially to know whether the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter and given expression in Directive 2000/78, more particularly in Articles 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down in a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age. The court also asks whether, for the purposes of that interpretation, account should be taken of the right to negotiate collective agreements stated in Article 28 of the Charter.

53 The first stage is to examine whether the rules at issue in the main proceedings contain a difference of treatment on grounds of age for the purposes of Article 2(1) of Directive 2000/78. Under that provision, 'the "principle of equal treatment" means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1' of the directive. Article 2(2)(a) of that directive states that, for the purposes of Article 2(1), direct discrimination is taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1.

54 In the present case, according to the information provided by the referring court, in the system established by the BAT the basic pay for each job depends, first, on classification in a salary group. Group X is the lowest and group I the highest. Classification in each grade depends on the characteristics of the activity performed by the employee.

55 Secondly, within each group, the employee's basic pay is determined on his appointment by reference to the age category to which he belongs. Every two years he obtains the basic pay of the next age category, until he reaches the basic pay of the last age category in his salary group.

56 An employee recruited in salary group VIb at the age of 21 will thus be classified in age category 21 in that group, whereas a 27-year-old employee recruited in that group will be classified in age category 27.

57 That rule is qualified if the employee is appointed later than the end of the month in which he reaches the age of 31 (if he is classified in one of groups III to X) or 35 (if he is classified in one of groups I to IIb). In that case the basic pay is that of the age category calculated by reducing the employee's age on appointment by half the number of years completed since he reached the age of 31 (or 35, depending on salary group). Thus an employee such as Ms

Hennigs, who was 41 when she was appointed in salary group IVa, received the basic pay for age category 35, in other words, only half the period from her 31st to her 41st birthday was taken into account.

58 It is thus apparent that the basic pay received by two employees appointed on the same date in the same salary group will differ according to their age at the time of appointment. It follows that those two employees are in a comparable situation and one of them receives lower basic pay than the other. That employee is thus treated less favourably, because of his age, than the other employee.

59 It follows that the system of pay established by Paragraph 27 of the BAT, read in conjunction with collective pay agreement No 35 pursuant to the BAT, creates a difference of treatment based directly on the criterion of age, for the purposes of Article 2(1) and (2)(a) of Directive 2000/78.

60 The second stage is to examine whether that difference of treatment may be justified under Article 6(1) of Directive 2000/78.

61 The first subparagraph of that provision states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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.

62 At this point in the consideration of the questions referred, and as suggested by the referring court, it should be examined whether the fact that the BAT is a collective agreement changes the assessment of the justification for the difference of treatment on grounds of age established by Paragraph 27 of the BAT, read in conjunction with collective pay agreement No 35 pursuant to the BAT.

63 It is clear from Article 16(1)(b) of Directive 2000/78 that collective agreements, like laws, regulations and administrative provisions, must observe the principle implemented by that directive.

64 Similarly, Article 18 of that directive provides that Member States may entrust the social partners, at their joint request, with the implementation of the directive as regards provisions concerning collective agreements.

65 The Court has repeatedly held that the social partners at national level may, on the same basis as the Member States, provide for measures which contain differences of treatment on grounds of age, in accordance with the first subparagraph of Article 6(1) of Directive 2000/78. Like the Member States, they enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 68, and Case C-45/09 *Rosenbladt* [2010] ECR I-0000, paragraph 41). In the context of that discretion, the difference of treatment on grounds of age must be appropriate and necessary for achieving that aim.

66 The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, have taken care to strike a balance between their respective interests (see, to that effect, *Rosenbladt*, paragraph 67 and the case-law cited).

67 Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law (see, to that effect, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).

68 Consequently, when they adopt measures falling within the scope of Directive 2000/78, which gives specific expression in the field of employment and occupation to the principle of non-discrimination on grounds of age, the social partners must comply with that directive (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 22).

69 In assessing whether the aim pursued by the measure at issue in the main proceedings is legitimate and whether that measure is appropriate and necessary for achieving that aim, it must be noted that the referring court and the German Government state that the higher pay is justified by the employee's longer professional experience and rewards his loyalty to the undertaking. Moreover, according to some legal writers and some of the lower courts, the higher basic pay received by older employees on their appointment is compensation for their financial needs, which in most cases are greater because of their social environment.

70 As regards the German Government's argument concerning compensation for the greater financial needs of older employees in connection with their social environment, it has not been shown that there is a direct correlation between the age of employees and their financial needs. Thus a young employee may have substantial family burdens to bear while an older employee may be unmarried without dependant children. In addition, the referring court explains that the basic pay of public sector contractual employees is supplemented by a 'local' supplement, the amount of which varies according to the employees' family burdens.

71 In its observations submitted to the Court, the German Government states that the age criterion used to determine basic pay on appointment is merely a more convenient way of forming categories of employees while taking overall account of their professional experience. When the system under the BAT was set up, there was a direct relationship between employees' ages and the contributions they paid. Where an employee is appointed after reaching the age of 31 (or 35), the employee's age no longer determines on its own the age category of pay. That, it says, is justified by the fact that, after a certain point in time, persons appointed late do not have professional experience that is entirely relevant to the activity they will carry out. It submits that that measure thus fulfils a legitimate aim and is appropriate and necessary.

72 It follows from those observations that the aim mentioned both by the referring court and by the German Government consists in wishing to establish a pay scale for public sector contractual employees so as to take account of employees' professional experience. That aim must in principle be regarded as 'objectively and reasonably' justifying 'within the context of national law' a difference of treatment on grounds of age, within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78. It should be recalled that the Court has acknowledged that rewarding experience that enables a worker to perform his duties better is, as a general rule, a legitimate aim of wages policy (see Case C-17/05 *Cadman* [2006] ECR I-9583, paragraph 34, and Case C-88/08 *Hütter* [2009] ECR I-5325, paragraph 47). It follows that that aim is 'legitimate' within the meaning of that provision.

73 It remains to ascertain, in accordance with the wording of that provision, whether, within the context of the broad discretion enjoyed by the social partners mentioned in paragraph 65 above, the means used to achieve that aim are 'appropriate and necessary'.

74 The Court has accepted that recourse to the criterion of length of service is, as a general rule, appropriate to achieve that aim, since length of service goes hand in hand with professional experience (see, to that effect, Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 24 and 25; *Cadman*, paragraphs 34 and 35; and *Hütter*, paragraph 47).

75 While the measure at issue in the main proceedings enables an employee to ascend in step in the salary group to which he belongs as his age advances and hence his length of service increases, it is clear that, on his appointment, the initial classification in a particular step in a particular salary group of an employee with no professional experiences is based purely on his age.

76 Thus an employee with no professional experience, appointed at the age of 30 to a job in one of salary groups III to X will, as from his appointment, receive basic pay equivalent to that received by an employee of the same age, in the same job, but appointed at the age of 21 and with nine years' length of service and professional experience in his job. Similarly, the former employee will reach the highest step in his group with a shorter length of service and less professional experience than those of the latter employee appointed at the age of 21 in the lowest step in his group. While Paragraph 27(C) of the BAT does provide for the possibility, under certain conditions, of taking into account the professional experience acquired by the employee before his appointment in order to classify him in a higher step than would normally have been assigned him as a result of his age, the German Government explained at the hearing that, in the opposite case, the employee's lack of professional experience does not mean that he is classified in a lower step than that assigned him as a result of his age.

77 It follows that the determination according to age of the basic pay step on appointment of a public sector contractual employee goes beyond what is necessary and appropriate for achieving the legitimate aim, relied on by the German Government, of taking account of the professional experience acquired by the employee before he is appointed. It should be observed that a criterion also based on length of service or professional experience but without resorting to age would, from the point of view of Directive 2000/78, appear better adapted to achieving the legitimate aim mentioned above. The fact that, for a large number of employees appointed at a young age, the step in classification corresponds to their professional experience and that the criterion of age coincides in most cases with their length of service does not alter that assessment.

78 It follows from all the above considerations that the answer to the single question in Case C-298/10 and to Question 1 in Case C-297/10 is that the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter and given specific expression in Directive 2000/78, and more particularly Articles 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter.

Questions 2 and 3 in Case C-297/10

79 By its second and third questions in Case C-297/10, which should be considered together, the referring court asks essentially whether Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter must be interpreted as precluding the social partners from enjoying sufficiently broad discretion to put an end to the discrimination on grounds of age by transferring contractual employees to a new collective pay system based on objective criteria, while maintaining, in order to carry out the transfer to that new collective pay system, unequal treatment of employees of different ages, if the consequent discrimination is justified by the preservation of established rights, it is progressively reduced, and the only other possible solution would be to reduce the pay of older employees.

80 As a preliminary point, regarding the relationship between the implementation of the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 and the right of collective bargaining recognised in Article 28 of the Charter, reference should be made to the considerations in paragraphs 62 to 68 above.

81 As stated in paragraphs 19 to 25 above, the BAT and Collective Pay Agreement No 35 pursuant to the BAT were replaced, as regards federal employees, by the TVöD from 1 October 2005. The pay system established by the TVöD no longer provides for age categories or for the 'local' supplement, but introduces a single system of pay. That pay is determined in accordance with criteria such as the activity, professional experience and the performance of the employee. The latter two criteria serve to decide the pay step within each salary group. The transitional provisions for reclassifying employees in connection with the transfer from the pay system established by the BAT to that under the TVöD were laid down by the TVÜ-Bund.

82 In the system established by the TVÜ-Bund, each employee concerned by the reclassification received a 'reference pay' in an amount equivalent to his previous pay. That reference pay corresponded to an individual intermediate step assigned for a period of two years. At the end of that period, the definitive reclassification took place by means of a transfer from the individual intermediate step to the next higher normal step in the salary group concerned.

83 The referring court seeks to know whether the transitional classification system established by the TVÜ-Bund for the transfer from the pay system under the BAT to that under the TVöD, first, introduces or perpetuates a difference of treatment on grounds of age and, secondly, is justified by the fact that the social partners sought to maintain the established rights of employees as regards pay.

84 As to whether the TVÜ-Bund introduces a difference of treatment on grounds of age within the meaning of Article 2(1) and (2) of Directive 2000/78, it appears from the referring court's findings that the classification of employees in an individual intermediate step meant that the employee received reference pay equivalent in amount to what he received under the BAT. However, the pay received under the BAT consisted principally of the basic pay which had been calculated on appointment exclusively by reference to the employee's age. As the Court stated in paragraph 59 above, the method of calculating basic pay created a difference of treatment based directly on the criterion of age, for the purposes of Article 2(1) and (2)(a) of Directive 2000/78. By taking as the basis for determining the reference amount the pay previously received, the system established by the TVÜ-Bund perpetuated the situation in which some employees receive lower pay than other employees, even though they are in comparable situations, on the sole ground of their age on appointment.

85 That difference of treatment is liable to continue under the TVöD, since, according to the information provided by the referring court, the definitive reclassification took place on the basis of the individual intermediate step assigned to each employee under the TVÜ-Bund.

86 It follows from the above that both under the TVÜ-Bund and under the TVöD, of the employees affected by the transfer from the pay system under the BAT to that under the TVöD, some receive lower pay than others despite being in comparable situations, on the sole ground of their age on appointment, which constitutes direct discrimination on grounds of age within the meaning of Article 2 of Directive 2000/78.

87 The Court must therefore examine whether that difference of treatment on grounds of age may be justified under Article 6(1) of that directive.

88 To that end, it must be examined in the light of the principles set out in paragraphs 61 and 65 above whether the difference of treatment on grounds of age in the TVÜ-Bund, and consequently in the TVöD, is a measure that pursues a legitimate aim and is appropriate and necessary for achieving that aim.

89 As regards the aim pursued by the social partners when negotiating the TVöD and the TVÜ-Bund, it appears from the order for reference and from the German Government's observations that when the contractual employees were reclassified in the new collective pay system it was ensured that they would keep their established rights and would have their previous pay maintained.

90 In this respect, in the context of a restriction of freedom of establishment, the Court has held that the protection of the established rights of a category of persons constitutes an overriding reason in the public interest which justifies that restriction, provided that the restrictive measure does not go beyond what is necessary for that protection (see, to that effect, Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraphs 63 and 65).

91 It appears, as regards the provisions of the collective agreements at issue in the main proceedings, that the social partners' aim was to replace a collective pay system based largely on age, and hence discriminatory, with a new system based on objective criteria. According to the information provided to the Court by the German Government, if the changeover from the system laid down by the BAT to that under the TVöD had taken place without transitional measures, 55% of federal contractual employees would have suffered an average monthly loss of income of EUR 80. To relieve that disadvantage, the social partners provided for previous pay to be maintained. According to the German Government, the drawing up of transitional arrangements intended to protect established advantages was an integral part of the compromise reached by the social partners when concluding the TVöD.

92 The Court has held that leaving it to the social partners to strike a balance between their respective interests offers considerable flexibility, as each of the parties may, where appropriate, reject the agreement (see *Palacios de la Villa*, paragraph 74, and *Rosenbladt*, paragraph 67). It is thus apparent that the maintenance of earlier pay, and consequently of a system that discriminates according to age, had the aim of avoiding losses of pay and was a decisive factor in enabling the social partners to implement the changeover from the system laid down by the BAT to that under the TVöD. The transitional rules in the TVÜ-Bund must therefore be regarded as pursing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

93 It remains to ascertain whether, in accordance with the wording of that provision, the means used to achieve that aim are 'appropriate and necessary'.

94 The referring court states that the only way of avoiding a reduction in employees' pay was classification in an individual intermediate step that ensured pay corresponding to that previously received.

95 It should be observed that the system of reclassifying employees implemented by the TVöD and the TVÜ-Bund concerns only employees who are already in post.

96 Moreover, following their definitive reclassification, employees' pay will progress solely in accordance with the criteria laid down by the TVöD, which do not include age. It follows that the discriminatory effects will tend to disappear as the pay of employees progresses.

97 By its transitional and temporary character, this situation may be distinguished from that at issue in Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR I-0000, in paragraph 32 of which the Court held that the possibility of derogation without temporal limitation from the principle of non-discrimination on grounds of sex worked against the achievement of the objective of equal treatment of men and women.

98 It is thus apparent that it was not unreasonable for the social partners to adopt the transitional measures implemented by the TVÜ-Bund and that those measures are appropriate for avoiding a loss of income on the part of federal contractual employees, and that they do not go beyond what is necessary to achieve that aim, having regard to the broad discretion enjoyed by the social partners in the field of determining pay.

99 Accordingly, the answer to Questions 2 and 3 in Case C-297/10 is that Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter must be interpreted as not precluding a measure in a collective agreement, such as that at issue in the main proceedings, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.

100 In view of the answer to Questions 2 and 3, there is no need to answer the other questions referred.

Costs

101 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. 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. **The principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and more particularly Articles 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a**

public sector contractual employee is determined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter of Fundamental Rights of the European Union.

2. **Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a measure in a collective agreement, such as that at issue in the main proceedings in Case C-297/10, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.**

JUDGMENT OF THE COURT (Grand Chamber)

26 February 2013 (*)

(Charter of Fundamental Rights of the European Union – Field of application – Article 51 – Implementation of European Union law – Punishment of conduct prejudicial to own resources of the European Union – Article 50 – Ne bis in idem principle – National system involving two separate sets of proceedings, administrative and criminal, to punish the same wrongful conduct – Compatibility)

In Case C-617/10,

REQUEST for a preliminary ruling under Article 267 TFEU from the Haparanda tingsrätt (Sweden), made by decision of 23 December 2010, received at the Court on 27 December 2010, in the proceedings

Åklagaren

v

Hans Åkerberg Fransson,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, G. Arestis, J. Malenovský, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, C. Toader, J.-J. Kasel and M. Safjan (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2012,

after considering the observations submitted on behalf of:

– Mr Åkerberg Fransson, by J. Sterner, advokat, and U. Bernitz, professor,

– the Swedish Government, by A. Falk and S. Johannesson, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Danish Government, by C. Vang, acting as Agent,

– the German Government, by T. Henze, acting as Agent,

– Ireland, by D. O'Hagan, acting as Agent, and M. McDowell SC,

– the Greek Government, by K. Paraskevopoulou and Z. Khatzipavlou, acting as Agents,

– the French Government, by N. Rouam, acting as Agent,

– the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the European Commission, by R. Lyal and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the *ne bis in idem* principle in European Union law.

2 The request has been made in the context of a dispute between the Åklagaren (Public Prosecutor's Office) and Mr Åkerberg Fransson concerning proceedings brought by the Public Prosecutor's Office for serious tax offences.

Legal context

European Convention for the Protection of Human Rights and Fundamental Freedoms

3 In Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Strasbourg on 22 November 1984 ('Protocol No 7 to the ECHR'), Article 4, headed 'Right not to be tried or punished twice', provides as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; "the ECHR"].'

European Union law

Charter of Fundamental Rights of the European Union

4 Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which is headed 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', reads as follows:

'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.'

5 Article 51 defines the Charter's field of application in the following terms:

'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.'

Sixth Directive 77/388/EEC

6 Article 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'), in the version resulting from Article 28h thereof, states:

'...

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. ...

...

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion …

...'

Swedish law

7 Paragraph 2 of Law 1971:69 on tax offences (skattebrottslagen (1971:69); 'the skattebrottslagen') is worded as follows:

'Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences.'

8 Paragraph 4 of the skattebrottslagen states:

'If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months' imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

9 Law 1990:324 on tax assessment (taxeringslagen (1990:324); 'the taxeringslagen') provides, in Paragraph 1 of Chapter 5:

'If, during the procedure, the taxable person has provided false information, other than orally, for the purposes of the tax assessment, a special charge (tax surcharge) shall be levied. The same shall apply if the taxable person has provided such information in legal proceedings relating to taxation and the information has not been accepted following a substantive examination.

Information shall be regarded as false if it is clear that information provided by the taxable person is inaccurate or that the taxable person has omitted information for the purposes of the tax assessment which he was required to provide. However, information shall not be regarded as false if the information, together with other information provided, constitutes a sufficient basis for a correct decision. Information also shall not be regarded as false if the information is so unreasonable that it manifestly cannot form the basis for a decision.'

10 Paragraph 4 of Chapter 5 of the taxeringslagen states:

'If false information has been provided, the tax surcharge shall be 40% of the tax referred to in points 1 to 5 of the first subparagraph of Paragraph 1 of Chapter 1 which, if the false information had been accepted, would not have been charged to the taxable person or his spouse. With regard to value added tax, the tax surcharge shall be 20% of the tax which would have been wrongly credited to the taxable person.

The tax surcharge shall be calculated at 10% or, with regard to value added tax, 5% where the false information was corrected or could have been corrected with the aid of confirming documents which are normally available to the Skatteverket [(Tax Board)] and which were available to the Skatteverket before the end of November of the tax year.'

11 Paragraph 14 of Chapter 5 of the taxeringslagen states:

'The taxable person shall be exempted wholly or partially from special charges if errors or omissions become evident which are excusable or if it would be otherwise unreasonable to levy the charge at the full amount. If the taxable person is exempted partially from the charge, it shall be reduced to a half or a quarter.

...

In assessing whether it would be otherwise unreasonable to levy the charge at the full amount, particular regard shall be had to whether:

...

3. errors or omissions have also resulted in the taxable person becoming liable for offences under the skattebrottslagen … or becoming the subject of forfeiture of proceeds of criminal activity within the meaning of Paragraph 1b of Chapter 36 of the Criminal Code (brottsbalken).'

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

12 Mr Åkerberg Fransson was summoned to appear before the Haparanda tingsrätt (Haparanda District Court) on 9 June 2009, in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT'), amounting to SEK 319 143 for 2004, of which SEK 60 000 was in respect of VAT, and to SEK 307 633 for 2005, of which SEK 87 550 was in respect of VAT. Mr Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

13 By decision of 24 May 2007, the Skatteverket had ordered Mr Åkerberg Fransson to pay, for the 2004 tax year, a tax surcharge of SEK 35 542 in respect of income from his economic activity, of SEK 4 872 in respect of VAT and of SEK 7 138 in respect of employers' contributions. By the same decision it had also imposed for the 2005 tax year a tax surcharge of SEK 54 240 in respect of income from his economic activity, of SEK 3 255 in respect of VAT and of SEK 7 172 in respect of employers' contributions. Interest was payable on those penalties. Proceedings challenging the penalties were not brought before the administrative courts, the period prescribed for this purpose expiring on 31 December 2010 in relation to the 2004 tax year and on 31 December 2011 in relation to the 2005 tax

year. The decision imposing the penalties was based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings.

14 Before the referring court, the question arises as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed.

15 It is in those circumstances that the Haparanda tingsrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2. Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle …, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest … If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

Jurisdiction of the Court

16 The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission dispute the admissibility of the questions referred for a preliminary ruling. In their submission, the Court would have jurisdiction to answer them only if the tax penalties imposed on Mr Åkerberg Fransson and the criminal proceedings brought against him that are the subject-matter of the main proceedings arose from implementation of European Union law. However, that is not so in the case of either the national legislation on whose basis the tax penalties were ordered to be paid or the national legislation upon which the criminal proceedings are founded. In accordance with Article 51(1) of the Charter, those penalties and proceedings therefore do not come under the *ne bis in idem* principle secured by Article 50 of the Charter.

17 It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18 That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 *ERT* [1991] I-2925, paragraph 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, paragraph 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 34; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 72; and Case C-27/11 *Vinkov* [2012] ECR, paragraph 58).

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the

Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR, paragraph 26).

23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

24 In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.

25 In relation to VAT, it follows, first, from Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which reproduce inter alia the provisions of Article 2 of the Sixth Directive and of Article 22(4) and (8) of that directive in the version resulting from Article 28h thereof, and second, from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion (see Case C-132/06 *Commission* v *Italy* [2008] ECR I-5457, paragraphs 37 and 46).

26 Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests (see, to this effect, Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraphs 40 to 42). Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (see, to this effect, Case C-539/09 *Commission* v *Germany* [2011] ECR I-11235, paragraph 72).

27 It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

28 The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

29 That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR, paragraph 60).

30 For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

31 It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the *ne bis in idem* principle laid down in Article 50 of the Charter.

Consideration of the questions referred

Questions 2, 3 and 4

32 By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33 Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34 In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24; Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 19; and Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35 Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 *Bonda* [2012] ECR, paragraph 37).

36 It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia *Commission* v *Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

37 It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

Question 5

38 By its fifth question, the Haparanda tingsrätt asks the Court, in essence, whether national legislation which allows the same court to impose tax penalties in combination with criminal penalties in the event of tax evasion is compatible with the *ne bis in idem* principle guaranteed by Article 50 of the Charter.

39 It should be recalled at the outset that, in proceedings under Article 267 TFEU, 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 concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 30 and the case-law cited).

40 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of European Union 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, to this effect, inter alia *Paint Graphos*, paragraph 31 and the case-law cited).

41 Here, it is apparent from the order for reference that the national legislation to which the Haparanda tingsrätt makes reference is not the legislation applicable to the dispute in the main proceedings and currently does not exist in Swedish law.

42 The fifth question must therefore be declared inadmissible, as the function entrusted to the Court within the framework of Article 267 TFEU is to contribute to the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, *Paint Graphos*, paragraph 32 and the case-law cited)

Question 1

43 By its first question, the Haparanda tingsrätt asks the Court, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

44 As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).

45 As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (*Melki and Abdeli*, paragraph 44 and the case-law cited).

47 Furthermore, in accordance with Article 267 TFEU, a national court hearing a case concerning European Union law the meaning or scope of which is not clear to it may or, in certain circumstances, must refer to the Court questions on the interpretation of the provision of European Union law at issue (see, to this effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415).

48 It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

49 In the light of the foregoing considerations, the answer to the first question is:

– European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law;

– European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

Costs

50 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:

1. The *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

2. European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.

European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.

JUDGMENT OF THE COURT (Second Chamber)

15 October 2015 (*)

(Reference for a preliminary ruling — Articles 49 TFEU and 51 TFEU — Freedom of establishment — Directive 2006/123/EC — Scope — Services in the internal market — Directive 2009/40/EC — Access to vehicle roadworthiness testing activities — Exercise by a private body — Activities connected with the exercise of official authority — Prior authorisation scheme — Overriding reasons relating to the public interest — Road safety — Territorial distribution — Minimum distance between roadworthiness testing centres — Maximum market share — Justification — Whether appropriate for the purpose of achieving the objective pursued — Coherence — Proportionality)

In Case C-168/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 20 March 2014, received at the Court on 7 April 2014, in the proceedings

Grupo Itevelesa SL,

Applus Iteuve Technology,

Certio ITV SL,

Asistencia Técnica Industrial SAE

v

OCA Inspección Técnica de Vehículos SA,

Generalidad de Cataluña,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça, A. Arabadjiev (Rapporteur), C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 19 March 2015,

after considering the observations submitted on behalf of:

– Grupo Itevelesa SL, by J. Lavilla Rubira, M. Alvarez-Tólcheff, T. Puente Méndez, M. Barrantes Diaz and S. Rodiño Sorli, abogados,

– Applus Iteuve Technology, by A. Vázquez Guillén, procurador, and by J. Folguera Crespo, L. Moscoso del Prado González and A. Guerra Fernández, abogados,

– Certio ITV SL, by R. Sorribes Calle, procuradora, and by J. Just Sarobé and R. Miró Miró, abogados,

– Asistencia Técnica Industrial SAE, by M. Marsal i Ferret, M. Ortíz-Cañavate Levenfeld and I. Galobardes Mendonza, abogados,

– OCA Inspección Técnica de Vehículos SA, by J. Macias Castaño, A. Raventós Soler and M. Velasco Muñoz Cuellar, abogados,

– the Generalidad de Cataluña, by N. París Domenech, abogada,

– the Spanish Government, by M. Sampol Pucurull, acting as Agent,

– Ireland, by S. Kingston, L. Williams and A. Joyce, acting as Agents,

– the Swedish Government, by N. Otte Widgren, A. Falk, C. Meyer-Seitz, U. Persson, K. Sparrman, L. Swedenborg, F. Sjövall and E. Karlsson, acting as Agents,

– the European Commission, by H. Tserepa-Lacombe and J. Rius, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns, in essence, the interpretation of Articles 49 TFEU and 51 TFEU, Articles 2(2)(d) and (i), 3, 9, 10 and 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) ('the Services Directive'), and Article 2 of Directive 2009/40/EC of the European Parliament and of the Council of 6 May 2009 on roadworthiness tests for motor vehicles and their trailers (OJ 2009 L 141, p. 12).

2 The request has been made in the context of proceedings between Grupo Itevelesa SL ('Itevelesa'), Applus Iteuve Technology ('Applus'), Certio ITV SL ('Certio') and Asistencia Técnica Industrial SAE ('ATI'), on the one hand, and OCA Inspección Técnica de Vehículos SA ('OCA'), on the other hand, concerning the lawfulness of national provisions relating to roadworthiness tests for motor vehicles.

Legal context

EU law

The Services Directive

3 According to recital 21 in the preamble to the Services Directive, '[t]ransport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive'.

4 Recital 33 in the preamble to that directive sets out, inter alia, that certification and testing services are covered by that directive.

5 Article 1(1) of the Services Directive provides that it establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

6 In accordance with Article 2(2)(d) of that directive, the latter does not apply to 'services in the field of transport, including port services, falling within the scope of Title [VI] of the [TFEU]'.

7 Under Article 2(2)(i) of that directive, the latter does not apply to 'activities which are connected with the exercise of official authority as set out in Article [51 TFEU]'.

8 Article 3 of the Services Directive provides:

‘If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. …’

9 Article 9 of the Services Directive, entitled ‘Authorisation schemes’, provides:

‘1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective.

…

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.’

10 Article 10 of that directive, entitled ‘Conditions for the granting of authorisation’, lays down that authorisation schemes are to be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner and sets out a list of those criteria.

11 Article 14 of that directive, entitled ‘Prohibited requirements’, provides:

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

…

(5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest;

…’

Directive 2009/40

12 Recital 2 in the preamble to Directive 2009/40 is worded as follows:

‘Within the framework of the common transport policy, certain road traffic within the Community should operate under the most favourable circumstances as regards both safety and competitive conditions applying to carriers in the Member States.’

13 Recital 5 in the preamble to that directive states:

‘The minimum Community standards and methods to be used for testing the items listed in this Directive should therefore be defined in separate Directives.’

14 Recital 26 in the preamble to that directive states that the objectives pursued by that directive consist in ‘harmonis[ing] the rules on roadworthiness tests, … prevent[ing] distortion of competition as between road hauliers and … guarantee[ing] that vehicles are properly checked and maintained …’.

15 Under Article 1(2) of that directive, ‘[t]he categories of vehicles to be tested, the frequency of the roadworthiness tests and the items which must be tested are listed in Annexes I and II’.

16 Article 2 of Directive 2009/40 provides:

‘The roadworthiness tests provided for in this Directive shall be carried out by the Member State, or by a public body entrusted with the task by the State or by bodies or establishments designated and directly supervised by the State, including duly authorised private bodies. In particular, where establishments designated as vehicle testing centres also perform motor vehicle repairs, Member States shall make every effort to ensure the objectivity and high quality of the vehicle testing.’

Directive 2014/45/EU

17 Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers and repealing Directive 2009/40 (OJ 2014 L 127, p. 51) provides, in recital 3 in the preamble thereto, as follows:

‘Roadworthiness testing is a part of a wider regime designed to ensure that vehicles are kept in a safe and environmentally acceptable condition during their use. …’

18 Under recital 43 in the preamble to Directive 2014/45:

‘Roadworthiness has a direct impact on road safety and should therefore be reviewed periodically. …’

19 Article 4(2) of that directive provides as follows:

‘Roadworthiness tests shall be carried out by the Member State of registration of the vehicle, by a public body entrusted with the task by that Member State or by bodies or establishments designated and supervised by that Member State, including authorised private bodies.’

Spanish law

20 Articles 35 to 37 of Law 12/2008 on Industrial Safety (Ley 12/2008 de seguridad industrial), adopted on 31 July 2008 by the Parliament of Catalonia (BOE No 204 of 23 August 2008, p. 14194) (‘Law 12/2008’), states as follows:

‘Article 35. Functions of operators of vehicle roadworthiness testing centres

The operators of vehicle roadworthiness testing centres have the following functions:

(a) to carry out roadworthiness tests for vehicles and for vehicle components and accessories;

(b) as a precautionary measure, to prevent the use of vehicles which, having been tested, are found to have safety defects which entail imminent danger.

…

Article 36. Requirements relating to operators of vehicle roadworthiness testing centres

1. In order to operate in Catalonia, operators of vehicle roadworthiness testing centres must meet the following requirements:

(a) there must be compliance with any local plan for vehicle roadworthiness testing centres that the Government may adopt pursuant to Article 37(2);

(b) no undertaking or group of undertakings may exceed the market share threshold laid down by regulation. Such market share threshold shall ensure that no proprietor shall provide services across all vehicle roadworthiness testing centres that account for more than half of the total number of testing lanes in Catalonia. …

(c) there must be compliance with such minimum permitted distances between vehicle roadworthiness testing centres belonging to the same undertaking or group of undertakings as shall be laid down by the Government pursuant to Article 37(3);

…

Article 37. Licensing of operators of vehicle roadworthiness testing centres

1. The Industrial Safety Agency of Catalonia (Agencia Catalana de Seguridad Industrial) shall be responsible for licensing operators of vehicle roadworthiness testing centres. Licences shall be in respect of each individual centre and shall be issued in accordance with procedures laid down by regulation.

2. In order to ensure that an appropriate service is provided for the number of vehicles in existence and that testing is carried out objectively and to a high standard, the Government may lay down by decree the number of vehicle roadworthiness testing centres required and the number of testing lanes that each centre should have, calculated on the basis of the total number of vehicles in existence, and may determine their location by means of a local plan. …

3. In order to ensure effective competition between operators, the Government shall lay down by decree the minimum permitted distances between vehicle roadworthiness testing centres belonging to the same undertaking or group of undertakings. Such distances shall ensure that no one proprietor shall achieve a dominant position in an area, taking into consideration the characteristics of the different locations of the vehicle roadworthiness testing centres.

…’

21 Decree 30/2010 adopting the regulations implementing Law 12/2008 of 31 July 2008 on Industrial Safety (decreto 30/2010, por el que se aprueba el reglamento de desarrollo de la Ley 12/2008, de 31 de julio, de seguridad industrial), adopted on 2 March 2010 by the Generalidad de Cataluña (Autonomous Government of Catalonia) (‘Decree 30/2010’), and Decree 45/2010 adopting the territorial plan for new vehicle roadworthiness testing centres in Catalonia for 2010-2014 (decreto 45/2010, por el que se aprueba el Plan territorial de nuevas estaciones de inspección técnica de vehículos de Cataluña para el periodo 2010-2014), adopted by that government on 30 March 2010 (‘Decree 45/2010’), implement the provisions of Law 12/2008 relating to the establishment of roadworthiness testing centres.

22 Articles 73 to 75 of Decree 30/2010 provide as follows:

‘Article 73

Compliance with the territorial plan and ensuring continuity

73.1 In order to ensure a proper service to the public and an inspection service that meets existing demand and is in accordance with Article 36(1)(a) of Law [12/2008], operators of vehicle roadworthiness testing centres shall comply with the requirements of the territorial plan for vehicle roadworthiness testing centres from time to time in force.

…

Article 74

Maximum market share

74.1 Further to Article 36(1)(b) of Law [12/2008], the market share of any undertaking or group of undertakings licensed to provide vehicle roadworthiness testing services in Catalonia may not exceed one half of the total. …

74.2 Market share shall be determined by reference to the number of licensed testing lanes in permanent centres being used by any proprietor in relation to the total number of such lanes in Catalonia.

Article 75

Minimum permitted distances

75.1 In order to ensure effective competition between operators, in accordance with Article 37.3 of this decree and Article 36(1)(c) of Law [12/2008], the actual distances between vehicle roadworthiness testing centres licensed to the same undertaking or group of undertakings shall not be less than:

(a) 4 km in the case of centres located in municipalities with more than 30 000 inhabitants, as at the date of the licence issued by the Industrial Safety Agency of Catalonia;

(b) 20 km in the case of centres located in other parts of Catalonia;

(c) 10 km in cases where one of the centres is located in a municipality with more than 30 000 inhabitants, at the date of the licence, and the other is located elsewhere in Catalonia.

75.2 For the purposes of this regulation, actual distance shall mean the shortest distance, using existing public highways, between one centre and another, as at the date of the licence issued by the Industrial Safety Agency of Catalonia.

75.3 In respect of the network of centres in existence as at the date of entry into force of this decree, the distances referred to in paragraph 1(a) may be reduced by up to 20%.’

23 Article 79(1)(c) of Decree 30/2010 states that the operators of the roadworthiness testing centres may order vehicles to be taken off the road in the situations set out in the applicable legislation and in accordance with the instructions and protocols adopted by the Industrial Safety Agency of Catalonia.

24 The preamble to Decree 45/2010 states as follows:

'… It is necessary to ensure that the supply of vehicle roadworthiness testing services is adequate to meet existing needs, whether in relation to the coverage of areas that are currently suffering from a shortage of provision, so that the service can be brought into closer proximity to its users, or to address the deficiency in service that exists in areas where vehicle roadworthiness testing centres are more concentrated and waiting times are longer.

It is desirable, in view of the local nature of the vehicle roadworthiness testing service, to avoid excessive concentration of the service in a particular area for reasons of profitability alone, to the detriment of other areas, which, because there are fewer vehicles, have no service, with users suffering as a result. By contrast, in areas where demand is higher due to the greater number of vehicles, the high density of centres may lead to a tendency for operators to compete by lowering their standards and to a consequent reduction in the quality of the service.'

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

25 On 5 May 2010, OCA, one of the Spanish operators carrying out vehicle roadworthiness tests, brought an administrative action before the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia) seeking partial annulment of Decree 30/2010 and annulment in full of Decree 45/2010, on the ground that the regulation of operators ensuring industrial safety which subject those operators to a prior administrative authorisation scheme, and the definition of the conditions and obligations of that authorisation scheme, are contrary to the Services Directive.

26 Four other operators carrying out vehicle roadworthiness tests — Itevelesa, Applus, Certio and ATI - and the Autonomous Government of Catalonia submitted observations in support of the validity of the decrees at issue in the main proceedings.

27 By decision of 25 April 2012, the High Court of Justice of Catalonia upheld that action and annulled, first, the provisions of Decree 30/2010 which govern the scheme for the authorisation of the operators of vehicle roadworthiness test centres ('the operators') and, secondly, Decree 45/2010 in its entirety, on the ground that that scheme was contrary to Law 17/2009 on access to service activities and the exercise thereof (Ley 17/2009 sobre el libre acceso a las actividades de servicios y su ejercicio), of 23 November 2009, which transposes the Services Directive into Spanish law.

28 Itevelesa, Applus, Certio and ATI appealed to the Supreme Court against that decision. That court upheld the request of the Autonomous Government of Catalonia to be regarded as an interested party in the proceedings as defendant.

29 In the context of those appeals, the referring court has doubts concerning the applicability of the Services Directive to vehicle roadworthiness testing, since Article 2(2)(d) of that directive could, in its opinion, be interpreted in two different ways. According to one interpretation, the test facilities are connected with road safety and thereby constitute an element of the common transport policy. According to a second interpretation, the vehicle roadworthiness testing services, which are provided by commercial undertakings in return for remuneration paid by the user, amount to certification or testing and reviewing services which, in accordance with recital 33 in the preamble to that directive, fall within its scope of application.

30 Moreover, the referring court is unsure whether the operators' power to take vehicles off the road is one of the 'activities which are connected with the exercise of official authority', within the meaning of Article 2(2)(i) of the Services Directive.

31 That court also questions the relationship between that directive and Directive 2009/40 for the purpose of determining whether access to the roadworthiness testing activities may be subject to an authorisation scheme. In this regard, it refers to the judgment in *Commission* v *Portugal* (C-438/08, EU:C:2009:651), in which the Court held that Directive 2009/40 did not contain any provisions relating to access to roadworthiness testing activities.

32 Finally, the referring court has doubts concerning the obligation on operators, in the context of the authorisation scheme established by the national legislation, to comply with the territorial plan which, for reasons connected with the need to ensure appropriate territorial cover, the quality of the service and competition between operators, limits the number of roadworthiness testing centres on the basis of two criteria arising, first, from the requirement that there be a minimum distance between the centres of a single undertaking or group of undertakings and, secondly, from the prohibition on holding a market share in excess of 50%. In this regard, the Catalan competition authority took the view that those criteria were not justified by overriding reasons of general interest and that that territorial plan unjustifiably limited competition by restricting the market access of new operators.

33 It is on that basis that the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 2(2)(d) of the Services Directive exclude vehicle roadworthiness tests from the scope of the directive where national legislation provides that these are to be carried out by private commercial entities under the supervision of the authorities of a Member State?

(2) If the previous question is answered in the negative (and vehicle roadworthiness tests do, in principle, fall within the scope of the Services Directive), are the grounds for exclusion referred to in Article 2(2)(i) of that directive applicable due to the fact that the private entities providing the service are empowered, as a precautionary measure, to order that vehicles found to have safety defects such that they would represent an imminent danger if driven, should be taken off the road?

(3) If the Services Directive applies to vehicle roadworthiness tests, does that directive, when interpreted in conjunction with Article 2 of Directive 2009/40, mean that it is permissible to make such activities subject to prior administrative authorisation in every case? Does what is said in paragraph 26 of the judgment in *Commission* v *Portugal* (C-438/08, EU:C:2009:651) have any bearing on the reply to this question?

(4) Is it compatible with Articles 10 and 14 of the Services Directive or, if that directive is not applicable, Article 49 TFEU, for national legislation to make the number of licences for roadworthiness testing centres subject to a local plan which justifies the quantitative restriction on the grounds of ensuring adequate local coverage, ensuring the quality of the service and encouraging competition between operators and, to that end, includes factors relating to economic planning?'

Consideration of the questions referred

The jurisdiction of the Court

34 Applus and ATI contest the admissibility of the request for a preliminary ruling on the ground that the dispute in the main proceedings does not have any cross-border elements and relates to a purely internal situation.

35 In that regard, it should be recalled that national legislation such as that at issue in the main proceedings — which, according to its wording, applies indiscriminately to Spanish nationals and to nationals of other Member States — is, generally, capable of falling within the scope of the provisions relating to the fundamental freedoms established by the TFEU only to the extent to which it applies to situations connected with trade between the Member States (see, to that effect, judgment in *Sokoll-Seebacher*, C-367/12, EU:C:2014:68, paragraph 10 and the case-law cited).

36 However, it is by no means inconceivable, in the present case, that undertakings established in Member States other than the Kingdom of Spain were or are interested in offering vehicle roadworthiness testing services in the latter Member State.

37 In those circumstances, the request for a preliminary ruling is admissible.

Substance

The first question

38 By its first question, the referring court seeks to establish whether the Services Directive is applicable to vehicle roadworthiness testing activities.

39 It should be noted at the outset that, according to Article 2(2)(d) of that directive, the latter does not apply to 'services in the field of transport, including port services, falling within the scope of Title [VI] of the [TFEU]'.

40 Since the concept of 'services in the field of transport', within the meaning of that provision, is not expressly defined by the Services Directive, it is necessary, therefore, to define its scope.

41 In the first place, with regard to the wording of Article 2(2)(d) of the Services Directive, it should be noted that the terms used by that provision in all of its language versions, with the exception of that in German, namely 'services in the field of transport', have a wider scope than that of the expression 'transport services', as it is used in recital 21 in the preamble to that directive to designate 'urban transport, taxis and ambulances as well as port services'.

42 It should be noted, in regard to this linguistic divergence, that, according to settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. The provisions of EU law must be interpreted and applied in a uniform manner, in the light of the versions established in all the languages of the European Union. Where there is a divergence between the various language versions of a provision of EU law, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (see judgment in *Kurcums Metal*, C-558/11, EU:C:2012:721, paragraph 48 and the case-law cited).

43 As has been indicated in paragraph 41 of the present judgment, it must be held that all the language versions of Article 2(2)(d) of the Services Directive, with the exception of the German-language version, expressly use the terms 'services in the field of transport', which

are to apply. The general scheme and purpose of that provision corroborate that conclusion.

44 In that regard, it is apparent from the documents preparatory to the adoption of the Services Directive that the exclusion relating to 'services in the field of transport' was intentionally drafted in terms designed to correspond to the wording of Article 51 EC, now Article 58 TFEU, paragraph 1 of which states that the 'freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport'.

45 The use of the terms 'services in the field of transport' thus demonstrates the intention of the EU legislature not to restrict the exclusion set out in Article 2(2)(d) of the Services Directive merely to means of transport in themselves.

46 It is therefore necessary to interpret that exclusion as covering, as the Advocate General has stated in point 28 of his Opinion, not only any physical act of moving persons or goods from one place to another by means of a vehicle, aircraft or waterborne vessel, but also any service inherently linked to such an act.

47 Roadworthiness tests for motor vehicles are, admittedly, ancillary to the transport service. However, such tests take place as a pre-condition, indispensable to the exercise of the main activity of transport, as is clear from the road-safety objective underlying roadworthiness tests for motor vehicles.

48 It should be noted, in the second place, that that interpretation is supported by the purpose of Directive 2009/40 on roadworthiness tests for motor vehicles which, even though, as was held by the Court in the judgment in *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 26), it does not contain any provisions on the rules relating to access to the activity of roadworthiness testing, governs the contents of that activity and seeks expressly, as is stated in recital 2 in the preamble thereto, to guarantee road safety. Such a purpose also follows explicitly from recitals 3 and 43 in the preamble to Directive 2014/45, which succeeded Directive 2009/40.

49 In that regard, it should be noted that Directives 2009/40 and 2014/45 were adopted on the basis of Article 71 EC and Article 91 TFEU respectively, both of those provisions being included respectively in the EC Treaty and the TFEU under the Title 'Transport' and constituting the legal basis expressly authorising the EU legislature to lay down 'measures to improve transport safety'. It is clear from the documents preparatory to the adoption of the Services Directive that the EU legislature intended that the services governed by the provisions adopted on the basis of Article 71 EC were to be excluded from the scope of application of that directive.

50 Consequently, vehicle roadworthiness tests must be understood as being 'services in the field of transport', within the meaning of Article 2(2)(d) of the Services Directive.

51 In so far as the referring court maintains that those activities are related to certification or testing activities, it must be held that the fact that the latter are, in accordance with recital 33 in the preamble to the Services Directive, covered by that directive is without prejudice to the general exclusion of services in the field of transport from the scope of application of that directive, as was stated by the Advocate General in point 32 of his Opinion.

52 It must therefore be held that the Services Directive is not applicable to the activity of vehicle roadworthiness testing centres, which, in so far as it concerns services in the field

of transport, is also, in accordance with Article 58(1) TFEU, not subject to the provisions of the TFEU on the freedom to provide services.

53 In those circumstances, the national legislation at issue in the main proceedings has to be assessed in the light of the provisions of the TFEU on freedom of establishment, which are applicable directly to transport, and not on the basis of the Title of that Treaty concerning transport (see, to that effect, judgment in *Yellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 33).

54 In the light of the foregoing, the answer to the first question is that Article 2(2)(d) of the Services Directive must be interpreted as meaning that vehicle roadworthiness testing activities are excluded from the scope of application of that directive.

The second question

55 By its second question, the referring court asks the Court whether the first paragraph of Article 51 TFEU must be interpreted as meaning that the activities of vehicle roadworthiness testing centres, such as those covered by the legislation applicable in Catalonia, are connected with the exercise of official authority within the meaning of that provision, in the light of the power to take vehicles off the road which is enjoyed by the operators of those centres in cases where vehicles display, during the control, safety defects which create an imminent danger.

56 It should be noted at the outset that the Court has already held, with regard to the activities of vehicle inspection centres carried out by private bodies in Portugal, that the decision whether or not to certify roadworthiness lacked the decision-making independence inherent in the exercise of public authority powers and was taken in the context of State supervision (see judgment in *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 41). Moreover, the Court has held that those bodies do not, in connection with their activities, have any power of coercion, as the right to impose penalties for failure to comply with the rules on vehicle inspection belongs to the police and judicial authorities (see judgment in *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 44).

57 In the present case, it should be noted, first, that Article 2 of Directive 2009/40 expressly provides that, where Member States choose to entrust private bodies with roadworthiness testing activities, those bodies must be directly supervised by the State.

58 That State supervision was specifically established by the national legislation at issue, Article 79(1)(c) of Decree 30/2010 stating that the decision to take vehicles off the road may be adopted only 'in the situations set out in the applicable legislation' and 'in accordance with the instructions and protocols adopted by the Industrial Safety Agency of Catalonia'.

59 Secondly, it should be noted, having regard to the information supplied by the referring court in response to a request for clarification put to it by the Court under Article 101 of its Rules of Procedure, that the owner of a vehicle which has been taken off the road has the right to lodge a complaint with a technical adviser, who is an official of the administration responsible for supervision and control of roadworthiness testing centres, and that that adviser may amend the decision to take the vehicle off the road. Moreover, in the event of an objection by the owner of the vehicle to its being taken off the road, the authorities of the Autonomous Government of Catalonia competent for traffic and policing are alone entitled to adopt physically coercive measures.

60 The power to take vehicles off the road enjoyed by the operators of roadworthiness test centres in cases where they identify defects entailing imminent danger is thus subject to supervision by the competent authorities and is not coupled with any physically coercive powers. Consequently, that power cannot be regarded as being directly and specifically connected, in itself, with the exercise of official authority.

61 It follows from all of the foregoing that the first paragraph of Article 51 TFEU must be interpreted as meaning that the activities of vehicle roadworthiness testing centres, such as those covered by the legislation at issue in the main proceedings, are not connected with the exercise of official authority within the meaning of that provision, notwithstanding the fact that the operators of those centres have the power to take vehicles off the road in cases where vehicles display, during the control, safety defects entailing an imminent danger.

The third and fourth questions

62 By its third and fourth questions, which it is appropriate to consider together, the referring court seeks to establish whether Article 49 TFEU precludes national legislation, such as that at issue in the main proceedings, which reserves the activity of vehicle roadworthiness testing solely to operators with prior administrative authorisation, the issue of which is subject to compliance, by those operators, with a territorial plan containing conditions relating to minimum permitted distances and maximum market share.

63 In the first place, with regard to the obligation to obtain prior administrative authorisation in order to carry out vehicle inspection activities, the Court has already had occasion to point out that Directive 2009/40 does not contain any provision concerning the conditions governing access to that activity (see, to that effect, judgment in *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 26).

64 In the absence of harmonisation in that regard, the Member States remain competent to define such conditions but are, however, required to exercise their powers in this area in a manner which respects the basic freedoms guaranteed by the TFEU (see, to that effect, judgment in *Nasiopoulos*, C-575/11, EU:C:2013:430, paragraph 20 and the case-law cited).

65 In the present case, it must be noted that Article 2 of Directive 2009/40 expressly confirms that the Member States are so competent by stating that the roadworthiness tests may be carried out by private bodies or establishments, designated by the State, entrusted with the task and acting under its supervision.

66 Consequently, although EU law does not preclude a Member State from making roadworthiness tests subject to the issue of prior authorisation, the fact none the less remains that such an authorisation scheme must, as has been stated in paragraph 64 of the present judgment, respect EU law and in particular Article 49 TFEU.

67 In should be noted that, according to the Court's settled case-law, Article 49 TFEU precludes restrictions on the freedom of establishment, that is to say, any national measure which is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the TFEU. The notion of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder trade within the EU (see, to that effect, judgment in *SOA Nazionale Costruttori*, C-327/12, EU:C:2013:827, paragraph 45 and the case-law cited).

68 In the present case, the national legislation at issue in the main proceedings makes the issue of prior administrative authorisation subject to conditions under which the centres of a single undertaking or group of undertakings must comply with certain minimum distances and must not hold a market share in excess of 50%.

69 It must therefore be concluded that, in the light of the case-law referred to in paragraph 67 of the present judgment, such rules are liable to hinder or render less attractive the exercise by operators from other Member States of their activities on the territory of Catalonia through the medium of a permanent establishment.

70 Consequently, that legislation constitutes a restriction on the freedom of establishment for the purposes of Article 49 TFEU.

71 In those circumstances, it is necessary, in the second place, to examine whether the provisions at issue in the main proceedings can be objectively justified.

72 In accordance with the Court's settled case-law, restrictions on the freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (see, to that effect, judgment in *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 33 and the case-law cited).

73 In the main proceedings, it should be noted, first, that the national legislation at issue applies without distinction to all operators.

74 With regard, secondly, to the objectives pursued by that legislation, the Autonomous Government of Catalonia and the Spanish Government contend that that legislation, by allowing an appropriate territorial cover, by guaranteeing the quality of the service and by promoting competition, seeks, as is expressly clear from the preamble to Decree 45/2010, both to protect consumers and to ensure road safety. According to the Court's settled case-law, both consumer protection (see, to that effect, judgments in *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 50, and in *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677, paragraph 58) and the need to ensure road safety (judgment in *Commission* v *Portugal*, C-438/08, EU:C:2009:651, paragraph 48 and the case-law cited) constitute overriding reasons in the public interest which are capable of justifying restrictions on freedom of establishment.

75 Consequently, it is necessary to establish, third, whether the restrictive conditions at issue in the main proceedings, as set out in paragraph 68 of the present judgment, are appropriate for ensuring the achievement of the objectives pursued and do not go beyond what is necessary in order to attain those objectives.

76 It is necessary in particular to be satisfied that the way in which the national legislation at issue in the main proceedings pursues those objectives is coherent. According to the Court's case-law, the national legislation as a whole and the various relevant rules will be appropriate for ensuring attainment of the objective relied upon only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner (see, to that effect, judgment in *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 47 and the case-law cited).

77 In that regard, it is ultimately for the referring court, which alone has jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such legislation satisfies those conditions. The Court, however, which is called on to provide answers of use to the referring court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the referring court to give judgment (judgment in *Sokoll-Seebacher*, C-367/12, EU:C:2014:68, paragraph 40 and the case-law cited).

78 In the present case, the first condition, which, as is clear from Article 75(1) of Decree 30/2010, consists in imposing compliance with minimum distances between roadworthiness testing centres, has as its objective, as is stated in the preamble to Decree 45/2010, to encourage operators to establish themselves in remote areas of the territory. However, by requiring compliance with minimum distances between centres belonging not to competing undertakings but to a single undertaking or group of undertakings, it is by no means established by the information submitted to the Court that such a condition allows, in itself, such an objective to be achieved, particularly since the Autonomous Government of Catalonia did not, during the hearing, indicate that those operators are obliged to establish themselves in those remote areas.

79 With regard to the second condition, prohibiting operators from holding a market share in excess of 50% on the roadworthiness testing market, it is apparent from the national legislation at issue in the main proceedings that that condition is intended to guarantee the quality of roadworthiness testing and, consequently, to ensure consumer protection.

80 However, in so far as such a condition is liable to affect the prior activity of the roadworthiness testing centres in Catalonia and the structure of the market, it therefore does not immediately appear to contribute to consumer protection.

81 In that regard, it should be noted, in relation to the objective connected with the quality of the service, that the content of roadworthiness testing is, as has been stated by the Advocate General in point 75 of his Opinion, harmonised at EU level.

82 Article 1(2) of Directive 2009/40, read in conjunction with Annexes I and II thereto, provides for a precise categorisation of the vehicles to be tested, the frequency of the testing and the items of testing which are obligatory, in order to ensure, as is in essence stated in recital 26 in the preamble to that directive, a high quality of roadworthiness testing within the European Union. That categorisation constitutes, according to recital 5 in the preamble to that directive, standards and methods which should be taken into account in the context of the review of proportionality.

83 It is consequently for the referring court to determine whether the two conditions established by the legislation at issue in the main proceedings for authorisation of the exercise of roadworthiness testing are appropriate for the purposes of guaranteeing the objectives of consumer protection and road safety in a consistent and systematic manner.

84 In the light of the foregoing considerations, the answer to the third and fourth questions is that Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the authorisation for an undertaking or group of undertakings to open a vehicle roadworthiness testing centre subject to the condition, first, that there is a minimum distance between that centre and centres belonging to that undertaking or group of undertakings which are already authorised and, secondly, that that undertaking or group of undertakings will, if such an authorisation is granted, not hold a

market share in excess of 50%, unless it is established that that condition is genuinely appropriate in order to achieve the objectives of consumer protection and road safety and does not go beyond what is necessary for that purpose, these being matters for the referring court to determine.

Costs

85 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. **Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that vehicle roadworthiness testing activities are excluded from the scope of application of that directive.**

2. **The first paragraph of Article 51 TFEU must be interpreted as meaning that the activities of vehicle roadworthiness testing centres, such as those covered by the legislation at issue in the main proceedings, are not connected with the exercise of official authority within the meaning of that provision, notwithstanding the fact that the operators of those centres have the power to take vehicles off the road in cases where vehicles display, during the control, safety defects creating an imminent danger.**

3. **Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the authorisation for an undertaking or group of undertakings to open a vehicle roadworthiness testing centre subject to the condition, first, that there is a minimum distance between that centre and centres belonging to that undertaking or group of undertakings which are already authorised and, secondly, that that undertaking or group of undertakings will, if such an authorisation is granted, not hold a market share in excess of 50%, unless it is established that that condition is genuinely appropriate in order to achieve the objectives of consumer protection and road safety and does not go beyond what is necessary for that purpose, these being matters for the referring court to determine.**

[Signatures]

OPINION OF ADVOCATE GENERAL SZPUNAR

delivered on 11 May 2017 (1)

Case C-434/15

Asociación Profesional Elite Taxi

v

Uber Systems Spain SL

(Request for a preliminary ruling from the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona, Spain))

(Reference for a preliminary ruling — Services in the internal market — Passenger transport — Use of IT tools and a smartphone application — Unfair competition — Requirement for authorisation)

Introduction

1. Although the development of new technologies is, in general, a source of controversy, Uber is a case apart. Its method of operating generates criticisms and questions, but also hopes and new expectations. In the legal field alone, the way Uber works has thrown up questions concerning competition law, consumer protection and employment law, among others. From an economic and social standpoint, the term 'uberisation' has even emerged. This request for a preliminary ruling therefore presents the Court with a highly politicised issue that has received a great deal of media attention.

2. The subject matter of this case is, however, much narrower. The interpretation that the Court has been asked to provide must serve only to ascertain where Uber stands in terms of EU law, in order to determine whether, and to what extent, its functioning falls within the scope of EU law. The main issue is therefore whether possible rules on how Uber operates are subject to the requirements of EU law, in the first place those relating to the freedom to provide services, or whether they fall within the scope of the shared competence of the European Union and the Member States in the field of local transport, a competence which has not yet been exercised at EU level.

Legal context

European Union law

3. Article 1(2) of Directive 98/34/EC (2) provides:

'For the purposes of this Directive, the following meanings shall apply: …

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present,

– "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

…'

4. Article 2(a) and (h) of Directive 2000/31/EC (3) provides:

'For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "information society services": services within the meaning of Article 1(2) of [Directive 98/34];

…

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

– the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

– the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

…

– requirements applicable to services not provided by electronic means.'

5. Article 3(1), (2) and (4) of Directive 2000/31 provides:

'1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

…'

6. Under Article 2(2)(d) of Directive 2006/123/EC: (4)

'This Directive shall not apply to the following activities:

…

(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;

…'

7. The first sentence of Article 3(1) of that directive provides:

'If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions.'

Spanish law

8. There is some confusion surrounding the description provided by the referring court, the parties to the main proceedings and the Spanish Government of the applicable national legal framework. I will set out the key features below, as they result from both the order for reference and the various written observations submitted in the course of these proceedings.

9. First, so far as concerns national rules on transport, Article 99(1) of Ley 16/1987 de Ordenación de los Transportes Terrestres (Law 16/1987 on the organisation of land transport) of 30 July 1987 provides that an authorisation for public passenger transport must be obtained in order to carry out transport of that nature as well as any intermediary activity in the conclusion of such contracts. Nonetheless, the defendant in the main proceedings states that Ley 9/2013 por la que se modifica la Ley 16/1987 y la Ley 21/2003, de 7 de julio, de Seguridad Aérea (Law 9/2013 amending Law 16/1987 and Law 21/2003 of 7 July 2003 on air safety) of 4 July 2013 abolished the requirement to hold a specific licence in order to provide intermediary passenger transport services. However, it is not clear whether this reform was implemented across Spain as a whole.

10. At regional and local level, domestic legislation is supplemented, as regards taxi services, by various regulations adopted by the autonomous community of Catalonia and the metropolitan area of Barcelona, including the Reglamento Metropolitano del Taxi (Regulation on taxi services in the metropolitan area of Barcelona), adopted by the Consell Metropolitá de l'Entitat Metropolitana de Transport de Barcelona (Governing Board of the transport management body for the metropolitan area of Barcelona), of 22 July 2004, which requires platforms such as that at issue in the main proceedings to have the necessary licences and administrative authorisations in order to pursue their activity.

11. Lastly, Ley 3/1991 de Competencia Desleal (Law 3/1991 on unfair competition) of 10 January 1991 defines as unfair competition, in Article 4, professional conduct contrary to the rules of good faith, in Article 5, misleading practices and, in Article 15, infringements of the rules governing competitive activity conferring a competitive advantage in the market.

Facts, the main proceedings and the questions referred for a preliminary ruling

The Uber application

12. Uber is the name of an electronic platform (5) developed by Uber Technologies Inc., a company having its principal place of business in San Francisco (United States). In the European Union, the Uber platform is managed by Uber BV, a company governed by Netherlands law and a subsidiary of Uber Technologies.

13. With the aid of a smartphone equipped with the Uber application, the platform allows users to order urban transport services in the cities covered by it. The application recognises the location of the user and finds available drivers who are nearby. When a driver accepts a trip, the application notifies the user of such acceptance and displays the driver's profile together with an estimated fare to the destination indicated by the user. Once the trip has been completed, the fare is automatically charged to the bank card which the user is required to enter when signing up to the application. The application also contains a ratings function, enabling drivers to be rated by passengers and passengers to be rated by drivers. Average scores falling below a given threshold may result in exclusion from the platform.

14. The transport services offered by the Uber platform are divided into different categories depending on the quality of the drivers and the type of vehicle. According to information supplied by the defendant in the main proceedings, at issue in those proceedings is a service by the name of UberPop, whereby non-professional private drivers transport passengers using their own vehicles.

15. The fare scale is drawn up by the operator of the platform based on the distance and duration of the trip. It varies according to the level of demand at any given time, so that the fare may, during peak times, exceed the basic fare several times over. The fare is calculated by the application and charged automatically by the platform operator, who withholds a proportion in respect of its fee, usually between 20% and 25%, and pays the remainder to the driver.

The main proceedings

16. Asociación Profesional Elite Taxi ('Elite Taxi') is a professional organisation representing taxi drivers in the city of Barcelona (Spain). On 29 October 2014, Elite Taxi brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona, Spain) asking the court, inter alia, to make an order against Uber Systems Spain SL ('Uber Spain'), a company governed by Spanish law; to declare that its activities, which allegedly infringe the legislation in force and amount to misleading practices, are acts of unfair competition; to order it to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet, when that is directly or indirectly linked to use of the digital platform Uber in Spain; and to prohibit it from engaging in such activities in the future. According to the referring Court's findings, neither Uber Spain nor the owners or drivers of the vehicles concerned have the licences and authorisations required under the Regulation on taxi services in the metropolitan area of Barcelona.

17. Uber Spain denies having committed any infringement of transport legislation. It argues that it is the company governed by Netherlands law, Uber BV, which operates the Uber application in the European Union, including in Spain, and that the applicant's claims should therefore be directed at that company. Uber Spain claims that it performs only advertising duties on behalf of Uber BV. It repeated those assertions in its observations in this case.

18. Since this concerns a question of fact, it is for the referring court to decide which of the two companies mentioned above should be the addressee of a possible injunction. I have nonetheless assumed that the company Uber BV operates the Uber application in the European Union. (6) This is the premiss — which is not without consequences from the perspective of EU law — on which my analysis will be based. In this Opinion, I shall use the term 'Uber' to refer to the electronic booking platform as well as its operator.

19. I should also point out that, as regards the subject matter of the main proceedings, there is no question here of blocking the Uber application on smartphones or otherwise rendering it unusable. No order or any other measure to that effect has been applied for. In the main proceedings, the only point in issue is the possibility of Uber providing the UberPop service in the city of Barcelona by means of that application.

Questions referred for a preliminary ruling and procedure before the Court

20. As the Juzgado Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona) considered that an interpretation of several provisions of EU law was required in order to enable it to give a decision in the case pending before it, it decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Inasmuch as Article 2(2)(d) of [Directive 2006/123] excludes transport activities from the scope of that directive, must the activity carried out for profit by the defendant, consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of the defendant, "smartphone and technological platform" interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of [Directive 98/34]?

(2) Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in [EU] legislation — Article 56 TFEU and Directives [2006/123] and … [2000/31]?

(3) If the service provided by [Uber Spain] were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of the Law on Unfair competition — concerning the infringement of rules governing competitive activity — contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

(4) If it is confirmed that Directive [2000/31] is applicable to the service provided by [Uber Spain], are restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute derogations from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) thereof?'

21. The request for a preliminary ruling was received at the Court on 7 August 2015. Written observations were lodged by the parties to the main proceedings, the Spanish, Finnish, French and Greek Governments, Ireland, the Netherlands and Polish Governments, the European Commission and the European Free Trade Association (EFTA) Surveillance Authority. With the exception of the Greek Government, those interested parties, together with the Estonian Government, were represented at the hearing held on 29 November 2016.

Analysis

22. The national court refers four questions for a preliminary ruling: the first two concern the classification of Uber's activity in the light of Directives 2000/31 and 2006/123 as well as the FEU Treaty, while the second two concern the conclusions which must, if necessary, be drawn from that classification.

The classification of Uber's activity

23. By its first two questions, the national court essentially enquires whether Uber's activity falls within the scope of Directives 2006/123 and 2000/31 as well as the provisions of the FEU Treaty on the freedom to provide services.

24. In order to reply to these questions, it is necessary, in the first place, to analyse that activity in the light of the system laid down by Directive 2000/31 and the definition of 'information society service' set out in Article 1(2) of Directive 98/34, a definition to which Article 2(a) of Directive 2000/31 refers.

25. In the second place, it will be necessary to determine whether that activity is a transport service or service in the field of transport for the purposes of Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123. The free movement of services in the field of transport is achieved within the framework of the common transport policy (7) and those services are therefore excluded from the scope of Directive 2006/123 pursuant to the abovementioned provision.

Uber's activity in the light of Directive 2000/31

26. In order to assess whether Uber's activity falls within the scope of Directive 2000/31, reference should be made to the definition of information society services set out in Article 2(a) of that directive. The definition refers to Article 1(2) of Directive 98/34.

27. Under that latter provision, an information society service is a service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. The test as to whether a service is for remuneration and is provided upon individual request does not appear to be problematic. However, the same cannot be said of the test as to whether a service is provided at a distance by electronic means.

28. As briefly explained in the section dealing with the facts of the main proceedings, Uber essentially makes it possible to locate a driver, with the aid of a smartphone application, and connect him with a potential passenger for the purpose of supplying urban transport on demand. We are therefore dealing with a composite service, since part of it is provided by electronic means while the other part, by definition, is not. The question is whether such a service falls within the scope of Directive 2000/31.

– Composite services under Directive 2000/31

29. The aim of Directive 2000/31 is to ensure the effectiveness of the freedom to provide information society services. Those services are defined, in Article 2(a) of the directive, by reference to Article 1(2) of Directive 98/34. Under that latter provision, information society services are, inter alia, '*entirely* transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means'. (8)

30. Of course, some supplies comprise components which are not transmitted by electronic means, because they cannot be dematerialised. The online sale of physical goods is a good example of this since it necessarily falls within the scope of information society services, according to recital 18 of Directive 2000/31. Directive 2000/31 also states that the coordinated field, namely the body of legal rules applying to an information society service and on the basis of which Member States may not, in principle, restrict the activities of providers established in other Member States, does not cover requirements applicable to services not provided by electronic means. (9) Member States are therefore free, subject to the limits which may be imposed by other provisions of EU law, to restrict providers' freedom pursuant to rules concerning services not provided by electronic means. (10)

31. However, in order for Directive 2000/31 to attain its objective of liberalising information society services, liberalisation confined to the electronic component alone must have a real impact on the possibility of pursuing the activity. This is why the legislature focused on services that are, in principle, entirely transmitted by electronic means, any supplies that may be made by other means being simply incidental to such services. It would be pointless only to liberalise a secondary aspect of a composite supply if that supply could not be freely made on account of rules falling outside the scope of the provisions of Directive 2000/31. Not only would such apparent liberalisation fail to attain its objective, it would also have adverse consequences, leading to legal uncertainty and diminished confidence in EU legislation.

32. For this reason, an interpretation of the notion of information society services which brings online activities with no self-standing economic value within its scope would be ineffective in terms of the attainment of the objective pursued by Directive 2000/31.

33. In the case of composite services, namely services comprising electronic and non-electronic elements, a service may be regarded as entirely transmitted by electronic means, in the first place, when the supply which is not made by electronic means is economically independent of the service which is provided by that means.

34. This situation arises, in particular, where an intermediary service provider facilitates commercial relations between a user and an independent service provider (or seller). Platforms for the purchase of flights or hotel bookings are one example of this. In those cases, the supply made by the intermediary represents real added value for both the user and the trader concerned, but remains economically independent since the trader pursues his activity separately.

35. By contrast, where the provider of the service supplied by electronic means is also the provider of the service not supplied by such means or where he exercises decisive influence over the conditions under which the latter service is provided, so that the two services form an inseparable whole, I think it is necessary to identify the main component of the supply envisaged, that is to say, the component which gives it meaning in economic terms. For a service to be classified as an information society service, this main component must be performed by electronic means.

36. This is the case, for example, with the online sale of goods. In online sales, the essential components of the transaction, namely the making of the offer and its acceptance by the purchaser, the conclusion of the contract and, more often than not, payment, are performed by electronic means and fall within the definition of information society service. That was the finding of the Court in its judgment in *Ker-Optika*. (11) The delivery of the goods purchased is simply the performance of a contractual obligation, so that the rules applying to the delivery should not, in principle, affect the provision of the main service.

37. However, I do not think that Directive 2000/31 must be interpreted as meaning that any trade-related online activity, be it merely incidental, secondary or preparatory in nature, which is not economically independent is, per se, an information society service.

38. I will now examine Uber's activity in the light of the foregoing considerations.

– Uber's activity

39. The outcome of this analysis will depend, to a large extent, on whether Uber's activity must be regarded as a whole comprising, first, a supply whereby passengers and drivers are connected with one another by means of the electronic platform and, secondly, the supply of transport in the strict sense, or whether these two supplies must be regarded as two separate services. I will begin by considering this question.

40. When classifying an activity in the light of the relevant legal provisions, a number of factual assumptions must be made. Given that the factual information provided by the referring court is incomplete and the service at issue was suspended in Spain as a result of various injunctions, my analysis will be based on the information available concerning Uber's operating methods in other countries. (12) These operating methods are roughly similar. In any event, it is for the referring court to carry out the definitive factual assessments.

41. What is Uber? Is it a transport undertaking, a taxi business to be blunt? Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else?

42. Uber is often described as an undertaking (or platform) in the 'collaborative' economy. I do not think there is any point in discussing the precise meaning of that term here. (13) What is relevant as far as Uber is concerned is that it certainly cannot be considered to be a ride-sharing platform. (14) Drivers on the Uber platform offer passengers a transport service to a destination selected by the passenger and, accordingly, are paid an amount which far exceeds the mere reimbursement of expenses incurred. It is therefore a traditional transport service. Whether or not it is regarded as forming part of a 'collaborative economy' is irrelevant to its classification under the law in force.

43. In its written observations, Uber claims that it simply matches supply (the supply of urban transport) to demand. I think, however, that this is an unduly narrow view of its role. Uber actually does much more than match supply to demand: it created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works.

44. Uber makes it possible for persons wishing to pursue the activity of urban passenger transport to connect to its application and carry out that activity subject to the terms and conditions imposed by Uber, which are binding on drivers by means of the contract for use of the application. There are numerous terms and conditions. They cover both the taking up and pursuit of the activity and even the conduct of drivers when providing services.

45. Thus, in order to access the Uber application as a driver, you must have a car. (15) The vehicles permitted to drive on behalf of Uber must satisfy certain conditions which seem to vary depending on the country and

city. As a general rule, however, they must be four- or five-door passenger vehicles subject, at least, to an age limit. The vehicles must have passed a roadworthiness inspection and comply with the provisions on mandatory insurance. (16)

46. Drivers must obviously be in possession of a driving licence (held for a specific period) and have no criminal record. In some countries, a list of traffic offences is also required.

47. Although there are no rules on working time within the framework of the Uber platform, so that drivers may pursue that activity alongside others, it is apparent that most trips are carried out by drivers for whom Uber is their only or main professional activity. Drivers also receive a financial reward from Uber if they accumulate a large number of trips. In addition, Uber informs drivers of where and when they can rely on there being a high volume of trips and/or preferential fares. Thus, without exerting any formal constraints over drivers, Uber is able to tailor its supply to fluctuations in demand.

48. The Uber application contains a ratings function, enabling drivers to be rated by passengers and vice versa. An average score falling below a given threshold may result in exclusion from the platform, especially for drivers. Uber therefore exerts control, albeit indirect, over the quality of the services provided by drivers.

49. Lastly, it is Uber that sets the price of the service provided. That price is calculated based on the distance and duration of the trip, as recorded by the application by means of GPS. An algorithm then adjusts the price to the intensity of the demand, by applying an appropriate multiplier to the basic fare when demand increases as a result of, for instance, an event or simply a change in the weather conditions, such as a storm.

50. Although Uber's representatives stated at the hearing that drivers are, in principle, free to ask for a lower fare than that indicated by the application, this does not seem to me to be a genuinely feasible option for drivers. Although drivers are theoretically given such a discretion, the fee Uber charges is the amount resulting from the fare as calculated by the application. Since any reduction in the fare paid by the passenger is to the detriment of the driver, it is unlikely that drivers would exercise that discretion. (17) Consequently, I think it is hard to deny that the fare is set by Uber.

51. Thus, Uber exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform. The other aspects are, in my opinion, of secondary importance from the perspective of an average user of urban transport services and do not influence his economic choices. Uber therefore controls the economically significant aspects of the transport service offered through its platform.

52. While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, (18) makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.

53. The foregoing leads me to conclude that Uber's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, (19) by Uber or on its behalf. The service is also presented to users, and perceived by them, in that way. When users decide to use Uber's services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by Uber.

54. The above finding does not, however, mean that Uber's drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber, which has already resulted in court judgments in some Member States, (20) is wholly unrelated to the legal questions before the Court in this case.

55. The same is true regarding the question of ownership of the vehicles. The fact that Uber is not the owner

is, in my view, irrelevant, since a trader can very well provide transport services using vehicles belonging to third persons, especially if he has recourse to such third persons for the purpose of those services, notwithstanding the nature of the legal relationship binding the two parties.

56. On the other hand, I take the view that the finding made immediately above prevents Uber being treated as a mere intermediary between drivers and passengers. Drivers who work on the Uber platform do not pursue an independent activity that exists independently of the platform. On the contrary, the activity exists solely because of the platform, (21) without which it would have no sense.

57. That is why I think it is wrong to compare Uber to intermediation platforms such as those used to make hotel bookings or purchase flights.

58. Similarities clearly exist, for instance as regards the mechanisms for booking or purchasing directly on the platform, the payment facilities or even the ratings systems. These are services offered by the platform to its users.

59. However, in contrast to the situation of Uber's drivers, both hotels and airlines are undertakings which function completely independently of any intermediary platform and for which such platforms are simply one of a number of ways of marketing their services. Furthermore, it is the hotels and airlines — and not the booking platforms — that determine the conditions under which their services are provided, starting with prices. (22) These undertakings also operate in accordance with the rules specific to their sector of activity, so that booking platforms do not exert any prior control over access to the activity, as Uber does with its drivers.

60. Lastly, such booking platforms give users a real choice between several providers whose offers differ on a number of important points from the users' perspective, such as flight and accommodation standards, flight times and hotel location. By contrast, with Uber, these aspects are standardised and determined by the platform, so that, as a general rule, the passenger will accept the service of the most quickly available driver.

61. Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence. While it is true, as Uber states in its observations in the case, that its concept is innovative, that innovation nonetheless pertains to the field of urban transport.

62. I must also point out that classifying Uber as a platform which groups together independent service providers may raise questions from the standpoint of competition law. (23) However, I will not develop this point further, as it oversteps the boundaries of the present case.

63. Under Uber's operating system, the connecting of potential passengers and drivers with one another does not, therefore, have any economic value of its own because, as explained above, drivers working for Uber do not pursue — at least when they are driving in the context of Uber's services — an independent economic activity. Within the framework of that service, first, Uber's drivers are only able to locate passengers through the Uber application and, secondly, that application allows only drivers working on the platform to be located. One is thus inseparable from the other and together they form a single service. I do not think that the supply of transport in the strict sense can be regarded as being of secondary importance, either.

64. It is true that the innovative nature of the Uber platform is to a large extent based on the use of new technologies, such as GPS and smartphones, in order to organise urban transport. However, the innovation does not stop there: it also extends to the organisation of the transport itself, without which Uber would be a mere taxi booking application. Accordingly, within the context of this service, it is undoubtedly the supply of transport which is the main supply and which gives the service economic meaning. Users look for drivers with one aim in mind: to be transported from A to B. Hence the connection stage is merely preparatory in order to enable the main supply to be performed in the best possible conditions.

65. The supply whereby passengers and drivers are connected with one another is therefore neither self-standing, nor the main supply, in relation to the supply of transport. Consequently, it cannot be classified as an 'information society service'. Such a classification would not permit the attainment of the objectives of liberalisation underpinning Directive 2000/31 because, even if the connection activity were liberalised, Member States would be free to render its pursuit impossible by imposing rules on the transport activity. Thus, the only

outcome of such liberalisation would be that the Member State where the service provider is established would be able to benefit from the establishment (as a result of investments, new jobs and tax revenue), while preventing the provision of the service on its territory pursuant to the rules on supplies not covered by Directive 2000/31. (24) Such a situation would undermine the entire rationale behind the freedom to provide information society services as organised by the directive, which is based on the supervision of the legality of the provider's operations by the Member State where he is established and the recognition of that supervision by other Member States. (25)

66. The above situation, where the functioning of the platform is not formally prohibited but, on account of the actual model used by the UberPop service, is based on non-professional drivers, the transport activity cannot be pursued in compliance with the law, has another unwanted effect. It has been shown that Uber uses a number of methods, which have been reported in the press, to prevent the authorities running checks on its drivers, such as temporarily disconnecting the application in some areas. Uber also offers legal and financial assistance to drivers who have been penalised for providing transport services without the requisite authorisation. Drivers themselves have various ways of evading checks. (26) Thus, this incomplete — or simply apparent — liberalisation, whereby one component of a composite activity is liberalised while another remains regulated, creates legal uncertainty, giving rise to grey areas and encouraging infringements of the law.

Uber's activity in the light of Directive 2006/123

67. It is not surprising that Uber's activity, as described in the preceding points, namely as a single supply comprising both the identification of an available driver and the trip booking as well as the supply of transport *stricto sensu*, may be regarded as a service in the field of transport within the meaning of Article 2(2)(d) of Directive 2006/123.

68. Although the wording of that provision, which excludes 'services in the field of transport' from the scope of Directive 2006/123, does not seem to be sufficient in itself to reach such a finding, recital 21 of the directive leaves no doubt as it states that the services in question include 'urban transport [and] taxis'. It is therefore not necessary to enter into discussions as to whether Uber's services constitute a kind of taxi service: all forms of urban transport are mentioned and Uber is certainly one of them.

69. Uber's activity will also have to be classified as falling within the scope of the exception to the freedom to provide services laid down in Article 58(1) TFEU and be subject to the rules laid down in Article 90 et seq. TFEU. Article 91(1)(b) TFEU expressly mentions the 'conditions under which non-resident carriers may operate transport services within a Member State' as an area in which rules must be laid down within the framework of the common transport policy. If it is accepted, as I have submitted, that Uber provides urban transport services, it must then be regarded, if not as a carrier in the strict sense, then at the very least as an organiser of transport services.

70. Thus, without there even being any need to examine the judgment in *Grupo Itevelesa and Others*, (27) which the national court mentioned in its order for reference, it must be concluded that Uber's activity constitutes a service in the field of transport within the meaning of Article 2(2)(d) of Directive 2006/123. It is therefore excluded from the scope of that directive. Furthermore, Uber's activity is covered by the exception to the freedom to provide services contained in Article 58(1) TFEU and is governed by the provisions of Article 90 et seq. TFEU.

Conclusion on the first and second questions referred for a preliminary ruling

71. To summarise the foregoing considerations, my opinion is that, in the case of composite services, consisting of a component provided by electronic means and another component not provided by such means, the first component must be either economically independent of the second or the main component of the two in order to be classified as an 'information society service'. Uber's activity must be viewed as a whole encompassing both the service of connecting passengers and drivers with one another by means of the smartphone application and the supply of transport itself, which constitutes, from an economic perspective, the main component. This activity cannot therefore be split into two, for the purpose of classifying a part of the service as an information society service. Consequently, the service must be classified as a 'service in the field of transport'.

72. I therefore propose that the Court should answer the first and second questions referred for a preliminary ruling as follows:

– Article 2(a) of Directive 2000/31, read in conjunction with Article 1(2) of Directive 98/34, must be interpreted as meaning that a service that connects, by means of mobile telephone software, potential passengers with drivers offering individual urban transport on demand, where the provider of the service exerts control over the key conditions governing the supply of transport made within that context, in particular the price, does not constitute an information society service within the meaning of those provisions.

– Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123 must be interpreted as meaning that the service described in the preceding point constitutes a transport service for the purposes of those provisions.

73. It will, of course, be for the referring court to assess, in the light of its own factual findings, whether the activity at issue in the main proceedings meets the test on control set out above. Nonetheless, I note that several courts in different Member States have already ruled to that effect. (28) This could serve as guidance for the referring court, in the spirit of a justice network.

Final remarks

74. In view of my proposed answers to the first and second questions referred for a preliminary ruling, the third and fourth questions have become irrelevant. In my final remarks, I would like, however, to analyse the legal effects of the possibility of classifying the supplies provided by Uber as a self-standing service, confined to connecting passengers and drivers with one another, which would therefore not cover the supply of transport in the strict sense. Such a service would undoubtedly be treated as an 'information society service', but I do not think it would be necessary to address the question whether that service falls within the field of transport.

The connection service as an information society service

75. To recap, Article 1(2) of Directive 98/34 provides that an information society service is a service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. A service that connects potential passengers and drivers with one another by means of a smartphone application would certainly meet those criteria.

76. As regards the remunerated nature of the service, under the Uber system, part of the fare paid by the passenger goes to the operator of the platform. The connection service is thus remunerated by the passenger once the supply of transport has been completed.

77. This service, examined separately from the supply of transport, is also provided at a distance, since the two parties, Uber and the recipient of the service, are not simultaneously present. It is performed with the aid of a smartphone application that operates by means of the internet, which is clearly covered by the notion of provision by electronic means. It is indeed the only way of booking a trip on the Uber platform. Lastly, the service is provided not in a continuous manner, but at the request of the recipient.

78. Uber's service, as described in point 74 of this Opinion, therefore falls within the scope of the provisions of Directive 2000/31.

79. Since the Uber application is managed and provided, to both drivers and passengers alike, on the territory of the European Union by the company Uber BV established in the Netherlands, in other Member States, including Spain, such provision is effected within the framework of the freedom to provide services, governed, in particular, by Article 3(2) and (4) of Directive 2000/31.

80. Pursuant to those provisions, Member States may not, in principle, restrict the freedom to provide services from other Member States, for reasons falling within the coordinated field, by introducing requirements, regardless of whether they are specifically designed for information society services or are of a general nature. The coordinated field covers, inter alia, under the first indent of Article 2(h)(i) of Directive

2000/31, requirements in respect of 'the taking up of the activity …, such as requirements concerning … authorisation …'. On the other hand, the third indent of Article 2(h)(ii) provides that the coordinated field does not cover 'requirements applicable to services not provided by electronic means'.

81. It follows that the requirement to have authorisation in order to provide intermediation services in the conclusion of urban transport contracts on demand, if it is still in force (29) and in so far as it applies to the connection service provided by the Uber platform, would fall within the scope of the coordinated field and would therefore be caught by the prohibition laid down in Article 3(2) of Directive 2000/31. By contrast, all the requirements applying to drivers, as regards both the taking up and pursuit of the transport activity, fall outside the coordinated field and, consequently, the prohibition, since the transport service, by its very nature, is not provided by electronic means.

82. Under Article 3(4) of Directive 2000/31, Member States may take measures to derogate from the freedom to provide information society services if they are necessary for reasons of public policy, public health, public security or the protection of consumers.

83. Although the fourth question referred for a preliminary ruling precisely concerns the justification for the domestic measures at issue, the national court does not set out in its request the reasons which might warrant making the intermediary activity in the field of transport subject to an authorisation requirement. In its observations, the Spanish Government puts forward reasons such as traffic management and road safety. However, these seem rather to be reasons which may justify the requirements imposed on drivers providing transport services.

84. So far as specifically concerns intermediary services, the only reason put forward by the Spanish Government which could apply to Uber is that relating to transparency in fixing prices, which falls within the scope of consumer protection. I recall that, under the Uber system, the fare is set not by the driver but by the platform. Nevertheless, it seems to me that such transparency could be ensured by means which are less restrictive than the requirement to have authorisation for the intermediary activity, such as a passenger information obligation. Such a requirement would thus not meet the criterion of proportionality, expressly provided for in Article 3(4)(a)(iii) of Directive 2000/31.

85. The complexity of the action in the main proceedings arises, however, from the fact that its aim is to have penalties imposed on Uber for allegedly engaging in acts of unfair competition towards the applicant's members. (30) Those acts are said to be the result not only of the fact that Uber pursued the intermediary activity in the conclusion of transport contracts without having the necessary authorisation, but also of the fact that drivers who provide transport services within the framework of the Uber platform do not satisfy the conditions laid down in Spanish law applicable to such services. Those conditions are not covered by Directive 2000/31 or by Directive 2006/123, since they undoubtedly fall within the field of transport.

86. Do the provisions of Directive 2000/31 therefore prevent the imposition of penalties on Uber on account of unfair competition resulting from the activity of drivers providing transport services on that platform? As explained above, (31) Uber is not, in my view, a mere intermediary between passengers and drivers. It organises and manages a comprehensive system for on-demand urban transport. Accordingly, it is responsible not only for the supply whereby passengers and drivers are connected with one another, but also for the activity of those drivers. The same would be true even if the connection supply were to be regarded as independent of the supply of transport in the strict sense, since these two supplies would ultimately be performed by Uber or on its behalf.

87. The interpretation to the effect that, in order to ensure the effectiveness of Directive 2000/31, Uber's activity as a whole should benefit from the liberalisation provided for in that directive must, in my view, be rejected. Such an interpretation would be at odds with the express provisions of Directive 2000/31, under which only requirements concerning services provided by electronic means are covered by the prohibition laid down in Article 3(2) of the directive. (32) In accordance with that interpretation, any economic activity could theoretically fall within the scope of Directive 2000/31, because all traders are currently in a position to offer services by electronic means, such as information on goods or services, bookings, appointments or payment.

88. Directive 2000/31 thus does not preclude requirements relating to the activity of transport in the strict sense being established in national law or the imposition of penalties on Uber for failing to comply with those

requirements, including by means of an injunction ordering it to discontinue the service. Uber's activity, at least as far as the UberPop service is concerned, in issue in the main proceedings, is organised in such a way that Uber cannot, as matters stand, comply with the requirements. Uber relies on non-professional drivers who, as they do not have an urban transport licence, by definition, do not satisfy the requirements concerned. Treating the connection activity as an information society service would not alter that finding, since the services of drivers fall outside the scope of Directive 2000/31. This demonstrates the artificiality of distinguishing between a service that is provided by electronic means and one that is not, where the two supplies are so closely linked to each other and are provided by the same person.

89. However, I do not think that the need to ensure the effectiveness of the rules on the provision of transport services *stricto sensu* can warrant the establishment, as a preventive measure, of the requirement to have authorisation for intermediation services in general. Unlawful activities in that field can be countered only with a system of enforcement.

90. In conclusion, I take the view that, if the service of connecting potential passengers and drivers with one another were to be regarded as independent of the supply of transport in the strict sense and, therefore, as an information society service, Article 3(2) of Directive 2000/31 would preclude the requirement to have authorisation in order to provide such a service, unless that requirement was justified on one of the grounds listed in Article 3(4) and was proportionate to the aim pursued, which seems to me to be unlikely. However, this would have no real legal effect, since the connection service has no economic meaning without the supplies of transport which, by contrast, the national legislature may make subject to numerous requirements.

Applicability of Directive 2006/123

91. As regards the applicability of Directive 2006/123, I do not consider it necessary to examine the question whether a service that connects, by means of a smartphone application, potential passengers with drivers offering urban transport on demand is covered by the concept of service in the field of transport within the meaning of Article 2(2)(d) of that directive.

92. Article 3(1) of Directive 2006/123 provides that precedence is to be given to provisions of other acts of EU law governing the access to and exercise of a service activity in specific sectors if those provisions conflict with the directive. Even though Directive 2000/31 is not one of the acts listed in that provision, the wording 'these [acts] include' clearly suggests, in my view, that the list is not exhaustive and is confined to acts the inclusion of which is not self-evident per se. Directive 2000/31 is a *lex specialis* in relation to Directive 2006/123 to the extent that, even in the absence of Article 3(1) of Directive 2006/123, it would have to be given precedence in keeping with the adage *lex posterior generali non derogat legi priori speciali*.

93. Therefore, if the connection activity were to be regarded as being covered by Directive 2000/31, it would fall outside the scope of Directive 2006/123.

Conclusion

94. In view of all of the foregoing considerations, I propose that the Court should answer the questions referred by the Juzgado Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona, Spain) for a preliminary ruling as follows:

(1) Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), read in conjunction with Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a service that connects, by means of mobile telephone software, potential passengers with drivers offering individual urban transport on demand, where the provider of the service exerts control over the key conditions governing the supply of transport made within that context, in particular the price, does not constitute an information society service within the meaning of those provisions.

(2) Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that the service described in the preceding point constitutes a transport service for the purposes of those provisions.

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1 Original language: French.

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2 Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'). Although Directive 98/34 was repealed on 7 October 2015 in accordance with Article 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), it applies *ratione temporis* to the facts in the main proceedings. Indeed, the wording of Article 1(1)(b) of Directive 2015/1535 is essentially the same.

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3 Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

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4 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

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5 Although I use the term 'platform' in this Opinion to describe the system for connecting drivers and passengers with one another and for booking transport services, no conclusions should be drawn from it regarding the nature of the platform. In particular, this term does not mean that a mere intermediary is involved, since Uber is not an intermediary, as I will explain below.

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6 See, in addition to the information supplied by the defendant in the main proceedings, Noto La Diega, G., 'Uber law and awareness by design. An empirical study on online platforms and dehumanised negotiations', *European Journal of Consumer Law*, No 2015/2, pp. 383 to 413, particularly p. 407.

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7 See Article 90 TFEU, read in conjunction with Article 58(1) TFEU.

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8 Second indent of the second subparagraph of Article 1(2) of Directive 98/34. Emphasis added.

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9 Article 2(h) and Article 3(2) of Directive 2000/31.

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10 See, to that effect, judgment of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraphs 29 and 30).

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11 Judgment of 2 December 2010 (C-108/09, EU:C:2010:725, paragraphs 22 and 28).

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12 The way in which Uber functions is already the subject of extensive academic writings. See, in particular, Noto La Diega, G., op. cit.; Rogers, B., 'The Social Cost of Uber', *The University of Chicago Law Review Dialogue*, 82/2015, pp. 85 to 102; Gamet, L., 'UberPop (†)', *Droit social*, 2015, p. 929; and Prassl, J., and Risak, M., 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork', *Comparative Labor Law & Policy Journal*, vol. 37 (2016), pp. 619 to 651. The factual issues relating to Uber's operating method are also apparent from decisions of Member States' national courts such as, for example, judgment of the London Employment Tribunal of 28 October 2016, *Aslam, Farrar and Others -v-Uber* (Case 2202551/2015); decision of the Audiencia Provincial de Madrid No 15/2017 of 23 January 2017 in an action between Uber and the Asociación Madrileña del Taxi; and order of the Tribunale Ordinario di Milano of 2 July 2015 (cases 35445/2015 and 36491/2015).

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13 On the notion of the collaborative economy see, in particular, Hatzopoulos, V., and Roma, S., 'Caring for

Sharing? The Collaborative Economy under EU Law', *Common Market Law Review*, No 54, 2017, pp. 81 to 128, p. 84 et seq. The Commission has proposed a definition of this notion in its communication entitled 'A European agenda for the collaborative economy' (COM(2016) 356 final, p. 3). However, being so broad, it is doubtful the definition could be used to mark out a sufficiently differentiated type of activity which would warrant specific legal treatment.

14 Ride sharing involves sharing a common journey, determined by the driver and not the passenger, in return for at the most, for the driver, reimbursement of part of the travel costs. Contact between drivers and potential passengers is facilitated by online applications. It is therefore a sort of 'hitchhiking 2.0'. In any case, it is not a gainful activity.

15 Uber denies making vehicles available to drivers but, through its Ubermarketplace service, it acts as an intermediary between drivers and car hire and leasing businesses.

16 However, it is not clear if this refers to the requirements applying to vehicles intended to be used in the paid transport of passengers or simply the formalities applying to vehicles for private use.

17 See judgment of the London Employment Tribunal cited in footnote 12, paragraph 18.

18 The high number of drivers allows the desired result to be achieved without having to exercise direct and individual control over each of them. On the other hand, the high number of passengers ensures effective and relatively objective control over drivers' conduct, relieving the platform of that task.

19 I am not addressing here the classification of the legal relationship between Uber and its drivers, which is a matter for national law.

20 See, in particular, judgment of the London Employment Tribunal cited in footnote 12.

21 Or a similar platform, as the model underpinning Uber has, since its creation, been replicated, although without achieving the same prominence.

22 The fact that some platforms conclude rate parity agreements with hotels, under which hotels agree to refrain from offering rates elsewhere which are lower than those offered on the platform in question, is immaterial. These agreements do not involve the setting of prices for the services by the platform, but a commitment concerning the rate-related treatment of different trading partners. All the same, the competition authorities of several Member States have questioned rate parity clauses, which led to the establishment of the European working group on online booking platforms, under the aegis of the Commission.

23 For example, the use by competitors of the same algorithm to calculate the price is not in itself unlawful, but might give rise to hub-and-spoke conspiracy concerns when the power of the platform increases. Regarding possible problems associated with the Uber model from the standpoint of competition law, see Hatzopoulos, V., and Roma, S., op. cit., pp. 110 and 120, as well as Ezrachi, A., and Stucke, M.E., 'Artificial Intelligence & Collusion: When Computers Inhibit Competition', *CCLP Working Paper 40*, Oxford 2015, p. 14. Also see judgments of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717), and of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42, paragraphs 27 and 28 and the case-law cited), as well as my Opinion in that case (C-74/14, EU:C:2015:493).

24 I note that, according to the information available, the UberPop service was prohibited in the Netherlands, the Member State of establishment of the company Uber BV, by judgment of the College van Beroep voor het bedrijfsleven of 8 December 2014 (AWB 14/726, ECLI:NL:CBB:2014:450). See Hatzopoulos, V., and Roma, S., op. cit., p. 91.

25 See Article 3(1) and (2) of Directive 2000/31.

26 Including Greyball software, which makes it possible to avoid checks by the authorities. See 'Uber Uses Tech to Deceive Authorities Worldwide', *The New York Times* of 4 March 2017.

27 Judgment of 15 October 2015 (C-168/14, EU:C:2015:685).

28 See, in particular, the national decisions cited in footnote 12 of this Opinion.

29 See my remarks on the issue in point 9 of this Opinion.

30 I recall that the main proceedings do not concern the actual functioning of the Uber application, but rather the provision of the UberPop service in the city of Barcelona.

31 See, in particular, points 43 to 53 of this Opinion.

32 See Article 3(2) of Directive 2000/31, read in conjunction with the third indent of Article 2(h)(ii). That provision is confirmed by recital 18 of the directive.

OPINION OF ADVOCATE GENERAL SZPUNAR

delivered on 4 July 2017 (1)

Case C-320/16

Uber France SAS

(Request for a preliminary ruling
from the tribunal de grande instance de Lille (Regional Court, Lille, France))

(Reference for a preliminary ruling — Technical regulation — Definition — Obligation to notify — Penalty — Unenforceable against individuals — System for putting customers in touch with non-professional drivers — UberPop application — Directive 2006/123/EC — Scope — Exclusion as a service in the field of transport)

Introduction

1. This is the second case in which the Court is called upon to consider legal issues regarding the way in which the local transport platform Uber works. (2) In the first case, in which I delivered my Opinion on 11 May 2017, (3) the central question was whether a service such as that provided by Uber should be classified as an information society service for the purposes of the relevant provisions of EU law. That question also arises in the present case. However, this case concerns a different issue, namely the question whether certain provisions of national law which apply to services such as those offered by Uber should have been notified as rules on services within the meaning of the provisions of EU law on technical notification. As I shall explain, that issue is partly independent of how Uber's activities are classified.

2. Accordingly, in the present Opinion I shall deal principally with the issue of notification, and I would refer to my earlier Opinion in so far as concerns the question of the classification of Uber's activities as an information society service.

Legal framework

EU law

3. Article 1(2), (5) and (11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, (4) as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (5) ('Directive 98/34, as amended'), provides: (6)

'For the purposes of this Directive, the following meanings shall apply:

...

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

   For the purposes of this definition:

   – "at a distance" means that the service is provided without the parties being simultaneously present,

   – "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

   – "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

…

5. "rule on services", requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

…

11. "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 or prohibiting the provision or use of a service, or establishment as a service provider.

…'

4. The first subparagraph of Article 8(1) of Directive 98/34, as amended, 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.'

French law

5. Article L. 3120-1 et seq. of the code des transports (Transport Code) governs the carriage of persons by road for consideration using vehicles with fewer than ten seats.

6. Article L. 3124-13 of the Transport Code provides:

'The organisation of a system for putting customers in touch with persons carrying on the activities mentioned in Article L.3120-1 where such persons are neither road transport undertakings entitled to provide occasional services as mentioned in Chapter II of Title 1 of this Book, nor taxi drivers, two or three-wheeled motorised vehicles or private hire vehicles within the meaning of this title shall be punishable by a two-year term of imprisonment and a fine of EUR 300 000.

Legal persons who incur criminal liability for the offence laid down in this article shall, in addition to a fine in accordance with Article 131-38 of the Criminal Code, incur the penalties laid down in paragraphs 2 to 9 of Article 131-39 of the Criminal Code. The prohibition referred to in paragraph 2 of Article 131-39 of the Criminal Code shall extend to the activity in the exercise of which or at the time of the exercise of which the offence was committed. The penalties laid down in paragraphs 2 to 7 of Article 131-39 of the Criminal Code shall not exceed five years in duration.'

The facts, the procedure and the questions referred for a preliminary ruling

7. Uber France is a company established under French law and a subsidiary of Uber BV, a company

governed by Netherlands law, which is itself a subsidiary of the company Uber Technologies Inc., whose principal place of business is in San Francisco (United States of America). Uber BV operates an electronic platform which enables users, with the aid of a smartphone equipped with the Uber application, to order urban transport services in the cities covered. The transport services offered on the Uber platform fall into various categories depending on the status of the driver and on the type of vehicle. The UberPop service is a service whereby non-professional private drivers transport passengers using their own vehicles. (7)

8. Uber France is a defendant before the tribunal correctionnel de Lille (Criminal Court, Lille, France) at the tribunal de grande instance, huitième chambre (Regional Court, Eighth Chamber, Lille) in a private prosecution and civil action brought by Mr Nabil Bensalem in relation to various matters, including the organisation, from 10 June 2014 onwards, of a system for putting customers in touch with persons carrying passengers by road for consideration using vehicles with fewer than ten seats in the circumstances set out in Article L. 3124-13 of the Transport Code.

9. In those proceedings, Uber France has submitted that Article L. 3124-13 of the Transport Code cannot be enforced against it because it is a technical regulation (a rule on services) that has not been notified, in breach of the first subparagraph of Article 8(1) of Directive 98/34, as amended. It is common ground, moreover, that Article L. 3124-13 has not been notified. What remains open to debate is whether it is a 'technical regulation'.

10. In those circumstances, the tribunal de grande instance de Lille (Regional Court, Lille) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '(1) Does Article L. 3124-13 of the Transport Code, inserted by Law No 2014-1104 of 1 October 2014 on taxis and private hire vehicles, constitute a new technical regulation that is not implicit and that relates to one or more information society services, within the meaning of [Directive 98/34, as amended], such that, pursuant to Article 8 of that directive, it had to be notified in advance to the European Commission, or does it fall within the scope of [Directive 2006/123 (8)], Article 2[(2)](d) of which excludes transport?
>
> (2) In the event that that question is answered in the affirmative, does a failure to satisfy the notification requirement laid down in Article 8 of [Directive 98/34, as amended] mean that Article L. 3124-13 of the Transport Code is unenforceable against individuals?'

11. The request for a preliminary ruling was received at the Court on 6 June 2016. Written observations have been lodged by Uber France, the Estonian, French, Netherlands, Polish and Finnish Governments, and the European Commission. The parties to the main proceedings, the Estonian, French and Netherlands Governments, the European Free Trade Association (EFTA) Surveillance Authority and the Commission were represented at the hearing on 24 April 2017.

Analysis

Preliminary observations

12. In formulating its questions, the referring court has apparently started from the premiss that the classification of a service as a service in the field of transport within the meaning of Directive 2006/123 precludes its classification as an information society service, thereby rendering inapplicable the obligation, under Directive 98/34, as amended, to notify the provisions relating to it. However, it is not certain that that automatically follows, inasmuch as Directive 98/34, as amended, contains no exclusion for transport of the kind that is laid down in Article 2(2)(d) of Directive 2006/123. (9) In my view, it is sufficient, without considering the question of the classification of Uber's activities under Directive 2006/123, to address the question of whether the provision of French law in question constitutes a technical regulation — and more specifically a rule on services, that being the only type of technical regulation of relevance in this case — that should have been notified in accordance with Article 8 of Directive 98/34, as amended.

13. Thus, by its first question, the referring court is essentially asking whether Article 1(5) of Directive 98/34, as amended, read in conjunction with Article 1(2) of that directive, must be interpreted as meaning that a provision of national law which prohibits and penalises the organisation of a system for putting customers in touch with persons engaging in the carriage of passengers in contravention of the rules which apply to such

transport activities constitutes a rule on services within the meaning of Article 1(5) and subject, as such, to the notification obligation under Article 8 of the directive. The second question referred for a preliminary ruling concerns the possible consequences for the main proceedings of the failure to notify such a provision, should it be found to constitute a technical regulation.

14. These questions of course raise the issue of whether a service such as the UberPop service offered by Uber may be classified as an information society service. That is the issue which I addressed in my Opinion in *Asociación Profesional Elite Taxi*, (10) which I will merely summarise in this Opinion, while adding a further two points. Nevertheless, I think that the question of whether the provision of French law at issue in this case constitutes a technical regulation can be resolved irrespectively of the classification of the UberPop service, and I shall explain that position in the second part of my analysis. Finally, in the third part of my analysis, I shall address the question of the possible consequences of the failure to notify.

The classification of the Uber service

15. In my Opinion in *Asociación Profesional Elite Taxi*, I observed that the UberPop service provided by Uber was a single composite service comprising a supply whereby passengers and drivers were connected with one another by means of smartphone software and a supply of transport. I also noted that, where a composite service such as that is in issue, the component that is provided by electronic means may be regarded as an information society service, for the purposes of the application of the definition of such services given in Article 1(2) of Directive 98/34, as amended, only if it is economically independent of the component that is not provided by electronic means or if it is the principal service within the composite service. Indeed, the application of the EU rules on information society services (which is to say both Directive 98/34, as amended, and Directive 2000/31 (11)) to services which are neither independent of services which do not fall within the scope of those rules nor predominant over such other services would be contrary to the wording of the provisions in question, would compromise the objective pursued by those provisions and would engender legal uncertainty, since it may be that the other services are regulated differently under various systems of national law, as is the case, especially, in specific fields such as transport. (12)

16. According to the information available on the way in which Uber functions, and subject to the findings of fact ultimately made by the national courts, in so far as the UberPop service is concerned, the connection service, which is performed by electronic means, is not independent of the transport service, because the former is inextricably linked with the latter and the two services are in fact supplied by the same company, Uber. That company, which indisputably provides the connection service, also exercises preponderant control over the transport service *stricto sensu*. Next, I also formed the view that the connection service was secondary to the transport service, the latter being the real economic *raison d'être* of the UberPop service considered as a whole. (13) I concluded from that that such a service could not be regarded as an information society service within the meaning of the definition of such services given in Article 1(2) of Directive 98/34, as amended. (14)

17. I maintain that position in the context of the present case and would refer to my Opinion in *Asociación Profesional Elite Taxi* for a more detailed explanation. I would merely add two points to the considerations set out in that Opinion.

18. First, Uber's situation must, in my view, be distinguished from that in the dispute which gave rise to the judgment in *Vanderborght*, which the Court of Justice handed down a few days before I delivered my Opinion in *Asociación Profesional Elite Taxi*. In that judgment, the Court held that advertising for a dental practice posted on an Internet website created by the practitioner in question fell within the definition of an 'information society service'. (15)

19. While that situation involved a service intended for users (other than the practitioner himself), the service in question consisted in the communication of information. It was directed, principally at least, not at people who were already patients of the practitioner in question, but at the general public, in the hope of attracting new patients. That sort of communication may or may not result in the subsequent provision of dental services (and, probably, in most cases it will not). Although the advertising was without question closely connected with the dental practice as such, it had, by contrast, no real connection with the actual dental care provided to individual patients.

20. The opposite is true of the connection service provided by the Uber platform, which is directed at people

who are already Uber customers and which is intended to result in the actual provision of a transport service. Moreover, the connection is a necessary precursor to the transport service provided in the context of the Uber system.

21. Given those differences, I do not think that the guidance offered by the judgment in *Vanderborght* can be directly applied to the question of the classification of services such as UberPop as information society services.

22. Secondly, I would like to emphasise that the situation that arises in the context of the services provided by Uber is clearly different from the relationship between a franchisor and its franchisees under a franchise agreement. Admittedly, the franchisor may also exercise strict control over the activities of its franchisees, to the extent that customers will perceive the franchisees as branches of the franchisor rather than as independent undertakings. However, the role of the franchisor is limited to providing services (such as trade mark licences, know-how, the supply of equipment and the provision of advice) to the franchisees. It will have no relationship with the users of the final services, which will be provided solely by the franchisees. The services of the franchisor are therefore independent of the final services, even if, in such a context, the franchisor determines the conditions under which those services are provided. Uber, on the other hand, is directly involved in the provision of the final service to users, and therefore must, by contrast with a franchisor, be regarded as the provider of that service.

The classification of the national provision at issue as a technical regulation

23. Even if the Court were to find that the UberPop service is an information society service, that would in no way affect the classification of the provision of French law in question as a technical regulation. Indeed, not every provision that concerns, in one way or another, information society services automatically falls within the category of technical regulations.

24. Indeed, among the various categories of technical regulations, Directive 98/34, as amended, distinguishes those which relate to services and clearly states that it deals only with information society services. According to the definition given in Article 1(5) of the directive, a rule on services is a requirement of a general nature relating to the taking-up and pursuit of service activities. In order to be classified as a technical regulation, it is also necessary that the specific aim and object of such a requirement should be to regulate such services in an explicit and targeted manner. By contrast, rules which affect such services only in an implicit or incidental manner are excluded.

25. Article L. 3124-13 of the Transport Code prohibits the organisation of systems for putting customers in touch with persons carrying on transport activities in breach of the rules which apply to those transport activities. That prohibition carries criminal penalties.

26. I can quite accept that, as Uber France submits in its observations, that prohibition is principally directed at systems for connecting the two parties by electronic means. Indeed, at present, such systems are technically and economically viable only if they operate with the aid of information technology, and thus by electronic means, within the meaning of Directive 98/34, as amended. Although systems for connecting parties by means of telecommunications still exist, organising them calls for significant technical resources (such as call centres and terminals in vehicles), which makes it unlikely that such a system would be organised with the participation of people who carry on transport activities outside of the legal framework.

27. I am therefore not persuaded by the French Government's argument that the provision at issue is not specifically aimed at information society services since that provision may affect other categories of intermediaries in the field of transport.

28. That said, it must be observed that the purpose of the provision is not to prohibit or to regulate in some other way the activity of putting customers in touch with providers of transport services in general. The purpose of the provision is solely to prohibit and to punish the activity of intermediary in the *illegal* exercise of transport activities. The activity of intermediary in legal transport services remains entirely outside the scope of the provision.

29. I therefore share the view expressed by the Polish Government in its written observations, that the provision affects information society services only in an incidental manner. Indeed, the purpose of the

provision is not to regulate such services specifically, but to ensure the effectiveness of the rules relating to transport services, which are not covered by Directive 98/34, as amended.

30. Furthermore, the provisions of Article L. 3124-13 of the Transport Code, in so far as they prohibit the organisation of systems for putting customers in touch with persons providing transport services in breach of the applicable rules, must be assessed in context. If an activity is illegal, any complicity in the exercise of that activity may also be regarded as illegal under national law. That is particularly so when the complicity involves the organisation of a system and when its purpose is to make a profit. (16) Therefore, in reality, the regulatory contribution made by Article L. 3124-13 of the Transport Code lies principally in the establishment of criminal sanctions for participation in an activity which is already illegal under national legislation.

31. If every national provision that prohibited or punished intermediation in illegal activities had to be regarded as a technical regulation merely because the intermediation most likely takes place by electronic means, then a great number of internal rules in the Member States, written and unwritten, would have to be notified as technical regulations. That would lead to an unwarranted extension of the obligation to notify, (17) without that really contributing to the attainment of the objectives of the notification procedure, the purpose of which is to prevent the adoption by the Member States of measures that are incompatible with the internal market and to enable economic operators to make more of the advantages inherent in the internal market. (18) Instead of that, an excessive notification obligation, with the penalty of regulations that have not been notified being inapplicable, (19) would facilitate circumvention of the law and engender legal uncertainty, including in relationships between individuals.

32. If, as Uber France maintains in its observations, Article L. 3124-13 of the Transport Code may be perceived as being specifically directed at the way in which the Uber platform functions, then that is because, when it developed the UberPop service, Uber deliberately chose an economic model that is irreconcilable with the national regulations governing the transportation of passengers. (20) That model is based on the provision of services by non-professional drivers who, by definition, do not have the authorisations which are required under French law in order to carry on that transport activity. Nevertheless, that does not make the provision in question a rule governing the activities of intermediary in the field of transport in general.

33. For those reasons, I think that Article L. 3124-13 of the Transport Code affects only incidentally the service of connecting customers with persons providing transport services, inasmuch as the connection relates to the unlawful provision of such services. Article L. 3124-13 must therefore be excluded from the scope of Directive 98/34, as amended, in accordance with the second indent of the fifth subparagraph of Article 1(5) thereof.

34. That exclusion arises not from the fact that the provision at issue is a provision of criminal law, but from the fact that the provision does not prohibit and does not penalise an activity which is in the nature of an information society service in a general fashion, but only in so far as the activity amounts to an act of complicity in the exercise of another activity, one that is illegal and, moreover, one that falls outside the scope of Directive 98/34, as amended.

The possible consequences of the failure to notify the national provision at issue

35. By its second question referred for a preliminary ruling, the referring court asks, in essence, what inferences it should draw, in the main proceedings, from the failure to notify Article L. 3124-13 of the Transport Code.

36. Of course, if the Court agrees with my proposed answer to the first question referred, and holds that the provision in question is not a technical regulation within the meaning of Directive 98/34, as amended, and does not, therefore, fall within the scope of the notification obligation, the second question referred for a preliminary ruling will no longer be relevant. For the sake of completeness, however, I shall analyse it, because the answer to that question will give a fuller picture of the position.

37. The case-law of the Court on the consequences of a failure to notify a technical regulation is settled. In principle, such a failure constitutes a procedural defect in the adoption of the technical regulations concerned and renders those technical regulations inapplicable and therefore unenforceable against individuals. (21) Although the Court treats a failure to notify as a procedural defect, it applies the same sanction as that which

applies in the case of substantive incompatibility of a provision of national law with a provision of EU law. (22)

38. Thus, an individual who wishes to escape the application of a rule may rely on the fact that it has not been notified, without there being any need to determine whether the rule is substantively contrary to the freedoms of the internal market. The resulting unenforceability may even benefit operators whose activities, while falling within the scope of the rule in question, do not amount to information society services, in particular, because their role is not limited to services provided by electronic means. (23) I am thinking in particular of the situation at issue in the present case, that of Uber. As I explained in my Opinion in *Asociación Profesional Elite Taxi*, Uber's activity does not fall within the definition of an information society service, (24) even though action could be taken against it under Article L. 3124-13 of the Transport Code. Nevertheless, this is the inherent consequence of a procedural defect, which invalidates, with regard to all individuals, a rule which has not been notified.

39. The answer to the second question referred for a preliminary ruling should therefore be that, if Article L. 3124-13 were to be regarded as a rule on services within the meaning of Article 1(5) of Directive 98/34, as amended, it would be unenforceable against individuals in so far as it has not been notified in accordance with Article 8 of that directive.

40. Finally, in so far as concerns the notification obligation under Article 15(7) of Directive 2006/123, a matter which the Commission raised at the hearing, I would state that, in my view, (25) although Uber's activities are not to be regarded as an information society service because of their composite nature, they without question fall within the field of transport, which excludes them from the scope of that directive.

Conclusion

41. In light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the tribunal de grande instance de Lille (Regional Court, Lille) as follows:

> Article 1(5) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, read in conjunction with Article 1(2) thereof, must be interpreted as meaning that a provision of national law which prohibits and penalises the organisation of a system for putting customers in touch with persons engaging in the carriage of passengers in contravention of the rules which apply to such transport activities does not constitute a rule on services subject to the notification obligation under Article 8 of that directive.

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1 Original language: French.

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2 A third request for a preliminary ruling concerning this same subject was dismissed as inadmissible by order of 27 October 2016, *Uber Belgium* (C-526/15, not published, EU:C:2016:830).

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3 See my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

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4 OJ 1998 L 204, p. 37.

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5 OJ 1998 L 217, p. 18.

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6 In accordance with Article 11 of Directive (EU) 2015/1535 of the European Parliament and the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015. It nevertheless continues to apply, *ratione temporis*, to the facts in the main proceedings.

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7 For a more detailed description of the Uber platform, see points 12 to 15 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

8 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

9 A service *in the field of transport* is not necessarily a *transport* service *stricto sensu* (see the judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685).

10 C-434/15, EU:C:2017:364.

11 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

12 See points 29 to 38 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

13 See points 39 to 64 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

14 See points 65 and 66 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

15 Judgment of 4 May 2017, *Vanderborght* (C-339/15, EU:C:2017:335, paragraph 39).

16 I would recall that only services provided for consideration may be regarded as information society services within the meaning of Directive 98/34, as amended.

17 The expansion of the notification obligation ('notification creep') has already been mentioned in point 62 of Advocate General Bobek's Opinion in *M. and S.* (C-303/15, EU:C:2016:531).

18 See the judgment of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 82).

19 See above.

20 It should be noted in this regard that Uber cannot rely on EU law in order to call into question the rules governing transport services in the strict sense because, in this field, positive action on the part of the Union legislature is necessary, in accordance with Articles 58 and 90 TFEU.

21 See, in particular, the judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 54) and, most recently, of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 67).

22 See the judgment of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 42).

23 See, in particular, points 29 to 38 of this Opinion.

24 See points 15 and 16 of this Opinion.

25 See points 67 to 70 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

JUDGMENT OF THE COURT (Grand Chamber)

20 December 2017 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Article 58(1) TFEU — Services in the field of transport — Directive 2006/123/EC — Services in the internal market — Directive 2000/31/EC — Directive 98/34/EC — Information society services — Intermediation service to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys — Requirement for authorisation)

In Case C-434/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain), made by decision of 16 July 2015, received at the Court on 7 August 2015, in the proceedings

Asociación Profesional Élite Taxi

v

Uber Systems Spain SL,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby (Rapporteur), C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 November 2016,

after considering the observations submitted on behalf of:

– Asociación Profesional Elite Taxi, by M. Balagué Farré and D. Salmerón Porras, abogados, and J.A. López-Jurado González, procurador,

– Uber Systems Spain SL, by B. Le Bret and D. Calciu, avocats, R. Allendesalazar Corcho, J.J. Montero Pascual, C. Fernández Vicién and I. Moreno-Tapia Rivas, abogados,

– the Spanish Government, by M.A. Sampol Pucurull and A. Rubio González, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– Ireland, by E. Creedon, L. Williams and A. Joyce, acting as Agents, and A. Carroll, Barrister,

– the Greek Government, by M. Michelogiannaki, acting as Agent,

– the French Government, by D. Colas, G. de Bergues and R. Coesme, acting as Agents,

– the Netherlands Government, by H. Stergiou and M. Bulterman, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by É. Gippini Fournier, F. Wilman, J. Hottiaux and H. Tserepa-Lacombe, acting as Agents,

– the EFTA Surveillance Authority, by C. Zatschler, Ø. Bø and C. Perrin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 TFEU, Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), and Articles 2 and 9 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings between Asociación Profesional Elite Taxi ('Elite Taxi'), a professional taxi drivers' association in Barcelona (Spain), and Uber Systems Spain SL, a company related to Uber Technologies Inc., concerning the provision by the latter, by means of a smartphone application, of the paid service consisting of connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative licence or authorisation.

Legal context

EU law

Directive 98/34

3 Article 1(2) of Directive 98/34 provides:

'For the purposes of this Directive, the following meanings shall apply:

…

(2) "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present,

– "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed

and received by wire, by radio, by optical means or by other electromagnetic means,

– "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

…'

4 In accordance with Articles 10 and 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015. Nevertheless, Directive 98/34 remains applicable *ratione temporis* to the dispute in the main proceedings.

Directive 2000/31

5 Article 2(a) of Directive 2000/31 provides that, for the purposes of the directive, 'information society services' means services within the meaning of Article 1(2) of Directive 98/34.

6 Article 3(2) and (4) of Directive 2000/31 states:

'2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.'

Directive 2006/123

7 According to recital 21 of Directive 2006/123, 'transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive'.

8 Article 2(2)(d) of Directive 2006/123 provides that the directive does not apply to services in the field of transport, including port services, falling within the scope of Title V of Part Three of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

9 Under Article 9(1) of Directive 2006/123, which falls under Chapter III thereof, headed 'Freedom of establishment for providers':

'Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.'

10 Under Chapter IV of the directive, headed 'Free movement of services', Article 16 lays down the procedures enabling service providers to provide services in a Member State other than that in which they are established.

Spanish law

11 In the metropolitan area of Barcelona, taxi services are governed by Ley 19/2003 del Taxi (Law No 19/2003 on taxi services) of 4 July 2003 (DOGC No 3926 of 16 July 2003 and BOE No 189 of 8 August 2003) and by Reglamento Metropolitano del Taxi (Regulation on taxi services in the metropolitan area of Barcelona) of 22 July 2004 adopted by the Consell Metropolitá of the Entitat Metropolitana de Transport de Barcelona (Governing Board of the Transport management body for the metropolitan area of Barcelona, Spain).

12 Under Article 4 of that law:

'1. The provision of urban taxi services is subject to the prior grant of a licence entitling the licence holder for each vehicle intended to carry out that activity.

2. Licences for the provision of urban taxi services are issued by the town halls or the competent local authorities in the territory where the activity shall be carried out.

3. The provision of interurban taxi services is subject to the prior grant of the corresponding authorisation issued by the ministry of transport of the regional government.'

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

13 On 29 October 2014, Elite Taxi brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain) seeking a declaration from that court that the activities of Uber Systems Spain infringe the legislation in force and amount to misleading practices and acts of unfair competition within the meaning of Ley 3/1991 de Competencia Desleal (Law No 3/1991 on unfair competition) of 10 January 1991. Elite Taxi also claims that Uber Systems Spain should be ordered to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet. Lastly, it claims that the court should prohibit Uber Systems Spain from engaging in such activity in the future.

14 The Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) noted at the outset that although Uber Systems Spain carries out its activity in Spain, that activity is linked to an international platform, thus justifying the assessment at EU level of the actions of that company. It also observed that neither Uber Systems Spain nor the non-professional drivers of the vehicles concerned have the licences and authorisations required under the Regulation on taxi services in the metropolitan area of Barcelona of 22 July 2004.

15 In order to determine whether the practices of Uber Systems Spain and related companies (together, 'Uber') can be classified as unfair practices that infringe the Spanish rules on competition, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) considers it necessary to ascertain whether or not Uber requires prior administrative authorisation. To that end, the court considers that it should be determined whether the services provided by that company are to be regarded as transport services, information society services or a combination of both. According to the court, whether or not prior administrative authorisation may be required depends on the classification adopted. In particular, the referring court takes the view that if the service at issue were covered by Directive 2006/123 or Directive 98/34, Uber's practices could not be regarded as unfair practices.

16 To that end, the referring court states that Uber contacts or connects with non-professional drivers to whom it provides a number of software tools — an interface — which enables them, in turn, to connect with persons who wish to make urban journeys and who gain access to the service through the eponymous software application. According to the court, Uber's activity is for profit.

17 The referring court also states that the request for a preliminary ruling in no way concerns those factual elements but solely the legal classification of the service at issue.

18 Consequently, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Inasmuch as Article 2(2)(d) of [Directive 2006/123] excludes transport activities from the scope of that directive, must the activity carried out for profit by [Uber Systems Spain], consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources —

in the words of [Uber Systems Spain], "smartphone and technological platform" interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of [Directive 98/34]?

(2) Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in [EU] legislation — Article 56 TFEU and Directives [2006/123] and … [2000/31]?

(3) If the service provided by [Uber Systems Spain] were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of Law [No 3/1991] on unfair competition [of 10 January 1991] — concerning the infringement of rules governing competitive activity — contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or to legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

(4) If it is confirmed that Directive [2000/31] is applicable to the service provided by [Uber Systems Spain], are restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute derogations from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) thereof?'

The jurisdiction of the Court

19 Elite Taxi claims that the legal classification of the service provided by Uber does not fall within the Court's jurisdiction because that classification requires a decision on issues of fact. In those circumstances, according to Elite Taxi, the Court has no jurisdiction to answer the questions referred.

20 In that regard, it should be recalled that the referring court has clearly stated, as is apparent from paragraph 17 above, that its questions concern solely the legal classification of the service at issue and not a finding or assessment of the facts of the dispute in the main proceedings. The classification under EU law of facts established by that court involves, however, the interpretation of EU law for which, in the context of the procedure laid down in Article 267 TFEU, the Court of Justice has jurisdiction (see, to that effect, judgment of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraphs 51 and 52).

21 The Court therefore has jurisdiction to reply to the questions referred.

Consideration of the questions referred

Admissibility

22 The Spanish, Greek, Netherlands, Polish and Finnish Governments, the European Commission and the EFTA Surveillance Authority note that the order for reference is insufficiently precise as regards both the applicable national legislation and the nature of the activities at issue in the main proceedings.

23 In that regard, it should be recalled that the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of EU 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 enable it to give a useful answer to the questions submitted to it (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 25).

24 On that last point, the need to provide an interpretation of EU law which will be of use to the referring court requires that court, according to Article 94(a) and (b) of the Rules of Procedure of the Court, to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (see judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 28).

25 Furthermore, according to the settled case-law of the Court, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under Article 23, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case file that may be sent to the Court by the national court (judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 26 and the case-law cited).

26 In the present case, it must be noted that the order for reference, while brief in its reference to the relevant national provisions, nevertheless serves to identify those that may apply to the provision of the service at issue in the main proceedings, from which it would follow that a licence or prior administrative authorisation is required for that purpose.

27 Similarly, the referring court's description of the service provided by Uber, the content of which is set out in paragraph 16 above, is sufficiently precise.

28 Lastly, in accordance with Article 94(c) of the Rules of Procedure, the referring court sets out precisely the reasons for its uncertainty as to the interpretation of EU law.

29 Consequently, it must be held that the order for reference contains the factual and legal material necessary to enable the Court to give a useful answer to the referring court and to enable interested persons usefully to take a position on the questions referred to the Court, in accordance with the case-law referred to in paragraph 25 above.

30 The Polish Government also expresses its doubts as to whether Article 56 TFEU, inter alia, is applicable to the present case, on the ground that the matter in the main proceedings is allegedly a purely internal matter.

31 However, it is apparent from the order for reference, in particular the information referred to in paragraph 14 above and the other documents in the file before the Court, that the service at issue in the main proceedings is provided through a company that operates from another Member State, namely the Kingdom of the Netherlands.

32 In those circumstances, the request for a preliminary ruling must be held to be admissible.

Substance

33 By its first and second questions, which should be considered together, the referring court asks, in essence, whether Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, is to be classified as a 'service in the field of transport' within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31, or whether, on the contrary, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

34 In that regard, it should be noted that an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court.

35 Accordingly, an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an 'information society service' within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is 'a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

36 By contrast, non-public urban transport services, such as a taxi services, must be classified as 'services in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of recital 21 thereof (see, to that effect, judgment of 1 October 2015, *Trijber and Harmsen*, C-340/14 and C-341/14, EU:C:2015:641, paragraph 49).

37 It is appropriate to observe, however, that a service such as that in the main proceedings is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey.

38 In a situation such as that with which the referring court is concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in the main

proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.

39 In that regard, it follows from the information before the Court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

40 That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as 'a service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123.

41 That classification is indeed confirmed by the case-law of the Court, according to which the concept of 'services in the field of transport' includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport (see, to that effect, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraphs 45 and 46, and Opinion 2/15 *(Free Trade Agreement with Singapore)* of 16 May 2017, EU:C:2017:376, paragraph 61).

42 Consequently, Directive 2000/31 does not apply to an intermediation service such as that at issue in the main proceedings.

43 Such service, in so far as it is classified as 'a service in the field of transport', does not come under Directive 2006/123 either, since this type of service is expressly excluded from the scope of the directive pursuant to Article 2(2)(d) thereof.

44 Moreover, since the intermediation service at issue in the main proceedings is to be classified as 'a service in the field of transport', it is covered not by Article 56 TFEU on the freedom to provide services in general but by Article 58(1) TFEU, a specific provision according to which 'freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport' (see, to that effect, judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 29 and the case-law cited).

45 Accordingly, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy (judgment of 22 December 2010, Y*ellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 30 and the case-law cited).

46 However, it should be noted that non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings, has not given rise to the adoption by the European Parliament and the Council of the European Union of common rules or other measures based on Article 91(1) TFEU.

47 It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.

48 Accordingly, the answer to the first and second questions is that Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

49 In the light of the answer given to the first and second questions, it is not necessary to provide an answer to the third and fourth questions, which were referred on the assumption that Directive 2006/123 or Directive 2000/31 applied.

Costs

50 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:

Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of Council of 20 July 1998, to which Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

[Signatures]

JUDGMENT OF THE COURT (First Chamber)

20 December 2017 (*) (i)

(Reference for a preliminary ruling — Information procedure in the field of technical rules and regulations — National legislation clarifying or introducing a prohibition on unauthorised offering of gaming, lotteries and betting and introducing a prohibition on unauthorised offering of advertising for gaming, lotteries and betting)

In Case C-255/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Københavns byret (Copenhagen District Court, Denmark), made by decision of 19 April 2016, received at the Court on 2 May 2016, in the criminal proceedings

Bent Falbert,

Poul Madsen,

JP/Politikens Hus A/S,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev, S. Rodin (Rapporteur) and E. Regan, Judges,

Advocate General : M. Bobek,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 May 2017,

after considering the observations submitted on behalf of:

– Messrs Madsen and Falbert and JP/Politikens Hus A/S, by S. MacMahon Baldwin and M. Dittmer, Advokater,

– the Danish Government, by M. Wolff and by N. Lyshøj, C. Thorning and J. Nymann-Lindegren, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and M. Figueiredo and by A. Silva Coelho and P. de Sousa Inês, acting as Agents,

– the Romanian Government, by L. Liţu and R.H. Radu, acting as Agents,

– the European Commission, by H. Tserepa-Lacombe, Y. Marinova and L. Grønfeldt and by U. Nielsen and G. Braga da Cruz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1), (2), (5) and (11) and Article 8(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998

L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34').

2 The request has been made in the context of criminal proceedings brought against Messrs Bent Falbert and Poul Madsen and also against JP/Politikens Hus A/S, who are being prosecuted for having published advertising for online gaming services offered without authorisation granted by the competent authority in the Danish newspaper *Ekstra Bladet* and on that newspaper's websites.

Legal context

European Union law

3 Article 1 of Directive 98/34 provides:

'For the purposes of this Directive, the following meanings shall apply:

(1) "product", any industrially manufactured product and any agricultural product, including fish products;

(2) "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present;

– "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

– "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

…

(5) "rule on services", requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

…

(11) “technical regulation”, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations include:

– laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,

…

– technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

…’

4 Article 8(1) of that directive provides that:

‘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.’

Danish law

5 Paragraph 10 of the lov om visse spil, lotterier og væddemål (Law on certain gaming, lotteries and betting) (‘the Law on gaming’), in the version thereof applicable to the main proceedings, as resulting from lov nr 204 om ændring af loven om visse spil, lotterier og andre love og om ophævelse af lov om væddemål i forbindelse med heste- og hundevæddeløb (Law No 204 amending the Law on certain gaming, lotteries and betting and other laws and repealing the Law on horse and dog race betting) of 26 March 2003 (‘the amending legislation’), is worded as follows:

‘1. A fine or imprisonment of up to six months shall be imposed on whoever, intentionally or through gross negligence,

(1) offers gaming, lotteries or betting in Denmark without holding a licence under Paragraph 1,

(2) brokers participation in gaming, lotteries or betting that is not covered by a licence under Paragraph 1.

…

3. A fine shall be imposed on whoever, intentionally or through gross negligence,

…

(3) advertises gaming, lotteries or betting, that is not covered by a licence under Paragraph 1.'

6 Under Paragraph 1(1) of the Law on gaming, the Minister for Taxation may issue a licence for gaming, lotteries and betting which, under Paragraph 2(1) thereof, may be granted to only one company.

7 The statement of reasons leading to the enactment of the amending legislation set out the objectives pursued by Paragraph 10(3)(3) of the Law on gaming as follows:

'It is proposed to prohibit advertising of those games, lotteries and betting, not authorised by law.

That amendment corresponds to the prohibition currently found in Paragraph 12(3) of the Law on horse race betting and adds clarification to Paragraph 10(4) of the Law on betting and lotteries.

That prohibition is aimed at protecting gaming operators licensed by the Danish authorities against competition from companies not having such a licence and who therefore cannot legally market or distribute gaming in Denmark.

Advertising for the purposes of the present law is to be understood as comprising all forms of announcement or communication of information on the activities and the commercial offering of gaming operators.

However, this prohibition shall not apply to editorial references in printed or digital media.

This prohibition applies irrespective of the media used. Advertising shall therefore be prohibited in printed media, on the radio, on television and on digital media, in the form of advertising banners, for example.

Advertising for the activities of gaming operators, including their websites, addresses, etc., shall also be prohibited under Paragraph 10(3)(3).'

The main proceedings and the question referred for a preliminary ruling

8 Messrs Falbert and Madsen are, respectively, the former and current chief editor of the Danish newspaper *Ekstra Bladet*, the owner of which is JP/Politikens Hus.

9 The defendants in the main proceedings are being prosecuted in criminal proceedings before the referring court for offences under, inter alia, Paragraph 10(3)(3) of the Law on gaming, due to their having published advertisements in the newspaper *Ekstra Bladet* and on that newspaper's websites, such as 'www.ekstrabladet.dk' and 'www.ekstrabladet.tv', for bookmaking firms offering gaming and betting in Denmark, without those firms having been issued a licence.

10 The referring court is uncertain as to whether the amending legislation should be categorised as a 'technical regulation' within the meaning of Directive 98/34 and therefore ought to have been notified to the Commission under Article 8(1) thereof.

11 That court states that it is necessary in particular to determine whether, as maintained by the defendants in the main proceedings before it, the amending legislation should be held to be a 'rule on services' within the meaning of Article 1(5) of Directive 98/34, inasmuch as it is specifically aimed at information society services.

12 That court observes in that regard that, prior to the entry into force of the amending legislation, only the offering of gaming in Denmark by non-Danish operators through physical distribution channels was prohibited, and that the purpose and aim of that legislation, as is apparent from the relevant *travaux préparatoires*, was to extend the prohibition to cover non-Danish operators offering gaming in Denmark over the Internet.

13 As the amending legislation was aimed at extending the pre-existing prohibition to new services, such as online gaming, the referring court takes the view that the law does not concern, in a merely 'implicit or incidental' manner, offers of online gaming and the associated advertising. On the contrary, it is legislation governing access to new information society services in respect of which Directive 98/34 requires notification to the Commission, as is evident from the relevant *travaux préparatoires*. It is of no import in that regard that under the amending legislation the distribution of gaming, whether online or offline, was prohibited.

14 In those circumstances, the Københavns byret (District Court, Copenhagen, Denmark) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does this case involve a rule that must be notified under Article 8(1), cf. Article 1(2), (5), and (11) of [Directive 98/34], assuming the following:

(a) amending legislation is to be introduced amending the Law on certain gaming, lotteries and betting (lov om visse spil, lotterier og væddemål), under which a provision is to be introduced on sentencing inter alia for whoever intentionally or through gross negligence "offers gaming, lotteries or betting in Denmark without holding a licence pursuant to Paragraph 1", and for whoever intentionally or through gross negligence "advertises gaming, lotteries or betting not covered by a licence under Paragraph 1",

and

(b) the remarks on the draft amending legislation indicate that the purpose of the abovementioned sentencing provisions is to clarify or introduce a prohibition on gaming offered online by gaming companies outside Denmark and directly targeting the Danish market, partly by prohibiting advertising for, inter alia, gaming offered online by gaming companies outside Denmark, inasmuch as the same remarks it is stated that there is no doubt that, under the rules prevailing before the amendments, gaming measures are unlawful if a gaming company outside Denmark makes use of sales channels in which the gaming device is actually physically sold within the borders of Denmark; there is, however, greater doubt as to whether gaming from outside Denmark aimed at gaming participants in Denmark but actually physically situated outside Denmark is also covered by the provision; and it is therefore necessary to have clarified whether those forms of gaming are covered. It is further

apparent from the remarks that it is suggested to introduce an advertising ban on gaming, lotteries and betting which are not licensed under that law, and that the amendment complies with the current prohibition in Paragraph 12(3) of the Law on horserace betting (hestevæddeløbsloven) but is a clarification of Paragraph 10(4) of the [now repealed] Law on betting and lotteries (Tips- og lottoloven). The remarks further state that the purpose of the prohibition is to protect gaming providers holding a licence from the Danish authorities against competition from companies that do not hold such a licence and who therefore cannot lawfully offer or broker gaming in Denmark.'

Consideration of the question referred

15 By its question referred, the referring court seeks guidance on whether Article 1 of Directive 98/34 must be interpreted as meaning that a technical regulation within the meaning of that provision, which is subject to the notification obligation under Article 8(1) of that directive, includes a national provision such as that at issue in the main proceedings, which provides for sanctions where a person offers gaming, lotteries or betting in Denmark without authorisation, and also in the case of advertising for unlicensed gaming, lotteries or betting.

16 It should be remembered in that regard that, according to settled case-law, national provisions that merely lay down the conditions governing the establishment or provisions of services by undertakings, such as provisions making the exercise of a business activity subject to prior authorisation do not constitute technical regulations within the meaning of Article 1(11) of Directive 98/34 (see, to that effect, inter alia, judgments of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 76, and 1 February 2017, *Município de Palmela*, C-144/16, EU:C:2017:76, paragraph 26).

17 In the present case, the view expressed by the Advocate General in points 31 and 32 of his Opinion, to the effect that a national provision such as Paragraph 10(1), point 1, of the Law on gaming, inasmuch as it provides for sanctions for the marketing of games of chance without prior authorisation, must be held to be a 'provision making the exercise of a business activity subject to prior authorisation' as interpreted in the case-law referred to in the preceding paragraph.

18 Consequently, such a provision does not come within the definition of 'technical regulation' as referred to in Article 1 of Directive 98/34.

19 As to the question whether Paragraph 10(3)(3) of the Law on gaming, which provides for sanctions for the advertising of services for unauthorised games of chance, constitutes a 'technical regulation' within the meaning of Article 1 of Directive 98/34, subject to the notification obligation under Article 8(1) of that directive, it should be noted first of all that although there is a close connection between Paragraph 10(1) point 1, of the Law on gaming, providing for sanctions for the marketing of games of chance without prior authorisation, and Paragraph 10(3)(3) of the Law on gaming, providing for sanctions for activities marketing unauthorised games of chance, it does not automatically follow that the latter provision must be held to be a provision making the exercise of a business activity subject to prior authorisation as interpreted in the case-law referred to in paragraph 16 of this judgment. Although there is a close connection between such provisions, they differ in function and scope (see, to that effect, judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 28).

20 Next, it should be noted that there is nothing in the file submitted to the Court indicating whether the amending legislation, by which Paragraph 10(3)(3) of the Law on gaming was introduced, providing for sanctions for services relating to unauthorised games of chance, introduced an amendment to earlier rules on gaming, inter alia by extending their scope to cover online gaming offered by non-Danish gaming operators or whether that law instead merely refined or clarified those earlier rules.

21 It should be noted in that regard, firstly, that the question whether the prohibition on advertising of unauthorised games, as provided for in Paragraph 10(3)(3) of the Law on gaming, in particular with regards to online games of chance offered by non-Danish gaming operators, was already provided for by the earlier rules on gaming, with the result that the question whether the amending legislation merely clarified that prohibition or whether instead the prohibition was introduced in the Law on gaming by the amending legislation, is a question of national law falling within the jurisdiction of the referring court (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 83).

22 Secondly, it should be remembered that it is only if the amending legislation introduced the prohibition on advertising unauthorised gaming into Paragraph 10(3)(3) of the Law on gaming, in particular with regards to online games of chance offered by non-Danish gaming operators, that the draft legislation that led to the enactment of the amending legislation ought to have been subject to the notification obligation under Article 8(1) of Directive 98/34.

23 In order for new national legislation to be held to be a technical regulation having to be notified under Directive 98/34, it must not be limited to reproducing or replacing, without adding technical specifications or other new or additional requirements, existing technical regulations which have been duly notified to the Commission (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 85).

24 If the amending legislation did introduce a prohibition on advertising of unauthorised gaming into Paragraph 10(3)(3) of the Law on gaming, inter alia by extending its scope to cover online gaming offered by non-Danish operators, it becomes necessary to consider whether that provision constitutes a 'technical regulation' within the meaning of Directive 98/34.

25 It must be noted in that context that the concept of a 'technical regulation' extends to four categories of measures, namely, (i) the 'technical specification', within the meaning of Article 1(3) of Directive 98/34; (ii) 'other requirements', as defined in Article 1(4) of that directive; (iii) the 'rule on services', covered in Article 1(5) of that directive; and (iv) the 'laws, regulations or administrative provisions of Member States prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider', under Article 1(11) of that directive (judgments of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 70, and 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 18).

26 In the present case, it must be considered firstly whether Paragraph 10(3)(3) of the Law on gaming may be held to be a 'technical regulation' coming under the category of 'rules on services' within the meaning of Article 1(5) of Directive 98/34.

27 It should be borne in mind that, under Article 1(2) of that directive, the concept of a 'technical regulation' covers solely regulations relating to information society services, that is, any service provided at a distance by electronic means and at the individual request of

a recipient of services (see judgments of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 21, and 1 February 2017, *Município de Palmela*, C-144/16, EU:C:2017:76, paragraph 28).

28 It should be noted in that regard that, in principle, Paragraph 10(3)(3) of the Law on gaming concerns two types of services being, on the one hand, advertising services, which are immediately sanctioned under that provision and, on the other, gaming services covered by the prohibition on advertising and which are the principal subject-matter of the Law on gaming, read as a whole.

29 Both advertising services and gaming services, in so far as they are provided, inter alia, by electronic means (online), constitute 'Information Society services' within the meaning of Article 1(2) of Directive 98/34 and the rules relating thereto which may accordingly be held to be 'rules on services' within the meaning of Article 1(5) of Directive 98/34.

30 It should also be noted, however, that, in order to be categorised as a 'rule on services', the definition in Article 1(5) of Directive 98/34 requires that rule to be 'specifically' aimed at Information Society services.

31 In the present case, it is apparent from the order for reference that the referring court is seeking guidance as to whether Paragraph 10(3)(3) of the Law on gaming may be regarded as being 'specifically' aimed at information society services when, inter alia, the wording of that provision does not refer explicitly to information society services and does not draw any distinction between services provided offline and services provided online. That court adds, however, that the *travaux préparatoires* for the amending legislation appear to indicate that the law was aimed, inter alia, at extending that provision to cover online services.

32 It should be noted in that regard, firstly, that under the first indent of Article 1(5) of Directive 98/34, the question whether a rule is aimed specifically at information society services must be determined in the light of both the stated reasons and the wording of the rule. Under that same provision, moreover, it is not required that 'the specific aim and object' of all of the rule in question be to regulate information society services, as it is sufficient that the rule pursue that aim or object in certain of its provisions.

33 Consequently, if it is not apparent solely from the wording of a national rule that it is aimed, at least in part, at regulating specifically information society services – such as in the present case, where the wording does not draw any distinction between services provided offline and services provided online – that object may nevertheless be gleaned quite readily from the stated reasons given for the rule – again as in the present case under the relevant national rules of interpretation, which allow for inter alia the *travaux préparatoires* for the rule to provide guidance.

34 Secondly, as observed by the Advocate General in point 63 of his Opinion, it is apparent from recitals 7 and 8 of Directive 98/48, by which Directive 98/34 was amended, that the object was to adapt existing national legislation to take account of new information society services and avoid restrictions on the freedom to provide services and freedom of establishment leading to 'refragmentation of the internal market'.

35 It would, however, run counter to that objective to exclude a rule, in respect of which the *travaux préparatoires* stated clearly that its aim and object were to extend an existing rule in order to cover information society services, from classification as a rule aimed specifically at such services within the meaning of Article 1(5) of Directive 98/34 on the sole

ground that the operative part of that rule makes no express reference to those services but instead covers them through a broader definition of services covering both services provided online and services provided offline.

36 It follows that a national provision such as Paragraph 10(3)(3) of the Law on gaming constitutes a technical regulation that must be notified to the Commission before being enacted, as it is clear from the *travaux préparatoires* for that provision that its aim and object was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.

37 In the light of all the foregoing considerations, the answer to the question referred is that Article 1 of Directive 98/34 must be interpreted as meaning that a national provision such as that at issue in the main proceedings, which provides for criminal sanctions where an unauthorised offer is made of gaming, lotteries or betting on the national territory, does not constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive. However, a national provision such as that at issue in the main proceedings, which provides for sanctions in the event of advertising for unauthorised gaming, lotteries or betting, does constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive, as it is clear from the *travaux préparatoires* for that provision of national law that its object and purpose was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.

Costs

38 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 (First Chamber) hereby rules:

Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a national provision such as that at issue in the main proceedings, which provides for criminal sanctions where an unauthorised offer is made of gaming, lotteries or betting on the national territory, does not constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive. However, a national provision such as that at issue in the main proceedings, which provides for sanctions in the event of advertising for unauthorised gaming, lotteries or betting, does constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive, as it is clear from the *travaux préparatoires* **for that provision of national law that its object and purpose was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.**

[Signatures]

ORDER OF THE COURT (Tenth Chamber)

7 February 2018 (*)

(References for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Social policy — Equal treatment of men and women in matters of employment and occupation — Directive 2006/54/EC — National rules providing for the temporary possibility for performing artists having reached retirement age to continue to perform until the age previously laid down for entitlement to a pension, fixed at 47 years old for women and 52 years old for men)

In Joined Cases C-142/17 and C-143/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Court of Cassation, Italy), made by decisions of 15 February 2017, received at the Court on 20 March 2017, in the proceedings

Manuela Maturi,

Laura Di Segni,

Isabella Lo Balbo,

Maria Badini,

Loredana Barbanera

v

Fondazione Teatro dell'Opera di Roma,

and

Fondazione Teatro dell'Opera di Roma

v

Manuela Maturi,

Laura Di Segni,

Isabella Lo Balbo,

Maria Badini,

Loredana Barbanera,

Luca Troiano,

Mauro Murri (**C-142/17),**

and

Catia Passeri

v

Fondazione Teatro dell'Opera di Roma (**C-143/17),**

THE COURT,

composed of E. Levits, President of the Chamber, A. Borg Barthet and M. Berger (Rapporteur), Judges,

Advocate General: J. Kokott,

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 These requests for a preliminary ruling concern the interpretation of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23) and Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings between, inter alia, several workers employed as dancers in the Fondazione Teatro dell'Opera di Roma ('the Foundation') concerning their dismissal on the ground that they had reached the working age limit.

Legal context

European Union law

3 Article 1 of Directive 2006/54, entitled 'Purpose', provides:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

4 Article 2 of that directive, entitled 'Definitions', is worded as follows:

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

(a) 'direct discrimination': where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

...'

5 Article 3 of Directive 2006/54, headed 'Positive action', provides:

'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.'

6 Article 14(1)(c) of Directive 2006/54 reads as follows:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty.'

Italian law

7 According to Italian law, a worker who has reached retirement age may be dismissed 'ad nutum' by his employer, that is without his employer being required to give reasons for that dismissal.

8 According to the referring court, the retirement age for workers in the performing arts sector, in the category for dancers, was 47 years old for women and 52 years old for men. It explains that Article 3(7) of Decree-Law No 64 of 30 April 2010, converted into Law No 100, of 29 June 2010, in the version in force at the material time ('Decree-Law No 64/2010'), changed those age limits for workers of both sexes, setting a common working age limit at 45 years old.

9 That provision also introduced a transitional option for the benefit of those workers, applicable for a period of two years from the date of its entry into force, pursuant to which they could continue to work beyond the common age limit. Therefore, workers employed on permanent contracts having reached or passed the newly adopted retirement age could continue to work until the retirement age previously in force, that is 47 years old for women and 52 years old for men, by exercising that option, renewable annually, within two months of the date of entry into force of that provision or within three months before they reached the qualifying age for a retirement pension.

The disputes in the main proceedings and the question referred for a preliminary ruling

10 As a preliminary point, it should be noted that the disputes in the main proceedings are between workers employed as female and male dancers and the Foundation, their employer. However, as is clear from the orders for reference, and as confirmed by the referring court following a request for clarification from the Court of Justice, the situation of the male workers is irrelevant to the question referred in the present requests for a preliminary ruling. Therefore, in this case, it is appropriate to consider only the situation of the female workers concerned.

11 The latter were employed by the Foundation until 31 March 2014, the date on which they were dismissed on the ground that they had reached the age limit for retirement. The termination of their contracts of employment is based on Article 3(7) of Decree-Law No 64/2010.

12 They brought an action before the Tribunale di Roma (District Court, Rome, Italy) seeking the annulment of their dismissals, re-instatement into their positions and an order for compensation from their employer for the loss caused. They take the view that their dismissals were unlawful, on the ground that they had exercised the option enabling them to continue their employment, laid down in Article 3(7) of Decree-Law No 64/2010, which was renewable annually at least three months before the legal working age limit was reached.

13 The court hearing the case upheld the action.

14 Following an appeal brought by the Foundation, the Corte d'appello di Roma (Court of Appeal, Rome) dismissed the claims of the workers in the main proceedings. That court held that Article 3(7) of Decree-Law No 64/2010 did not infringe EU law on the ground that, while it lowered the age for retirement to 45 years old, that provision granted employees having reached that age before the entry in to force of that provision, or during the period between 1 July 2010 and 1 July 2012, the right to benefit from the age limit laid down by the previous national rules, that is 47 years old for women and 52 years old for men.

15 According to the Corte d'appello di Roma (Court of Appeal, Rome), the national legislature intended to introduce graduated access to the new working age limit for workers who, close to that new retirement age, were exposed to sudden restrictive change to the previous rules. Therefore, according to that court, there is no incompatibility between the law at issue and the principles of EU law, having regard also to the transitional nature of the provision and the narrow range of beneficiaries.

16 The workers concerned in the main proceedings brought an appeal against that judgment before the Corte suprema di cassazione (Court of Cassation, Italy) relying, inter alia, on the incompatibility of Article 3(7) of Decree-Law No 64/2010 with Article 157 TFEU, Article 21 of the Charter and Directive 2006/54.

17 The Foundation also brought an appeal before the referring court against the judgment of the Corte d'appello di Roma (Court of Appeal, Rome) of 14 October 2015.

18 Stating that the outcome of the dispute in the main proceedings depends on the interpretation to be adopted of the concept of 'non-discrimination on the grounds of sex' laid down in Directive 2006/54 and Article 21 of the Charter, the referring court asks whether Article 3(7) of Decree-Law No 64/2010 is compatible with the provisions of EU law relied on by the applicants.

19 In those circumstances the Corte suprema di cassazione (Court of Cassation decided to stay the proceedings in both cases and to refer the following questions to the Court for a preliminary ruling:

'Is the national legislation referred to in Article 3(7) of [Decree-Law No 64/2010], according to which "for workers in the performing arts belonging to the category of dancers, the retirement age is fixed for men and women at the forty-fifth year of chronological age, with the use, for workers to whom the contributory or mixed system applies in full, of the transformation coefficient referred to in Article 1(6) of the Law of 8 August 1995, No 335, relative to the higher age. For the two years following the date of entry into force of this provision, the workers referred to in this paragraph employed on contracts of indefinite duration, who have reached or passed the retirement age, are afforded the option, renewable annually, of remaining in service. This option must be exercised through a formal application to be presented to the ente nazionale di previdenza e assistenza per i lavoratori dello spettacolo (ENPALS) (National Welfare and Assistance Office for Workers in the Entertainment Business) within two months of the date of entry into force of this provision, or at least three months before the qualifying age for a retirement pension is reached, without prejudice to the maximum retirement age of 47 years for women and 52 for men", contrary to the principle of non-discrimination on grounds of sex, as laid down in Directive 2006/54 and in the Charter (Article 21)?'

20 By order of the President of the Court of 27 April 2017, Cases C-142/17 and C-143/17 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the question referred

21 Pursuant to Article 99 of the Rules of Procedure of the Court of Justice, where the answer 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, give its decision by reasoned order.

22 That provision must be applied in the present cases.

23 By its question, the referring court asks essentially whether Article 14(1)(c) of Directive 2006/54 must be interpreted as meaning that it prohibits national rules, such as that laid down in Article 3(7) of Decree-Law No 64/2010, pursuant to which workers employed as dancers having reached the retirement age fixed by that regulation at 45 years for both women and men, have the possibility, for a transitional period of two years, to continue to work up to the working age limit laid down by the previous legislation, fixed at 47 years old for women and 52 years old for men.

24 As a preliminary point, it should be noted that the Court has held that the question of the conditions for payment of a retirement pension and the conditions governing termination of employment are separate issues (see, in particular, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 24).

25 As regards the latter, Article 14(1)(c) of Directive 2006/54 provides that application of the principle of equal treatment in relation to dismissals means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies.

26 In that connection, the definition of 'dismissal' within the meaning of that provision, a term which must be given a wide meaning, covers the termination of the employment relationship on the ground that the worker has reached the working age limit laid down by national law, pursuant to an employer's general policy concerning retirement, even if it involves the grant of a retirement pension (see, to that effect, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 26).

27 It follows that a case, such as those at issue in the main proceedings, in which the workers concerned have, in accordance with the national rules, been automatically retired by their employer on the ground that they have reached the working age, concerns the conditions for dismissals within the meaning of Article 14(1)(c) of Directive 2006/54 (see, to that effect, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 27).

28 The Court has already held, as regards Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), which was repealed by Directive 2006/54, that a general policy concerning dismissal involving the dismissal of a female employee solely because she has attained or passed the qualifying age for a retirement pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to Directive 76/207 (judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 28).

29 Such an interpretation is also applicable to national rules, such as that in Article 3(7) of Decree-Law No 64/2010, which provides that workers who have reached the working age limit may, for a transitional period, exercise an option enabling them to continue to work if the age at which the employment contract ends definitively differs according to whether the worker concerned is a man or a woman.

30 In that connection, it should be noted, first, that under Article 2(1)(a) of Directive 2006/54, direct discrimination occurs where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

31 In the present case, it is clear from Article 3(7) of Decree-Law No 64/2010 that, for a period of two years which started to run from the date of entry into force of that provision, dancers employed on permanent contracts having reached or passed the new retirement age were given the option to continue working, renewable annually, within two months from the date of entry into force of that provision or at least three months before they reached the qualifying age for a retirement pension, up to the age limit for retirement previously in force, that is 47 years old for women and 52 years old for men.

32 It is clear from that provision that the conditions for exercising the option at issue depend on the sex of the workers.

33 Second, it must be examined whether, in a context such as that governed by those provisions, female workers of 45 years of age are in a comparable situation to that of male workers in the same age bracket within the meaning of Article 2(1)(a) of Directive 2006/54.

34 The elements which characterise various situations, and hence their comparability, must be determined and assessed, in particular, in the light of the subject matter of the provisions in question and of the aim they pursue, whilst account must be taken for that purpose of the principles and objectives of the field to which the measure at issue relates (see, in particular, judgment of 26 October 2017, *BB construct*, C-534/16, EU:C:2017:820, paragraph 43 and the case-law cited).

35 In the cases in the main proceedings, the rules establishing a difference in treatment are intended to govern the conditions under which the employment relationship of the workers concerned is terminated.

36 In that context, no factors capable of conferring specific characteristics on the situation of female workers as compared with those of male workers can be identified. Therefore, the female workers concerned are not in a comparable situation within the meaning of Article 2(1)(a) of Directive 2006/54 to that or male workers of the same age as regards the conditions for terminating the employment relationship. As a consequence, such a provision establishes a difference of treatment directly based on grounds of sex.

37 In those circumstances, given that a difference in treatment directly based on grounds of sex, such as that established by the national rules at issue in the main proceedings, constitutes direct discrimination on grounds of sex within the meaning of Article 2(1)(a) of Directive 2006/54 (judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 42).

38 In that connection, it must be recalled that Directive 2006/54 draws a distinction between discrimination directly on grounds of sex and 'indirect' discrimination inasmuch as the former cannot be justified by a legitimate aim. By contrast, pursuant to Article 2(1)(b) of that directive, provisions, criteria or practices liable to constitute indirect discrimination can avoid being classified as discriminatory if they are 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary' (judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 41).

39 Therefore, a difference of treatment, such as that at issue in the main proceedings, cannot be justified by the wish to avoid exposing the workers concerned to a sudden change, in a restrictive sense, from the preceding rules on continuation of employment.

40 Therefore, the answer to the question referred is that Article 14(1)(c) of Directive 2006/54 must be interpreted as meaning that national rules, such as those laid down in Article 3(7) of Decree-Law No 64/2010, pursuant to which workers employed as dancers having reached the retirement age laid down by those rules of 45 years old for both women and men, have the option for a transitional period of two years to continue to work up to the working age limit laid down by the previous rules, set at 47 years old for women and 52 years old for men, establishes direct discrimination based on sex which is prohibited by that directive.

Costs

41 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 (Tenth Chamber) hereby rules:

Article 14(1)(c) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as meaning that national rules, such as those laid down in Article 3(7) of Decree-Law No 64 of 30 April 2010, converted into Law No 100, of 29 June 2010, in the version in force at the material time, pursuant to which workers employed as dancers having reached the retirement age laid down by those rules of 45 years old for both women and men, have the option for a transitional period of two years to continue to work until the working age limit laid down by the previous rules, set at 47 years old for women and 52 years old for men, establishes direct discrimination based on sex which is prohibited by that directive

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

10 April 2018 (*)

(Reference for a preliminary ruling — Services in the field of transport — Directive 2006/123/EC — Services in the internal market — Directive 98/34/EC — Information society services — Rule on information society services — Definition — Intermediation service making it possible, by means of a smartphone application and for remuneration, to put non-professional drivers using their own vehicle in contact with persons who wish to make urban journeys — Criminal penalties)

In Case C-320/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de grande instance de Lille (Regional Court, Lille, France), made by decision of 17 March 2016, received at the Court on 6 June 2016, in the criminal proceedings against

Uber France SAS,

the other party to the proceedings being:

Nabil Bensalem,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, A. Rosas, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby (Rapporteur), K. Jürimäe, C. Lycourgos and M. Vilaras, Judges,

Advocate General: M. Szpunar,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2017,

after considering the observations submitted on behalf of

– Uber France SAS, by Y. Chevalier, Y. Boubacir and H. Calvet, avocats,

– Mr Bensalem, by T. Ismi-Nedjadi, avocat,

– the French Government, by D. Colas and R. Coesme, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Netherlands Government, by H. Stergiou and M. Bulterman, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by H. Tserepa-Lacombe, J. Hottiaux, Y.G. Marinova, G. Braga da Cruz and F. Wilman, acting as Agents,

– the EFTA Surveillance Authority, by C. Zatschler, Ø. Bø, M.L. Hakkebo and C. Perrin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1 and Article 8(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), and of Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings before a criminal court in a private prosecution and civil action brought against Uber France SAS, in relation to the illegal organisation of a system for putting non-professional drivers using their own vehicle in contact with persons who wish to make urban journeys.

Legal context

EU law

Directive 98/34

3 According to Article 1(2), (5), (11) and (12) of Directive 98/34:

'For the purposes of this Directive, the following meanings shall apply:

…

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

   For the purposes of this definition:

   – "at a distance" means that the service is provided without the parties being simultaneously present,

   – "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

   – "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

   An indicative list of services not covered by this definition is set out in Annex V.

…

5. "rule on services", requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

   …

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

…

11. "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 or prohibiting the provision or use of a service, or establishment as a service provider.

…

12. "draft technical regulation", the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.'

4 The first subparagraph of Article 8(1) of that directive 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.'

5 In accordance with Articles 10 and 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015.

Directive 2006/123

6 According to recital 21 of Directive 2006/123, 'transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive'.

7 Article 2(2)(d) of Directive 2006/123 provides that the directive does not apply to services in the field of transport, including port services, falling within the scope of Title V of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

French law

8 Loi n° 2014-1104 du 1er octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur (Law No 2014-1104 of 1 October 2014 on taxis and private hire vehicles) (*JORF* of 2 October 2014, p. 15938) inserted Article L. 3124-13 into the code des transports (Transport Code). That article is worded as follows:

'The organisation of a system for putting customers in contact with persons carrying on the activities mentioned in Article L.3120-1 [namely, the carriage of persons by road for remuneration using vehicles with fewer than 10 seats, with the exception of collective public transport and private carriage of persons by road] where such persons are neither road transport undertakings entitled to provide occasional services as mentioned in Chapter II of Title 1 of this book nor taxi drivers, or two or three-wheeled motorised vehicles or private hire vehicles within the meaning of this title shall be punishable by a two-year term of imprisonment and a fine of EUR 300 000.

Legal persons who incur criminal liability for the offence laid down in this article incur, in addition to a fine in accordance with Article 131-38 of the Criminal Code, the penalties laid down in paragraphs 2 to 9 of Article 131-39 of the Criminal Code. The prohibition referred to in paragraph 2 of Article 131-39 of the Criminal Code extends to the activity in the exercise of which or at the time of the exercise of which the offence was committed. The penalties laid down in paragraphs 2 to 7 of Article 131-39 of the Criminal Code may not exceed five years in duration.'

9 Paragraphs 2 to 9 of Article 131-19 provide:

'Where a statute so provides against a legal person, a crime or offence may be punished by one or more of the following penalties:

…

(2) prohibition, either permanently or for a maximum period of five years, of the direct or indirect exercise of one or more professional or social activities;

(3) placement, for a maximum period of five years, under judicial supervision;

(4) closure, either permanently or for a maximum period of five years, of the establishments or of one or more of the establishments of the undertaking used to commit the offences;

(5) disqualification, either permanently or for a maximum period of five years, from public tendering;

(6) prohibition, either permanently or for a maximum period of five years, of the public offering of shares or of allowing shares to be traded on a regulated market;

(7) prohibition, for a maximum period of five years, of the issuing of cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, or of the use of payment cards.

(8) confiscation of property, under the conditions laid down in Article 131-21;

(9) posting of a public notice of the decision or dissemination of that decision in the press or through any form of communication to the public by electronic means.'

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

10 Uber France provides, by means of a smartphone application, a service called 'UberPop', through which it puts non-professional drivers using their own vehicle in contact with persons who wish to make urban journeys. In the context of the service provided by means of that application, that company, as established by the tribunal de grande instance de Lille (Regional Court, Lille, France) in the order for reference, fixes the rates, collects the fare for each journey from the customer before paying part of it to the non-professional driver of the vehicle, and prepares the invoices.

11 Uber France is a defendant before that court in a private prosecution and civil action brought by Mr Nabil Bensalem in relation to (i) misleading commercial practices from 2 February 2014 and 10 June 2014 onwards, (ii) the aiding and abetting of the unlawful exercise of the profession of taxi driver from 10 June 2014 onwards, and (iii) the unlawful organisation from 1 October 2014 onwards of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats.

12 By judgment of 17 March 2016, the tribunal de grande instance de Lille (Regional Court, Lille) found Uber France guilty of misleading commercial practices and not guilty of the offence of aiding and abetting the unlawful exercise of the profession of taxi driver.

13 As regards the offence of the unlawful organisation of a system for putting customers in contact with non-professional drivers, an offence under Article L. 3124-13 of the code des transports (Transport Code), that court was uncertain as to whether that provision should be regarded as establishing a 'rule on Information Society services' within the meaning of Article 1(5) of Directive 98/34, the non-notification of which in accordance with Article 8(1) of that directive means that it is unenforceable against individuals, or as a rule on 'services in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123.

14 In those circumstances, the tribunal de grande instance de Lille (Regional Court, Lille) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article L. 3124-13 of the Transport Code, inserted by Law No 2014-1104 of 1 October 2014 on taxis and private hire vehicles, constitute a new technical regulation that is not implicit and that relates to one or more information society services, within the meaning of [Directive 98/34], such that, pursuant to Article 8 of that directive, it had to be notified in advance to the European Commission, or does it fall within the scope of [Directive 2006/123], Article 2[(2)](d) of which excludes transport?

In the event that that question is answered in the affirmative, does a failure to satisfy the notification requirement laid down in Article 8 of [Directive 98/34] mean that Article L. 3124-13 of the Transport Code is unenforceable against individuals?'

Consideration of the question referred

15 By the first part of its question, the referring court asks, in essence, whether Article 1 of Directive 98/34 and Article 2(2)(d) of Directive 2006/123 must be interpreted as meaning that a provision of national law that lays down criminal penalties for the organisation of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorised to do so, must be classified as a rule on information society services, subject to the obligation of prior notification to the Commission as provided for in the first subparagraph of Article 8(1) of

Directive 98/34 or that, on the contrary, such a provision concerns a service in the field of transport, excluded from the scope of Directive 98/34 and from that of Directive 2006/123.

16 As a preliminary point, it must be noted that the legislation at issue in the main proceedings makes the organisation of a system putting customers in contact with persons carrying passengers by road without authorisation subject to criminal penalties such as imprisonment, a fine, the prohibition on exercising a social or professional activity, the closure of the undertaking's establishment and the confiscation of property.

17 In the case in the main proceedings, the service in question consists in putting, by means of a smartphone application and for remuneration, non-professional drivers in contact with persons who wish to make urban journeys, and in the context of which, as stated in paragraph 10 of the present judgment, the provider of that service fixes the rates, collects the fare for each journey from the customer before paying part of it to the non-professional driver of the vehicle, and prepares the invoices.

18 Having been requested to deliver a preliminary ruling in the context of civil litigation, the Court explained in its judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981), the legal classification of such a service in the light of EU law.

19 Thus, the Court first took the view that an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his own vehicle meets, in principle, the criteria for classification as an 'information society service' within the meaning of Article 1(2) of Directive 98/34 (judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 35).

20 However, the Court noted that the intermediation service at issue in the case giving rise to that judgment was more than an intermediation service consisting of putting, by means of a smartphone application, non-professional drivers using their own vehicles in contact with persons who wish to make an urban journey (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 37).

21 In that regard, the Court found that the intermediation service provided by the company concerned was inherently linked to the offer by that company of non-public urban transport services, in view of the fact that, in the first place, that company provided an application without which those drivers would not have been led to provide transport services, and the persons who wished to make an urban journey would not have used the services provided by those drivers and, in the second place, that company exercised decisive influence over the conditions under which services were provided by those drivers, inter alia by determining the maximum fare, by collecting that fare from the customer before paying part of it to the non-professional driver of the vehicle, and by exercising a certain control over the quality of the vehicles, the drivers and their conduct, which could, in some circumstances, result in their exclusion (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraphs 38 and 39).

22 The Court found, on the basis of those factors, that the intermediation service at issue in that case had to be regarded as forming an integral part of an overall service the main component of which was a transport service and, accordingly, had to be classified, not as

an ‘information society service’ within the meaning of Article 1(2) of Directive 98/34, but as a ‘service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123 (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 40).

23 The Court inferred from that finding, in particular, that that intermediation service did not come under Directive 2006/123, since services in the field of transport are among those expressly excluded from the scope of that directive pursuant to Article 2(2)(d) thereof (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 43).

24 The same holds true, for the same reasons, with regard to the intermediation service at issue in the main proceedings, as the information available to the Court shows that that service is not essentially different from the service described in paragraph 21 of the present judgment, that, however, being a matter for the referring court to verify.

25 Accordingly, subject to that verification, legislation such as that in the main proceedings, relied on in criminal proceedings against the company providing that intermediation service, cannot come within the scope of Directive 2006/123.

26 It follows that that legislation cannot be classified as a rule on information society services within the meaning of Article 1 of Directive 98/34, and is not therefore subject to the obligation of prior notification to the Commission provided for in the first subparagraph of Article 8(1) of that directive.

27 In the light of the foregoing considerations, the answer to the first part of the question referred is that Article 1 of Directive 98/34 and Article 2(2)(d) of Directive 2006/123 must be interpreted as meaning that a provision of national law that lays down criminal penalties for the organisation of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorised to do so, concerns a ‘service in the field of transport’ in so far as it applies to an intermediation service that is provided by means of a smartphone application and forms an integral part of an overall service the principal element of which is the transport service. Such a service is excluded from the scope of application of those directives.

28 Having regard to the answer to the first part of the question, there is no need to answer the second part, concerning the question of whether such a provision of national law should, inasmuch as it applies to a service such as that at issue in the main proceedings, have been notified in accordance with the first subparagraph of Article 8(1) of Directive 98/34.

Costs

29 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:

Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, and Article 2(2)(d) of

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that a provision of national law that lays down criminal penalties for the organisation of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorised to do so, concerns a 'service in the field of transport' in so far as it applies to an intermediation service that is provided by means of a smartphone application and forms an integral part of an overall service the principal element of which is the transport service. Such a service is excluded from the scope of application of those directives.

[Signatures]

JUDGMENT OF THE COURT (Fifth Chamber)

12 April 2018 (*)

(Failure of a Member State to fulfil obligations — Regulation (EC) No 1072/2009 — Article 2(6) — Article 8 — Cabotage operations — Definition — Definition contained in a 'Questions and answers' document drawn up by the European Commission — Legal force — National implementing measures limiting the number of loading points and unloading points which may be part of the same cabotage operation — Discretion — Restriction — Proportionality)

In Case C-541/16,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 25 October 2016,

European Commission, represented by J. Hottiaux, L. Grønfeldt and U. Nielsen, acting as Agents,

applicant,

v

Kingdom of Denmark, represented initially by C. Thorning then by J. Nymann-Lindegren and M. Sønndahl Wolff, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 11 October 2017,

after hearing the Opinion of the Advocate General at the sitting on 23 November 2017,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration that the Kingdom of Denmark has failed to fulfil its obligations under Article 2(6) and Article 8 of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72).

Legal context

European Union law

Regulation No 1072/2009

2 The objective of Regulation No 1072/2009 is the establishment of a common transport policy, inter alia, by laying down common rules applicable to access to the market in the international carriage of goods by road within the territory of the European Union, as well as laying down the conditions under which non-resident hauliers may operate transport

services within a Member State. That regulation lays down the principle that international carriage is to be carried out subject to possession of a Community licence. That licence may be issued to any haulier carrying goods by road for hire or reward.

3 Recitals 4 to 6, 13 and 15 of Regulation No 1072/2009 state:

'(4) The establishment of a common transport policy implies the removal of all restrictions against the person providing transport services on the grounds of nationality or the fact that he is established in a different Member State from the one in which the services are to be provided.

(5) In order to achieve this smoothly and flexibly, provision should be made for a transitional cabotage regime as long as harmonisation of the road haulage market has not yet been completed.

(6) The gradual completion of the single European market should lead to the elimination of restrictions on access to the domestic markets of Member States. Nevertheless, this should take into account the effectiveness of controls and the evolution of employment conditions in the profession, the harmonisation of the rules in the fields of, inter alia, enforcement and road user charges, and social and safety legislation. The Commission should closely monitor the market situation as well as the harmonisation mentioned above and propose, if appropriate, the further opening of domestic road transport markets, including cabotage.

…

(13) Hauliers who are holders of Community licences provided for in this Regulation and hauliers authorised to operate certain categories of international haulage service should be permitted to carry out national transport services within a Member State on a temporary basis in conformity with this Regulation, without having a registered office or other establishment therein. …

…

(15) Without prejudice to the provisions of the Treaty on the right of establishment, cabotage operations consist of the provision of services by hauliers within a Member State in which they are not established and should not be prohibited as long as they are not carried out in a way that creates a permanent or continuous activity within that Member State. To assist the enforcement of this requirement, the frequency of cabotage operations and the period in which they can be performed should be more clearly defined. In the past, such national transport services were permitted on a temporary basis. In practice, it has been difficult to ascertain which services are permitted. Clear and easily enforceable rules are thus needed.'

4 Article 2 of Regulation No 1072/2009, headed 'Definitions', provides:

'For the purposes of this Regulation:

…

(6) "cabotage operations" means national carriage for hire or reward carried out on a temporary basis in a host Member State, in conformity with this Regulation;

…'

5 Chapter III of Regulation No 1072/2009, entitled 'Cabotage', includes Article 8 thereof, which provides in paragraphs 1 and 2:

'1. Any haulier for hire or reward who is a holder of a Community licence and whose driver, if he is a national of a third country, holds a driver attestation, shall be entitled, under the conditions laid down in this Chapter, to carry out cabotage operations.

2. Once the goods carried in the course of an incoming international carriage have been delivered, hauliers referred to in paragraph 1 shall be permitted to carry out, with the same vehicle, or, in the case of a coupled combination, the motor vehicle of that same vehicle, up to three cabotage operations following the international carriage from another Member State or from a third country to the host Member State. The last unloading in the course of a cabotage operation before leaving the host Member State shall take place within 7 days from the last unloading in the host Member State in the course of the incoming international carriage.

Within the time limit referred to in the first subparagraph, hauliers may carry out some or all of the cabotage operations permitted under that subparagraph in any Member State under the condition that they are limited to one cabotage operation per Member State within 3 days of the unladen entry into the territory of that Member State.'

Danish law

6 Paragraph 3 of the Cabotagevejledning gældende fra den 14 maj 2010. En vejdledning om cabotagereglerne i Europarlamentets og Rådets forordnung nr. 1072/2009 om fælles regler for adgang til markedet for international godskørsel (Guidelines of 14 May 2010 on the rules on road transport cabotage in Regulation No 1072/2009 of the European Parliament and of the Council on common rules for access to the international road haulage market, 'the Cabotage Guidelines') that the Trafikstyrelsen (Transport Office, Denmark) published on its website on 21 May 2010 states:

'A cabotage operation is defined as national carriage of a consignment from the picking-up of the goods until their delivery at the consignee as specified in the consignment note. An operation can involve several loading points or several unloading points.'

Pre-litigation procedure

7 On 2 October 2013, the Commission requested further information from the Kingdom of Denmark within the framework of the EU Pilot Procedure (No 5703/13) in order to determine whether the Danish rules on cabotage operations were compatible with Regulation No 1072/2009 and raised three complaints based on the obligation to submit the relevant documents at the time the checks as to compliance with the rules on cabotage were carried out, the level of fines imposed on hauliers in the event of infringement of those rules, and the limit applied to the possibility to carry out cabotage operations having several loading points and several unloading points.

8 The Kingdom of Denmark complied with that request by letters of 18 November and 12 December 2013.

9 Taking the view that those answers were unsatisfactory, on 11 July 2014, the Commission sent a letter of formal notice to that Member State and repeated the three complaints referred to in paragraph 7 of the present judgment.

10 By letter of 9 September 2014, the Kingdom of Denmark challenged those complaints.

11 On 25 September 2015, the Commission sent the Kingdom of Denmark a reasoned opinion in which it stated that it was satisfied by the explanations of the Danish authorities and the amendments to the Danish legislation with respect to the complaint about the obligation to submit the relevant documents at the time the checks were carried out. Therefore, the reasoned opinion only concerned the other two complaints.

12 The Kingdom of Denmark replied to that reasoned opinion by letter of 25 November 2015 in which it provided further explanations.

13 The Commission was satisfied with the explanations relating to the complaint concerning the level of fines imposed on hauliers in the case of infringements of the rules of cabotage. Therefore, it decided to bring the present action, limiting its scope to the complaint relating to the restriction of the number of loading points and unloading points which may be included in a cabotage operation.

The action

Arguments of the parties

14 In support of its action, the Commission claims that the definition of 'cabotage operations' referred to in Article 2(6) and Article 8 of Regulation No 1072/2009 must be interpreted as meaning that one single cabotage operation may include several loading points, several unloading points or even several loading points and several unloading points.

15 The Commission submits that, during the meeting of the Committee on Road Transport of 25 October 2010, the representatives of the Member States reached an agreement on that interpretation which was published on the website of Commission Directorate-General (DG) 'Mobility and Transport', in the form of a 'Questions and answers' document and is, therefore, binding on all Member States.

16 The Commission takes the view that, in so far as the Cabotage Guidelines adopted by the Kingdom of Denmark provide that a cabotage operation may include either several loading points or several unloading points, they fail to comply either with that interpretation or the objective pursued by Regulation No 1072/2009.

17 Finally, in its reply, the Commission refutes the argument of the Kingdom of Denmark that the Member States have discretion to adopt national implementing measures in order to clarify the definition of 'cabotage operations' within the meaning of Regulation No 1072/2009. According to the Commission, such discretion cannot exist as that definition was harmonised by Article 2(6) and Article 8 of that regulation and, in any event, the Cabotage Guidelines are not consistent with the principle of proportionality.

18 The Kingdom of Denmark challenges the interpretation of the definition of 'cabotage operations' recommended by the Commission. It observes that Article 8(2) of Regulation No 1072/2009 simply states that up to three cabotage operations can be carried out with the same vehicle, but fails to indicate the number of loading points and unloading points which may be included in a single cabotage operation. Thus, that regulation lacks clarity as regards that definition.

19 That argument is supported by the fact that the rules relating to cabotage operations laid down by Regulation No 1072/2009 are interpreted and applied differently in the Member States, as is clear more specifically from pages 18 and 19 of the Report from the Commission to the European Parliament and the Council on the State of the Union Road Transport Market (COM(2014) 222 final). Furthermore, the Commission itself

acknowledged that the definition of cabotage operations in Regulation No 1072/2009 is problematic and plans to revise that regulation in order to remedy that problem.

20 As to the argument that the interpretation of the definition of cabotage operations was clarified as a result of a meeting of the Committee on Road Transport, and that the new definition drawn up by the representatives of the Member States on that occasion appeared in a 'Questions and answers' document is binding on the Member States, the Kingdom of Denmark submits that that document has no legal force and that the definition that it contains is not based on an agreement between the Member States.

21 The Kingdom of Denmark states that the Court held, in paragraph 48 of the judgment of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863), that, when a regulation lacks clarity, the Member States have discretion to adopt measures at national level in order to remedy that, provided however that those measures are proportionate and consistent with the objectives pursued by the regulation in question.

22 That Member State observes that, in accordance with Article 2(6) and Article 8(2) of Regulation No 1072/2009, read in the light of recital 15 thereof, the latter's objective is to limit national transport of goods by road in the host Member State carried out by a non-resident road haulier by prohibiting, in particular, cabotage operations carried out in such a way as to create a permanent or continuous activity in that Member State.

23 If no limit were imposed on the number of loading and unloading points, it would be possible for a non-resident road haulier to carry out a large number of transport operations in the host Member State which would be regarded as constituting a single cabotage operation, so that the limit on three operations laid down by Regulation No 1072/2009 could be circumvented.

24 The Kingdom of Denmark concludes that, in so far as they ensure the temporary nature of the cabotage and help to improve the load factor of heavy goods vehicles and avoid empty journeys to improve transport efficiency, the Cabotage Guidelines are consistent with the objective pursued by Regulation No 1072/2009. Those measures also help to enhance legal certainty and ensure the effectiveness of the checks on compliance with the regulation.

Findings of the Court

25 In order to rule on the substance of the present action, it must be recalled, as a preliminary point, that it is established case-law that in proceedings for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgments of 12 May 2005, *Commission* v *Belgium*, C-287/03, EU:C:2005:282, paragraph 27 and the case-law cited, and of 19 May 2011, *Commission* v *Malta*, C-376/09, EU:C:2011:320, paragraph 32 and the case-law cited).

26 In the present case, the Commission criticises the Kingdom of Denmark for having failed to fulfil its obligations under Article 2(6) and Article 8 of Regulation No 1072/2009 by adopting national implementing measures intended to clarify the interpretation of the definition of 'cabotage operations' within the meaning of that regulation, even though that Member State was not competent to do so. In any event, those measures are not consistent with the objective pursued by Regulation No 1072/2009.

27 In that connection, it should also be recalled that, if, by virtue of the very nature of regulations and of their function in the system of sources of European Union law, the provisions of regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, however, some of their provisions may necessitate, for their implementation, the adoption of measures of application by the Member States (judgments of 21 December 2011, *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraphs 39 and 40, and of 30 March 2017, *Lingurár*, C-315/16, EU:C:2017:244, paragraph 17 and the case-law cited).

28 It is established that Member States may adopt implementing measures for a regulation provided that they do not thereby obstruct its direct applicability or conceal its nature as an act of EU law; that they specify that they are acting in exercise of a discretion conferred on them under that regulation; and that they adhere to the parameters laid down thereunder (judgments of 21 December 2011, *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraph 41, and of 30 March 2017, *Lingurár*, C-315/16, EU:C:2017:244, paragraph 18 and the case-law cited).

29 It is by referring to the relevant provisions of the regulation concerned, interpreted in the light of its objectives, that it may be determined whether they prohibit, require or allow Member States to adopt certain implementing measures and, particularly in the latter case, whether the measure concerned comes within the scope of the discretion that each Member State is recognised as having (judgment of 30 March 2017, *Lingurár*, C-315/16, EU:C:2017:244, paragraph 19 and the case-law cited).

30 In that connection, it must be recalled that the relevant provisions of Regulation No 1072/2009, that is Article 2(6) and Article 8 thereof, do not expressly authorise the Member States to adopt national implementing measures as far as concerns cabotage operations.

31 However, as is clear from paragraph 28 of the present judgment, and as the Advocate General noted in point 41 of his Opinion, the Member States may adopt national implementing regulations in respect of a regulation even though that regulation does not expressly authorise them to do so.

32 Thus the Court has already held, in paragraphs 48 to 50 of the judgment of 21 December 2011, *Danske Svineproducenter* (C-316/10, EU:C:2011:863), in the context of Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 (OJ 2005 L 3, p. 1), that Member States must be recognised as having some discretion enabling them to adopt national measures laying down numerical standards as regards the internal height of compartments for the transportation of pigs by road, in so far as, even though that regulation did not expressly authorise the Member States to adopt those standards it did not specifically lay down the height of those compartments.

33 Likewise, the Court held, in paragraphs 36 and 40 to 43 of the judgment of 28 October 2010, *SGS Belgium and Others* (C-367/09, EU:C:2010:648), that even though Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1) did not expressly authorise the Member States to do so, they were entitled to adopt national implementing measures laying down penalties which may be imposed if the infringement of EU law prejudices the

EU budget, since the relevant provisions of that regulation simply lay down general rules and do not specify in which situations or to whom each of those penalties applies.

34 Therefore, in the same way, it is important to verify whether, as the Kingdom of Denmark states, the definition of 'cabotage operations' set out in Regulation No 1072/2009 lacks precision, in particular as regards the question whether a cabotage operation may include several points of loading and several points of unloading, so that the adoption of national implementing measures intended to clarify the scope of that definition appears justified.

35 In that connection, it must be observed, first, that Article 2(6) of Regulation No 1072/2009 defines 'cabotage operations' as 'national carriage for hire or reward carried out on a temporary basis in a host Member State' without, however, any indication of the number of loading or unloading points that may constitute such an operation.

36 Article 8(2) of that regulation states that once the goods carried in the course of an incoming international carriage have been delivered, non-resident hauliers are to be permitted to carry out up to three cabotage operations following the international carriage from another Member State or from a third country to the host Member State. The provision states that the last unloading in the course of a cabotage operation before leaving the host Member State must take place within 7 days from the last unloading in the host Member State in the course of the incoming international carriage.

37 While it follows from the words 'last unloading in the course of a cabotage operation' in that article that a cabotage operation may consist of a number of unloading points, that provision does not state however whether a cabotage operation may also include several loading points.

38 Consequently, it must be held that the wording of Article 2(6) and Article 8(2) of Regulation No 1072/2009 do not give an answer to the question whether the definition of 'cabotage operations' referred to in that regulation must be understood as meaning that a cabotage operation may include a number of loading points and a number of unloading points.

39 As the Advocate General observed, in point 44 of his Opinion, the fact that a provision of a regulation is worded in general or imprecise terms is an indication that domestic measures of application are required.

40 Furthermore, since the objective of Regulation No 1072/2009 is to ensure a coherent framework for international road haulage throughout the European Union, that regulation does not preclude a Member State from adopting certain implementing measures for that regulation. In particular, as far as concerns cabotage operations, recital 5 of that regulation states that provision should be made for a transitional regime for that type of transport so long as the harmonisation of the road transport market has not yet been completed.

41 Second, it should be pointed out that, in order to decide when the limit of three transport operations laid down in Article 8(2) of Regulation No 1072/2009 must be regarded as being reached, it must be determined whether a transport operation consisting of several loading points and unloading points is one single cabotage operation or several cabotage operations.

42 Third, it is common ground that the definition of 'cabotage operations', within the meaning of Regulation No 1072/2009 is interpreted differently in different Member States. As the Advocate General observed, in point 49 of his Opinion, the Kingdom of Denmark and, until recently, the Republic of Finland consider that one operation cannot not have several

loading points and several unloading points. The Kingdom of Belgium, the Federal Republic of Germany and the Republic of Poland allow several loading points and several unloading points where there is one single freight contract or where the goods have the same consignor or the same consignee. The Kingdom of the Netherlands and the Kingdom of Sweden consider that a cabotage operation can always have several loading and several unloading points. Such a difference of interpretation shows the lack of clarity and precision of Regulation No 1072/2009 regarding the definition of cabotage operations.

43 Fourth, it must be observed that, in paragraph 19 of its report COM(2014) 222 final, in its written observations and at the hearing, the Commission itself acknowledged the need to clarify the definition of 'cabotage operations' within the meaning of Regulation No 1072/2009.

44 Therefore, it must be held that, even though Article 2(6) and Article 8 of Regulation No 1072/2009 do not expressly provide for the adoption of national implementing measures, they are unclear as regards the definition of cabotage operation, so that the Member States must be granted discretion to adopt such measures.

45 As the Advocate General states, in points 57 and 58 of his Opinion, that finding cannot be called into question by the draft regulation of the European Parliament and the Council amending Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 with a view to adapting them to developments in the sector (COM(2017) 281 final), which aims, inter alia, to amend Regulation No 1072/2009 with respect to the definition of cabotage operations in Article 2(6) thereof. Since the draft regulation is still under discussion, it is irrelevant for the purposes of the present case.

46 The Commission's argument that the interpretation of the definition of cabotage operations was clarified in a 'Questions and answers' document adopted following the meeting of the Committee on Road Transport on 25 October 2010 also cannot be accepted.

47 Even if, as the Commission claims, that document was published on the website of Commission DG 'Mobility and Transport', it was not published in the *Official Journal of the European Union*. Furthermore, as the Advocate General observed, in points 82 to 84 of his Opinion, Article 2(2) of the Rules of Procedure for the Committee on Road Transport states that the agenda drawn up for each meeting is to make a distinction between, on the one hand, proposed measures about which that committee is asked to give an opinion, in accordance with the regulatory procedure with scrutiny, and, on the other hand, other issues put to that committee for information or a simple exchange of views. It is clear from the file before the Court that the interpretation of the definition of 'cabotage operations', as set out in that document, does in fact appear on the agenda of the Committee on Road Transport of 25 October 2010, but that it was not put to the vote. Therefore, that interpretation cannot be regarded as resulting from an agreement between the representatives of the Member States. In any event, the Commission itself acknowledged in its written observations and at the hearing that that document is not legally binding.

48 In those circumstances, the Kingdom of Denmark cannot be criticised for having adopted national implementing measures for Regulation No 1072/2009 and, more specifically, for Article 2(6) and Article 8 thereof, in order to clarify the scope of the definition of 'cabotage operations' within the meaning of the latter with a view to its application on the territory of that Member State.

49 However, it is important to verify whether the national implementing measures adopted by the Kingdom of Denmark, namely the Cabotage Guidelines, are consistent with the principle of proportionality.

50 The principle of proportionality, which applies to, inter alia, the legislative and regulatory authorities of the Member States when they apply European Union law, requires that measures implemented by means of a provision must be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (judgment of 21 December 2011, *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraph 52).

51 First, as regards whether the Cabotage Guidelines are appropriate to achieve the objective intended by Regulation No 1072/2009 as far as concerns that type of transport, the Kingdom of Denmark submits that, by prohibiting non-resident road hauliers from carrying out cabotage operations with several loading points and several unloading points, those measures aim, in particular, to ensure that cabotage operations are not carried out in such a manner as to create a permanent or continuous activity.

52 In that connection it must be observed, as stated in recital 5 thereof, that, as Regulation No 1072/2009 is intended to establish a transitional cabotage regime, the Member States are not required to completely open national markets to non-resident hauliers. This is why, under Article 8(2) of Regulation No 1072/2009, cabotage is permitted only following an international carriage and is limited to three operations within 7 days from the unloading of that international carriage. Furthermore, recitals 13 and 15 of Regulation No 1072/2009 emphasise the temporary nature of cabotage and state, in particular, that cabotage operations should not be carried out so as to create a permanent or continuous activity in the host Member State.

53 As the Advocate General noted, in points 66 and 68 of his Opinion, allowing non-resident hauliers to carry out cabotage operations with an unlimited number of loadings points and an unlimited number of unloading points could render meaningless the three-operation limit laid down in Article 8(2) of Regulation No 1072/2009 and, thereby, run counter to the temporary nature of the cabotage and the objective pursued by that regulation with regard to that type of transport. In those circumstances, therefore, the temporary nature of the cabotage is ensured only through the 7-day limit laid down in Article 8(2) of Regulation No 1072/2009.

54 Therefore, the prohibition laid down by the Cabotage Guidelines is of such a nature as to ensure compliance with the limit of three transport operations laid down in Article 8(2) of that regulation.

55 Accordingly, those measures are appropriate to achieve the objective pursued by Regulation No 1072/2009 with regard to cabotage.

56 Second, it must be ascertained whether the Cabotage Guidelines go beyond what is necessary to achieve that objective.

57 The Kingdom of Denmark submits that the limit on the number of loading points and unloading points in a cabotage operation provided for in the Cabotage Guidelines is necessary to ensure the temporary nature of the cabotage operation and that that limit is not too restrictive because those guidelines do not go as far as stating that a cabotage operation may have only one loading point and one unloading point.

58 It must be observed in that regard that the Cabotage Guidelines provide that a cabotage operation may have several loading points or several unloading points. Therefore, those measures do not limit the number of consignors or principles for the same cabotage operation and impliedly allow a cabotage operation to have several loading points and one unloading point or several unloading points and one loading point.

59 It follows that, according to the Cabotage Guidelines, only cabotage operations having several loading points and several unloading points are prohibited.

60 Therefore, those measures do not go beyond what is necessary to achieve the objective pursued by Regulation No 1072/2009.

61 Taking account of the foregoing, it must be held that the Cabotage Guidelines are consistent with the principle of proportionality.

62 In those circumstances, it must be held that the Commission has failed to establish that, by adopting national implementing measures aiming to clarify the definition of cabotage operation within the meaning of Regulation No 1072/2009, the Kingdom of Denmark has failed to fulfil its obligations under Article 2(6) and Article 8 thereof.

63 Therefore, the Commission's application must be dismissed.

Costs

64 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if costs have been applied for. Since the Kingdom of Denmark has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 26 April 2018(1)

Case C-41/17

Isabel González Castro

v

Mutua Umivale

ProsegurEspaña SL

Instituto Nacional de la Seguridad Social (INSS)

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain))

(Social policy — Protection of safety and health of workers — Directive 92/85/EEC — Article 7 — whether 'night work' covers shift work where the worker concerned performs her duties during the night — Worker who is breastfeeding — Assessment of working conditions challenged by the worker concerned — Article 19(1) of Directive 2006/54/EC — Burden of proof — Equal treatment — Discrimination on grounds of sex)

1. In this request for a preliminary ruling the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain) asks this Court for guidance as to the meaning of the expression 'night work' in Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. (2) The referring court wishes to know whether a breastfeeding mother who works shifts under an arrangement whereby some hours are worked at night benefits from specific protection under that directive. That court also asks whether, if the worker concerned challenges a decision refusing to allow her leave to breastfeed her child and payment of an allowance for that period, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (3) applies. Certain provisions of that directive shift the incidence of the burden of proof to the employer (or the competent authority as the case may be) to prove that there has been no discrimination in the case at issue.

EU law

Directive 89/391

2. Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (4) is a framework directive. It defines 'prevention' as 'all the steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks'. (5) Section II sets out the employer's obligations, which include a duty to ensure the safety and health of workers in every aspect related to the work. (6) The directive states that particularly sensitive risk groups must be protected against the dangers which specifically affect them (7) and empowers the EU legislature to adopt individual directives to encourage improvement in the working environment as regards the health and safety of workers. (8)

Directive 92/85

3. Directive 92/85 was adopted within the framework of Directive 89/391. The recitals indicate that pregnant workers, workers who have recently given birth or who are breastfeeding are a specific risk group. (9) The protection of the safety and health of such workers should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women. (10) Some types of activity may pose a specific risk for that group of workers: such risks should be assessed and the result of the assessment should be communicated to the worker concerned. (11) Where the assessment reveals a risk to the safety or health of the female worker, provision should be made for her protection. (12) Measures should be taken to ensure that that group of workers is not required to work at night where such provision is necessary from the point of view of their safety and health. (13)

4. Article 1(1) states that the purpose of Directive 92/85 'is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding'.

5. The following definitions are set out in Article 2:

> '(a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
>
> (b) *worker who has recently given birth* shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
>
> (c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

6. Pursuant to Article 3(1) the Commission has drawn up guidelines on, inter alia, the assessment of physical agents considered hazardous for the safety and health of workers within the meaning of Article 2. (14) The second subparagraph of Article 3(1) states that 'the [Guidelines] shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with work done by workers within the meaning of Article 2'. Article 3(2) states that the guidelines serve as the basis of the risk assessment to be conducted for the purposes of Article 4.

7. Article 4(1) states that for all activities liable to involve a specific risk of exposure to the agents, processes or working conditions listed non-exhaustively in Annex I, (15) the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2. The purpose of the assessment is to evaluate any risks to the safety or health and any possible effect on, inter alia, the breastfeeding of the worker concerned, and to decide what measures should be taken. Pursuant to Article 4(2), the worker concerned must be informed of the results of that assessment and of all measures to be taken concerning health and safety at work.

8. Article 5 sets out the action to be taken further to the results of an assessment under Article 4 where that assessment reveals a risk to safety or health or an effect on pregnancy or breastfeeding of a worker. In such cases employers are to take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided (Article 5(1)). If such an adjustment is not technically or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer is to take the necessary measures to move the worker concerned to another job (Article 5(2)). If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned must be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health (Article 5(3)).

9. Article 7 is entitled 'Night work'. It provides:

> '1. Member States shall take the necessary measures to ensure that workers referred to in Article 2 are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in

accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

2. The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of:

(a) transfer to daytime work; or

(b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.'

10. Article 11(1) provides that in order to guarantee the rights of workers protected by Directive 92/85, where, inter alia, the assessment carried out under Article 4 reveals a risk and further action is to be taken pursuant to Article 5 or in cases where Article 7 of that directive applies, Member States must make provision for workers, including maintenance of a payment and/or entitlement to an adequate allowance.

Directive 2003/88

11. Directive 2003/88/EC concerning certain aspects of the organisation of working time (16) includes the following definition:

'"night time" means any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00;

...' (17)

Directive 2006/54

12. The recitals of Directive 2006/54 include the following statements. It is clear from the Court's rulings that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by the directive. (18) The Court has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. Directive 2006/54 should therefore be without prejudice to Directive 92/85. (19) Finally, 'the adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As [the Court] has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs'. (20)

13. Article 1 provides that the purpose of the directive is 'to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'.

14. Direct discrimination is defined in Article 2(1)(a) as arising 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'. Under Article 2(1)(b) indirect discrimination arises 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. For the purposes of Article 2(2)(c), 'discrimination' includes 'any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of [Directive 92/85]'.

15. Article 14(1) prohibits discrimination on grounds of sex in relation to, inter alia, employment and working conditions (Article 14(1)(c)).

16. Article 19 provides:

'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.

...

4. Paragraphs [1 and 2] shall also apply to:

(a) the situations covered ..., in so far as discrimination based on sex is concerned, by [Directive 92/85] ...'

17. Pursuant to Article 28, Directive 2006/54 is to be without prejudice to (EU and national) provisions concerning the protection of women, particularly as regards pregnancy and maternity. It is also specifically stated to be without prejudice to, inter alia, Directive 92/85.

Spanish law

18. Article 26 of Ley 31/1995 de Prevención de Riesgos Laborales (Law 31/1995 on the Prevention of Occupational Risks) of 8 November 1995) ('the LPRL') is worded as follows:

'1. The assessment of the risks [for the safety and health of workers] referred to in Article 16 of this Law must include determination of the nature, degree and duration of exposure of pregnant workers or workers who have recently given birth to agents, processes or working conditions liable to have an adverse effect on the health of the workers or the foetus in any activity likely to present a specific risk. If the results of the assessment reveal a risk to safety or health or a possible effect on the pregnancy or breastfeeding of such workers, the employer shall adopt the measures necessary to avoid exposure to that risk by adjusting the working conditions and the working hours of the worker concerned.

Such measures shall include, where necessary, the non-performance of night work or shift work.

2. Where the adjustment of working conditions or working hours is not feasible or where, despite such adjustment, working conditions are liable to have an adverse effect on the health of the pregnant worker or the foetus and a certificate to that effect is issued by the medical department of the [Instituto Nacional de la Seguridad Social ('the INSS')] or the mutual insurer, depending on the entity with which the undertaking has agreed cover for occupational risks, together with a report from the Servicio Nacional de Salud [National Health Service, Spain] general practitioner who treats the worker, the latter will have to perform a different job or role compatible with her condition. After consultation with the workers' representatives, the employer must determine the list of jobs that are risk-free for those purposes.

A move to another job or role shall be effected in accordance with the rules and criteria applied in cases of functional mobility and shall take effect until such time as the worker's state of health allows her to return to her previous job.

...

3. If such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds, the worker concerned may have her contract suspended on the grounds of risk during pregnancy, pursuant to Article 45(1)(d) [of Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers' Statute) of 24 March 1995], for the period necessary for the protection of her safety and health and for as long as it remains impossible for her to return to her previous job or move to another job compatible with her condition.

4. The provisions of paragraphs 1 and 2 of this article shall also be applicable during the period of breastfeeding if the working conditions are liable to have an adverse effect on the health of the woman concerned or her child and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the National Health Service general practitioner who treats the worker or her child. In addition, the worker concerned may have her contract suspended on the grounds of risk while breastfeeding children under nine months old, pursuant to Article 45(1)(d) of [Royal Legislative Decree 1/1995], if the conditions set out in paragraph 3 of this article are satisfied.'

19. Under Spanish law, a situation of risk during breastfeeding entails suspension of the employment contract and receipt of a social security payment only where it is demonstrated that there is a risk and it is not possible to adjust the job or to move the individual to another job.

20. The referring court states that the Tribunal Supremo (Supreme Court) has repeatedly stated in judgments concerning shift work and night work that working patterns may not automatically be considered risks to breastfeeding. It has however ruled that such a risk may be held to exist where the hours of work are inconsistent with the baby's regular feeding intervals, provided that the incompatibility of direct feeding cannot be alleviated by expressing the milk and that it would, in any case, have to be shown that expressing milk would not be advisable in the particular case for reasons connected with the health of mother or baby.

21. As regards procedural law, Article 96 of Ley 36/2011 reguladora de la jurisdicción social (Law 36/2011 governing the social courts) of 10 October 2011 ('Ley 36/2011') is entitled 'Burden of proof in the case of discrimination and accidents at work'. Article 96(1) transposes Article 19(1) of Directive 2006/54 by providing that in cases where a person considers themselves wronged because the principle of equal treatment has not been applied to them establishes facts from which it may be presumed that there has been discrimination, inter alia, on grounds of sex the burden of proof will shift to the respondent.

Facts, procedure and the questions referred

22. Ms Isabel González Castro was employed as a security guard by Prosegur España SL. On 8 November 2014 she gave birth to her son whom she breastfed. From March 2015 she worked at the As Termas shopping centre in Lugo (Spain). (21) She worked a variable rotating pattern of eight-hour shifts. The security service at her place of work was provided by at least two security guards, except for the following shifts when there was only one security guard: Monday to Thursday from midnight to 8 a.m.; Fridays from 2 a.m. to 8 a.m.; Saturdays from 3 a.m. to 8 a.m. and Sundays from 1 a.m. to 8 a.m.

23. It appears from the case file provided by the referring court that on 3 March 2015 Ms González Castro obtained a certificate from the paediatric department of the public health service for risks during breastfeeding, confirming that she was indeed breastfeeding her son. The employer's insurer, Mutua Umivale, sent Prosegur España a standard form letter dated 3 March 2015 stating that the request for payment of an allowance during pregnancy or breastfeeding was refused, 'because no risk existed'. Ms González Castro completed a form entitled 'Request for a medical certificate indicating the existence of a risk during breastfeeding' dated 9 March 2015 which she submitted to her employer. The standard wording on the form stated, 'The medical certificate requested will, in your case, justify moving to another job or changing the functions that you perform. Only if that does not occur for the reasons laid down by law, will you be paid the allowance for risk during pregnancy or breastfeeding.' Prosegur España's representative filled in a form entitled 'Certificate for the payment of employer's contributions to the social security system in relation to a request for the payment of a financial allowance for risk during breastfeeding' dated 13 March 2015 stating that Ms González Castro was employed as a security guard, her duties entailed doing rounds at the premises and, where necessary, ensuring that crimes are not committed and that her working conditions did not affect breastfeeding. (22)

24. Mutua Umivale then formally examined Ms González Castro's request for a medical certificate. On 17 March 2015, Mutua Umivale wrote to Ms González Castro refusing her request for a medical certificate stating that, on the basis of the material that the worker herself had provided, there was no risk inherent to her job that could be prejudicial. The material annexed to that letter quoted from the Spanish Paediatric Association's handbook 'Guidance on assessing workplace risk during breastfeeding' produced for the INSS ('the Spanish Paediatric Association's handbook'). Mutua Umivale stated in that letter that 'night work, shift work or working

alone do not *in themselves* pose *a clear* risk for breastfeeding, although such work can result in breastfeeding being less convenient because of the pattern of working hours, there is no risk that breastfeeding will be interrupted if the recommendations we have given to you are followed'. (23)

25. On 24 April 2015 Ms González Castro wrote to the Mutua Umivale contesting the refusal. Her application was refused by the Mutua Umivale by letter of 4 May 2015 on the grounds that there was no risk at Ms González Castro's post which put at risk the health of the child. On 4 August 2015 Mutua Umivale produced a medical report signed by Dr Maria Renau Escudero. The report cited the certificate from the paediatrician that she had supplied and her employer's statements that 'neither her working conditions nor her activities and functions as a security guard affected breastfeeding.' The report also cited the Spanish Paediatric Association's handbook. It concludes that there is no risk to the worker concerned which affects breastfeeding citing that handbook: 'according to our criteria, night work as well as shift work do not imply by themselves a clear risk for breastfeeding, although we can accept that both circumstances will have an impact on breastfeeding meaning that it is less convenient, due to the pattern of working hours'. On 30 December 2015, Ms González Castro's challenge against that decision was dismissed by the Juzgado de lo Social No 3 de Lugo (Social Court No 3, Lugo) on the ground that shift work or night work does not represent a risk during breastfeeding according to judgments of the Spanish Supreme Court and the Spanish Paediatric Association's handbook. Ms González Castro lodged an appeal against that judgment with the referring court.

26. Ms González Castro claims that she was at risk during the period when she was breastfeeding her son for three reasons: (i) the very nature of the work of a security guard (the danger involved and the associated stress); (ii) the fact that her work was done in shifts, sometimes at night and alone; and (iii) the fact that it was not possible to breastfeed at the workplace as, she claims, there was nowhere provided for her to do so and she was unable to leave her work station to breastfeed. Mutua Umivale (the insurer) counters that Ms González Castro's work did not involve any real risk to breastfeeding, but only constituted a 'difficulty' for breastfeeding, which is inherent in any work. It maintains that night work and shift work do not in themselves mean that there is a clear risk to breastfeeding, 'although they may make breastfeeding more inconvenient', and that the difficulties or incompatibility of feeding the baby directly 'can be alleviated by expressing breast milk outside of work, given that it can be stored, even at room temperature, for long periods'.

27. The referring court states that there was no evidence that Ms González Castro had access to a facility at her workplace to breastfeed her son or to express breast milk, or that her job could be adjusted or moved in order to avoid the factors which Ms González Castro claimed represented a risk to breastfeeding.

28. Against that background the referring court requests a preliminary ruling on the following questions:

> '(1) Should Article 7 of [Directive 92/85] be interpreted as meaning that the night work, which those workers referred to in Article 2, including workers who are breastfeeding, must not be obliged to perform, includes not only work performed entirely during the night, but also shift work when, as in this case, some of those shifts are worked at night?
>
> (2) In proceedings in which the existence of a situation of risk for a worker who is breastfeeding is at issue, do the special rules on burden of proof in Article 19(1) of [Directive 2006/54], transposed into Spanish law by, inter alia, Article 96(1) of [Ley 36/2011]), apply in conjunction with the requirements set out in Article 5 of [Directive 92/85], transposed into Spanish law by Article 26 of [the LPRL], relating to the granting of leave to a breastfeeding worker and, as the case may be, payment of the relevant allowance under national legislation by virtue of Article 11(1) of [Directive 92/85]?
>
> (3) In proceedings in which the existence of a risk during breastfeeding giving entitlement to leave, as provided for in Article 5 of [Directive 92/85] and transposed into Spanish law by Article 26 of [the LPRL], is at issue, can Article 19(1) of [Directive 2006/54] be interpreted as meaning that the following are "facts from which it may be presumed that there has been direct or indirect discrimination" in relation to a breastfeeding worker: (1) the fact that the worker does shift work as a security guard with some shifts being worked at night and alone; (2) in addition, that the work entails doing rounds and, where necessary, dealing with emergencies (criminal behaviour, fire and other incidents); and (3) furthermore that there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk?

(4) In proceedings in which the existence of a risk during breastfeeding giving entitlement to leave is at issue, when "facts from which it may be presumed that there has been direct or indirect discrimination" have been established in accordance withArticle 19(1) of [Directive 2006/54] in conjunction with Article 5 of [Directive 92/85], transposed into Spanish law by Article 26 of [the LPRL], can a breastfeeding worker be required to demonstrate, in order to be granted leave in accordance with the domestic legislation transposing Article 5(2) and (3) of [Directive 92/85], that the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required and that moving her to another job is not technically and/or objectively feasible or cannot reasonably be required or are these matters for the respondents (the employer and the [Mutua Umivale] providing the social security benefit associated with the suspension of the contract of employment) to prove?'

29. Written observations have been submitted by the INSS, the German and Spanish Governments and the European Commission. At the hearing on 22 February 2018 the same parties, save for the German Government, presented oral argument.

Assessment

Preliminary remarks

30. The INSS is of the view that Spanish law provides the answers to the referring court's questions. Accordingly, it submits that the request for a preliminary ruling is unnecessary.

31. It seems to me that whilst the national measures implementing Directives 92/85, 2003/88 and 2006/54 fall within the purview of the referring court, the authoritative interpretation of the provisions of EU law which those national measures transpose is a matter for this Court. In essence, the referring court wishes to ascertain whether the concept of night work in Article 7 of Directive 92/85 should be interpreted in the light of Directive 2003/88 and whether Ms González Castro's circumstances come within the scope of that provision. It also wishes to know to what extent Directive 92/85 should be read together with Directive 2006/54. Those are issues of EU law. Moreover, the Court has consistently ruled that the power to formulate the questions to be referred is vested in the national court or tribunal alone. (24) By making its request for a preliminary ruling, the referring court has simply exercised that power. I therefore disagree with the INSS: the referring court's questions should be examined.

32. It is common ground that Ms González Castro was employed by Prosegur España and that at the material time she was considered to be 'a worker who is breastfeeding' for the purposes of Article 2(c) of Directive 92/85. (25) As the Court stated recently '... the condition of a breastfeeding woman being intimately related to maternity, and in particular "to pregnancy or maternity leave", workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth'. (26)

33. It is also not in dispute that Ms González Castro's working pattern is that of a shift worker which includes working hours that are performed during the night.

34. Finally, I should point out that under Article 7 of Directive 92/85 the Member States are to take the necessary measures to ensure that workers are not obliged to perform night work during pregnancy and for a period following childbirth, determined by the competent national authority. The referring court's description of national law in the order for reference indicates that in Spain that period is 9 months after childbirth. It is common ground that Ms González Castro's claim for an allowance was made within that period.

Question 1

35. By Question 1 the referring court asks whether 'night work' for the purposes of Article 7 of Directive 92/85 includes shift work where the employee concerned works only some hours at night.

36. The INSS submits that it is for the referring court to determine whether Ms González Castro is a night worker under national rules and whether there is a risk to breastfeeding certified by a doctor, in accordance with Article 7 of Directive 92/85 and the relevant national rules.

37. It is undoubtedly true that the functions of the Court and those of the referring court are clearly distinct and that it falls exclusively to the latter to interpret national legislation. (27) However, in proceedings under Article 267 TFEU it follows from the division of functions between national courts and this Court that the referring court is required to interpret the national legislation at issue as far as possible in the light of the wording and purpose of the directives at issue to give effect to the result intended. (28) It is not for this Court to rule on the compatibility of the national rules with those directives. However, the Court does have jurisdiction to supply the referring court with all the guidance as to the interpretation of EU law necessary for that court to perform that function. (29)

38. Germany submits that Article 7 of Directive 92/85 should be construed in in the light of Directive 2003/88. It argues that 'night work' covers shift work where some hours are worked at night. Spain states that shift work carried out at night falls within the concept of night work, but it does not follow that such work entails an intrinsic risk for breastfeeding workers. The Commission submits that night work covers not only work done entirely through the night but also shift work carried out at least partially during the night.

39. I agree with the Commission for the following reasons.

40. First, although the concept of night work is not defined in Directive 92/85, night work cannot be limited to a particular pattern of working hours. In my view, 'night work' is capable of covering both work performed entirely at night and shift work where only part of the hours worked are at night.

41. Second, it is settled case-law that in 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. (30)

42. The reading of Article 7 of Directive 92/85 that I propose is consistent with the aims of that directive. The objective of Directive 92/85 is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. (31) Thus, a worker who is breastfeeding is within the specific risk group for whom measures to protect safety and health should be taken. Furthermore, it is consistent with the general preventive aim of that measure that women falling within Article 2(c) of the directive should be eligible for protection under Article 7 if they work night shifts, rather than through the night time as a matter of course.

43. Does Directive 2003/88 shed light on the interpretation of the concept of night work in Article 7 of Directive 92/85?

44. Both directives have the same legal basis. (32) However, Article 7 of Directive 92/85 does not cross refer to the definition of 'night time' in Article 2(3) of Directive 2003/88 and night work is not a term that is defined in the latter directive. (33)

45. Moreover, Directive 92/85 protects a particularly vulnerable group of workers (34) and it is necessary to establish whether the worker concerned meets the requirements of that directive in order to benefit from its provisions. The rules in Directive 2003/88 are not necessarily relevant to such an assessment.

46. It seems to me that *night work* in Directive 92/85 does not necessarily bear exactly the same meaning as *night time* in Article 2(3) of Directive 2003/88. Rather, it is a question of interpreting the two directives coherently.

47. The expression 'night time' in Directive 2003/88 is defined in Article 2(3) as meaning any period which is not less than 7 hours as defined by national law and which includes the period between midnight and 5.a.m. I consider that the word 'night' in Directive 92/85 should, in the absence of any compelling reason to the contrary, be given the same meaning. It would follow that, if a worker performs her duties during that period, those working hours will constitute night work for the purposes of Article 7 of Directive 92/85. I note that Directive 2003/88 uses the expression 'any period', which suggests that shift work is not excluded from the scope of the definition.

48. I also agree with the observation made by the referring court that, if shift work performed at night were to be excluded from the scope of Article 7 of Directive 92/85, a breastfeeding mother working shifts during those hours would receive less protection than women who work only at night. It is difficult to believe that such a result could have been intended by the legislature.

49. The Court has repeatedly held (in relation to what is now Directive 2006/54) that Member States are obliged not to lay down in national legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited. Such a ban would be contrary to the principle of equal treatment. (35)

50. However, the thirteenth recital of Directive 92/85 states that provision should be made for, inter alia, workers who are breastfeeding not to be required to work at night where that is necessary from the point of view of their safety and health. Taken in conjunction with the scheme of Article 7, that indicates that there is to be an individual evaluation of the circumstances of the worker concerned.

51. The national court's case file shows that Ms González Castro did obtain certified medical confirmation that she was indeed breastfeeding and that she launched the process for obtaining a medical certificate in support of her request by completing her section of the form entitled 'Request for a medical certificate indicating the existence of a risk during breastfeeding' on 9 March 2015. The INSS stated at the hearing that it is not part of the process for *issuing* such a medical certificate, which is a matter between the worker, her employer and as the case may be his insurer (here, the Mutua Umivale). The Court was also told that the worker is able to submit a report from another doctor, such as a general practitioner, but that it is unclear whether a report of that type would be sufficient of itself to launch the procedure and render the claimant eligible for protection under Directive 92/85.

52. It is of course for the referring court to make the necessary findings of fact. However, the Mutua Umivale's letter to Ms González Castro's employer of 3 March 2015 suggests that her request was not going to prosper even before she made her formal application for the medical certificate on 9 March 2015. (36) There is no indication that either her employer or Mutua Umivale carried out an individual assessment of her individual circumstances. Piecing together the material available from the submissions of the INSS and the Spanish Government, the referring court's description in its order for reference and the documents on that court's case file, the current national practice appears to be that where a designated job profile is not recognised by the Spanish Paediatric Association's handbook as entailing a risk to breastfeeding, the worker's request for a medical certificate will be rejected automatically. (37)

53. I am clear that such an approach is contrary to Directive 92/85. The EU legislature has decided that night work poses a risk. The medical certificate is meant to trigger an assessment of the circumstances of the individual worker in any particular case. The system described to the Court is plainly at variance with the legislature's aims.

54. I am not suggesting that there was improper conduct in the case at issue. However, a procedure whereby the insurer responsible for paying the allowance sought by the worker also acts as a gatekeeper, by deciding whether that worker is able to obtain the medical certificate required under Article 7 of Directive 92/85 is inherently flawed. The insurer is in a position where it has a clear conflict of interest.

55. If Ms González Castro meets the requirements of Article 7(1) she will be protected under Directive 92/85 and there is no need to consider Articles 4 and 5 (see Questions 2 to 4), since where Article 7 applies it is unnecessary to rely upon the general risk assessment under Article 4 of Directive 92/85. (38) As matters stand, it is unclear whether Articles 4 and 5 remain relevant to the dispute in the main proceedings. (39)

56. I therefore conclude that a worker who does shift work and performs some of her duties at night is capable of falling within the scope of Article 7(1) of Directive 92/85, subject to her submitting a medical certificate stating that it is necessary to take measures to avoid a risk to her safety or health in accordance with Article 7(2) of that directive. It is for the referring court to verify, taking account of all the circumstances of the case whether the claimant provided, or was placed in a position where she could provide, such a certificate.

Questions 2, 3 and 4

General remarks

57. Under Article 19(1) of Directive 2006/54, Member States are to take the necessary measures in accordance with their respective judicial systems to ensure that, when a person considers themselves wronged because the principle of equal treatment has been breached establishes facts from which it may be presumed that there has been direct or indirect discrimination, the burden of proof shifts to the respondent to prove that that principle has not been infringed. (40) By Questions 2, 3 and 4 the referring court essentially seeks guidance on how that provision should be read together with Article 5 of Directive 92/85. Those questions are particularly relevant if Ms González Castro does not meet the conditions laid down in Article 7 of Directive 92/85 for leave from work and payment of an allowance pursuant to Article 11, as there is no possibility of transferring her to daytime work only. (41)

58. The referring court has based Questions 2, 3 and 4 on the premiss that a correctly conducted assessment under Article 4(1) of Directive 92/85 would have revealed a risk to the breastfeeding worker and that it is therefore necessary to consider what action should have been taken to protect her safety and health under Article 5. Yet, there is no information in the order for reference (or the accompanying national case file) which states that any assessment was conducted in accordance with Article 4(1) and (2) of Directive 92/85. At the hearing, the Spanish Government informed the Court that Article 26 LPRL is the main provision which implements Articles 4 and 7 of Directive 92/85, but that the national legislation does not make a clear distinction between those two articles of that directive. It is not entirely clear whether Article 4 or Article 7 (or even both) forms the basis for Ms González Castro's request for an allowance. That is a question which it is ultimately for the referring court to verify.

59. Do Ms González Castro's circumstances fall within the scope of Article 4 of Directive 92/85?

60. That provision applies to a worker who is breastfeeding 'for all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I'. The fact that Ms González Castro was not employed in underground mining work (the sole category of work listed under 'Working conditions' in the non-exhaustive table at Annex I) does not mean that a job such as hers is necessarily excluded from the scope of Directive 92/85. The risk assessment which is carried out pursuant to Article 4(1) is conducted on the basis of the Guidelines which cover, inter alia, 'mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2' of that directive. (42) Shift work and night work are two situations which are identified in the Guidelines. (43) Thus, the express wording of the second subparagraph of Article 3(1) read together with Article 4(1) of Directive 92/85 confirm that a job such as that held by Ms González Castro is indeed within the scope of the latter provision.

61. Article 4 is the general provision which sets out the action to be taken in relation to all activities liable to involve a specific risk to workers within the meaning of Article 2 of Directive 92/85. Article 7, on the other hand, is a specific provision which applies in cases of night work, which the legislature has singled out as liable to present a particular risk to pregnant workers or those who have recently given birth or are breastfeeding.

62. It is the employer who is *required* to conduct the risk assessment, rather than for the worker concerned to request expressly protection under Directive 92/85. That is entirely consistent with the framework established by Directive 89/391, which places a duty on employers to take preventive action to ensure the safety and health of workers for all aspects related to work. (44)

63. In brief, Directive 92/85 introduced a requirement to evaluate and communicate risks. Where the results of the risk assessment carried out pursuant to Article 4(1) of that directive reveal a risk to safety or health and a potential effect on the pregnancy or breastfeeding of a worker, Article 5(1) and (2) provide that the employer is required temporarily to adjust the working conditions and/or the worker's working hours. (45) If that is impossible in the circumstances, the worker concerned must be moved to another job. It is only when such a move is not feasible that Article 5(3) provides that the worker is to be granted leave, in accordance with national legislation and/or national practice, for the whole of the period necessary to protect her safety or health. (46) Thus, Article 5 is only triggered if the results of the assessment in Article 4 of Directive 92/85 reveal a risk to the safety or health or an effect, here on the breastfeeding worker concerned.

64. Although the referring court does not mention Article 4 of Directive 92/85 expressly in its questions, that does not prevent this Court from providing the referring court with all the necessary elements of interpretation of EU law, including other provisions of that directive (here, in particular Article 4) that may be of assistance. (47)

65. Accordingly, I understand Questions 2, 3 and 4 to be asking for guidance on the interpretation of Article 19 of Directive 2006/54 concerning the incidence of the burden of proof and Article 4 of Directive 92/85. I shall consider Questions 2 and 3 together before examining Question 4.

Questions 2 and 3

66. Do the rules which shift the burden of proof to the employer (or competent authority) under Article 19(1) of Directive 2006/54 apply where a worker within the meaning of Article 2(c) of Directive 92/85 challenges a risk assessment made under Article 4(1) of that directive (or where Article 7 is at issue) (Question 2)? Moreover, what is meant by 'facts from which it may be presumed that there has been direct or indirect discrimination' in Article 19(1) of Directive 2006/54. The referring court asks in particular whether the following facts demonstrate direct or indirect discrimination for the purposes of that provision: (i) that the worker does shift work sometimes alone at night; (ii) that the work entails the surveillance of a building and if necessary dealing with emergencies; and (iii) that there is no evidence that workplace has suitable facilities for breastfeeding or expressing breast milk (Question 3).

67. As regards the risk assessment under Article 4, the employer is required to make that assessment in accordance with the Guidelines. (48) It is for the employer to identify: (i) hazards, which include mental and physical fatigue as well as other physical and mental burdens; and (ii) the category of worker, here a breastfeeding mother; and to arrange for the qualitative and quantitative risk assessment which is to be carried out by a competent person. The Guidelines make it clear that a risk assessment, should take due account of medical advice and the concerns of the individual woman. (49)

68. The Guidelines state the following in relation to the risk assessment for 'Mental and physical fatigue and working hours': 'Long working hours, shift work and night work can have a significant effect on the health of new and expectant mothers, and on breastfeeding. Not all women are affected in the same way, and the associated risks vary with the type of work undertaken, working conditions and the individual concerned … both mental and physical fatigue increases during pregnancy and in the postnatal period due to the various physiological and other changes taking place. Because they suffer from increasing tiredness, some pregnant and breastfeeding women may not be able to work irregular or late shifts or night work, or overtime. Working time arrangements … may affect the health of the pregnant woman and her unborn child, her recovery after childbirth, or her ability to breastfeed, and may increase the risks of stress and stress related ill health.' (50)

69. The referring court explains that Ms González Castro's claim was dismissed at first instance on the grounds that 'shift work or night work does not represent a risk during breastfeeding, according to judgments of the Tribunal Supremo (Supreme Court) and the Spanish Paediatric Association's handbook, and that the fact that the worker has to "do rounds, answer alarm calls to potential emergencies (criminal behaviour, fire) and, in short, remain vigilant in case of any incident (and perform such duties alone in certain cases)" does not "involve any risk to breastfeeding or make it impossible to breastfeed since milk can be expressed outside of working hours"'.

70. That statement suggests that the competent authority considered the general profile of Ms González Castro's job by reference to general guidance, but did *not* examine her individual circumstances as required by a combined reading of Articles 3(2) and 4 of Directive 92/85.

71. Under Article 19(1) of Directive 2006/54, Member States are to 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 must be for the respondent to prove that there has been no breach of the principle of equal treatment. Article 19(4)(a) of Directive 2006/54 states, inter alia, that the rules reversing the burden of proof in Article 19(1) also apply to situations covered by Directive 92/85 in so far as discrimination on grounds of sex is

concerned. (51) Failure to conduct a proper risk assessment under Article 4 of Directive 92/85 amounts to less favourable treatment of a woman related to pregnancy or maternity leave for the purposes of that directive, in accordance with Article 2(2)(c) of Directive 2006/54: it therefore constitutes discrimination within the meaning of that act. (52)

72. The concept of indirect discrimination as defined in Article 2(1)(b) of Directive 2006/54 cannot be relevant to workers who come within the scope of Article 2 of Directive 92/85. Provisions, criteria or practices that lead to less favourable treatment of a woman relating to pregnancy or maternity leave cannot by definition be 'apparently neutral', because those provisions have ramifications only for the specific categories of workers defined in Article 2 of Directive 92/85. (53) Thus, where a worker relies on Directive 92/85 the issue is whether there are facts from which direct discrimination may be presumed for the purposes of Article 19(1) of Directive 2006/54. (54)

73. Article 19(4)(a) of Directive 2006/54 states, inter alia, that the rules reversing the burden of proof in Article 19(1) also apply to situations covered by Directive 92/85 in so far as discrimination on grounds of sex is concerned. Any less favourable treatment of a female worker because she is a breastfeeding mother must be regarded as falling within the scope of Article 2(2)(c) of Directive 2006/54 and therefore constitutes direct discrimination on grounds of sex. (55) As a consequence, the rules in Article 19(1) of Directive 2006/54 are potentially applicable.

74. The Court has repeatedly held that, by reserving to Member States the right to retain or introduce provisions intended to protect women in connection with pregnancy and maternity, Article 2(2)(c) of Directive 2006/54 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth. Furthermore, pursuant to Article 14 of Directive 2006/54, any discrimination against a woman in such circumstances is covered by the prohibition provided for by that directive, in so far as it is related to the employment and working conditions of the worker in question within the meaning of Article 14(1)(c) of that directive. (56)

75. Do the facts identified by the referring court give rise to discrimination for the purposes of Article 19(1) of Directive 2006/54?

76. If the employer fails to conduct an assessment under Article 4(1) where the worker concerned falls within Article 2(c) of Directive 92/85, that failure constitutes 'facts from which it may be presumed that there has been direct … discrimination' within the meaning of Article 19(1) of Directive 2006/54. The factors mentioned by the referring court in its order for reference (shift work, the duties expected of a security guard, lack of facilities at work to breastfeed) would be relevant to any assessment. However, it is not the presence of those factors that should give rise to the employer's evaluation. (57) The need to conduct the evaluation stems from the woman's condition, here as a breastfeeding worker, and from the employer's obligations under Article 4 of Directive 92/85.

77. However, where the worker concerned considers herself wronged and is able to demonstrate that the assessment conducted did not include an evaluation of her *individual circumstances*, such a situation would likewise lead to a presumption of direct discrimination for the purposes of Article 19(1) of Directive 2006/54. That seems to me to be the case where the employer or the competent authorities apply a policy or a general rule to the effect that shift work or night work does not represent an intrinsic risk to breastfeeding, without examining the particular situation of the individual worker concerned and her child. Such an approach effectively undermines the aims of both Directive 92/85 and Directive 2006/54. A process of that type places the worker in a position where she has to challenge and, if appropriate, rebut a presumption that her job does not place her at risk. That contrasts starkly with the fact that both directives recognise that workers that come within Article 2 of Directive 92/85 are a particularly vulnerable group. (58) Thus, a process of evaluation which requires the worker concerned to rebut a general presumption that she is not at risk because her job profile is not considered to entail risks for breastfeeding mothers constitutes less favourable treatment of a woman for the purposes of Article 2(2)(c) of Directive 2006/54 read together with Article 19(1) and (4)(a) of that directive.

78. It is for the referring court to verify whether that is indeed the effect of the national rules at issue; whether any assessment under Article 4(1) of Directive 92/85 was carried out; and in so far as there was such an assessment in Ms González Castro's case, whether it conformed to the Guidelines.

79. Where a worker within the meaning of Article 2(c) of Directive 92/85 considers herself wronged, because the principle of equal treatment has not been applied to her, and demonstrates that her employer has not carried out an assessment under Article 4(1) of that directive to evaluate risks to her safety and health, or that any such assessment was not conducted in accordance with the Guidelines referred to in Article 3 of Directive 92/85, those circumstances create a presumption of direct discrimination within the meaning of Article 19(1) of Directive 2006/54. It is for the national court to verify whether the practical application of the national system at issue operates in a manner which is inconsistent with the rule in that provision which shifts the burden of proof to the respondent.

Question 4

80. The referring court seeks to ascertain by Question 4 whether the employer bears the burden of proof if he disputes the worker's claim that she is entitled to leave and payment of an allowance pursuant to Articles 5(3) and 11 of Directive 92/85. That court states that that question arises only if the Court answers 'yes' to Question 3.

81. On the basis of my analysis thus far, that question becomes relevant only if the referring court were to find (i) that the competent authorities conducted an assessment in accordance with Article 4(1) of Directive 92/85 which reveals a risk to the safety or health of Ms González Castro, (ii) that her working conditions could not be temporarily adjusted (Article 5(1)) and (iii) that she could not be moved to another job (Article 5(2)). Whilst the description of the facts in the order for reference does not reflect that premiss, it remains the case that Ms González Castro's claim to be entitled to leave and payment of an allowance lies behind the national proceedings. An answer to Question 4 may therefore assist the referring court in determining the national proceedings.

82. It is the employer that has the general overview of working conditions and requirements for its employees and that is best placed to evaluate what measures are suitable for dealing with any risks that are identified. Thus, in so far as the assessment of further action pursuant to Article 5 of Directive 92/85 is part of the main proceedings, the burden of proof under Article 19(1) of Directive 2006/54 remains with the employer. (59) The contrary view would eviscerate the protection afforded under Directive 92/85. (60) I add that this seems to me pre-eminently to be a situation where discussion between employer and employee is called for as to what adjustments are required.

83. Therefore, in so far as the assessment of further action pursuant to Article 5 of Directive 92/85 is part of the main proceedings, the burden of proof under Article 19(1) of Directive 2006/54 remains with the respondent.

Conclusion

84. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions posed by the Tribunal Superior de Justicia de Galicia (Spain) as follows:

- A worker who does shift work and performs some of her duties at night is capable of falling within the scope of Article 7(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, subject to her submitting a medical certificate stating that it is necessary to take measures to avoid a risk to her safety or health in accordance with Article 7(2) of that directive. It is for the referring court to verify, taking account of all the circumstances of the case, whether the claimant provided, or was placed in a position where she could provide such a certificate.

- The rules in Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation which shift the burden of proof to the respondent apply in circumstances where a breastfeeding worker within the meaning of Article 2(c) of Directive 92/85 demonstrates that her employer has failed to carry out a risk assessment in accordance with Article 4(1) of that directive.

– Where a worker within the meaning of Article 2(c) of Directive 92/85 considers herself wronged because the principle of equal treatment has not been applied to her, and demonstrates that her employer has not carried out an assessment under Article 4(1) of that directive to evaluate risks to her safety and health, or that any such assessment was not conducted in accordance with the Guidelines referred to in Article 3 of that directive, those circumstances create a presumption of direct discrimination within the meaning of Article 19(1) of Directive 2006/54. It is for the national court to verify whether the practical application of the national system at issue operates in a manner which is inconsistent with the rule in that provision which shifts the burden of proof to the respondent.

– In so far as the assessment of further action pursuant to Article 5 of Directive 92/85 is part of the main proceedings, the burden of proof under Article 19(1) of Directive 2006/54 remains with the respondent.

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1 Original language: English.

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2 Council Directive of 19 October 1992 (OJ 1992 L 348, p. 1).

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3 Directive of the European Parliament and of the Council of 5 July 2006 (OJ 2006 L 204, p. 23). See further points 12 to 17 below.

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4 Council Directive of 12 June 1989 (OJ 1989 L 183, p. 1).

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5 Article 3(d).

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6 Article 5(1).

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7 Article 15.

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8 Article 16(1).

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9 The eighth recital.

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10 The ninth recital.

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11 The tenth recital.

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12 The eleventh recital.

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13 The thirteenth recital.

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14 See the Communication from the Commission on the Guidelines on the assessment of chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2000) 466 final/2 ('the Guidelines')).

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15 The list in Annex I includes physical, biological and chemical agents, processes and working conditions. The only listing under the latter is 'Underground mining work'.

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16 Directive of the European Parliament and of the Council of 4 November 2003 (OJ 2003 L 299, p. 9).

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17 Article 2(3).

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18 Recital 23.

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19 Recital 24.

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20 Recital 30.

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21 I shall refer to the period which started in March 2015 when Ms González Castro was working as a security guard for Prosegur España and breastfeeding her son as the 'material time'.

22 At point 3 of that form Prosegur España declares that it had tried to adapt Ms González Castro's working conditions to transfer her to another post, but that such a transfer was not possible because her working conditions have no influence on breastfeeding.

23 My emphasis.

24 Judgment of 6 March 2003, *Kaba*, C-466/00, EU:C:2003:127, paragraph 40 and the case-law cited. See also judgment of 15 November 2007, *International Mail Spain*, C-162/06, EU:C:2007:681, paragraph 23 and the case-law cited.

25 A 'worker' for the purposes of Directive 92/85 is an autonomous concept of EU law, see judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 39.

26 Judgment of 19 October 2017, *OteroRamos*, C-531/15, EU:C:2017:789, paragraph 59. See further the eighth recital of Directive 92/85.

27 Judgment of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 58.

28 Judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paragraph 8.

29 Judgment of 15 November 2007, *International Mail Spain*, C-162/06, EU:C:2007:681, paragraphs 19 and 20 and the case-law cited.

30 See, by analogy, judgment of 16 July 2015, *Maïstrellis*, C-222/14, EU:C:2015:473, paragraph 30.

31 Judgment of 18 March 2014, *D.*, C-167/12, EU:C:2014:169, paragraph 29 and the case-law cited.

32 The legal basis of Directive 92/85 was Article 118a of the EEC Treaty; for Directive 2003/88 it was Article 137 EC (the corresponding provision to Article 118a of the former Treaty). The equivalent provision is now Article 153 TFEU.

33 Directive 92/85 precedes Directive 2003/88 by 11 years. The latter codified Council Directive 93/104/EC of 23 November 1993 concerning certain aspects on the organisation of working time (OJ 1993 L 307, p. 18). Article 1(4) of Directive 2003/88 states that the provisions of Directive 89/391 are fully applicable to, inter alia, night work, shift work and patterns of work. See also recital 3 of Directive 2003/88.

34 Judgment of 18 March 2014, *D.*, C-167/12, EU:C:2014:169, paragraphs 33 and 34.

35 Judgments of 13 March 1997, *Commission* v *France*, C-197/96, EU:C:1997:155, paragraph 4 and the case-law cited, and of 4 December 1997, *Commission* v *Italy*, C-207/96, EU:C:1997:583, paragraph 4 and the case-law cited. See also the ninth recital of Directive 92/85.

36 See point 23 above.

37 See points 24 and 25 above.

38 The original proposal COM(90) 406 final stated that there was to be a mandatory period during which the worker concerned should not perform night work. That period could be supplemented by an additional period upon presentation of a medical certificate indicating that it was necessary for the worker's health. The text was changed in the amended proposal COM(92) 259 final of 10 June 1992 to wording which is now reflected in Article 7 of Directive 92/85.

39 See further points 57 to 64 below.

40 Judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paragraph 29 and the case-law cited. That case concerned Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6).

41 See point 27 above.

42 Second subparagraph of Article 3(1), see point 6 above.

43 See point 68 below.

44 See point 2 above.

45 See the eleventh recital of Directive 92/85.

46 Judgment of 1 July 2010, *Parviainen*, C-471/08, EU:C:2010:391, paragraphs 31 and 32 and the case-law cited.

47 Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 39 and the case-law cited.

48 Article 3(2) of Directive 92/85. See also Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraphs 44 to 51, and my Opinion in that case, EU:C:2017:287, points 41 to 45.

49 These include whether the worker concerned is new to breastfeeding: see pages 8 and 9 of the Guidelines.

50 See the table on page 13 of the Guidelines.

51 Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 53.

52 Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 62.

53 In nearly all heterogamous animal species, offspring are ordinarily carried by the female until birth. But, in fish of the Syngnathidae family, however (which includes seahorses), males perform this function. That not being the case for humans, it is intrinsically implausible that one will find an apparently neutral provision, criterion or practice which puts persons of one sex at a particular disadvantage compared with persons of another sex in relation to pregnancy, the fact of having recently given birth or breastfeeding. Such a provision, criterion or practice cannot be 'apparently neutral' as it can only affect women, who fall within those very specific categories.

54 See point 14 above and recital 23 of Directive 2006/54.

55 Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 60.

56 Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 64.

57 Thus, whether any of those factors exist cannot be determinative.

58 See point 3 above.

59 Judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 75. See also my Opinion in that case, EU:C:2017:287, points 90 and 91, and recital 30 of Directive 2006/54.

60 See, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 74.

JUDGMENT OF THE COURT (Fifth Chamber)

19 September 2018 (*)

(Reference for a preliminary ruling — Directive 92/85/EEC — Articles 4, 5 and 7 — Protection of the safety and health of workers — Worker who is breastfeeding — Night work — Shift work performed in part at night — Risk assessment of her work — Prevention measures — Challenge by the worker concerned — Directive 2006/54/EC — Article 19 — Equal treatment — Discrimination on grounds of sex — Burden of proof)

In Case C-41/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain), made by decision of 30 December 2016, received at the Court on 25 January 2017, in the proceedings

Isabel González Castro

v

Mutua Umivale,

ProsegurEspaña SL,

Instituto Nacional de la Seguridad Social (INSS),

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 22 February 2018,

after considering the observations submitted on behalf of:

– the Instituto Nacional de la Seguridad Social (INSS), by P. García Perea and A. Lozano Mostazo, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the German Government, by T. Henze and D. Klebs, acting as Agents,

– the European Commission, by S. Pardo Quintillán and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2018,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 19 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23) and Articles 4, 5 and 7 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

2 The request has been made in the context of proceedings between Isabel González Castro and Mutua Umivale ('mutual insurer Umivale'), her employer, Prosegur España SL ('Prosegur') and the Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute, Spain) ('INSS') concerning their refusal to suspend her employment contract and pay her an allowance for risk during breastfeeding.

Legal context

European Union law

Directive 92/85

3 The 1st, 8th to 11th and 14th recital of Directive 92/85 state:

'Whereas Article 118a of the [EEC] Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

...

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects and measures must be taken with regard to their safety and health;

Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

Whereas some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives;

Whereas, further, should the result of this assessment reveal the existence of a risk to the safety or health of the female worker, provision must be made for such worker to be protected;

...

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least 2 weeks, allocated before and/or after confinement;

...'

4 Article 1(1) of Directive 92/85 states:

'The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16(1) of [Council] Directive 89/391/EEC [of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1)], is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.'

5 Article 2 of that directive, headed ‘Definitions’, provides:

‘For the purposes of this Directive:

…

(c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.’

6 Article 3 of the Directive provides:

‘1. In consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers within the meaning of Article 2.

The guidelines referred to in the first subparagraph shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2.

2. The purpose of the guidelines referred to in paragraph 1 is to serve as a basis for the assessment referred to in Article 4(1).

To this end, Member States shall bring these guidelines to the attention of all employers and all female workers and/or their representatives in the respective Member State.’

7 The guidelines mentioned in Article 3 of Directive 92/85, in the version applicable to the present case, are set out in Commission Communication of 20 November 2000 on the Guidelines on the assessment of chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2000) 466 final/2, ‘the Guidelines’).

8 As regards the risk assessment and informing workers of that assessment, Article 4 of Directive 92/85 provides:

‘1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of [Directive 89/391], in order to:

– assess any risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers within the meaning of Article 2,

– decide what measures should be taken.

2. Without prejudice to Article 10 of [Directive 89/391], workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.’

9 As regards action further to the risk assessment, Article 5(1) to (3) of that directive provides:

‘1. Without prejudice to Article 6 of [Directive 89/391], if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by

temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.'

10 Article 7 of Directive 92/85, entitled 'Night work', provides:

'1. Member States shall take the necessary measures to ensure that workers referred to in Article 2 are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

2. The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of:

(a) transfer to daytime work;

or

(b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.'

Directive 2006/54

11 Article 1 of Directive 2006/54, entitled 'Purpose', provides:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

12 Article 2 of that directive, headed 'Definitions', provides:

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

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

...

2. For the purposes of this Directive, discrimination includes:

...

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of [Directive 92/85].'

13 Article 14(1) of Directive 2006/54 extends the prohibition of discrimination, inter alia, to working conditions and provides as follows:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the [EC] Treaty;

...'

14 As regards the burden of proof and access to the courts in the event of direct or indirect discrimination, Article 19(1) and (4) of that directive provides:

'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.

...

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the [EC] Treaty and, in so far as discrimination based on sex is concerned, by Directive [92/85] and [Council Directive] 96/34/EC [of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4)];

...'

Directive 2003/88/EC

15 Recital 14 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) provides:

'Specific standards laid down in other Community instruments relating, for example, to rest periods, working time, annual leave and night work for certain categories of workers should take precedence over the provisions of this Directive.'

16 Article 1 of that directive, entitled 'Purpose and scope', states:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

...

(b) certain aspects of night work, shift work and patterns of work.

…'

17 Article 2(3) and (4) of the Directive, entitled 'Definitions', provide:

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

…

3. "night time" means any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00;

4. "night worker" means:

(a) on the one hand, any worker who, during night time, works at least three hours of his daily working time as a normal course; and

(b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:

(i) by national legislation, following consultation with the two sides of industry; or

(ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level;

…'

Spanish law

18 The social benefit in respect of risk during breastfeeding was incorporated into Spanish law by Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 on real equality between women and men) of 22 March 2007 (BOE No 71, 23 March 2007, p. 12611, 'Law 3/2007').

19 The object of Law 3/2007 is to promote the integration of women into the workplace by enabling them to reconcile their work life with their private and family life.

20 The 12th supplementary provision of that law amended Article 26 of Ley 31/1995 de Prevención de Riesgos Laborales (Law 31/1995 on the Prevention of Occupational Risks) of 8 November 1995 (BOE No 269, 10 November 1995, p. 32590, 'Law 31/1995') by providing for the protection of female workers and their newborn children in situations of risk during breastfeeding when the conditions of employment are liable to have an adverse effect on the health of the worker or the child.

21 Article 26 of Law 31/1995, which transposes, inter alia, Articles 4 and 7 of Directive 92/85 into national law, is worded as follows:

'1. The assessment of the risks [for the safety and health of workers] referred to in Article 16 of this Law must include determination of the nature, degree and duration of exposure of pregnant workers or workers who have recently given birth to agents, processes or working conditions liable to have an adverse effect on the health of the workers or the foetus in any activity likely to present a specific risk. If the results of the assessment reveal a risk to safety or health or a possible effect on the pregnancy or breastfeeding of such workers, the employer shall adopt the measures necessary to avoid exposure to that risk by adjusting the working conditions and the working hours of the worker concerned.

Such measures shall include, where necessary, the non-performance of night work or shift work.

2. Where the adjustment of working conditions or working hours is not feasible or where, despite such adjustment, working conditions are liable to have an adverse effect on the health of the pregnant worker or the foetus and a certificate to that effect is issued by the medical department of the [INSS] or the mutual

insurer, depending on the entity with which the undertaking has agreed cover for occupational risks, together with a report from the Servicio Nacional de Salud [National Health Service, Spain] medical practitionerwho treats the worker, the latter will have to perform a different job or role compatible with her condition. After consultation with the workers' representatives, the employer must determine the list of jobs that are risk-free for those purposes.

A move to another job or role shall be effected in accordance with the rules and criteria applied in cases of functional mobility and shall take effect until such time as the worker's state of health allows her to return to her previous job.

…

3. If such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds, the worker concerned may have her contract suspended on the grounds of risk during pregnancy, pursuant to Article 45(1)(d) [of Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Esatatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers' Statute) of 24 March 1995 (BOE No 75, 29 March 1995, p. 9654)], for the period necessary for the protection of her safety and health and for as long as it remains impossible for her to return to her previous job or move to another job compatible with her condition.

4. The provisions of paragraphs 1 and 2 of this article shall also be applicable during the period of breastfeeding if the working conditions are liable to have an adverse effect on the health of the woman concerned or her child and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the National Health Service medical practitioner who treats the worker or her child. In addition, the worker concerned may have her contract suspended on the grounds of risk while breastfeeding children under nine months old, pursuant to Article 45(1)(d) of [Royal Legislative Decree 1/1995], if the conditions set out in paragraph 3 of this article are satisfied.

…'

22 The 18th supplementary provision of Law 3/2007 amended the Spanish legislation in such a way that a period of breastfeeding was expressly recognised as one of the situations covered by the Ley General de la Seguridad Social — Real Decreto Legislativo 1/1994 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (Royal Legislative Decree 1/1994 approving the consolidated text of the General Law on Social Security) of 20 June 1994 (BOE No 154, 29 June 1994, p. 20658, 'the General Law on Social Security').

23 Article 135a of the General Law on Social Security provides:

'Protected situation

For the purposes of the financial allowance in respect of risk during breastfeeding, the period of suspension of the employment contract shall be deemed a protected situation in cases where, because the female worker has to move from one job to another compatible with her condition, as provided for in Article 26(4) of Law 31/1995, such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds.'

24 Article 135b of the General Law on Social Security provides:

'Financial allowance

A female worker shall be granted, in accordance with the terms and conditions laid down in this Law governing the financial allowance in respect of risk during pregnancy, the financial allowance in respect of risk during breastfeeding, which shall cease when the child reaches the age of nine months, unless the recipient returns before then to her previous job or to another job compatible with her condition.'

25 As regards procedural law, Article 96(1) of Ley 36/2011, reguladora de la jurisdicción social (Law 36/2011 governing the social courts) of 10 October 2011 (BOE No 245, 11 October 2011, p. 106584) provides:

'Burden of proof in the case of discrimination and accidents at work

1. In proceedings in which the arguments of the parties reveal reliable evidence of discrimination on the grounds of gender, sexual orientation, racial or ethnic origin, religion or belief, disability, age, or of harassment, and in any other case of infringement of a fundamental right or public freedom, the respondent shall be required to produce an objective and reasonable justification, established to the requisite legal standard, for the measures adopted and for their proportionality.'

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

26 It is apparent from the order for reference thatMs González Castro works as a security guard for Prosegur.

27 On 8 November 2014, she gave birth to a boy who was then breastfed.

28 Since March 2015, Ms González Castro has performed her duties in a shopping centre, on the basis of a variable rotating pattern of eight-hour shifts.

29 The security service she performs at her place of work is usually performed with another security guard, except for the following shifts, which she performs alone: Monday to Thursday from midnight to 8 a.m.; Friday from 2 a.m. to 8 a.m.; Saturday from 3 a.m. to 8 a.m. and Sunday from 1 a.m. to 8 a.m.

30 Ms González Castro initiated the procedure for obtaining an allowance in respect of risk during breastfeeding, laid down in Article 26 of Law 31/1995, with the mutual insurer Umivale, a non-profit private mutual insurance company providing cover for risks relating to accidents at work and occupational diseases. To that end, she requested that mutual insurer, in accordance with national legislation, to issue her with a medical certificate indicating the existence of a risk to breastfeeding posed by her work.

31 Her application having been rejected by the mutual insurer Umivale, she lodged a complaint which was also rejected.

32 Ms González Castro brought an action against that rejection before the Juzgado de lo Social No 3 de Lugo (Social Court No 3, Lugo, Spain).

33 Her action having been dismissed, Ms González Castro brought an appeal against that decision before the referring court, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain).

34 In the first place, the referring court asks for an interpretation of the concept of 'night work', within the meaning of Article 7 of Directive 92/85, where, as in the case before it, that night work is combined with shift work. According to the referring court, breastfeeding shift workers who only work certain shifts at night must enjoy the same protection as breastfeeding workers who perform night work but not on the basis of shifts.

35 In the second place, the referring court considers that it is possible that the risk assessment of Ms González Castro's work, provided for under the procedure for obtaining an allowance in respect of risk during breastfeeding, in accordance with Article 26 of Law 31/1995 transposing Articles 4 and 7 of Directive 92/85, was not properly carried out and her work does in fact pose a risk to her health or safety, in particular because she performs night work and does shifts, sometimes alone, doing rounds and having to respond to emergencies, such as criminal behaviour, fire and other incidents of that kind, and there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk.

36 In that context, the referring court seeks guidance as to whether it is appropriate to apply the rules reversing the burden of proof laid down in Article 19(1) of Directive 2006/54 in a situation such as that at issue in the case before it and, if so, it asks what are the conditions for the application of that provision, in

particular as regards the issue whether it is for the worker concerned or the respondent, whether it be the employer or the organisation responsible for the payment of the allowance in respect of risk during breastfeeding, to demonstrate that the adjustment of the working conditions or the move of the worker concerned to another job are not technically or objectively feasible or cannot reasonably be required.

37 In those circumstances, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 7 of [Directive 92/85] be interpreted as meaning that the night work, which those workers referred to in Article 2, including workers who are breastfeeding, must not be obliged to perform, includes not only work performed entirely during the night, but also shift work when, as in this case, some of those shifts are worked at night?

(2) In proceedings in which the existence of a situation of risk for a worker who is breastfeeding is at issue, do the special rules on burden of proof in Article 19(1) of [Directive 2006/54], transposed into Spanish law by, inter alia, Article 96(1) of [Ley 36/2011], apply in conjunction with the requirements set out in Article 5 of [Directive 92/85], transposed into Spanish law by Article 26 of [Law 31/1995], relating to the granting of leave to a breastfeeding worker and, as the case may be, payment of the relevant allowance under national legislation by virtue of Article 11(1) of [Directive 92/85]?

(3) In proceedings in which the existence of a risk during breastfeeding giving entitlement to leave, as provided for in Article 5 of [Directive 92/85] and transposed into Spanish law by Article 26 of [Law 31/1995], is at issue, can Article 19(1) of [Directive 2006/54] be interpreted as meaning that the following are "facts from which it may be presumed that there has been direct or indirect discrimination" in relation to a breastfeeding worker: (1) the fact that the worker does shift work as a security guard with some shifts being worked at night and alone; (2) in addition, that the work entails doing rounds and, where necessary, dealing with emergencies (criminal behaviour, fire and other incidents); and (3) furthermore that there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk?

(4) In proceedings in which the existence of a risk during breastfeeding giving entitlement to leave is at issue, when "facts from which it may be presumed that there has been direct or indirect discrimination" have been established in accordance with Article 19(1) of [Directive 2006/54] in conjunction with Article 5 of [Directive 92/85], transposed into Spanish law by Article 26 of [Law 31/1995], can a breastfeeding worker be required to demonstrate, in order to be granted leave in accordance with the domestic legislation transposing Article 5(2) and (3) of [Directive 92/85], that the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required and that moving her to another job is not technically and/or objectively feasible or cannot reasonably be required or are these matters for the respondents (the employer and the [Mutua Umivale] providing the social security benefit associated with the suspension of the contract of employment) to prove?'

Consideration of the questions referred

The first question

38 By its first question, the referring court asks, in essence, whether Article 7 of Directive 92/85 must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work in the context of which only part of her duties are performed at night.

39 In order to answer that question, it must be noted that, 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 (see, inter alia, judgment of 17 April 2018, *Egenberger,* C-414/16, EU:C:2018:257, paragraph 44 and the case-law cited).

40 Under Article 7(1) of Directive 92/85, Member States must take the necessary measures to ensure that pregnant workers, workers who have recently given birth or workers who are breastfeeding are not obliged to perform night work during their pregnancy and for a period following childbirth which will be

determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

41 Article 7(2) states that the measures referred to in paragraph (1) must entail the possibility, in accordance with national legislation and/or national practice, of a transfer to daytime work or of leave from work or an extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably by required on duly substantiated grounds.

42 The wording of that provision does not however contain any details as regards the exact scope of the concept of 'night work'.

43 In that regard, it is apparent from Article 1 of Directive 92/85 that that directive is part of a series of directives, adopted on the basis of Article 118A of the EEC Treaty, seeking to set minimum requirements, especially as regards improvements in the working environment to protect the safety and health of workers.

44 As the Advocate General noted in point 44 of her Opinion, this is also true of Directive 2003/88, which sets minimum safety and health requirements for the organisation of working time and applies, in particular, to certain aspects of night work, shift work and patterns of work.

45 Directive 2003/88 defines, in Article 2(4), a night worker as 'any worker, who, during night time, works at least three hours of his daily working time as a normal course' and 'any worker who is likely during night time to work a certain proportion of his annual working time'. Furthermore, Article 2(3) of that article states that the concept of 'night time' means 'any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00'.

46 It follows from the wording of those provisions, and in particular the use of the expressions 'any period', 'at least three hours of his … working time' and 'a certain proportion of his … working time', that a worker who, as in the case in the main proceedings, does shift work in the context of which only part of her duties are performed at night must be regarded as performing work during 'night time' and must therefore be classified as a 'night worker' within the meaning of Directive 2003/88.

47 It must be noted that, since it is in the interest of pregnant workers, workers who have recently given birth or are breastfeeding to be subject, in accordance with Recital 14 of Directive 2003/88, to the specific provisions laid down by Directive 92/85 relating to night work, in particular in order to strengthen the protection that those workers must enjoy in that regard, those specific provisions must not be interpreted less favourably than the general provisions of Directive 2003/88 which are applicable to other categories of workers.

48 Consequently, it must be held that a worker such as that at issue in the main proceedings carries out 'night work' within the meaning of Article 7 of Directive 92/85 and that she is covered by that provision.

49 That interpretation is supported by the purpose of Article 7 of Directive 92/85.

50 That provision aims to strengthen the protection enjoyed by pregnant workers and workers who have recently given birth or are breastfeeding by enshrining the principle that they are not obliged to perform night work when that work poses a risk to their health or safety.

51 If a breastfeeding worker who, as in the main proceedings, performs shift work were to be excluded from the scope of Article 7 of Directive 92/85 on the ground that only part of her duties are performed at night, that provision would be deprived in part of its effectiveness. The worker concerned may be exposed to a risk to her health or safety and the protection she is entitled to under that provision would be considerably reduced.

52 As regard the conditions for the application of Article 7 of Directive 92/85 to a situation such as that at issue in the main proceedings, it must be stated that, to benefit from the protection measures set out in

Article 7(2), namely transfer to daytime work or, failing that, leave from work, the worker concerned must submit a medical certificate stating the need for such a measure for her safety or health, in accordance with the procedures laid down by the Member State in question. It is for the national court to determine whether that is the case in the main proceedings.

53 In the light of the foregoing, the answer to the first question is that Article 7 of Directive 92/85 must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work in the context of which only part of her duties are performed at night.

The second to fourth questions

54 As a preliminary point, it should be observed that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it and, in that context, to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 39 and the case-law cited).

55 Consequently, even if, formally, the referring court has limited its second to fourth questions to the interpretation of Article 19(1) of Directive 2006/54 and of Article 5 of Directive 92/85, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 40 and the case-law cited).

56 In the present case, it is apparent from the order for reference that the relevant national legislation in the case in the main proceedings, namely Article 26 of Law 31/1995, transposes into national law, without any clear distinction, inter alia, Articles 4 and 7 of Directive 92/85 and that legislation provides, in particular, that the suspension of the employment contract for risk during breastfeeding and the grant of the related allowance are possible only if it is established, following the assessment of the work of the worker concerned, that it poses such a risk and that it is not feasible to adjust the working conditions of that worker or move her to another job.

57 The referring court starts from the premiss that it is possible that, if the risk assessment of the work of the worker concerned provided for by the national legislation has been carried out properly, the existence of a risk to the health or safety of that worker might have been revealed, in particular in the light of Article 7 of Directive 92/85, on the basis that that worker performs night work and does shifts, sometimes alone, doing rounds and having to respond to emergencies, such as criminal behaviour, fire and other incidents of that kind and there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk.

58 In that context, the referring court asks whether the rules of reversal of the burden of proof under Article 19(1) of Directive 2006/54 must be applied in a situation such as that at issue in the main proceedings, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, accordingly, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work. If so, the referring court asks what are the conditions for the application of that provision, in particular as regards whether it is for the worker concerned or the respondent, whether it be the employer or the organisation responsible for payment of the financial allowance in respect of risk during breastfeeding, to demonstrate that the adjustment of working conditions or the move of the worker concerned to another job are not technically or objectively feasible or cannot reasonably be required.

59 In the light of those considerations, it must be understood that, by its second to fourth questions, which it is appropriate to consider together, the referring court is asking, is essence, whether Article 19(1) of Directive 2006/54 must be interpreted as applying to a situation, such as that at issue in the main

proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessmentof her work and, if so, what are the conditions for application of that provision in such a situation.

60 It should be noted, in the first place, that under Article 19(1) of Directive 2006/54, Member States must 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 any other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it will be for the respondent to prove that there has been no breach of the principle of equal treatment.

61 Article 19(4)(a) of Directive 2006/54 states, inter alia, that the rules reversing the burden of proof in Article 19(1) apply also to situations covered by Directive 92/85 in so far as discrimination based on sex is concerned.

62 In that regard, the Court has held that Article 19(1) of Directive 2006/54 applies to a situation in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned,the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85 (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 65).

63 Failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of Article 4(1) of Directive 92/85 must indeed be regarded as less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of that directive, and thus constitutes direct discrimination on grounds of sex, within the meaning of Article 2(2)(c) of Directive 2006/54 (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraphs 62 and 63).

64 The Court stated, in that regard, that in order to be in conformity with the requirements of Article 4(1) of Directive 92/85, the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 51).

65 In the second place, it must be noted that the risk assessment provided for in Article 4 of Directive 92/85 is intended to protect pregnant workers and workers who have recently given birth or are breastfeeding and their children in that, when that assessment reveals that the work of such a worker poses a risk for her health or safety, or has an effect on her pregnancy or the breastfeeding of her child, the employer must, in accordance with Article 5 of that directive, take the necessary measures to ensure that the exposure to that risk is avoided.

66 As the Advocate General observed in point 61 of her Opinion, Article 4 of Directive 92/85 is the general provision which sets out the action to be taken in relation to all activities liable to involve a specific risk to pregnant workers and workers who have recently given birth or are breastfeeding. Article 7, on the other hand, is a specific provision which applies in cases of night work, which the legislature has singled out as liable to present a particular risk to pregnant workers and workers who have recently given birth or are breastfeeding.

67 Whereas Articles 4 and 7 of Directive 92/85 pursue the same aim of protecting pregnant workers and workers who have recently given birth or are breastfeeding against the risks posed by their jobs, Article 7 of Directive 92/85 aims, more specifically, to strengthen that protection by establishing the principle that pregnant workers and workers who have recently given birth or are breastfeeding are not obliged to perform night work as long as they submit amedical certificate indicating the need for such protection on the basis on their safety or health.

68 The risk assessment of the work of pregnant workers and workers who have recently given birth or are breastfeeding provided for under Article 7 of Directive 92/85 cannot, therefore, be subject to less stringent requirements than those that apply under Article 4(1) of that directive.

69 That interpretation is supported by the fact that the guidelines, the purpose of which is, in accordance with Article 3(2) of Directive 92/85, to serve as a basis for the assessment referred to in Article 4(1) of that directive, expressly refer to night work.

70 It follows, in particular, from the detailed table on the risk assessment of generic hazards and associated situations which are likely to be met by most pregnant women, women who have recently given birth or women who are breastfeeding, set out at page 13 of those guidelines, that night work may have a significant effect on the health of pregnant women, women who have recently given birth or women who are breastfeeding, the risks for those women vary with the type of work undertaken, working conditions and the individual concerned and, consequently, because of increased tiredness, some pregnant or breastfeeding women may not be able to work irregular or late shifts or work at night. That table also provides for preventive measures as regards night work.

71 Furthermore, it follows from the Guidelines that the risk assessment of the workof a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraphs 46 and 51).

72 Consequently, it must be considered, as the Advocate General noted at point 50 of her Opinion, that the risk assessment of the work of the worker concerned, carried out under Article 7 of Directive 92/85, must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk. If there is no such assessment, the situation amounts to less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of that directive, and constitutes direct discrimination on grounds of sex, within the meaning of Article 2(2)(c) of Directive 2006/54, enabling the application of Article 19(1) of that directive.

73 As regards the conditions for the application of that provision, it should be recalled that the rules of evidence that it provides do not apply at the time that the worker in question requests an adjustment of her working conditions or, as in the case in the main proceedings, an allowance in respect of risk during breastfeeding, and a risk assessment of her work must, accordingly, be carried out in accordance with Article 4(1) of Directive 92/85 or, where appropriate, Article 7 of Directive 92/85. It is only at a later stage, when a decision relating to that risk assessment is challenged by the worker in question before a court or any other competent authority, that those rules of evidence are to be applied (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 67).

74 Nevertheless, in accordance with Article 19(1) of Directive 2006/54, it is for a worker who considers herself wronged because the principle of equal treatment has not been applied to her to raise, before a court or any other competent authority, facts or evidence from which it may be presumed that there has been direct or indirect discrimination (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 68 and the case-law cited).

75 In a situation such as that at issue in the main proceedings, that means that the worker in question must adduce, before a court or any other competent authority of the Member State concerned, facts or evidence capable of indicating that the risk assessment of her work provided for under the national legislation transposing, in particular, Articles 4 and 7 of Directive 92/85 into national law did not include a specific assessment taking into account her individual situation and she has, therefore, been discriminated against.

76 In the present case, it is apparent from the order for reference and the documents before the Court that Ms González Castro initiated the procedure for obtaining an allowance in respect of risk during breastfeeding with the mutual insurer Umivale and, to that end, submitted, on 9 March 2015, a request for a medical certificate indicating the existence of a risk for breastfeeding posed by her work by means of a form provided by the mutual insurer in that regard.

77 In the context of that procedure, Prosegur sent, on 13 March 2015, to the mutual insurer Umivale a declaration in which it stated that it had not tried to adapt the working conditions of Ms González Castro's work or to move her to another job since it considered that the duties she performed and her working conditions did not affect breastfeeding.

78 That declaration, which takes the form of a standard form provided by the mutual insurer Umivale, does not contain any reasons indicating how Prosegur reached that conclusion and it does not appear to be based on a specific assessment taking into account the individual situation of the worker concerned.

79 As regards the decision by which the mutual insurer Umivale dismissed the application made by Ms González Castro, it merely states that 'there is no risk inherent to her work which may be harmful, after an exhaustive analysis of the documentation provided by the worker herself'. In the conclusions set out in the Annex to that decision, the mutual insurer Umivale referred to the Spanish Paediatric Association 'Guidance on assessing workplace risk during breastfeeding' published by the INSS, to conclude that they indicate that shift work or night work do not pose a risk to breastfeeding. The mutual insurer Umivale claims also, without any further explanation, that Ms González Castro is not exposed to substances which are harmful to her child and that her working conditions do not affect breastfeeding.

80 In these circumstances, it is apparent, as the Advocate General noted in points 70 and 77 of her Opinion, that the risk assessment of Ms González Castro's work did not include a specific assessment taking into account her individual situation and that she was discriminated against. It is ultimately for the referring court, which alone has jurisdiction to assess the facts of the case before it, to verify whether that is indeed the case.

81 If so, it will be for the respondent in the main proceedings to prove that the risk assessment provided for by national legislation transposing, inter alia, Articles 4 and 7 of Directive 92/85 into national law included a specific assessment taking into account the individual situation of Ms González Castro, bearing in mind that documents such as a declaration by the employer that the duties performed by that worker and her working conditions do not affect breastfeeding, without any explanations capable of substantiating that assertion, combined with the fact that her work is not included in the list of jobs posing a risk to breastfeeding drawn up by the competent body of the Member State concerned, cannot alone provide an irrebuttable presumption that such is the case. Otherwise, both Articles 4 and 7 of Directive 92/85 and the rules of evidence provided for in Article 19 of Directive 2006/54 would be deprived of any useful effect (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 74).

82 It should be noted that the same rules of evidence are applicable in the context of Article 5, or, where appropriate, Article 7(2) of Directive 92/85. In particular, in so far as a breastfeeding worker requests leave from work for the whole of the period necessary to protect her safety or health and provides evidence capable of showing that the protective measures provided for in Article 5(1) and (2) or the first subparagraph of Article 7(2) were impracticable,it is for the employer to establish that those measures were technically or objectively feasible and could reasonably be required in the situation of the worker concerned.

83 In the light of all the above considerations, the answer to the second to fourth questions is that Article 19(1) of Directive 2006/54 must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed.

Costs

84 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 (Fifth Chamber) hereby rules:

1. **Article 7 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work during which only part of her duties are performed at night.**

2. **Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain.**

It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed.

[Signatures]

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 10 September 2019(1)

Case C-450/18

WA

v

Instituto Nacional de la Seguridad Social

(Request for a preliminary ruling from the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3 of Gerona, Spain))

(Reference for a preliminary ruling — Female and male workers — Equal treatment in matters of social security — Directive 79/7/EEC — Invalidity pension — Pension supplement granted to mothers of two or more children in receipt of a contributory social security pension — Article 157(4) TFEU — Positive action — Measures aimed at compensating for career-related disadvantages of female workers

I. Introduction

1. Spanish law provides that *women who have had two or more biological or adopted children* are entitled to a supplement to their contributory social security retirement pension, widow's pension, or permanent invalidity pension. The applicant in the main proceedings ('the Applicant'), a father of two daughters, challenged a decision of the national social security authority refusing to grant him a similar supplement to his permanent invalidity pension.

2. The referring court wishes to know whether the national provision establishing the pension supplement for women, which does not grant such a right to men, infringes the EU prohibition of discrimination on grounds of sex.

3. The Court has already had the opportunity to address the issue of pension systems granting advantages linked to motherhood to female workers only. The cases *Griesmar* (2) and *Leone* (3) concerned, however, occupational pensions for civil servants, which fell under the principle of equal pay, enshrined in Article 157 TFEU. By the present case, the Court is invited to set out whether a similar approach should also apply to cases concerning benefits which are part of a general social security pension scheme.

II. Legal framework

A. EU law

4. According to the third recital of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, (4) 'the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity; … in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment'.

5. The purpose of Directive 79/7 is, according to its first article, 'the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment"'.

6. Pursuant to Article 3(1), Directive 79/7 shall apply to:

'(a) statutory schemes which provide protection against the following risks:

...

– invalidity,

...'

7. Article 4 of Directive 79/7 establishes:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

...

– the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.'

8. According to Article 7(1)(b) of Directive 79/7, that directive shall be without prejudice to the right of Member States to exclude from its scope 'advantages in respect of old-age pension schemes granted to persons who have brought up children' and 'the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children'.

B. Spanish law

9. Article 60(1) of the Ley General de la Seguridad Social (General Law on Social Security, 'LGSS') (5) provides as follows:

'Women who have had biological or adopted children and are recipients of a contributory retirement, widow's or permanent incapacity pension under any scheme within the social security system shall be granted a pension supplement on account of their contribution to social security in terms of the number of children they have had.

That supplement, which shall have the legal nature of a contributory state pension for all purposes, shall consist of an amount equivalent to the result of applying to the initial amount of the pensions referred to a specified percentage which shall be based on the number of children in accordance with the following scale:

(a) In the case of two children: 5%.

(b) In the case of three children: 10%.

(c) In the case of four or more children: 15%.

For the purpose of establishing entitlement to the supplement and the amount thereof, only children born or adopted before the operative event for the pension concerned shall be taken into account.'

III. Facts, procedure and the question referred for a preliminary ruling

10. By decision of the Instituto Nacional de la Seguridad Social (National Social Security Institute, Spain, 'the INSS') of 25 January 2017, the Applicant was granted an absolute permanent invalidity pension of 100% of the basic amount, which came to EUR 1 603.43 per month plus revaluations.

11. The Applicant filed an administrative complaint against that decision claiming, essentially, that since he was the father of two daughters, he was entitled to receive a supplement in the amount of 5% of the pension on the same terms as women.

12. By decision of 9 June 2017, the INSS dismissed that administrative complaint and confirmed its decision of 25 January 2017. The INSS stated that the maternity supplement, as its name indicates, is a supplement granted exclusively to women in receipt of a contributory social security benefit who are mothers of two or more children, because of their contribution to social security in terms of demographics.

13. On 23 May 2017, the Applicant brought an action against the decision of the INSS before the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona, Spain), the referring court. He sought the recognition of the right to receive an increase in his pension of 5% of the basic amount of his absolute permanent invalidity pension in the form of a supplement equivalent to the maternity supplement granted under Article 60(1) of the LGSS.

14. On 18 May 2018, the referring court was notified that the Applicant had died on 9 December 2017. The Applicant's wife took over the claim as his legal successor and pursued it further in the main proceedings. (6)

15. According to the referring court, the concept of *a contribution in terms of demographics* is one that is equally valid as regards both women and men, since reproduction and responsibility for bringing up, looking after, feeding and educating children lies with anyone who has the status of parent, regardless of their gender. Furthermore, a career break following the birth or adoption of children, or in order to bring up natural or adopted children, can be equally detrimental to women and men. The referring court believes that, from that point of view, the rules on the maternity supplement laid down in Article 60(1) of the LGSS introduce an unjustified difference in treatment in favour of women, to the detriment of men who are in an equivalent situation.

16. However, the referring court acknowledges that, from a *biological* point of view, there is an undeniable differentiating factor, for, when it comes to reproduction, women make a far greater personal sacrifice than men. Women have to deal with a period of pregnancy and with birth, which involves clear biological and physiological sacrifices, together with the disadvantages that that entails for women, not only in physical terms but also in the area of employment. The referring court believes that, from a biological point of view, the maternity supplement governed by Article 60(1) of the LGSS provides for a supplement in favour of women which is justified. No man will be in an equivalent situation. The situation of a male worker is not comparable with that of a female worker who is faced with the professional disadvantages which a career break for pregnancy and the birth of a child involves. That court, however, harbours doubts as to the implications for the present case of the case-law of the Court, in particular the judgment in *Griesmar*. (7)

17. In those circumstances, the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona) stayed the proceedings and referred the following question to the Court for a preliminary ruling:

> 'Does a national legislative provision (specifically, Article 60(1) of the [LGSS] which grants the right to receive a pension supplement –– in view of their contribution to social security in terms of demographics –– to women who have had biological or adopted children and are in receipt of a contributory retirement, widow's or permanent incapacity pension under any scheme within the social security system, but, on the other hand, does not grant that right to men in an identical situation, infringe the principle of equal treatment which prohibits all discrimination on grounds of sex, enshrined in Article 157 [TFEU] and 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 and recast by Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation?'

18. The Applicant, the INSS and the European Commission submitted written observations. Those interested parties, as well as the Spanish Government, which also replied to written questions from the Court, presented oral submissions at the hearing held on 13 June 2019.

IV. Analysis

19. This Opinion is structured as follows. First, I will start with the identification of the relevant instrument of EU law that is applicable to the benefit at issue in the present case (A). I will then proceed to the interpretation of the relevant provisions that apply to the present case, which are contained in Directive 79/7 (B). Finally, since I will conclude that that directive is to be interpreted as precluding a measure such as the one at issue in this case, I shall examine whether the national provision could, nevertheless, be covered by the general 'positive discrimination' exception provided for in Article 157(4) TFEU (C).

A. Applicable instrument of EU law

20. The order for reference poses the question of the compatibility of Article 60(1) of the LGSS with the principle of equal treatment as enshrined in Article 157 TFEU and in Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. (8)

21. The Applicant endorses the EU legal framework identified in the order for reference. Conversely, the INSS, the Spanish Government and the Commission disagree with that position and submit that the applicable EU law instrument in the present case is Directive 79/7. The Applicant argues, in the alternative, that that directive is in any case applicable.

22. I agree that the applicable legal instrument is Directive 79/7.

23. The Court is naturally bound by the facts of the case as established by the national court, as well as by the scope of the questions and the overall framework of the case as defined by the national court in the order for reference. That is nonetheless not the case as far as the applicable EU law is concerned. The Court is entitled to interpret all the relevant provisions of EU law necessary for national courts to decide the actions pending before them, even if those provisions are not expressly identified in the questions referred to the Court. (9)*Iura (Europaea) novit Curia (Europaea)*.

24. EU law distinguishes between occupational pension schemes, which come under the concept of 'pay' in Article 157(1) and (2) TFEU, (10) and statutory social security pension schemes, which do not. (11)

25. The case-law of the Court has consistently confirmed that 'social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers' cannot be brought within the concept of 'pay' in Article 157 TFEU. This is because 'these schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.' (12)

26. The Applicant submitted at the hearing that the present case concerns a contributory pension that depends on the previous employment. A higher salary gives rise to an entitlement to a higher pension. That is why, in his view, the benefit at issue should be considered as 'pay' within the meaning of Article 157(2) TFEU.

27. It is true, as the Applicant submits, that the case-law has identified *the criterion of employment* as a decisive factor for characterising a pension scheme as 'pay'. (13) Nevertheless, the fact that a pension scheme is funded through contributions the calculation of which depends on the salary hardly turns that pension scheme automatically into 'pay'. Indeed, the test devised by the Court entails an overall analysis which does not rely on a single criterion, such as the contributory nature of a benefit. (14) Even though social security benefits may relate to the concept of pay and may be linked to employment through contributions, benefits governed by statute without any element of negotiation within the undertaking or sector applicable to general categories of employees have been found to fall outside the concept of 'pay'. (15)

28. The Court has already had the opportunity to address different benefits coming under the Spanish general social security scheme. It has consistently found that contributory benefits, such as retirement pensions and unemployment benefits, as well as the permanent invalidity pension, to which the supplement at issue applies, are not covered by the concept of 'pay', but fall under the framework of Directive 79/7. (16)

29. In my view, there is no reason to depart from that approach in the present case. There is little doubt that the benefit at issue forms part of a social security scheme governed by legislation — to the exclusion of any element of agreement — and that it is applicable to the working population in general and not to a specific category of workers.

30. Directive 2006/54 follows the same distinction established by the case-law on Article 157(2) TFEU with regard to the concept of 'pay'. The directive's scope is specifically limited to 'occupational social security schemes', which are defined to the exclusion of statutory social security schemes. (17)

31. As a result, the benefit at issue does not fall within the concept of 'pay' in the sense of Article 157(2) TFEU. It is thus also not covered by Directive 2006/54.

32. The EU law instrument applicable to the present case is therefore Directive 79/7. The benefit at issue supplements a social security permanent invalidity pension, which is part of a statutory scheme of protection against one of the risks set out in Article 3(1)(a) of that directive, namely invalidity. Like the pension itself, the supplement is directly and effectively linked to protection against the risk of invalidity. It is intrinsically connected to the materialisation of that risk and seeks to ensure that its beneficiaries are properly protected against the risk of invalidity (18) by reducing the gender gap. (19)

33. All those considerations lead me to the conclusion that it is necessary to reformulate the preliminary question as referring to Directive 79/7.

B. Does Directive 79/7 preclude a measure such as the one at issue?

34. The analysis of the compatibility of the national provision at issue with Directive 79/7 involves three steps. First, are women and men in a comparable situation for the purposes of the application of the national provision at issue? (1). Second, does the national provision at issue amount to discrimination under Article 4(1) of Directive 79/7? (2). Third, if that is the case, could Article 60(1) of the LGSS be covered by one of the derogations provided for by Article 7 of that directive? (3).

1. Comparability

35. Discrimination involves applying different rules to comparable situations or applying the same rule to objectively different situations. (20) Pursuant to settled case-law of the Court, the analysis of comparability must be carried out not in a general and abstract manner, but in a specific manner, *in the light of the benefit concerned*. This entails taking due account of the aims of the specific national measure or benefit concerned. (21) Therefore, the (stated) legislative aims are of particular relevance when it comes to ascertaining the comparability between female and male workers.

36. The case-law of the Court, as well as secondary legislation, has singled out situations where female and male workers are simply not comparable because of the biological condition of women, which is understood to cover pregnancy, birth and the period that immediately follows birth.

37. On the one hand, with regard to the situation of *maternity* leave, the Court has held that women are 'in a special position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work'. (22) The Court has consistently stated that 'the situation of a male worker is not comparable to that of a female worker where the advantage granted to the female worker alone is designed to offset the occupational disadvantages, inherent in maternity leave, which arise for female workers as a result of being away from work'. (23)

38. On the other hand, the Court has found the positions of working mothers and fathers to be comparable with regard to many other circumstances related to *parenthood and childcare*. Women and men are in a comparable situation in their capacity as parents and when it comes to bringing up their children. (24) As a result, they are in a comparable situation, for example, as regards their possible need to reduce their daily working time in order to look after their children, (25) or their need to use nursery facilities when they are in employment. (26)

39. Therefore, it is essential to determine in the present case whether the national rules at issue are connected with the particular biological features of women pertaining to pregnancy, birth and maternity (a). If that is not the case, it becomes crucial to identify the objective aims of the measure at issue in order to determine whether female and male workers are in a comparable situation in that regard (b).

(a) A measure relating to protection on the grounds of maternity under Article 4(2) of Directive 79/7?

40. Article 4(2) of Directive 79/7 sets out that 'the principle of equal treatment shall be without prejudice to the provisions relating to the protection of women *on the grounds of maternity*'. According to the third recital of that directive, 'the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity' and 'in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment'.

41. That provision can be regarded as an acknowledgement of the lack of comparability between women and men in view of their biological condition, in line with the case-law highlighted above in point 37 of this Opinion.

42. Can the measure at issue be considered as a provision 'relating to the protection of women on the grounds of maternity' in the sense of Article 4(2) of Directive 79/7?

43. The Spanish Government and the INSS submit that Article 60(1) of the LGSS is covered by Article 4(2) of Directive 79/7. The INSS states that the measure is inherently connected with maternity, since the women covered by it are mothers: if there is no maternity, the situation that the national provision is intended to remedy does not arise at all. The Spanish Government argued at the hearing that Article 4(2) of Directive 79/7 should be understood as allowing measures of positive discrimination for reasons of maternity and should be interpreted in a broad way in the light of Article 157(4) TFEU and of Article 23 of the Charter of Fundamental Rights of the European Union ('the Charter').

44. Conversely, the Applicant and the Commission consider that the measure at issue cannot be covered by Article 4(2) of Directive 79/7. Those interested parties defend a narrow reading of that provision in the sense that it covers only the aspects connected with the biological condition of women. That would be the case, in particular, of the period covered by maternity leave.

45. The expression 'on the grounds of maternity' is not defined in Directive 79/7. To my knowledge, Article 4(2) of that directive has not been interpreted by the Court to date. However, the Court has interpreted on several occasions similar provisions in the context of Article 2(3) of Directive 76/207/EEC, (27) which in terms rather similar to those of Article 4(2) of Directive 79/7 established that that directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

46. In the context of Article 2(3) of Directive 76/207, the Court has considered that the 'maternity' exception must be interpreted strictly. (28) The Court has consistently linked its application to the biological condition of women and the special relationship which exists between a woman and her child. Therefore, only measures connected with the protection of women during pregnancy, birth and maternity leave have been considered covered by that provision. (29) Conversely, measures not strictly connected with protecting women in those situations have been deemed not to fall within the 'maternity' exception. (30)

47. This strict approach to the concept of 'maternity' has also been applied by the Court in order to determine whether the situations of female and male workers are comparable for the purpose of applying the principle of equal pay in Article 157 TFEU in the area of occupational pensions. In *Griesmar*, the Court stated that a measure could be accepted if it were designed to 'offset the occupational disadvantages which arise for female workers as a result of being absent from work during the period following childbirth, in which case the situation of a male worker is not comparable to that of a female worker'. (31) However, the Court explicitly refused to consider the disadvantages incurred by women in the course of their professional career by virtue of their predominant role in bringing up children as linked to 'maternity leave' or to any disadvantage incurred as a result of being absent from work after birth. (32) This was, in part, because the credit at issue in that case was also granted in respect of adopted children without it being linked to a prior grant of adoption leave to the mother. (33)

48. Thus, the concept of 'maternity', as interpreted by the Court, relates to the specific biological reality which makes women and men non-comparable: pregnancy, birth, and maternity leave. This circumscribes the object of that special protection not only *ratione materiae*, but also, logically, *ratione temporis*, as the maternity exception cannot be considered to cover any subsequent event(s) or situation(s) simply by virtue of having

been a mother. *Maternity* must therefore be understood in a narrow manner. It cannot be equated with the more general concepts of *motherhood* or *parenthood*.

49. The INSS and the Spanish Government suggest departing from that approach in the context of Directive 79/7 and embracing a broader understanding of 'maternity' as 'motherhood'. When questioned about the reasons for suggesting such a broad reading at the hearing, the Spanish Government argued that Article 4(2) of Directive 79/7 should be construed, in the light of Article 157(4) TFEU and Article 23 of the Charter, as opening the door to measures of positive discrimination regarding motherhood in the broad sense.

50. I do not find this argument convincing. As I will explain in detail below, (34) a potential legal basis for positive action in the context of the present case could perhaps be found outside Directive 79/7, in Article 157(4) TFEU. Here it suffices to note that the measures allowing for different treatment of women and men that are protective measures on grounds of maternity within the scope of Directive 79/7 are based on a different premiss and logic than the general rules on positive action in Article 157(4) TFEU. To suggest that later, general provisions on positive action should be allowed interpretatively to twist the understanding of comparability in older, specific sectoral legislation, effectively rendering one of its key provisions toothless, does not appear to me to be a good recipe for statutory interpretation.

51. In short, I see no good reason to give the concept of 'grounds of maternity' a different and broader meaning in the context of Directive 79/7. Rather the opposite, as the Commission correctly cautions: a broad understanding of the 'maternity' derogation would allow for different treatment in situations where working mothers and fathers are indeed in a comparable situation, therefore defeating the very purpose of the directive.

52. On the basis of that reasonably narrow interpretation of 'grounds of maternity', which must, in my view, also apply in the context of Directive 79/7, I do not see how the measure at issue could be considered covered by the exception contained in Article 4(2) thereof.

53. A glimpse at the specific features of the measure at issue confirms that conclusion. The maternity supplement set out in Article 60(1) of the LGSS is not connected with any of the specific situations of pregnancy, birth and maternity leave. It does not in fact require any of those situations as a condition for benefiting from the maternity supplement.

54. First, as the Applicant notes, not every female worker having access to the maternity supplement might have actually enjoyed a period of maternity leave. Since, under national law, adoption leave can be enjoyed equally by women and men, (35) it may well be that a woman can benefit from the maternity supplement despite not having taken such leave or, for that matter, neither having been pregnant nor having given birth. Second, when a child has two mothers, (36) both of them will be entitled to the maternity supplement but only one might have actually taken maternity leave. Since the measure at issue does not contain any condition according to which women must have stopped working at the time when they had children, the connection with maternity leave would also be missing, for example, in situations where a woman gave birth before entering the workforce. Third, the fact that the measure does not apply to mothers of one child confirms that it is not connected to the protection of maternity.

55. Thus, all in all, the measure is under-inclusive of situations that are clearly and objectively connected with maternity, while being over-inclusive of situations that are not. Such a legislative design can hardly fit within the confines of Article 4(2) of Directive 79/7.

56. It would also appear that both the INSS and the Spanish Government eventually acknowledged that the specific objective of Article 60(1) of the LGSS is far broader than the objective of protecting women on grounds of maternity in the (narrow) sense posited above.

57. All of those considerations confirm that Article 60(1) of the LGSS does not contain any element establishing a relationship between the supplement and the professional disadvantages linked to the concept of 'maternity' in the sense of Article 4(2) of Directive 79/7.

(b) What are the aims of the measure at issue?

58. According to Article 60(1) of the LGSS, the maternity supplement was introduced in acknowledgment of a 'demographic contribution' to social security. As the Commission points out, the preamble to the law adopting the measure does not contain any more specific justification than that. (37)

59. If one were to focus on the stated aim of Article 60(1) of the LGSS itself, it would be hard to see how women and men are not in a comparable position regarding their 'demographic contribution' to the social security system, as both still seem to be necessary for procreation. (38)

60. However, as it transpires from the drafting history and the policy context described by the Commission, the INSS and the Spanish Government, the measure at issue was inspired by and pursues a much broader objective.

61. It follows from the submissions of the Commission, as well as from the written response of the Spanish Government to the question posed by the Court, that the parliamentary amendment which is at the origin of the measure at issue signalled a need to recognise the gender dimension of pensions and to eliminate or at least *reduce the gender gap in pensions*. (39) This is because women more often give up their work to take care of children, which has a direct impact on their income as well as on their pensions, giving rise to the phenomenon known as the 'double penalty'. (40) The measure aims therefore at introducing the concept of a 'demographic contribution' in order to recognise the effort made by women in taking care of and bringing up children to the detriment of their professional activity. (41) This was also considered to be the underlying objective of the measure by the Spanish Constitutional Court: the objective is to compensate mothers who, despite their intention to have a longer professional life, have dedicated themselves to childcare, with the result that they have not been able to pay contributions over as many years as other workers. (42)

62. The INSS, moreover, produced statistical evidence showing that social security contributions relate directly to gender and the number of children. The gender pension gap has, according to that evidence, a greater impact on women who are mothers of two or more children.

63. A first preliminary conclusion can be drawn from the elements just mentioned. It is clear that the measure at issue is *not* in fact aimed at protecting women who assume childcare responsibilities. Indeed, Article 60(1) of the LGSS does not contain any condition that would link the benefit at issue with actual childcare. It does not require demonstrating a period of leave, an interruption of employment, or at least some reduction of working hours. Admittedly, even if that were the stated objective, it would be of little avail, since the Court has consistently held that fathers and mothers are in a comparable position with regard to childcare. (43)

64. The second preliminary conclusion is that the genuine objective of the measure at issue appears to be the *reduction of the gender gap* in pensions, on the basis of general statistical data which show that women who are mothers of more than one child are particularly disadvantaged as regards their pension entitlements.

65. The latter objective immediately begs the question whether such a structural situation of inequality is sufficient to render women and men non-comparable in any given situation.

66. In my view, that cannot be the case. It is true that, in some instances, the case-law of the Court has taken into account differences affecting different groups of persons in order to reject their comparability. (44) However, the Court has deemed comparable the situation of persons belonging to different age groups that were affected by structural problems, such as unemployment. (45) Moreover, the Court has cautioned against relying on generalisations and statistical data precisely because this is likely to lead to discriminatory treatment of women and men in a given situation. (46) Indeed, the existence of strong statistical evidence which demonstrates structural differences affecting women does not exclude that there are situations in which women and men are placed in a comparable situation.

67. I see no reason not to follow the same approach in the present case. Moreover, arguments related to the different situations in which groups find themselves, provided that such a difference would not be so considerable as to render the groups wholly non-comparable, are to be properly assessed at the justification stage (47) or, if relevant, within the framework of assessment for 'positive action'. In particular, 'positive action' allows for a departure from the individual approach to equality in order to take into consideration the disadvantageous situation of a group, with a view to achieving substantive equality. (48)

68. As a result, I must conclude that the existence of general, structural inequality in pensions does not preclude that female and male workers who are parents of two or more children are in a comparable position when it comes to the benefit in question, namely access to (a supplement to) a contributory invalidity pension.

2. Discrimination

69. Because of the nature of the measure at issue, the analysis of whether Article 60(1) of the LGSS is discriminatory is bound to be extremely brief. The provision reserves the benefit of the supplement exclusively for women. It therefore constitutes direct discrimination based on sex, which affects the calculation of benefits in the sense of Article 4(1) of Directive 79/7.

70. As the Commission correctly points out, within the framework of Directive 79/7 it is not possible to justify such an instance of direct discrimination. (49) A derogation from the prohibition of direct discrimination on grounds of sex is possible only in the situations exhaustively set out in that directive. (50) It is therefore necessary to examine whether the measure at issue could be covered by Article 7(1) of Directive 79/7.

3. Article 7(1) of Directive 79/7

71. Because of the particularly sensitive nature of social security and due to widespread differences in treatment between women and men at the time when Directive 79/7 was negotiated, Article 7(1) allowed Member States to exclude certain matters from the scope of the directive. Indeed, Directive 79/7 aimed 'only' at the 'progressive' implementation of the principle of equal treatment between women and men. (51) The exceptions in Article 7(1) thus cannot be logically linked to a systematic attempt at the protection of women or positive discrimination. They aim, rather, at preserving certain elements of the social security systems that existed at the time of the adoption of the directive. (52)

72. Amongst the matters that Member States are allowed to exclude from the scope of Directive 79/7, Article 7(1)(b) refers to 'advantages in respect of old-age pension schemes granted to persons who have brought up children' and 'the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children'.

73. The INSS and the Spanish Government argue in general terms that the measure at issue in the present case is covered by that exception.

74. The Applicant, conversely, claims that the exception in Article 7(1)(b) is not applicable. That exception is, in the Applicant's view, only applicable to old-age pensions, not to invalidity pensions such as the one at issue.

75. I see no objection to applying Article 7(1)(b) to a permanent invalidity pension. Indeed, even if the first part of that provision refers to an 'old-age' pension, that is not the case of the second part, which refers generally to the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children. In fact, the Court has already applied the exception contained in Article 7(1)(b) in the context of Spanish permanent invalidity pensions. (53)

76. However, Article 7(1)(b) is not applicable in this case for a different reason. As the Applicant correctly points out, Article 60(1) of the LGSS is *not related to any actual interruption of employment* due to the bringing up of children. The maternity supplement is awarded regardless of the existence of an interruption in employment, whether in the form of maternity or parental leave, or of any other kind. (54)

77. I would like to add, for the sake of clarification, that even if a measure such as the one at issue were actually linked to an interruption of employment due to the bringing up of children, that would not, in my view, mean that it could be subsumed under the exception set out in Article 7(1)(b).

78. As the Commission and the Applicant correctly argue, the exceptions contained in Article 7(1) of Directive 79/7 were designed in the context of a *progressive elimination* of disparities of treatment, (55) and must be interpreted strictly. (56) Even though Article 7(2) and Article 8(2) of that directive refer to the possibility for Member States to 'maintain' existing provisions, Article 7(1) has not been interpreted by the Court as a strict standstill clause. The case-law accepts that Article 7(1) of Directive 79/7 can apply to the subsequent adoption

of measures that cannot be separated from pre-existing measures falling within that derogation, as well as to amendments to such measures. (57)

79. However, the rule at issue in the present case cannot be considered, on any reasonable construction, as being connected to a *progressive advancement* towards the full application of the principle of equality between women and men in the field of social security. The measure was adopted in 2015, several decades after Directive 79/7 came into force. It was inserted into a national legal context where no similar provision existed to which it could be linked. It is therefore not possible to consider the measure as necessary for or inseparable from any pre-existing regime making use of the derogation provided in Article 7(1)(b). It is, moreover, unconnected with the overall aim of Article 7(1) of preserving the financial equilibrium of the social security system.

80. As a result, I must conclude that the measure at issue in the present case cannot be considered covered by the exception provided for in Article 7(1)(b) of Directive 79/7.

C. Article 157(4) TFEU

81. Despite my finding that Article 60(1) of the LGSS is precluded by Directive 79/7, it remains to be analysed whether the measure at issue may nonetheless be permissible under Article 157(4) TFEU, a provision which was extensively discussed by the interested parties that submitted observations in this case.

82. Article 157(4) TFEU states that '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'. That provision thus makes it possible to 'redeem' or render compatible again EU law measures which are not covered by the specific exceptions or derogations provided for in secondary law in the field of sex equality. (58)

83. However, the scope of Article 157(4) TFEU remains unclear. First, it remains unresolved whether Article 157(4) TFEU is limited to the sphere of 'equal pay' or has a broader scope of application (1). Second, what kind of measures can be considered as covered by this provision, in particular regarding measures to 'compensate for disadvantages in professional careers'? (2) Having analysed these two key issues in general, and suggested that certain carefully drafted national measures in the field of social security pensions could be covered by Article 157(4) TFEU, I am still bound to conclude that the measure at issue in the present case is not one of those, since it fails to meet the basic requirements of proportionality (3).

1. The scope of Article 157(4) TFEU and 'equal pay'

84. The benefit at issue does not come within the concept of 'pay' within the meaning of Article 157(2) TFEU. (59) Could Article 157(4) TFEU therefore redeem a national measure that does not fall within the scope of Article 157(2) TFEU?

85. When asked about this issue at the hearing, the Commission submitted that, bearing in mind that the concept of 'professional careers' in Article 157(4) TFEU is very broad, the scope of this provision is not limited to the concept of 'equal pay'. It could thus also apply to the field of social security.

86. I agree with the Commission that there is no reason to limit the scope of Article 157(4) TFEU to the field of 'equal pay'.

87. Admittedly, the particular provision that enables Member States to adopt 'positive action' measures is placed in Article 157 TFEU, which was historically related to 'equal pay'. However, a number of elements support the view that paragraph 4 of that provision reaches beyond the specific 'equal pay' field.

88. First, the wording of Article 157(4) TFEU is clearly rather broad. It sets out an exception to the 'principle of equal treatment' between women and men, not to 'equal pay', without placing any explicit limitations as to the areas in which it shall apply. (60) The measures allowed by this provision are described in equally broad terms as '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'. The objectives of Article 157(4) TFEU are similarly set out by reference to the very broad aim of 'ensuring full equality in practice … in working life'.

89. Second, from a systematic point of view, any potential overall limitation of Article 157 TFEU to the specific area of 'equal pay' is already broken by Article 157(3) TFEU, which constitutes a broad legal basis going well beyond the principle of equal pay, and including the adoption of 'measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'. (61)

90. Third, it is true that in the past, the Court embraced a 'narrow' interpretation of the positive action exception enshrined in Article 2(4) of Directive 76/207, stating that that provision constituted a derogation from the equal treatment principle. (62) That position has nonetheless been progressively abandoned. (63) It does not feature in the case-law concerning the broader and overarching positive action exception contained in Article 157(4) TFEU. That is, in my view, not by chance. Article 157(4) TFEU constitutes the primary law consolidation of a vision of substantive equality in the field of sex equality, and not a mere derogation that should be interpreted narrowly.

91. I therefore think that Article 157(4) TFEU should be interpreted as allowing, under the 'positive discrimination' umbrella, measures that would otherwise be prevented by the principle of equal treatment enshrined in Directive 79/7, as long as those measures indeed seek to ensure 'full equality in practice between men and women in working life', and to provide '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'.

92. There is, however, another preliminary matter: does Article 157(4) TFEU apply to the field of social security? Indeed, that field remains under a specific regime, cut off somewhat from all the other instruments in the field of sex equality regarding working conditions and pay, and governed by the only survivor of the 'old' directives, adopted on the basis of Article 235 EEC (current Article 352 TFEU). (64)

93. Nevertheless, from a broader point of view, it must be emphasised that to exclude the field governed by Directive 79/7 from the scope of Article 157(4) TFEU would lead to the rather paradoxical consequence of isolating the social security field and excluding it from the goal of achieving substantive equality in practice pursued by that provision. This is because the provisions of Directive 79/7 providing for the possibility of a derogation, Article 4(2) and Article 7, are not well suited as vehicles for positive discrimination. This is mostly because of the narrow interpretation that both deserve, but also, and more specifically, because of their different structures and purposes.

94. Moreover, as already indicated, Directive 79/7 is the 'last of the Mohicans' of the equality legislation of the 1970s and 1980s still standing. The beauty, clarity and simplicity of its language, which, in view of the legislative drafting of today, can only be admired, should not detract from the fact that the social reality faced and tackled in 1978 is bound to be different from that faced some 40 years later.

95. However, having made those allowances, I am still of the view that accepting, under certain conditions, Article 157(4) TFEU as justification for narrowly tailored measures in the field of social security falling under Directive 79/7, but apparently at odds with its provisions, is systematically and logically preferable to the alternative advocated by the INSS and the Spanish Government, namely to start interpreting and in fact modifying the concepts contained in Directive 79/7 in the light of Article 157(4) TFEU and whatever vision of (substantive) equality. (65)

96. As already outlined above, Article 4(2) of Directive 79/7 accepts that men and women are not comparable in the specific situation of maternity, but it does not, as such, establish a specific avenue for 'positive action'. (66) It is true that the conceptual foundations of positive action share some elements of the reasoning that underlies the findings of non-comparability related to maternity precisely due to the specific situation of disadvantage suffered by one of the identified groups and the aim of achieving substantive equality. (67) However, at least in the field of sex discrimination, these two conceptual categories — maternity as one of the features precluding comparability and the possibility of taking positive action to remedy or compensate for the disadvantages suffered by women — are kept as separate categories in the legislation and case-law. (68)

97. This is no mere coincidence. Indeed, the logic underlying both exceptions is different: an exception concerning measures for the protection of women on grounds of maternity, such as Article 4(2) of Directive 79/7, is based on non-comparability with regard to a very specific biological reality that will never change. It is not aimed at remedying or compensating a pre-existing imbalance or structural disadvantageous situation, which may disappear with social progress. In fact, Article 4(2) of Directive 79/7 operates independently of any pre-existing situation of disadvantage or underrepresentation.

98. Moreover, from the point of view of the functions and objectives of the maternity exception and positive action, the distinction is of considerable importance. Many of the disadvantages suffered by women emanate from a socially constructed role attributed to them, and a broad interpretation of the 'maternity' exception as covering 'motherhood' is likely to perpetuate and further petrify those roles, therefore running counter to the very purpose of positive action.

99. In the case of Article 7 of Directive 79/7, its limited scope, linked to the progressive nature of the directive, already constitutes an important objection to regarding that provision as a suitable avenue for positive action in the field of social security. Moreover, as already noted, the purpose of that provision is not so much linked to the idea of substantive equality, but to the logic of maintaining some pre-existing differences to the 'advantage' of women, while also preserving the fiscal balance of social security systems. (69)

100. In sum, excluding social security from the scope of Article 157(4) TFEU would mean that Directive 79/7 would be the only specific instrument of secondary law in the field of social policy implementing the EU principle of equality between women and men that is excluded from the substantive approach to equality heralded by Article 157(4) TFEU as the general 'positive action' provision on grounds of sex.

101. I find that consequence difficult to embrace. Thus, Article 157(4) TFEU should also serve to justify a national measure that would otherwise be discriminatory within the specific legal framework established by the applicable secondary EU law, including Directive 79/7, inasmuch as such a measure complies with the requirements of that Treaty provision, namely, that those measures aim to ensure 'full equality in practice between men and women in working life', and provide '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'.

2. Compensation for disadvantages in professional careers

102. The Commission, despite having accepted that Article 157(4) TFEU could potentially apply in the field of social security, submits that the measure at issue in the present case cannot be subsumed within the 'positive action' exception provided for by that article on the basis of the interpretation that the Court has given to its predecessors in the judgments in *Griesmar* and *Leone*.

103. In *Griesmar*, the Court interpreted Article 6(3) of the Agreement on Social Policy (70) in a case concerning a service credit for children, which was awarded to female civil servants under an occupational retirement scheme. The Court found that that measure did not come within the positive action measures envisaged by Article 6(3) of the Agreement on Social Policy. The measure did not appear 'to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life'. The Court noted that, 'on the contrary, that measure is limited to granting female civil servants who are mothers a service credit at the date of their retirement, *without providing a remedy for the problems which they may encounter in the course of their professional career*'. (71) This was confirmed in *Leone*, (72) as well as in several Treaty infringement judgments concerning certain advantages conferred on female civil servants regarding retirement age and the number of years of service required for retirement. (73)

104. At first sight, the considerations in those judgments are also perfectly valid for the discussion of Article 157(4) TFEU in the present case. Indeed, the maternity supplement affects the pension entitlement after the recognition of a situation of permanent absolute invalidity and not during the professional career of the Applicant.

105. A second look reveals, however, two issues with such an analogy: a more technical one, and a principled one.

106. First, the more *technical* argument: the case-law in *Griesmar* and *Leone* need not necessarily be read as completely excluding the possibility to have resort to Article 157(4) TFEU in any situation which is connected with the need to compensate for past disadvantages. The statements in those judgments must be viewed in the context of the circumstances of the specific case in question. Indeed, where the *sole measure* that exists to tackle a structural problem like the gender gap consists of compensation after retirement, it is indeed legitimate to suggest that the national provisions do not provide a remedy to problems encountered by women in the course of their professional careers. In such circumstances, providing only for compensation after retirement could even contribute to perpetuating a traditional distribution of the roles of women and men by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties, (74) with women effectively only receiving a 'pay-off' at the end of their careers.

107. The situation is rather different, in my view, where a national measure, such as the one at issue in the present case, forms part of a *broader system* of national law that includes different measures seeking to actually remedy the problems encountered by women in the course of their professional careers. In such a case, it cannot be excluded that, as a matter of principle, if there exists a general legislative context that aims at offsetting the disadvantages that women are exposed to by supporting them *in the course of their professional life*, a measure having the impact of *compensating past disadvantages* could legitimately be devised under Article 157(4) TFEU. Such a measure would indeed be *ancillary* to the main system of compensation measures effective during professional life. It would be remedial and temporary in nature in order to tackle, in the name of intergenerational justice, the situation of those who could not benefit from the progression towards equality in the social security system.

108. If such a reasonable and indeed substantive equality oriented interpretation of the scope of Article 157(4) TFEU were not embraced, then it would be time, in my view, to rethink the approach of this Court as a matter of principle.

109. First, there is the text of Article 157(4) TFEU. It clearly refers to the objective of ensuring equality in practice by encompassing not only measures aimed at easing *access* and preventing disadvantages, (75) but also *compensation* for those disadvantages. That provision supersedes, in my view, the perhaps not entirely useful focus on the dichotomy between equality of opportunity and equality of results that had dominated much of the previous case-law interpreting different legal provisions. (76)

110. Second, the interpretation of the scope of Article 157(4) TFEU must logically adapt to the specificities of the field at issue. If it is accepted that Article 157(4) TFEU applies to the field covered by Directive 79/7, compensation for disadvantages in professional careers must necessarily cover the consequences in the present of past disadvantages. I fail to see how it could be otherwise in the area of social security, where the disadvantages in pensions will mostly be felt once the person leaves the job market. It is difficult to see how the issue of the *currently existing* gender pension gap could possibly be tackled by easing access for women to the labour market or by measures adopted while they are still active in the labour market (those measures would avoid *a potential future* gender pension gap), while categorically excluding any measures that would become applicable once they leave the job market (where the real and more urgent problem lies).

111. Third, such an approach to Article 157(4) TFEU would indeed lead to too narrow and exclusionary a result, since it would result in the prolongation of the disadvantages suffered by women throughout their working lives into their retirement period. (77) The practical result would be morally questionable: since *full equality in practice* applies only to equality of opportunity *during their working lives*, nothing after their exit from the labour market can ever be compensated, even if the disadvantage clearly flows from inequality experienced during their working lives, and will logically manifest itself later. In such a scenario, equality of opportunity would only be a helpful concept if it included an equal opportunity to change the past.

112. I would therefore suggest that not only can Article 157(4) TFEU serve to justify a national measure that would otherwise be discriminatory within the specific legal framework established by the applicable secondary EU law, including Directive 79/7, it can also be invoked for measures that aim at compensating for disadvantages experienced during professional careers that, although originating in inequality during working life, only manifest themselves later, upon leaving the job market.

113. However, EU law consistently subjects positive action measures to the test of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to

achieve the aim at hand. The principle of equal treatment must be reconciled as far as possible with the requirements of the aim thus pursued. (78)

114. I shall now turn to these requirements in the context of the present case.

3. The present case

115. The INSS and the Spanish Government insist on the supplementary corrective nature of the benefit at issue. According to those interested parties, the 'maternity supplement' fits within the broader legislative framework which aims at compensating the effects on pensions of the disadvantages experienced by women during their professional life. Several measures have been described, including measures which compensate for contributions during the period following birth, maternity leave and parental leave, as well as measures in the field of employment, such as the guarantee of longer periods of paternity leave. However, those measures do not apply retroactively and cannot therefore remedy the situation of older generations that could not benefit from them. Moreover, in view of those measures, the Spanish Government submits that the need to maintain the 'maternity supplement' in the future would be periodically reassessed.

116. All those elements would need to be considered by the national court, in order to assess whether the measure at issue is indeed of a complementary compensatory nature in the framework of a broader system, which aims in fact at offsetting the disadvantages suffered by women during their professional careers.

117. However, although it is theoretically possible to apply Article 157(4) TFEU to the present case, I must nonetheless conclude that, on the information presented to this Court, the benefit at issue, as currently devised, would not in any case pass the test of proportionality required by that provision. I am bound to agree with the Commission on this point: the measure at issue does not comply with the proportionality principle.

118. First, from the point of view of its appropriateness, it must be noted that the measure at issue does not apply to non-contributory pensions which are arguably more affected by the gender gap, bearing in mind that it is women of older generations who are less likely to reach even the necessary number of years to claim contributory pensions.

119. Second, as the Commission notes, the measure only applies to the pensions that started to be paid out in 2016, therefore leaving out women from the generations that are most likely to be affected by the gender gap. In my view, this fact creates such strong dissonance between the (officially stated) aim of the measure and the means chosen for its realisation as to render it inappropriate to achieve that stated aim. (79)

120. Third, the measure at issue does not meet the requirement of necessity. Article 60(1) of the LGSS relies on the exclusive and automatic criterion of sex. It only applies to women and does not admit of any kind of consideration of the situation of men in comparable situations. There is no possibility to apply the same measure to men who have been affected by interruptions of their careers or reduced contributions connected with bringing up their children. (80)

121. A closing remark is in order: neither the legitimacy of the objective pursued by the national measure nor the statistical evidence adduced by the national authorities attesting to the existence of the gender gap *qua* structural problem have been called into question. Moreover, national rules in the field of social security aimed at remedying the gender gap by means of compensation could, in my view, be pursued under Article 157(4) TFEU. However, Article 60(1) of the LGSS in its current form fails to fulfil the requirements of both appropriateness and necessity so as to satisfy the standards of the principle of proportionality, which must be complied with in order to render such a measure permissible under Article 157(4) TFEU.

122. Those considerations lead me to the conclusion that the measure at issue in the present case is not permissible under Article 157(4) TFEU, and is therefore incompatible with EU law.

V. Conclusion

123. On the basis of the foregoing considerations, I propose that the Court answer the question referred by the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona, Spain) as follows:

> Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as precluding a national provision such as the one at issue in the present case, which, on the one hand, confers the right to receive a pension supplement on women who are mothers of two or more children and who become entitled to a contributory permanent incapacity pension after its entry into force, but, on the other hand, does not contain any possibility to grant that right to men in any situation.

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1 Original language: English.

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2 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648).

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3 Judgment of 17 July 2014 (C-173/13, EU:C:2014:2090).

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4 Council Directive of 19 December 1978 (OJ 1979 L 6, p. 24).

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5 Approved by Real Decreto Legislativo 1/1994 (Royal Legislative Decree 1/1994) of 20 June 1994 (BOE No 154, of 29 June 1994, p. 20658) in the consolidated version approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291), as amended by Ley 48/2015, de 29 de octubre, de Presupuestos generales del Estado para el año 2016 (Law 48/2015 on the general State Budgets for 2016) (BOE No 260 of 30 October 2015, p. 101965).

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6 References to the Applicant in this Opinion should be construed accordingly.

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7 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648).

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8 Directive of the European Parliament and of the Council of 5 July 2006 (recast) (OJ 2006 L 204, p. 23).

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9 See to that effect, for example, judgment of 19 September 2013, Betriu Montull (C-5/12, EU:C:2013:571, paragraphs 40 and 41 and the case-law cited).

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10 See, for example, judgment of 17 May 1990, Barber (C-262/88, EU:C:1990:209, paragraphs 25 to 28).

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11 See, for example, judgment of 25 May 1971, Defrenne (80/70, EU:C:1971:55, paragraphs 7 and 8).

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12 See, for example, judgment of 25 May 1971, Defrenne (80/70, EU:C:1971:55, paragraphs 7 and 8).

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13 See, for example, judgment of 28 September 1994, Beune (C-7/93, EU:C:1994:350, paragraph 43) or of 29 November 2001, Griesmar (C-366/99, EU:C:2001:648, paragraph 28).

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14 On the issue of the contributory nature of a benefit and its qualification as 'pay', see Opinion of Advocate General Sharpston in Espadas Recio (C-98/15, EU:C:2017:223, points 34 to 38).

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15 See, to that effect, for example, judgment of 25 May 1971, Defrenne (80/70, EU:C:1971:55, paragraphs 7 and 8) or of 28 September 1994, Beune (C-7/93, EU:C:1994:350, paragraph 24).

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16 With regard to contributory retirement pensions, also covered by the pension supplement at issue in this case, see, for example, judgments of 22 November 2012, Elbal Moreno (C-385/11, EU:C:2012:746, paragraph 26), and of 8 May 2019, Villar Láiz (C-161/18, EU:C:2019:382, paragraph 56). With regard to unemployment pensions, see judgment of 9 November 2017, Espadas Recio (C-98/15, EU:C:2017:833, paragraphs 33 and 34). With regard to permanent invalidity pensions, see judgments of 16 July 2009, Gómez-Limón Sánchez-Camacho (C-537/07, EU:C:2009:462, paragraph 63), and of 14 April 2015, Cachaldora Fernández (C-527/13, EU:C:2015:215, paragraphs 26 and 34).

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17 See recitals 13 and 14. According to its Article 1(c), Directive 2006/54 applies to 'occupational social security schemes', with those schemes being expressly defined in Article 2(1)(f) as 'schemes not governed by Directive 79/7 …'.

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18 See, to that effect, with regard to adjustment mechanisms, judgment of 20 October 2011, Brachner (C-123/10, EU:C:2011:675, paragraph 42 et seq.).

19 See, on the objectives of the measure, Section B(1)(b) of this Opinion.

20 See, for example, judgment of 14 July 2016, *Ornano* (C-335/15, EU:C:2016:564, paragraph 39 and the case-law cited).

21 See to that effect, for example, judgments of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 33), and of 19 July 2017, Abercrombie & Fitch Italia (C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited). See, in greater detail on the comparability analysis, my Opinion in Cresco Investigation (C-193/17, EU:C:2018:614, points 64 to 79).

22 See, for example, judgments of 13 February 1996, Gillespie and Others (C-342/93, EU:C:1996:46, paragraph 17), and of 14 July 2016, Ornano (C-335/15, EU:C:2016:564, paragraph 39).

23 Judgment of 29 November 2001, Griesmar (C-366/99, EU:C:2001:648, paragraph 41). See also judgment of 16 September 1999, Abdoulaye and Others (C-218/98, EU:C:1999:424, paragraphs 18, 20 and 22).

24 See, for example, judgments of 25 October 1988, Commission v France (312/86, EU:C:1988:485, paragraph 14); of 29 November 2001, Griesmar (C-366/99, EU:C:2001:648, paragraph 56); of 26 March 2009, Commission v Greece (C-559/07, not published, EU:C:2009:198, paragraph 69); and of 16 July 2015, Maïstrellis (C-222/14, EU:C:2015:473, paragraph 47).

25 Judgment of 30 September 2010, Roca Álvarez (C-104/09, EU:C:2010:561, paragraph 24).

26 Judgment of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 30).

27 Article 2(7), as amended, of Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15). That article has been superseded by Article 28 of Directive 2006/54.

28 See, for example, judgment of 15 May 1986, *Johnston* (222/84, EU:C:1986:206, paragraph 44).

29 See, for example, on maternity leave, judgment of 18 November 2004, Sass (C-284/02, EU:C:2004:722, paragraph 33); on an additional period of maternity leave, judgment of 12 July 1984, Hofmann (184/83, EU:C:1984:273, paragraphs 25 and 26); and on specific arrangements concerning the possible use of a period of leave by employed mothers or fathers, judgment of 19 September 2013, Betriu Montull (C-5/12, EU:C:2013:571, paragraphs 61 to 65).

30 See, for example, judgments of 25 October 1988, Commission v France (312/86, EU:C:1988:485, paragraphs 13 and 14) regarding several 'special rights for women' protecting women in their capacity as older workers or parents, and of 30 September 2010, Roca Álvarez (C-104/09, EU:C:2010:561, paragraphs 26 to 31) concerning a leave period that, despite being called 'breastfeeding leave', was in fact detached from breastfeeding as such and could be considered as aiming at childcare. See also, to that effect, judgment of 16 July 2015, Maïstrellis (C-222/14, EU:C:2015:473, paragraph 51) regarding parental leave.

31 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648, paragraph 46).

32 Ibid., paragraph 51.

33 Ibid., paragraph 52.

34 See Section C, points 93 and 96 to 98.

35 According to Article 48(5) of the Ley del Estatuto de los Trabajadores (Law on the Workers' Statute), in the version resulting from Real decreto legislativo 2/2015 (Royal Legislative Decree 2/2015) of 23 October 2015 (BOE No 255 of 24 October 2015).

36 The Applicant explains that this is possible according to Article 44(5) of Ley 20/2011, de 21 de julio, del Registro Civil (Law 20/2011 of 21 July 2011 on the Civil Registry) (BOE No 175 of 22 July 2011).

37 Ley 48/2015 de 29 de octubre, de Presupuestos Generales del Estado para el año 2016 (Law 48/2015 on the General State Budgets for 2016) (BOE No 260 of 10 October 2015).

38 In spite of some initial hesitation concerning the possibility of parthenogenetic activation of oocytes commencing the process of development of a human being in a non-fertilized human ovum (see judgment of 18 October 2011, Brüstle, C-34/10, EU:C:2011:669, paragraph 36, but see also judgment of 18 December 2014, International Stem Cell Corporation, C-364/13, EU:C:2014:2451, paragraph 38), it would appear that, even under EU law, both sexes are still necessary for conception.

39 *Boletín Oficial de las Cortes Generales* — Congreso de los Diputados (1.9.2015, Serie A, No 163-4, pp. 2812 to 2814).

40 Plan Integral de Apoyo a la Familia (PIAF) 2015-2017 (Comprehensive Family Support Plan 2015-2017), approved by the Council of Ministers on 14 May 2015 (available at www.mscbs.gob.es/novedades/docs/PIAF-2015-2017.pdf).

41 Informe sobre el complemento de maternidad en las pensiones contributivas (Report on the maternity supplement to contributory pensions) sent in June 2015 to the Comisión de Seguimiento y Evaluación de los Acuerdos del Pacto de Toledo (Evaluation and follow-up Commission of the Agreements of the Toledo Pact) by the Spanish Government.

42 Order of the Tribunal Constitucional (Constitutional Court, Spain) of 16 October 2018 (No 3307-2018, ES:TC:2018:114A, paragraph 3(b)).

43 See the case-law cited above in footnotes 29 and 30.

44 Judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraphs 37 to 39).

45 See judgment of 19 July 2017, Abercrombie & Fitch Italia (C-143/16, EU:C:2017:566, paragraphs 26 and 27).

46 See, to that effect, judgment of 3 September 2014, *X* (C-318/13, EU:C:2014:2133, paragraph 38). See also, regarding arguments rather similar to the ones put forward by the Spanish Government and the INSS in the present case, judgment of 29 November 2001, Griesmar (C-366/99, EU:C:2001:648, paragraph 56).

47 On the internal transitivity between those categories, see my Opinion in Cresco Investigation (C-193/17, EU:C:2018:614, points 61 and 62).

48 See, in this connection, Opinion of Advocate General Tesauro in *Kalanke* (C-450/93, EU:C:1995:105, point 8). See, for my proposal in this sense, Section C of this Opinion.

49 See, by analogy, judgments of 18 November 2010, Kleist (C-356/09, EU:C:2010:703, paragraph 41), and of 12 September 2013, Kuso (C-614/11, EU:C:2013:544, paragraph 50).

50 See, to that effect, judgment of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraph 50 and the case-law cited).

51 See judgments of 11 July 1991, *Johnson* (C-31/90, EU:C:1991:311, paragraph 25), and of 16 July 2009, Gómez-Limón Sánchez-Camacho (C-537/07, EU:C:2009:462, paragraph 60).

52 As emphasised by the case-law, even if those objectives are not stated in the recitals to Directive 79/7, 'it can be inferred from the nature of the exceptions contained in Article 7(1) of the directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored'. See, for example, judgments of 30 April 1998, De Vriendt and Others (C-377/96 to C-384/96, EU:C:1998:183, paragraph 26), and of 27 April 2006, Richards (C-423/04, EU:C:2006:256, paragraph 35).

53 Judgment of 16 July 2009, Gómez-Limón Sánchez-Camacho(C-537/07, EU:C:2009:462, paragraphs 60 and 63).

54 Above, point 63.

55 See, for example, judgment of 7 July 1992, Equal Opportunities Commission (C-9/91, EU:C:1992:297, paragraph 14).

56 See, for example, with regard to Article 7(1)(a), judgment of 21 July 2005, *Vergani* (C-207/04, EU:C:2005:495, paragraph 33 and the case-law cited).

57 See, judgments of 7 July 1994, *Bramhill* (C-420/92, EU:C:1994:280), and of 23 May 2000, *Hepple and Others* (C-196/98, EU:C:2000:278, paragraph 23), as well as the Opinions of Advocate General Saggio in Hepple and Others (C-196/98, EU:C:1999:495, points 21 to 24), and of Advocate General Mischo in Taylor (C-382/98, EU:C:1999:452, points 66 to 69).

58 See, for example, suggesting that Article 157(4) TFEU can apply to situations where a national measure has been declared incompatible with the specific rules of secondary EU law permitting positive action, judgments of 28 March 2000, *Badeck and Others* (C-158/97, EU:C:2000:163, paragraph 14); of 6 July 2000, Abrahamsson and Anderson (C-407/98, EU:C:2000:367, paragraphs 40, 54 and 55); and of 30 September 2004, *Briheche* (C-319/03, EU:C:2004:574, paragraphs 29 to 30).

59 See above, points 27 to 31 of this Opinion.

60 See Tobler, C., 'Sex Equality Law under the Treaty of Amsterdam', *European Journal of Law Reform*, Vol. 1, No 1, Kluwer Law International, 2000, pp. 135 to 151, at p. 142.

61 Langenfeld, C., 'AEUV Art. 157 Gleiches Entgelt für Männer und Frauen' in Grabitz, E., Hilf, M., and Nettesheim, M., *Das Recht der Europäischen Union*, C.H. Beck, Munich, 2019, Werkstand: 66. Rn. 84. See also Krebber, S., 'Art 157 AEUV' in Callies, C., and Ruffert, M., *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, C.H. Beck, Munich, 2016, Rn. 73.

62 See judgment of 17 October 1995, Kalanke (C-450/93, EU:C:1995:322, paragraph 21).

63 See, to that effect, judgment of 11 November 1997, Marschall (C-409/95, EU:C:1997:533, paragraph 32), which no longer refers to the obligation of 'strict interpretation', or judgments of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 39), and of 30 September 2004, *Briheche* (C-319/03, EU:C:2004:574, paragraph 24). See also, by analogy, judgment of 22 January 2019 *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 65).

64 Other 'old' directives in this field have either been recast through Directive 2006/54 — the legal basis of which is Article 157(3) TFEU — or amended by legal acts adopted on that same legal basis (this is the case of Council Directive 76/207, cited above, and also 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 (OJ 1975 L 45, p. 19); Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40); and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56)).

65 Above, point 50.

66 See points 41 and 50 of this Opinion.

67 See, for example, judgment of 18 March 2004, Merino Gómez (C-342/01, EU:C:2004:160, paragraph 37), where Article 2(3) of Directive 76/207 is linked to the aim to 'bring about equality in substance rather than in form'. See also judgment of 30 April 1998, Thibault (C-136/95, EU:C:1998:178, paragraph 26).

68 This is confirmed by the fact that the measures for the protection of women on grounds of maternity and positive action are covered by different legal bases, as the Commission submitted at the hearing. The 'maternity' exception is provided for in Article 28(1) of Directive 2006/54, whereas the general provision regarding positive action is in Article 3 of the directive. This was also the case of Directive 76/207, where two different provisions were also devoted to those different categories (Article 2(3) and (4) — after amendment,

Article 2(7) and (8)). Different provisions are also devoted to the 'maternity' exception and 'positive action' in Article 4(2) and Article 6 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37). But see Opinion of Advocate General Tesauro in Kalanke (C-450/93, EU:C:1995:105, point 17), which seems to portray Article 2(3) of Directive 76/207 as a measure of 'positive action'.

69 See above footnote 52 and the case-law cited.

70 The origin of Article 157(4) TFEU is Article 6(3) of the Agreement on Social Policy between the Member States of the European Communities excluding the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 91), which was incorporated into Community law by Protocol No 14 on Social Policy to the Maastricht Treaty.

71 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648, paragraph 65). Emphasis added.

72 Judgment of 17 July 2014 (C-173/13, EU:C:2014:2090, paragraphs 100 to 103).

73 Judgments of 13 November 2008, Commission v Italy (C-46/07, not published, EU:C:2008:618, paragraph 57), and of 26 March 2009, *Commission* v *Greece* (C-559/07, not published, EU:C:2009:198, paragraphs 66 to 68).

74 See, to that effect, judgments of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 41), and of 30 September 2010, *Roca Álvarez* (C-104/09, EU:C:2010:561, paragraph 36).

75 It should be noted that Article 23 of the Charter also seems to cover only the 'access' side of the equation, but reaches beyond that: 'The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

76 See, in particular, regarding the exclusion of approaches to 'positive action' which may include a 'results-oriented' approach aimed at compensation for the past, Opinion of Advocate General Tesauro in Kalanke (C-450/93, EU:C:1995:105, point 9). See also, on this discussion, Opinion of Advocate General Poiares Maduro in Briheche (C-319/03, EU:C:2004:398, points 48 to 50).

77 In agreement on this point with the Opinions of Advocate General Jääskinen in Amédée (C-572/10, EU:C:2011:846, points 58 and 59), and in *Leone* (C-173/13, EU:C:2014:117, point 57).

78 See, with regard to Article 2(4) of Directive 76/207, judgments of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 39), and of 30 September 2004, *Briheche* (C-319/03, EU:C:2004:574, paragraph 24). In general, see my Opinion in Cresco Investigation (C-193/17, EU:C:2018:614, point 111).

79 In fact, it could be reasonably assumed that such a measure of social policy, while not remedying the past, would rather have the effect of cementing and petrifying exactly the traditional repartition of roles the effects of which it states that it wishes to remedy for the future.

80 See, to that effect, judgment of 29 November 2001, Griesmar (C-366/99, EU:C:2001:648, paragraph 57). Regarding the role of 'saving clauses' opening up positive action measures to men in specific circumstances, see judgments of 11 November 1997, Marschall (C-409/95, EU:C:1997:533, paragraph 33); of 28 March 2000, Badeck and Others (C-158/97, EU:C:2000:163, paragraph 36); and of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 45).

JUDGMENT OF THE COURT (First Chamber)

12 December 2019 (*)

(Reference for a preliminary ruling — Social policy — Directive 79/7/EEC — Equal treatment for men and women in matters of social security — Article 4(1) and (2) — Article 7(1) — Calculation of benefits — Directive 2006/54/EC — Equal treatment of men and women in matters of employment and occupation — National legislation granting a right to a pension supplement for women who have had at least two biological or adopted children, and who are in receipt of a contributory permanent incapacity pension — Same right not granted to men in an identical situation — Comparable situation — Direct discrimination on grounds of sex — No exceptions)

In Case C-450/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 3 de Gerona (Social Court No 3, Gerona, Spain), made by decision of 21 June 2018, received at the Court on 9 July 2018, in the proceedings

WA

v

Instituto Nacional de la Seguridad Social (INSS),

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, M. Safjan (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: M. Bobek,

Registrar: L. Carrasco Marco, administrator,

having regard to the written procedure and further to the hearing on 13 June 2019,

after considering the observations submitted on behalf of

– WA, by F. Casas Corominas, abogado,

– the Instituto Nacional de la Seguridad Social (INSS), initially by A.R. Trillo García, L. Martínez-Sicluna Sepúlveda and P. García Perea, and subsequently by L. Martínez-Sicluna Sepúlveda and P. García Perea, letrados,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the European Commission, initially by N. Ruiz García, C. Valero and I. Galindo Martín, and subsequently by N. Ruiz García and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2019,

gives the following

Judgment

1 This request for preliminary ruling concerns the interpretation of Article 157 TFEU and of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The request has been made in proceedings between WA, a father of two children, and the Instituto Nacional de la Seguridad Social (INSS) (National Institute for Social Security, Spain) concerning the refusal to grant him a pension supplement which is available to women who have had at least two biological or adopted children.

Legal context

EU law

Directive 79/7/EEC

3 The second and third recitals of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) state:

'Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes;

Whereas the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity; whereas, in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment'.

4 Article 1 of that directive provides:

'The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment".'

5 Article 2 of that directive provides:

'This Directive shall apply to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons.'

6 Article 3(1) of that directive provides:

'This Directive applies to:

(a) statutory schemes which provide protection against the following risks:

- sickness,
- invalidity,
- old age,
- accidents at work and occupational diseases,
- unemployment;

…’

7 Article 4 of Directive 79/7 is worded as follows:

‘1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

– the scope of such schemes and the conditions of access to them;

– the obligation to contribute and the calculation of contributions;

– the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.’

8 Article 7 of that directive states:

‘1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

…

(b) advantages in respect of old-age pension schemes granted to persons who have raised children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;

…

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.’

Directive 2006/54

9 Directive 2006/54 repealed Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15).

10 Recital 13 of Directive 2006/54 states:

‘In its judgment of 17 May 1990 in [Barber (C-262/88, EU:C:1990:209)], the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 [EC].’

11 Article 1 of that directive provides:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

…

(b) working conditions, including pay;

(c) occupational social security schemes.

…'

12 Article 2(1) of that directive provides:

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

…

(f) "Occupational social security schemes" means schemes not governed by Directive [79/7] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.'

The relevant provisions of Spanish law

13 Under Article 7(1) of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291) ('the LGSS'):

'Regardless of their sex, civil status or profession, Spanish citizens residing in Spain and foreign nationals who reside or are legally present in Spanish territory come under the social security system for the purposes of contributory benefits, provided that, in both situations, they work in the national territory and they come under one of the following subparagraphs:

(a) employees who provide their services on behalf of others under the conditions set out in Article 1(1) of the consolidated text of the Estatuto de los Trabajadores (Workers' Statute), in the various branches of the economy, or similar employees, whether they are temporary, seasonal, permanent or even "*fijos discontinuos*" employees, including teleworkers, and in all cases, regardless of the professional category of the employee, or the form or the amount of the remuneration which (s)he receives or the general nature of the employment relationship;

(b) self-employed persons, whether or not they are the owners of individual or family undertakings, over the age of 18 years, who satisfy all the conditions expressly laid down by this law or by legislation adopted for its implementation;

(c) employee-members of workers' cooperatives;

(d) students;

(e) civil or military servants.'

14 Article 60(1) of the LGSS provides:

'Women who have had biological or adopted children and are recipients of a contributory retirement, widow's or permanent incapacity pension under any scheme within the social security system shall be granted a pension supplement on account of their demographic contribution to social security.

That supplement, which shall have the legal nature of a contributory State pension for all purposes, shall consist of an amount equivalent to the result of applying to the initial amount of the pensions referred to a specified percentage which shall be based on the number of children in accordance with the following scale:

(a) in the case of two children: 5 per cent.

(b) in the case of three children: 10 per cent.

(c) in the case of four or more children: 15 per cent.

For the purpose of establishing entitlement to the supplement and the amount thereof, only children born or adopted before the operative event for the pension concerned shall be taken into account.'

15 Article 196(3) of the LGSS provides:

'The financial benefit for permanent absolute incapacity shall consist of a lifelong pension.'

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

16 By a decision of 25 January 2017, the INSS granted WA a permanent absolute incapacity pension of 100% of the basic amount ('the decision of 25 January 2017'). That pension came to EUR 1 603.43 per month plus revaluations.

17 WA brought a prior administrative complaint against that decision, claiming that, as the father of two daughters, he should, on the basis of Article 60(1) of the LGSS, be entitled to receive the pension supplement provided for in that provision ('the pension supplement at issue'), representing 5% of the initial amount of his pension under the same conditions as women who are the mothers of two children and are in receipt of contributory permanent incapacity pensions under a scheme within the Spanish social security system.

18 By decision of 9 June 2017, the INSS dismissed WA's prior administrative complaint and confirmed the decision of 25 January 2017. In that regard, the INSS stated that the pension supplement at issue is granted exclusively to women in receipt of a contributory pension from the Spanish social security and who are mothers of at least two children, because of their demographic contribution to social security.

19 In the meantime, on 23 May 2017, WA challenged the decision of 25 January 2017 before the Juzgado de lo Social No 3 de Gerona (Social Court No 3, Gerona, Spain), claiming that his right to receive the pension complement at issue should be recognised.

20 On 18 May 2018, the Juzgado de lo Social No 3 de Gerona (Social Court No 3, Gerona) was informed that WA died on 9 December 2017. His wife, DC, succeeded WA on his death as the applicant in the main proceedings. The referring court states that any payment of the pension supplement at issue would therefore run up to the date of WA's death.

21 The referring court states that Article 60(1) of the LGSS entitles women who have had at least two biological or adopted children to receive the pension supplement at issue, on account of their demographic contribution to social security, whereas men in an identical situation do not have that entitlement. That court expresses doubts about whether such a provision is compatible with EU law.

22 The notion of 'demographic contribution to social security', referred to in Article 60(1) of the LGSS, is equally valid as regards both women and men, since reproduction and responsibility for looking after, feeding and bringing up the children lies with anyone who has the status of a mother or father. Consequently, a career break as a result of the birth or adoption of children or in order to bring up those children can be equally detrimental to women and men, regardless of their demographic contribution to social security. In that context, Article 60(1) of the LGSS creates an unjustified difference in treatment in favour of women, to the detriment of men in an identical situation.

23 Reproduction, however, involves a greater sacrifice for women in personal and professional terms. They have to deal with a period of pregnancy and with the birth, which involves clear biological and physiological sacrifices, together with the disadvantages which that involves in physical terms and in the area of employment and their legitimate expectations of promotion in their profession. In biological terms, the provisions of Article 60(1) of the LGSS may therefore be justified inasmuch as they are intended to protect women from the consequences of pregnancy and motherhood.

24 In those circumstances, the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona) stayed the proceedings and referred the following question to the Court for a preliminary ruling:

‘Does a national legislative provision (specifically Article 60(1) of the [LGSS]) which grants the right to receive a pension supplement –– in view of their demographic contribution to social security –– to women who have had biological or adopted children and are in receipt of a contributory retirement, widow’s or permanent incapacity pension under any scheme within the social security system, but, on the other hand, does not grant that right to men in an identical situation, infringe the principle of equal treatment which prohibits all discrimination on grounds of sex, enshrined in Article 157 of the [TFUE] and in Directive [76/207], as amended by Directive [2002/73] and recast by Directive [2006/54]?’

Consideration of the question referred

Preliminary observations

25 In the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgments of 26 June 2008, *Wiedemann and Funk*, C-329/06 and C-343/06, EU:C:2008:366, paragraph 45, and of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 42).

26 In the present case, even if formally the referring court has limited its question to the interpretation only of the provisions of Article 157 TFEU and of Directive 2006/54, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its question. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgments of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 32, and of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 43).

27 In the present case, WA, a father of two children, applied, on the basis of Article 60(1) of the LGSS, for the pension supplement at issue, which would be added to his contributory pension for permanent absolute incapacity.

28 In that regard, it should be noted that the term ‘pay’ within the meaning of Article 157(2) TFEU covers pensions which depend on the employment relationship between worker and employer, excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy. Accordingly, that concept cannot be extended to encompass social security schemes or benefits — such as retirement pensions — which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned and which are obligatorily applicable to general categories of employee (see judgment of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 20 and the case-law cited).

29 A contributory permanent incapacity pension, such as the one which WA received, on the basis of which the pension supplement at issue is calculated, appears to be determined less by an employment relationship between worker and employer than by considerations of social policy, in accordance with the case-law cited in the preceding paragraph.

30 In addition, Article 60(1) of the LGSS stipulates that the pension supplement at issue has, for all purposes, the legal nature of a contributory State pension.

31 It is true that considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the last salary (judgments of

28 September 1994, *Beune*, C-7/93, EU:C:1994:350, paragraph 45, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 23).

32 In that regard, as the INSS submits, the first of those three conditions does not appear to be satisfied in so far as the documents before the Court disclose no evidence that a contributory permanent incapacity pension such as that at issue in the main proceedings applies only to a specific category of worker.

33 Therefore, such a contributory permanent incapacity pension does not come under the notion of 'pay' within the meaning of Article 157(1) and (2) TFEU or of Directive 2006/54 (see, to that effect, judgments 13 February 1996, *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 14; of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 25; and of 14 July 2016, *Ornano*, C-335/15, EU:C:2016:564, paragraph 38).

34 In addition, it is apparent from subparagraph (c) of the second paragraph of Article 1 of Directive 2006/54, read in conjunction with Article 2(1)(f) thereof, that that directive does not apply to statutory schemes governed by Directive 79/7.

35 On the other hand, the pension supplement at issue falls within the scope of the latter directive, since it forms part of a statutory scheme providing protection against one of the risks listed in Article 3(1) of Directive 79/7 — namely, invalidity — and it is directly and effectively linked to protection against that risk (see, to that effect, judgments of 16 December 1999, *Taylor*, C-382/98, EU:C:1999:623, paragraph 14, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 26).

36 That pension supplement is intended to protect women who have had at least two biological or adopted children and who are in receipt of an invalidity pension, by ensuring that they have the necessary means, in particular in terms of their needs.

37 In those circumstances, it is appropriate to understand the question asked as seeking, in essence, to ascertain whether Directive 79/7 must be interpreted as meaning that it precludes national legislation which, on account of the women's demographic contribution to social security, makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement.

Substance

38 As a result of the third indent of Article 4(1) of Directive 79/7, the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference, in particular, to marital or family status as regards the calculation of benefits.

39 The main proceedings concern the calculation of the total amount of the permanent incapacity benefit of a man who has had two children, and he is applying for the pension supplement at issue.

40 According to Article 60(1) of the LGSS, in view of the demographic contribution of women to the social security system, the pension supplement at issue is awarded to women where they have had at least two biological or adopted children and they are in receipt, in particular, of contributory permanent incapacity pensions under a scheme within the social security system. By contrast, men in an identical situation are not entitled to that pension supplement.

41 Thus, it appears that that national legislation treats men who have had at least two biological or adopted children less favourably. Such less favourable treatment based on sex may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7.

42 According to the Court's settled case-law, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (judgments of 13 February

1996 *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 16, and of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 73).

43 Thus, it is appropriate to ascertain whether the difference in treatment between men and women created by the national legislation at issue in the main proceedings concerns categories of persons who are in comparable situations.

44 In that regard, the requirement relating to the comparability of situations does not require those situations to be identical, but only similar (judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 41 and the case-law cited).

45 The comparability of situations must be assessed not in a global and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, and, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates (judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 42 and the case-law cited).

46 With regard to the aim pursued by Article 60(1) of the LGSS, namely to reward the demographic contribution of women to social security, it should be pointed out that the contribution of men to demography is just as necessary as that of women.

47 Therefore, the ground of demographic contribution to social security cannot justify men and women not being in a comparable situation with regard to the award of the pension supplement at issue.

48 However, in response to a written question from the Court, the Spanish Government stated that the objective pursued by that pension supplement is not just to reward women who have had at least two children for their demographic contribution to social security. That supplement was also conceived as a measure to reduce the gap between the pension payments of men and those of women arising from differences in career paths. The aim pursued is to ensure the award of adequate pensions to women whose contribution capacity and therefore the amount of the pension have been reduced where their professional careers have been interrupted or shortened due to the fact that they have had at least two children.

49 In addition, the INSS claims in its observations that the pension supplement at issue is justified on grounds of social policy. To that end, the INSS provides numerous statistical data which reveal a difference between the pension payments of men and those of women, and, on the one hand, between the pension payments of childless women or those who have had one child and, on the other, the payments of women who have had at least two children.

50 In that respect, as regards the objective of reducing the gap between the pension payments of men and those of women by awarding the pension supplement at issue, it must be stated that Article 60(1) of the LGSS is intended, at least in part, to protect women in their capacity as parents.

51 First, this is a quality which both men and women may have and, secondly, the situation of a father and that of a mother may be comparable as regards the bringing-up of children (see, to that effect, judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 56, and of 26 March 2009, *Commission* v *Greece*, C-559/07, not published, EU:C:2009:198, paragraph 69).

52 In particular, the fact that women are more affected by the occupational disadvantages entailed in bringing up children, because it is they who generally carry out that task, does not prevent their situation from being comparable to that of a man who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages (see, to that effect, judgment of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 56).

53 In those circumstances, as the Advocate General stated in point 66 of his Opinion, the existence of statistical data highlighting structural differences between the pension payments of women and those of

men is not sufficient to make it possible to reach the conclusion that, as regards the pension supplement at issue, women and men are not in a comparable situation as parents.

54 According to the case-law of the Court, a derogation from the prohibition, set out in Article 4(1) of Directive 79/7, of all direct discrimination on grounds of sex is possible only in the situations exhaustively set out in the provisions of that directive (see, to that effect, judgments of 3 September 2014, *X*, C-318/13, EU:C:2014:2133, paragraphs 34 and 35, and of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 50).

55 With regard to those grounds for derogation, it must be stated in the first place that, by virtue of Article 4(2) of Directive 79/7, the principle of equal treatment is without prejudice to the provisions relating to the protection of women on the ground of maternity.

56 In that regard, it is clear from the case-law of the Court that, by reserving to the Member States the right to retain or introduce provisions which are intended to ensure that protection, Article 4(2) of Directive 79/7 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth (see, to that effect regarding Directive 76/207, judgments of 12 July 1984, *Hofmann*, 184/83, EU:C:1984:273, paragraph 25, and of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 62).

57 In the present case, there is nothing in Article 60(1) of the LGSS that establishes a link between the award of the pension supplement at issue and taking maternity leave or the disadvantages suffered by a woman in her career as a result of being absent from work during the period following the birth of a child.

58 In particular, that supplement is granted to women who have adopted children, which means that the national legislature did not intend to limit the application of Article 60(1) of the LGSS to protecting the biological condition of women who have given birth.

59 In addition, as the Advocate General stated in point 54 of his Opinion, that provision does not require women to have actually stopped working at the time they had their children, and thus the condition relating to maternity leave is absent. That is particularly the case where a woman has given birth before entering the job market.

60 Therefore, it must be held that a pension supplement such as that at issue in the main proceedings does not fall within the scope of the derogation from the prohibition of discrimination laid down in Article 4(2) of Directive 79/7.

61 In the second place, according to Article 7(1)(b) of Directive 79/7, that directive is without prejudice to the right of Member States to exclude from its scope advantages in respect of old-age pension schemes granted to persons who have brought up children and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing-up of children.

62 In that regard it must be stated that, in any event, Article 60(1) of the LGSS makes the award of the pension supplement at issue subject, not to the bringing-up of children or the existence of periods of interruption of employment due to the bringing-up of children, but only to the fact that women recipients have had at least two biological or adopted children and receive a contributory retirement, widow's or permanent incapacity pension under a scheme within the social security system.

63 Consequently, Article 7(1)(b) of Directive 79/7 does not apply to a benefit such as the pension supplement at issue.

64 Finally, it must be added that, under Article 157(4) TFEU, in order to ensure full equality in practice between men and women in working life, the principle of equal treatment must not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

65 However, that provision cannot be applied to national legislation such as Article 60(1) of the LGSS, given that the pension supplement at issue is limited to granting women a surplus at the time when a pension is awarded, in particular in the case of permanent invalidity, without providing a remedy for the problems which they may encounter in the course of their professional career, and that supplement does not appear to compensate for the disadvantages to which women are exposed by helping them in that career and, thus, to ensure full equality in practice between men and women in working life (see, to that effect, judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 65, and of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraph 101).

66 Consequently, it must be stated that national legislation such as that at issue in the main proceedings constitutes direct discrimination on grounds of sex and is, therefore, prohibited by Directive 79/7.

67 In the light of the foregoing considerations, the answer to the question asked is that Directive 79/7 must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement.

Costs

68 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 (First Chamber) hereby rules:

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement.

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2019 (*)

(Reference for a preliminary ruling — Directive 2000/31/EC — Information society services — Directive 2006/123/EC — Services — Connection of hosts, whether businesses or individuals, with accommodation to rent with persons seeking that type of accommodation — Qualification — National legislation imposing certain restrictions on the exercise of the profession of real estate agent — Directive 2000/31/EC — Article 3(4)(b), second indent — Obligation to give notification of measures restricting the freedom to provide information society services — Failure to give notification — Enforceability — Criminal proceedings with an ancillary civil action)

In Case C-390/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the investigating judge of the tribunal de grande instance de Paris (Regional Court, Paris, France), made by decision of 7 June 2018, received at the Court on 13 June 2018, in the criminal proceedings against

X,

interveners:

YA,

Airbnb Ireland UC,

Hôtelière Turenne SAS,

Association pour un hébergement et un tourisme professionnels (AHTOP),

Valhotel,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, E. Regan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Szpunar,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2019,

after considering the observations submitted on behalf of:

– Airbnb Ireland UC, by D. Van Liedekerke, O.W. Brouwer and A.A.J. Pliego Selie, advocaten,

– the Association pour un hébergement et un tourisme professionnels (AHTOP), by B. Quentin, G. Navarro and M. Robert, avocats,

– the French Government, by E. de Moustier and R. Coesme, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

– the Luxembourg Government, initially by D. Holderer, and subsequently by T. Uri, acting as Agents,

– the European Commission, by L. Malferrari, É. Gippini Fournier and S.L. Kalėda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

2 The request has been made in criminal proceedings against X, inter alia, for handling monies for activities concerning the mediation and management of buildings and businesses by a person without a professional licence.

Legal context

EU law

Directive 98/34

3 Point 2 of the first paragraph of Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), provides the following:

'For the purposes of this Directive, the following meanings shall apply:

…

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present,

– "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

…'

Directive (EU) 2015/1535

4 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1) repealed and replaced Directive 98/34 as of 7 October 2015.

5 Article 1(1)(b) of Directive 2015/1535 states:

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

…

(b) "service" means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

(i) "at a distance" means that the service is provided without the parties being simultaneously present;

(ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex I.'

6 Article 5(1) of that directive provides:

'Subject to Article 7, 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 those grounds have not already been made clear in the draft.

…'

7 Under the second paragraph of Article 10 of Directive 2015/1535, references to Directive 98/34 are henceforth to be construed as references to Directive 2015/1535.

Directive 2000/31

8 Recital 8 of Directive 2000/31 states:

'The objective of this Directive is to create a legal framework to ensure the freedom of information society services between Member States and not to harmonise the field of criminal law as such.'

9 In the version before the entry into force of Directive 2015/1535, Article 2(a) of Directive 2000/31 defined 'information society services' as services within the meaning of point 2 of the first paragraph of Article 1 of Directive 98/34. Since that directive entered into force, that reference must be understood as being made to Article 1(1)(b) of Directive 2015/1535.

10 Article 2(h) of Directive 2000/31 provides:

‘(h) “coordinated field”: requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

– the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

– the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

– requirements applicable to goods as such,

– requirements applicable to the delivery of goods,

– requirements applicable to services not provided by electronic means.’

11 Article 3(2) and (4) to (6) of that directive states the following:

‘2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.'

Directive 2006/123/EC

12 Article 3(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) provides:

'If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. …'

French law

13 Article 1 of Law No 70-9 of 2 January 1970 regulating the conditions for the exercise of activities relating to certain transactions concerning real property and financial goodwill (JORF of 4 January 1970, p. 142), in the version applicable to the facts in the main proceedings ('the Hoguet Law'), provides:

'The provisions of the present law apply to all natural or legal persons who lend themselves to or give their assistance on a regular basis, even in an ancillary capacity, to any transaction affecting the goods of others and relative to:

1. the purchase, sale, search for, exchange, leasing or sub-leasing, seasonal or otherwise, furnished or unfurnished, of existing buildings or those under construction;

…'

14 Article 3 of that law provides:

'The activities listed in Article 1 may be practised only by natural persons or legal entities holding a professional licence that has been issued, for a period and in accordance with rules laid down by a decree of the Council of State, by the President of the Regional Chamber of Commerce and Industry or by the President of the Île-de-France Regional Chamber of Commerce and Industry, listing the transactions which those persons may carry out. …

That licence may be issued only to natural persons on condition that they:

1. provide proof of their professional credentials;

2. provide proof of a financial guarantee permitting the reimbursement of funds …;

3. take out insurance against the financial consequences of their civil and professional liability;

4. are not caught by one of the validation or disqualification conditions …

…’

15 Article 5 of that law provides:

‘The persons referred to in Article 1 who receive or possess sums of money … must respect the conditions laid down by the decree of the Council of State, in particular the formalities of record keeping and the delivery of receipts, as well as other obligations arising from that mandate.’

16 Article 14 of that law is worded as follows:

‘The following acts are punishable by 6 months’ imprisonment and a fine of EUR 7 500:

(a) lending oneself to or providing assistance on a regular basis, even in an ancillary capacity, to the transactions listed in Article 1 without holding a valid licence issued in accordance with Article 3, or after such a licence has been restored, or if the aforesaid licence has not been restored after a declaration of non-competence from the appropriate administrative body;

…’

17 Article 16 of the Hoguet Law provides:

‘The following acts are punishable by 2 years’ imprisonment and a fine of EUR 30 000:

1. receiving or possessing at the time of the transactions listed in Article 1, in whatever capacity or manner, sums of money, goods, or stocks and bonds that are:

(a) in breach of Article 3;

(b) in breach of the conditions laid down in Article 5 regarding the keeping of records and the delivery of receipts when such documents and receipts are legally required;

…’

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

18 Airbnb Ireland UC, a company established in Dublin (Ireland) under Irish law, is part of the Airbnb Group, made up of a number of companies directly or indirectly owned by Airbnb Inc., which is established in the United States. Airbnb Ireland offers an electronic platform the purpose of which is, on payment of a commission, to establish contact, in particular in France, between, on the one hand, hosts, whether professionals or private individuals, with accommodation to rent and, on the other, people looking for such accommodation. Airbnb Payments UK Ltd, a company established in London (United Kingdom) under the law of the United Kingdom, provides online payment services as part of that contact service and manages the payment activities of the Group in the European Union. In addition, Airbnb France SARL, a company established under French law and a supplier to Airbnb Ireland, is

responsible for promoting that platform among users in the French market by organising, inter alia, advertising campaigns for target audiences.

19 Apart from the service of connecting hosts and guests using its electronic platform which centralises offers, Airbnb Ireland offers the hosts a certain number of other services, such as a format for setting out the content of their offer, with an option for a photography service, and also with an option for civil liability insurance and a guarantee against damages for up to EUR 800 000. Furthermore, it provides them with an optional tool for estimating the rental price having regard to the market averages taken from that platform. In addition, if a host accepts a guest, the guest will transfer to Airbnb Payments UK the rental price to which is added 6% to 12% of that amount in respect of charges and the service provided by Airbnb Ireland. Airbnb Payments UK holds the money on behalf of the guest and then, 24 hours after the guest checks in, sends the money to the host by transfer, thus giving the guest assurance that the property exists and the host a guarantee of payment. Finally, Airbnb Ireland has put in place a system whereby the host and the guest can leave an evaluation on a scale of zero to five stars, and that evaluation is available on the electronic platform at issue.

20 In practice, as is apparent from the explanations provided by Airbnb Ireland, internet users looking for rental accommodation connect to its electronic platform, identify the place where they wish to go to and the period and number of persons of their choice. On that basis, Airbnb Ireland provides them with the list of available accommodation matching those criteria so that the users can select the accommodation of their choice and proceed to reserve it online.

21 In that context, users of the electronic platform at issue, both hosts and guests, conclude a contract with Airbnb Ireland for the use of that platform and with Airbnb Payments UK for the payments made via that platform.

22 On 24 January 2017, the Association pour un hébergement et un tourisme professionnels (Association for professional tourism and accommodation, AHTOP) lodged a complaint together with an application to be joined as a civil party to the proceedings, inter alia, for the practice of activities concerning the mediation and management of buildings and businesses without a professional licence, under the Hoguet Law, between 11 April 2012 and 24 January 2017.

23 In support of its complaint, AHTOP claims that Airbnb Ireland does not merely connect two parties through its platform; it also offers additional services which amount to an intermediary activity in property transactions.

24 On 16 March 2017, after that complaint was lodged, the Public Prosecutor attached to the Tribunal de grande instance de Paris (Regional Court, Paris, France) brought charges, inter alia, for handling monies for activities concerning the mediation and management of buildings and businesses by a person with no professional licence, contrary to the Hoguet Law, for the period between 11 April 2012 and 24 January 2017.

25 Airbnb Ireland denies acting as a real estate agent and argues that the Hoguet Law is inapplicable on the ground that it is incompatible with Directive 2000/31.

26 In that context, the investigating judge of the tribunal de grande instance de Paris (Regional Court, Paris) is uncertain whether the service provided by Airbnb Ireland should be classified as an ‘information society service’ within the meaning of that directive and, if so, whether it precludes the Hoguet Law from being applied to that company in the main

proceedings or whether, on the contrary, that directive does not preclude criminal proceedings being brought against Airbnb Ireland on the basis of that law.

27 In those circumstances the investigating judge of the tribunal de grande instance de Paris (Regional Court, Paris) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do the services provided in France by … Airbnb Ireland via an electronic platform managed from Ireland benefit from the freedom to provide services established in Article 3 of [Directive 2000/31]?

(2) Are the restrictive rules relating to the exercise of the profession of real estate agent in France laid down by [the Hoguet Law] enforceable against Airbnb Ireland?’

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

28 Airbnb Ireland claims that the referring court is wrong to take the view that the activities of Airbnb Ireland come within the scope of the Hoguet Law. The French Government expressed the same view at the hearing.

29 In that regard, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU 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 (judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 27).

30 In the present case, as the French Government acknowledges, in essence, the referring court raises the issue of the enforceability of the provisions of the Hoguet Law against Airbnb Ireland because it implicitly considers that the intermediation service provided by that company falls within the material scope of that law.

31 However, it is not manifestly apparent that the referring court’s interpretation of the Hoguet Law is clearly precluded in the light of the wording of the provisions of national law contained in the order for reference (see, by analogy, judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 28).

32 Airbnb Ireland further submits that the order for reference contains a summary of French national legislation and that it should have taken into consideration other provisions of that legislation. For its part, the Commission argues that that decision is vitiated by a lack of factual details.

33 In the present case, the order for reference sets out briefly but precisely the relevant national legal context and the origin and nature of the dispute. It follows that the referring court has defined the factual and legal context of its request for an interpretation of EU law sufficiently and that it has provided the Court with all the information necessary to enable it to reply usefully to that request (judgment of 23 March 2006, *Enirisorse*, C-237/04, EU:C:2006:197, paragraph 19).

34 In those circumstances, this request for a preliminary ruling cannot be considered to be inadmissible in its entirety.

Preliminary observations

35 In their observations, AHTOP and the Commission respectively argue that the legislation at issue in the main proceedings must be assessed having regard, not only to Directive 2000/31, but also to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) and Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1).

36 In that regard, it should be pointed out that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to rule on the case before it. In that context, the Court may extract from all the information provided by the national court, in particular from the grounds of the order for reference, the legislation and the principles of EU law that require interpretation in view of the subject matter of the dispute in the main proceedings in order to reformulate the questions referred to it and to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in those questions (see, to that effect, judgment of 16 July 2015, *Abcur*, C-544/13 and C-545/13, EU:C:2015:481, paragraphs 33 and 34 and the case-law cited).

37 However, it is for the national court alone to determine the subject matter of the questions which it wishes to refer to the Court. Thus, where the request itself does not reveal a need to reformulate those questions, the Court cannot, at the request of one of the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, examine questions which have not been submitted to it by the national court. If, in view of developments during the proceedings, the national court were to consider it necessary to obtain further interpretations of EU law, it would be for it to make a fresh reference to the Court (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 48 and the case-law cited).

38 In the present case, and in the absence of any mention of Directives 2005/36 and 2007/64 in the questions referred or indeed of any other explanations in the order for reference that require the Court to consider the interpretation of those directives in order to provide a useful reply to the referring court, there is no reason for the Court to examine the arguments relating to those directives, which would effectively result in the Court modifying the substance of the questions referred to it.

The first question

39 By its first question, the referring court asks, in essence, whether Article 2(a) of Directive 2000/31 must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of other services, such as a format for setting out the content of their offer, a photography service, civil liability insurance and a guarantee

against damages, a tool for estimating the rental price or payment services for those accommodation services, must be classified as an 'information society service' under Directive 2000/31.

40 As a preliminary point, it should be stated, first — and this is not disputed by any of the parties or by the other interested parties involved in the present proceedings — that the activity of intermediation at issue in the main proceedings comes under the notion of 'service' within the meaning of Article 56 TFEU and Directive 2006/123.

41 Secondly, it must nevertheless be recalled that, under Article 3(1) of Directive 2006/123, that directive does not apply if its provisions conflict with a provision of another EU act governing specific aspects of access to, or the exercise of, a service activity in specific services or for specific professions.

42 Therefore, in order to determine whether a service such as the one at issue in the main proceedings comes under Directive 2006/123, as is claimed by AHTOP and the French Government, or by contrast, under Directive 2000/31, as is maintained by Airbnb Ireland, the Czech and Luxembourg Governments and the Commission, it is necessary to determine whether such a service must be qualified as an 'information society service', within the meaning of Article 2(a) of Directive 2000/31.

43 In that regard, and bearing in mind the period covered by the facts referred to in the complaint lodged by AHTOP and the criminal proceedings with an ancillary civil action pending before the referring court, the definition of the notion of 'information society service' under Article 2(a) of Directive 2000/31, was successively referred to in point 2 of the first paragraph of Article 1 of Directive 98/34 and then, as of 7 October 2015, in Article 1(1)(b) of Directive 2015/1535. That definition was not, however, amended on the entry into force, on 7 October 2015, of Directive 2015/1535, for which reason only that directive will be referred to in this judgment.

44 Under Article 1(1)(b) of Directive 2015/1535, the concept of an 'information society service' covers 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

45 In the present case, the referring court states, as is clear from paragraph 18 above, that the service at issue in the main proceedings, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services so as to enable the former to reserve accommodation.

46 It follows, first of all, that that service is provided for remuneration, even though the remuneration received by Airbnb Payments UK is only collected from the guest and not also from the host.

47 Next, in so far as the host and the guest are connected by means of an electronic platform without the intermediation service provider, on the one hand, or the host or guest, on the other, being present at the same time, that service constitutes a service which is provided electronically and at a distance. Indeed, at no point during the process of concluding the contracts between, on the one hand, Airbnb Ireland or Airbnb Payments UK and, on the other, the host or the guest, do the parties come into contact other than by means of the Airbnb Ireland electronic platform.

48 Finally, the service in question is provided at the individual request of the recipients of the service, since it involves both the placing online of an advertisement by the host and an individual request from the guest who is interested in that advertisement.

49 Therefore, such a service meets the four cumulative conditions laid down in Article 1(1)(b) of Directive 2015/1535 and therefore, in principle, constitutes an 'information society service' within the meaning of Directive 2000/31.

50 However, as the parties and the other interested parties involved in the present proceedings submit, the Court has held that, although an intermediation service which satisfies all of those conditions, in principle, constitutes a service distinct from the subsequent service to which it relates and must therefore be classified as an 'information society service', that cannot be the case if it appears that that intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification (see, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 40).

51 In the present case, AHTOP essentially claims that the service provided by Airbnb Ireland forms an integral part of an overall service, whose main component is the provision of an accommodation service. To that end, it submits that Airbnb Ireland does not just connect two parties through its electronic platform of the same name, but also offers additional services which are characteristic of an intermediary activity in property transactions.

52 However, although it is true that the purpose of the intermediation service provided by Airbnb Ireland is to enable the renting of accommodation — and it is common ground that that comes under Directive 2006/123 — the nature of the links between those services does not justify departing from the classification of that intermediation service as an 'information society service' and therefore the application of Directive 2000/31 to it.

53 Such an intermediation service cannot be separated from the property transaction itself, in that it is intended not only to provide an immediate accommodation service, but also, on the basis of a structured list of the places of accommodation available on the electronic platform of the same name and corresponding to the criteria selected by the persons looking for short-term accommodation, to provide a tool to facilitate the conclusion of contracts concerning future interactions. It is the creation of such a list for the benefit both of the hosts who have accommodation to rent and persons looking for that type of accommodation which constitutes the essential feature of the electronic platform managed by Airbnb Ireland.

54 In that regard, because of its importance, the compiling of offers using a harmonised format, coupled with tools for searching for, locating and comparing those offers, constitutes a service which cannot be regarded as merely ancillary to an overall service coming under a different legal classification, namely provision of an accommodation service.

55 In addition, a service such as the one provided by Airbnb Ireland is in no way indispensable to the provision of accommodation services, both from the point of view of the guests and the hosts who use it, since both have a number of other, sometimes long-standing, channels at their disposal, such as estate agents, classified advertisements, whether in paper or electronic format, or even property lettings websites. In that regard, the mere fact that Airbnb Ireland is in direct competition with those other channels by providing its users, both hosts and guests, with an innovative service based on the particular features of

commercial activity in the information society does not permit the inference that it is indispensable to the provision of an accommodation service.

56 Finally, it is not apparent, either from the order for reference or from the information in the file before the Court, that Airbnb Ireland sets or caps the amount of the rents charged by the hosts using that platform. At most, it provides them with an optional tool for estimating their rental price having regard to the market averages taken from that platform, leaving responsibility for setting the rent to the host alone.

57 As such, it follows that an intermediation service such as the one provided by Airbnb Ireland cannot be regarded as forming an integral part of an overall service, the main component of which is the provision of accommodation.

58 None of the other services mentioned in paragraph 19 above, taken together or in isolation, call into question that finding. On the contrary, such services are ancillary in nature, given that, for the hosts, they do not constitute an end in themselves, but rather a means of benefiting from the intermediation service provided by Airbnb Ireland or of offering accommodation services in the best conditions (see, by analogy, judgments of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 52; of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855, paragraph 71; and of 4 September 2019, *KPC Herning*, C-71/18, EU:C:2019:660, paragraph 38).

59 First of all, that is the case as regards the fact that, in addition to its activity of connecting hosts and guests via the electronic platform of the same name, Airbnb Ireland provides hosts with a format for setting out the content of their offer, an optional photography service for the rental property and a system for rating hosts and guests which is available to future hosts and guests.

60 Such tools form part of the collaborative model inherent in intermediation platforms, which makes it possible, first, for those seeking accommodation to make a fully informed choice from among the accommodation offerings proposed by the hosts on the platform and, secondly, for hosts to be fully informed of the reliability of the guests with whom they might engage.

61 Next, that is the case with regard to the fact that Airbnb Payments UK, a company within the Airbnb Group, is responsible for collecting the rents from the guests and then transferring those rents to the hosts, in accordance with the conditions set out in paragraph 19 above.

62 Such payment conditions, which are common to a large number of electronic platforms, are a tool for securing transactions between hosts and guests, and their presence alone cannot modify the nature of the intermediation service, especially where such payment conditions are not accompanied, directly or indirectly, by price controls for the provision of accommodation, as was pointed out in paragraph 56 above.

63 Finally, nor is the fact that Airbnb Ireland offers hosts a guarantee against damage and, as an option, civil liability insurance capable of modifying the legal classification of the intermediation service provided by that platform.

64 Even taken together, the services, optional or otherwise, provided by Airbnb Ireland and referred to in paragraphs 59 to 63 above, do not call into question the separate nature of the intermediation service provided by that company and therefore its classification as an ‘information society service’, since they do not substantially modify the specific

characteristics of that service. In that regard, it is also paradoxical that such added-value ancillary services provided by an electronic platform to its customers, in particular to distinguish itself from its competitors, may, in the absence of additional elements, result in the nature and therefore the legal classification of that platform's activity being modified, as was observed by the Advocate General in point 46 of his Opinion.

65 Furthermore, and contrary to what AHTOP and the French Government maintain, the rules for the functioning of an intermediation service such as the one provided by Airbnb cannot be equated to those of the intermediation service which gave rise to the judgments of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 39), and of 10 April 2018, *Uber France* (C-320/16, EU:C:2018:221, paragraph 21).

66 Apart from the fact that those judgments were given in the specific context of urban passenger transport to which Article 58(1) TFEU applies and that the services provided by Airbnb Ireland are not comparable to those that were at issue in the cases giving rise to the judgments referred to in the previous paragraph, the ancillary services referred to in paragraphs 59 to 63 above do not provide evidence for the same level of control found by the Court in those judgments.

67 Thus, the Court stated in those judgments that Uber exercised decisive influence over the conditions under which transport services were provided by the non-professional drivers using the application made available to them by that company (judgments of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraph 39, and of 10 April 2018, *Uber France,* C-320/16, EU:C:2018:221, paragraph 21).

68 The matters mentioned by the referring court and recalled in paragraph 19 above do not establish that Airbnb Ireland exercises such a decisive influence over the conditions for the provision of the accommodation services to which its intermediation service relates, particularly since Airbnb Ireland does not determine, directly or indirectly, the rental price charged, as was established in paragraphs 56 and 62 above, still less does it select the hosts or the accommodation put up for rent on its platform.

69 In the light of the foregoing, the answer to the first question is that Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service, must be classified as an 'information society service' under Directive 2000/31.

The second question

Jurisdiction

70 The French Government submits that the Court manifestly lacks jurisdiction to answer the second question, inasmuch as the referring court is asking the Court of Justice to decide whether the activities of Airbnb Ireland fall within the material scope of the Hoguet Law and therefore to interpret French law.

71 It is, however, clear from the wording of the second question that the referring court is not thereby asking the Court whether the Hoguet Law applies to the activities of Airbnb Ireland,

but whether that law, which it finds to be restrictive of the freedom to provide information society services, is enforceable against that company.

72 That question which is closely linked to the power given in Article 3(4)(a) of Directive 2000/31 to Member States to derogate from the principle of the freedom to provide information society services and to the obligation for those Member States to give the Commission and the relevant Member State notification of the measures adversely affecting that principle, as provided for in Article 3(4)(b) of that directive, is a question concerning the interpretation of EU law.

73 Therefore, the Court has jurisdiction to answer that question.

Admissibility

74 In the alternative, the French Government submits that, since the referring court has failed to establish that the activities of Airbnb Ireland fall within the material scope of the Hoguet Law, its second question does not set out the reasons why it is unsure as to the interpretation of Directive 2000/31 and does not identify the link which that court establishes between that directive and the Hoguet Law. It does not therefore satisfy the requirements laid down in Article 94 of the Rules of Procedure of the Court of Justice and is accordingly inadmissible.

75 In that regard, as was set out in paragraph 30 above, it is clear from the second question that, according to the referring court, the intermediation service provided by Airbnb Ireland through the electronic platform of the same name falls within the material scope of that law.

76 In addition, by referring to the restrictive nature of that law as regards services such as the intermediation service at issue in the main proceedings and the principle of the freedom to provide information society services, recognised in Articles 1 and 3 of Directive 2000/31, while setting out the difficulties of interpreting that directive with regard to the question whether national legislation such as the Hoguet Law may be enforced against Airbnb Ireland, the referring court satisfies the minimum requirements laid down by Article 94 of the Rules of Procedure.

77 Accordingly, the second question is admissible.

Substance

78 By its second question, the referring court asks the Court of Justice whether the legislation at issue in the main proceedings is enforceable against Airbnb Ireland.

79 That question is prompted by the argument advanced by Airbnb Ireland concerning the incompatibility of the provisions of the Hoguet Law at issue in the main proceedings with Directive 2000/31 and, more particularly, by the fact that the French Republic has not satisfied the conditions laid down in Article 3(4) of that directive allowing Member States to adopt measures restricting the freedom to provide information society services.

80 The second question should therefore be construed as asking whether Article 3(4) of Directive 2000/31 must be interpreted as meaning that, in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures do not satisfy all the conditions laid down by that provision.

81 As a preliminary point, it should be noted that the legislation at issue in the main proceedings, as the referring court points out, is restrictive of the freedom to provide information society services.

82 First, the requirements of the Hoguet Law mentioned by the referring court, principally the obligation to hold a professional licence, concern access to the activity of connecting hosts who have places of accommodation and persons seeking that type of accommodation within the meaning of Article 2(h)(i) of Directive 2000/31 and do not come under any of the excluded categories referred to in Article 2(h)(ii) of that directive. Secondly, they apply inter alia to service providers established in Member States other than the French Republic, thereby making the provision of their services in France more difficult.

83 Under Article 3(4) of Directive 2000/31, Member States may, in respect of a given information society service falling within the coordinated field, take measures that derogate from the principle of the freedom to provide information society services, subject to two cumulative conditions.

84 First, under Article 3(4)(a) of Directive 2000/31, the restrictive measure concerned must be necessary in the interests of public policy, the protection of public health, public security or the protection of consumers; it must be taken against an information society service which actually undermines those objectives or constitutes a serious and grave risk to those objectives and, finally, it must be proportionate to those objectives.

85 Secondly, under the second indent of Article 3(4)(b) of that directive, before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State concerned must notify the Commission and the Member State on whose territory the service provider in question is established of its intention to adopt the restrictive measures concerned.

86 With regard to the second condition, the French Government accepts that the Hoguet Law did not give rise to a notification by the French Republic either to the Commission or to the Member State of establishment of Airbnb Ireland, that is to say, Ireland.

87 It must be stated at the outset that the fact that that law predates the entry into force of Directive 2000/31 cannot have had the consequence of freeing the French Republic of its notification obligation. As the Advocate General stated in point 118 of his Opinion, the EU legislature did not make provision for a derogation authorising Member States to maintain measures predating that directive and which could restrict the freedom to provide information society services without complying with the conditions laid down for that purpose by that directive.

88 It is therefore necessary to determine whether a Member State's failure to fulfil its obligation to give prior notification of the measures restricting the freedom to provide information society services coming from another Member State, laid down in the second indent of Article 3(4)(b) of Directive 2000/31, renders the legislation concerned unenforceable against individuals, in the same way as a Member State's failure to fulfil its obligation to give prior notification of the technical rules, laid down in Article 5(1) of Directive 2015/1535, has that consequence (see, to that effect, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 54).

89 In that regard, it should, first, be pointed out that the second indent of Article 3(4)(b) of Directive 2000/31 imposes a specific obligation for Member States to notify the

Commission and the Member State on whose territory the service provider in question is established of their intention to adopt measures restricting the freedom to provide information society services.

90 From the point of view of its content, the obligation laid down in that provision is therefore sufficiently clear, precise and unconditional to confer on it direct effect and, therefore, it may be invoked by individuals before the national courts (see, by analogy, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 44).

91 Secondly, it is common ground that, as is apparent from Article 3(2) of Directive 2000/31, read in conjunction with recital 8 of that directive, the objective of that directive is to ensure the freedom to provide information society services between Member States. That objective is pursued by way of a mechanism for monitoring measures capable of undermining it, which makes it possible for both the Commission and the Member State on whose territory the service provider in question is established to ensure that those measures are necessary in furtherance of overriding reasons in the general interest.

92 In addition, and as is apparent from Article 3(6) of that directive, the Commission, which is responsible for examining without delay the compatibility with EU law of the notified measures, is required, when it reaches the conclusion that the proposed measures are incompatible with EU law, to ask the Member State concerned to refrain from adopting those measures or to put an end to the measures in question as a matter of urgency. Thus, under that procedure, the Commission can avoid the adoption or at least the maintenance of obstacles to trade contrary to the TFEU, in particular by proposing amendments to be made to the national measures concerned (see, by analogy, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 41).

93 It is true, as the Spanish Government, in particular, submits and as is apparent from Article 3(6) of Directive 2000/31, that the second indent of Article 3(4)(b) of that directive, unlike Article 5(1) of Directive 2015/1535, does not formally impose any standstill obligation on a Member State which intends to adopt a measure restricting the freedom to provide an information society service. However, as was pointed out in paragraph 89 above, except in duly justified urgent cases, the Member State concerned must give prior notification to the Commission and the Member State on whose territory the service provider in question is established of its intention to adopt such a measure.

94 In view of the matters raised in paragraphs 89 to 92 above, the prior notification obligation established by the second indent of Article 3(4)(b) of Directive 2000/31 is not simply a requirement to provide information, comparable to the one at issue in the case which gave rise to the judgment of 13 July 1989, *Enichem Base and Others* (380/87, EU:C:1989:318, paragraphs 19 to 24), but rather an essential procedural requirement which justifies the unenforceability of non-notified measures restricting the freedom to provide an information society service against individuals (see, by analogy, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraphs 49 and 50).

95 Thirdly, the extension to Directive 2000/31 of the solution adopted by the Court in the judgment of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172), in relation to Directive 2015/1535, is all the more justified, as was correctly pointed out by the Commission at the hearing, by the fact that the notification obligation under the second indent of Article 3(4)(b) of Directive 2000/31, like the measure at issue in the case which gave rise to that judgment, is not intended to prevent a Member State from adopting measures falling within its own field of competence and which could affect the freedom to

provide services, but to prevent a Member State from impinging on the competence, as a matter of principle, of the Member State where the provider of the information society service concerned is established.

96 It follows from the foregoing that a Member State's failure to fulfil its obligation to give notification of a measure restricting the freedom to provide an information society service provided by an operator established on the territory of another Member State, laid down in the second indent of Article 3(4)(b) of Directive 2000/31, renders the measure unenforceable against individuals (see, by analogy, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 54).

97 In that regard, it must also be pointed out that, as was the case in relation to the technical rules of which the Member State did not give notification in accordance with Article 5(1) of Directive 2015/1535, the fact that a non-notified measure restricting the freedom to provide information society services is unenforceable may be relied on, not only in criminal proceedings (see, by analogy, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 84), but also in a dispute between individuals (see, by analogy, judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraph 64 and the case-law cited).

98 Therefore, in proceedings such as those at issue in the main proceedings, in which, in the course of an action before a criminal court, an individual seeks compensation from another individual for harm originating in the offence being prosecuted, a Member State's failure to fulfil its obligation to give notification of that offence under the second indent of Article 3(4)(b) of Directive 2000/31 makes the national provision laying down that offence unenforceable against the individual being prosecuted and enables that person to rely on that failure to fulfil an obligation, not only in criminal proceedings brought against that individual, but also in the claim for damages brought by the individual who has been joined as a civil party.

99 Bearing in mind that the French Republic did not give notification of the Hoguet Law and given the cumulative nature of the conditions laid down in Article 3(4) of Directive 2000/31, recalled in paragraphs 84 and 85 above, the view must be taken that that law cannot, on any view, be applied to an individual in a situation like that of Airbnb Ireland in the main proceedings, regardless of whether that law satisfies the other conditions laid down in that provision.

100 In the light of the foregoing, the answer to the second question is that the second indent of Article 3(4)(b) of Directive 2000/31 must be interpreted as meaning that, in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures were not notified in accordance with that provision.

Costs

101 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:

1. **Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), which refers to Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation, while also providing a certain number of services ancillary to that intermediation service, must be classified as an 'information society service' under Directive 2000/31.**

2. **The second indent of Article 3(4)(b) of Directive 2000/31 must be interpreted as meaning that, in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures were not notified in accordance with that provision.**

ORDER OF THE COURT (Eighth Chamber)

22 April 2020 (*)

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court — Directive 2003/88/EC — Organisation of working time — Concept of 'worker' — Parcel delivery undertaking — Classification of couriers engaged under a services agreement — Possibility for a courier to engage subcontractors and to perform similar services concurrently for third parties)

In Case C-692/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Watford Employment Tribunal (United Kingdom), made by decision of 18 September 2019, received at the Court on 19 September 2019, in the proceedings

B

v

Yodel Delivery Network Ltd,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of the provisions of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between B and Yodel Delivery Network Ltd ('Yodel') concerning the classification of B's professional status in his employment relationship with that undertaking.

Legal context

EU law

3 Article 2 of Directive 2003/88 provides:

'For the purpose of this Directive, the following definitions shall apply:

1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

…'

United Kingdom law

4 Directive 2003/88 was transposed into national law by the Working Time Regulations 1998, Regulation 2 of which provides:

'In these Regulations

…

"worker" means an individual who has entered into or works under …:

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly;

…'

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

5 B is a neighbourhood parcel delivery courier. He carries on his business exclusively for the undertaking Yodel, a parcel delivery undertaking, since July 2017.

6 In order to carry on his activity, B had to undergo training in order to familiarise himself with the use of the handheld delivery device provided by Yodel.

7 Neighbourhood couriers who carry on their activity for the benefit of that undertaking are engaged on the basis of a courier services agreement which stipulates that they are 'self-employed independent contractors'.

8 They use their own vehicle to deliver the parcels handled by Yodel and use their own mobile telephone to communicate with that undertaking.

9 Under that courier services agreement, couriers are not required to perform the delivery personally, but may appoint a subcontractor or a substitute for the whole or part of the service provided, whose substitution Yodel may veto if the person chosen does not have a level of skills and qualification which is at least equivalent to that required of a courier engaged by Yodel. In any event, the courier remains personally liable for any acts or omissions of any appointed subcontractor or substitute.

10 That courier services agreement also provides that the courier is free to deliver parcels for the benefit of third parties concurrently to providing services on behalf of Yodel.

11 Under that agreement, Yodel is not required to use the services of the couriers with whom it has concluded a services agreement, just as those couriers are not required to accept any parcel for delivery. In addition, those couriers may fix a maximum number of parcels which they are willing to deliver.

12 As regards working hours, the couriers with whom Yodel has concluded a services agreement receive the parcels to be delivered at their home between Monday and Saturday of each week. The parcels must be delivered between 7.30 and 21.00, however

those couriers remain free to decide, except for fixed-time deliveries, the time of delivery and the appropriate order and route to suit their personal convenience.

13 As for remuneration, a fixed rate, which varies according to the place of delivery, is set for each parcel.

14 Although the services agreement concluded between Yodel and the couriers classifies those couriers as 'self-employed independent contractors', B claims that his status is that of a 'worker' for the purposes of Directive 2003/88. He considers that, although he is self-employed for tax purposes and accounts for his own business expenses, he is an employee of Yodel.

15 The referring court, before which B brought an action, states that neighbourhood couriers engaged on the same terms as B carry on their delivery activity as legal persons by engaging their own staff.

16 That court adds that, under national legislation, as applied by the United Kingdom courts, the status of 'worker' presupposes that the person concerned undertakes to do or perform personally any work or service. Furthermore, that status is incompatible with that person's right to provide services to several customers simultaneously.

17 Thus, according to the referring court, first, the fact that the couriers with whom Yodel concluded a services agreement have the possibility of subcontracting the tasks entrusted to them precludes, under the law of the United Kingdom, their classification as a 'worker'.

18 The referring court notes, second, that the fact that the couriers with whom Yodel concluded a services agreement are not required to provide their services exclusively to that undertaking means that they must be classified, in accordance with the law of the United Kingdom, as 'self-employed independent contractors'.

19 The referring court has doubts as to the compatibility of the provisions of that law, as interpreted by the courts of the United Kingdom, with EU law. Furthermore, in the event that B were to be classified as a 'worker' for the purposes of Directive 2003/88, it wishes to obtain guidance as to the methods for calculating the working time of the couriers with whom Yodel concluded a services agreement, since they may, during the time they devote to the delivery of parcels on behalf of that undertaking, provide their services simultaneously to other undertakings, and organise their activities with a great deal of latitude.

20 In those circumstances, the Watford Employment Tribunal (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does Directive [2003/88] preclude provisions of national law which require an individual to undertake to do or perform all of the work or services required of him, "personally" in order to fall within the scope of the Directive?

2. In particular:

2.1. Does the fact that an individual has the right to engage subcontractors or "substitutes" to perform all or any part of the work or services required of him mean that he is not to be regarded as a worker for the purposes of Directive [2003/88] either:-

2.1.1. at all (the right to substitute being inconsistent with the status of worker); or

2.1.2. only in respect of any period of time when exercising such right of substitution (so that he is to be regarded as a worker in relation to periods of time actually spent performing work or services)?

2.2. Is it material to a determination of worker status for the purposes of Directive [2003/88] that the particular claimant has not in fact availed himself of the right to subcontract or use a substitute, where others engaged on materially the same terms have done so?

2.3. Is it material to a determination of worker status for the purposes of Directive [2003/88] that other entities including limited companies and limited liability partnerships are engaged on materially the same terms as the particular claimant?

3. Is it material to a determination of worker status for the purposes of Directive [2003/88] that the putative employer is not obliged to offer work to the individual claimant i.e. that it is offered on a "when needed" basis; and/or that the individual claimant is not obliged to accept it i.e. it is "subject always to the courier's absolute right not to accept any work offered"?

4. Is it material to a determination of worker status for the purposes of Directive [2003/88] that the individual claimant is not obliged to work exclusively for the putative employer but may concurrently perform similar services for any third party, including direct competitors of the putative employer?

5. Is it material to a determination of worker status for the purposes of Directive [2003/88] that the particular claimant has not in fact availed himself of the right to perform similar services for third parties, where others engaged on materially the same terms have done so?

6. For the purposes of [Article 2(1)] of Directive [2003/88] how is a worker's working time to be calculated in circumstances where the individual claimant is not required to work fixed hours but is free to determine his own working hours within certain parameters e.g. between the hours of 7.30 and 21.00? In particular how is working time to be calculated when:-

6.1. The individual is not required to work exclusively for the putative employer during those hours and/or that certain activities performed during those hours (e.g. driving) may benefit both the putative employer and a third party;

6.2. The worker is afforded a great deal of latitude as to the mode of delivery of work, such that he may tailor his time to suit his personal convenience rather than solely the interests of the putative employer.'

Consideration of the questions referred

21 Under Article 99 of its Rules of Procedure, where, inter alia, the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred 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.

22 It is appropriate to apply that provision in the present case.

23 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Directive 2003/88 must be interpreted as precluding a person, engaged by his putative employer under a services agreement stipulating that he is a self-employed independent contractor, from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer, and
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer.

24 As a preliminary point, it should be noted that Directive 2003/88 does not define the concept of 'worker'.

25 However, the Court has already ruled on that concept.

26 It has thus held, inter alia, that that concept has an autonomous meaning specific to EU law (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 41).

27 In that regard, it is for the national court to apply that concept of a 'worker' for the purposes of Directive 2003/88, and the national court must, in order to determine to what extent a person carries on his activities under the direction of another, base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved (see, to that effect, judgments of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 29, and of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 29).

28 Since an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (judgments of 10 September 2015, *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 46, and of 20 November 2018, *Sindicatul Familia Constanța and Others*, C-147/17, EU:C:2018:926, paragraph 42).

29 Thus, the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (judgments of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 27, and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 28).

30 More specifically, the Court has held that the classification of an 'independent contractor' under national law does not prevent that person being classified as an employee**,** within

the meaning of EU law, if his independence is merely notional, thereby disguising an employment relationship (judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 35 and the case-law cited).

31 That is the case of a person who, although hired as an independent service provider under national law, for tax, administrative or organisational reasons, acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 36 and the case-law cited).

32 On the other hand, more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff are the features which are typically associated with the functions of an independent service provider (judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 33).

33 It is for the referring court to ascertain, in the light of the case-law referred to in paragraphs 27 to 32 of the present judgment, whether a self-employed independent contractor, such as B, may be classified as a 'worker' for the purposes of that case-law, taking account of the circumstances at issue in the main proceedings.

34 That being so, in order to give a useful answer to the referring court, the following points should be made.

35 It follows from the specific features of the file submitted to the Court that a person, such as B, appears to have a great deal of latitude in relation to his putative employer.

36 In those circumstances, it is necessary to examine the consequences of that great deal of latitude on the independence of such a person and, in particular, whether, despite the discretion, referred to by the referring court, afforded to that person, his independence is merely notional.

37 In addition, it must be ascertained whether it is possible to establish, in the circumstances specific to the case in the main proceedings, the existence of a subordinate relationship between B and Yodel.

38 In that regard, concerning, first, the discretion of a person, such as B, to appoint subcontractors or substitutes to carry out the tasks at issue, it is common ground that the exercise of that discretion is subject only to the condition that the subcontractor or substitute concerned has basic skills and qualifications equivalent to the person with whom the putative employer has concluded a services agreement, such as the person at issue in the main proceedings.

39 Thus, the putative employer can exercise only limited control over the choice of subcontractor or substitute by that person, on the basis of a purely objective criterion, and cannot give precedence to any personal choices and preferences.

40 Second, it is apparent from the file submitted to the Court that, under the services agreement at issue in the main proceedings, B has an absolute right not to accept the tasks assigned to him. In addition, he may himself set a binding limit on the number of tasks which he is prepared to perform.

41 Third, as regards the discretion of a person, such as B, to provide similar services to third parties, it appears that that discretion may be exercised for the benefit of any third party, including for the benefit of direct competitors of his putative employer, it being understood that that discretion may be exercised in parallel and simultaneously for the benefit of a number of third parties.

42 Fourth, as regards 'working' time, while it is true that a service, such as that at issue in the main proceedings, must be provided during specific time slots, the fact remains that such a requirement is inherent to the very nature of that service, since compliance with those times slots appears essential in order to ensure the proper performance of that service.

43 In the light of all those factors, first, the independence of a courier, such as that at issue in the main proceedings, does not appear to be fictitious and, second, there does not appear, a priori, to be a relationship of subordination between him and his putative employer.

44 That being so, it is for the referring court, taking account of all the relevant factors relating to B and to the economic activity which he carries on, to classify his professional status in accordance with Directive 2003/88, in the light of the criteria laid down in the case-law set out in paragraphs 27 to 32 of the present order.

45 It follows from all the foregoing considerations that Directive 2003/88 must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:

– to use subcontractors or substitutes to perform the service which he has undertaken to provide;

– to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;

– to provide his services to any third party, including direct competitors of the putative employer, and

– to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,

provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Eighth Chamber) hereby orders:

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:

– **to use subcontractors or substitutes to perform the service which he has undertaken to provide;**

– **to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;**

– **to provide his services to any third party, including direct competitors of the putative employer, and**

– **to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,**

provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88.

Luxembourg, 22 April 2020.

OPINION OF ADVOCATE GENERAL SZPUNAR

delivered on 10 September 2020 (1)

Case C-62/19

Star Taxi App SRL

v

Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General,

Consiliul General al Municipiului Bucureşti,

interested parties

IB,

Camera Naţională a Taximetriştilor din România,

D'Artex Star SRL,

Auto Cobălcescu SRL,

Cristaxi Service SRL

(Request for a preliminary ruling
from the Tribunalul București (Regional Court, Bucharest, Romania))

(Reference for a preliminary ruling – Directive (EU) 2015/1535 – Article 1(1)(b) – Definition of 'Information Society services' – Service putting taxi customers directly in touch with taxi drivers – Mandatory taxi booking service for taxis of authorised carriers – Article 1(1)(e) – Rule on services – Notification obligation – Directive 2000/31/EC – Article 4 – Prior authorisation – Authorisation schemes not specifically and exclusively targeted at Information Society services – Directive 2006/123/EC – Articles 9 and 10 – Authorisation schemes for service activities)

Introduction

1. EU legislation lays down special rules for a specific category of services, namely 'Information Society' services, that is to say, services provided at a distance by electronic means or, put simply, mainly via the internet. Under EU law, such services benefit from the principle of mutual recognition between Member States as well as a number of facilitations as regards establishment in the providers' respective Member States of origin.

2. However, it is not always easy to distinguish between an Information Society service and a 'traditional' service when different kinds of services form an integral part of a composite service. That is particularly the case for urban transport services booked by electronic means. The Court has already had the opportunity to provide some guidance on that distinction in specific circumstances. (2) However, such guidance is not necessarily intended to apply in different circumstances.

3. A second difficulty comes to light where national rules govern 'traditional' services of the same economic nature as Information Society services. It is therefore necessary to determine to what extent and, as the case may be, under what circumstances EU law allows those rules to be applied to the latter category of services. A

further question arises where there is doubt as to whether the rules adopted to regulate 'traditional' services are actually intended to apply to Information Society services, due to the latter's specificity or novelty. (3)

4. All of those different issues emerge in the present case and thus give the Court the opportunity to clarify its case-law on the matter.

Legal context

European Union law

5. Under Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'): (4)

> 'For the purpose of this Directive, the following terms shall bear the following meanings:
>
> (a) "information society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC; [(5)]'

6. Article 4 of that directive provides:

> '1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.
>
> 2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services ...'

7. Article 2(1) and Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (6) provides:

> '1. This Directive shall apply to services supplied by providers established in a Member State.
>
> 2. This Directive shall not apply to the following activities:
>
> ...
>
> (d) services in the field of transport, including port services, falling within the scope of Title [VI] of the [TFEU];
>
> ...'

8. Under the first sentence of Article 3(1) of that directive:

> 'If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions.'

9. Article 9(1) of that directive provides:

> '1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
>
> (a) the authorisation scheme does not discriminate against the provider in question;
>
> (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.'

10. Lastly, Article 10(1) and (2) of that directive states:

'1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.'

11. Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (7) provides:

'1. For the purposes of this Directive, the following definitions apply:

...

(b) "service" means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

(i) "at a distance" means that the service is provided without the parties being simultaneously present;

(ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex I;

...

(e) "rule on services" means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

For the purposes of this definition:

(i) a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner;

(ii) a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner;

(f) "technical regulation" means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

...

This comprises technical regulations imposed by the authorities designated by the Member States and appearing on a list drawn up and updated, where appropriate, by the Commission, in the framework of the Committee referred to in Article 2.

...'

12. Under the first subparagraph of Article 5(1) of that directive:

'Subject to Article 7, 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 those grounds have not already been made clear in the draft.'

13. Finally, Article 10 of the directive provides:

'Directive 98/34/EC, as amended by the acts listed in Part A of Annex III to this Directive, is repealed, without prejudice to the obligations of the Member States relating to the time limits for the transposition into national law of the Directives set out in Part B of Annex III to the repealed Directive and in Part B of Annex III to this Directive.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.'

Romanian law

14. Article 1a(j) and Article 15 of Legea nr. 38/2003 privind transportul în regim de taxi și în regim de închiriere (Law No 38/2003 on transport by taxi and hire vehicle) of 20 January 2003 (8) ('Law No 38/2003') provide:

'Article 1a

...

(j) taxi dispatching ("dispatching") means an activity related to the transport by taxi consisting in receiving customer bookings by telephone or other means and forwarding them to a taxi driver via a two-way radio;

...

Article 15

1. Taxi dispatching may be carried on only within the area covered by the authorisation by any legal person ("the booking centre") holding an authorisation granted by the competent authority in accordance with this law.

2. A taxi dispatching authorisation may be obtained by submitting the following documents:

(a) a copy of the registration certificate issued by the commercial register;

(b) a sworn declaration by the taxi or hire vehicle transport operator that the booking centre is equipped with the necessary technical means, a two-way radio, a secure radio frequency, authorised staff and the necessary spaces;

(c) a copy of the radio telephony operator certificate for the employees of the taxi booking centre issued by the competent communications authority;

(d) a copy of the licence to use radio frequencies issued by the competent authority.

…

5. Authorised carriers providing taxi services shall use a booking centre in accordance with this law on the basis of a dispatching agreement concluded with that centre under non-discriminatory conditions.

6. Dispatching services shall be mandatory for all taxis of authorised carriers operating in an area other than areas where less than 100 taxi licences have been issued or where that service is optional.

…

8. Taxi dispatching agreements concluded with authorised carriers must contain terms setting out the parties' obligations to comply with the rules on quality and legality of the service provided and the agreed fares.

9. Taxis served by a booking centre may provide transport services on the basis of a flat fare or fare scale depending on vehicle category, in accordance with the dispatching agreement.

10. The booking centre shall supply the authorised carriers it serves with a two-way radio for installation in taxis on the basis of a lease agreement concluded under non-discriminatory conditions.'

15. In the municipality of Bucharest (Romania), taxi services are regulated by the Hotărârea Consiliului General al Municipiului București nr. 178/2008 privind aprobarea Regulamentului-cadru, a Caietului de sarcini și a contractului de atribuire în gestiune delegată pentru organizarea și executarea serviciului public de transport local în regim de taxi (Decision No 178/2008 of Bucharest Municipal Council approving the framework regulation, contract documents and concession agreement for the delegated management of the organisation and provision of local public taxi services) of 21 April 2008 ('Decision No 178/2008'). Article 21(1) of Annex 1 to that decision was originally worded as follows:

'In the municipality of Bucharest, dispatching services shall be mandatory for all taxis of authorised carriers and may be provided only by booking centres authorised by the competent authorisation authority of the municipality of Bucharest, under conditions ensuring that customers are able to request those services by telephone or other means through booking centres.'

16. Decision No 178/2008 was amended by the Hotărârea Consiliului General al Municipiului București nr. 626/19.12.2017 pentru modificarea și completarea Hotărârii Consiliului General al Municipiului București nr. 178/2008 privind aprobarea Regulamentului-cadru, a Caietului de sarcini și a contractului de atribuire în gestiune delegată pentru organizarea și executarea serviciului public de transport local în regim de taxi (Decision No 626/19.12.2017 of Bucharest Municipal Council amending and supplementing Decision No 178/2008) of 19 December 2017 ('Decision No 626/2017').

17. Article 3 of Annex 1 to Decision No 178/2008 as amended, resulting from Article I of Decision No 626/2017, states:

'The terms and concepts used and defined in Law No 38/2003 have the same meaning herein and, for the purposes of this framework regulation, the following definitions shall apply:

…

(Ia) dispatching by any other means: activity carried out by a booking centre authorised by the competent authority to receive bookings from customers by means of an IT application or bookings made on the website of an authorised booking centre and to forward them to taxi drivers via a two-way radio.

(Ib) IT application: software installed and functioning on a mobile or fixed device, belonging exclusively to the authorised booking centre and bearing its name.

…'

18. Article 21 of Annex 1 to Decision No 178/2008 as amended, resulting from Articles II and III of Decision No 626/2017, is worded as follows:

'1. In the municipality of Bucharest, dispatching services shall be mandatory for all taxis of authorised carriers and may be provided only by booking centres authorised by the competent authorisation authority of the municipality of Bucharest, under conditions ensuring that customers are able to request those services by telephone or other means, including through applications connected to the internet that must bear the name of the booking centre appearing in the dispatching authorisation granted by the competent authorisation authority of the municipality of Bucharest.

…

3a. Dispatching services shall be mandatory for all taxis of authorised carriers operating a taxi in the municipality of Bucharest and may be provided only by booking centres authorised by the competent authorisation authority of the municipality of Bucharest, under conditions ensuring that customers are able to request those services by telephone or other means (IT applications, bookings made on the website of a booking centre) and to forward them to taxi drivers via a two-way radio.'

19. Article 41(2a) of Annex 1 to that decision as amended, resulting from Article IV of Decision No 626/2017, provides that in the pursuit of taxi activities, taxi drivers are required, inter alia, to refrain from using telephones or other mobile devices when providing transport services.

20. Article 59(6a) of Annex 1 to that decision as amended, resulting from Article V of Decision No 626/2017, states:

'Failure to comply with the obligations laid down in Article 21(3a), which are applicable to all comparable activities irrespective of the way and the circumstances in which they are carried out, resulting in an unauthorised driver or an authorised taxi carrier being contacted to transport a person or group of persons in the municipality of Bucharest, shall be punishable by a fine of between 4 500 and 5 000 [Romanian lei (RON) (between approximately EUR 929 and 1 032)].'

Dispute in the main proceedings, procedure and questions referred for a preliminary ruling

21. S.C. Star Taxi App SRL ('Star Taxi App'), a company incorporated under Romanian law established in Bucharest, operates an eponymous smartphone application placing users of taxi services directly in touch with taxi drivers.

22. That application makes it possible to run a search which displays a list of taxi drivers available for a journey. The customer is then free to choose a particular driver. Star Taxi App does not forward bookings to taxi drivers and does not set the fare, which is paid directly to the driver at the end of the journey.

23. Star Taxi App concludes contracts for the provision of services directly with taxi drivers authorised and licensed to provide taxi services, without carrying out any selection or recruitment process. Under those contracts, drivers are given access to an IT application and are equipped with a smartphone on which the application is installed and a SIM card including a limited amount of data to enable use of the application, in

exchange for a monthly payment from the taxi driver to Star Taxi App. Furthermore, that company does not control either the quality of the vehicles and their drivers or the drivers' conduct.

24. On 19 December 2017, Bucharest Municipal Council adopted Decision No 626/2017, which extended the scope of the obligation to apply for authorisation for the activity of 'dispatching' to cover operators of IT applications such as Star Taxi App. Star Taxi App was fined RON 4 500 (approximately EUR 929) for having infringed those rules.

25. Taking the view that its activity constituted an Information Society service to which the principle of the exclusion of prior authorisation laid down in Article 4(1) of Directive 2000/31 applies, Star Taxi App lodged a prior administrative complaint requesting revocation of Decision No 626/2017. That request was refused on the ground that the disputed rules, first, had become necessary on account of the considerable scale on which unauthorised legal entities were found to be unlawfully taking bookings and, secondly, did not infringe the freedom to provide services by electronic means since they provided a framework for an intermediation service in connection with the activity of passenger transport by taxi.

26. Star Taxi App therefore brought proceedings before the Tribunalul București (Regional Court, Bucharest, Romania) seeking annulment of Decision No 626/2017.

27. In those circumstances the Tribunalul București (Regional Court, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '(1) Are the provisions of Directive [98/34] (Article 1(2)), as amended by Directive [98/48], and of Directive [2000/31] (Article 2(a)), which state that an Information Society service is a "service … provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services", to be interpreted as meaning that an activity such as that carried on by Star Taxi App SRL (namely a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers) must be regarded specifically as an Information Society and collaborative economy service (bearing in mind that Star Taxi App SRL does not fulfil the criteria for being a transport undertaking considered by the Court of Justice of the European Union in paragraph 39 of its judgment of 20 December 2017, *Asociación Profesional Elite Taxi,* C-434/15, EU:C:2017:981, with reference to Uber)?
>
> (2) In the event that [the application operated by] Star Taxi App SRL is to be regarded as an Information Society service, do the provisions of Article 4 of Directive [2000/31], of Articles 9, 10 and 16 of Directive [2006/123] and of Article 56 TFEU entail the application of the principle of the freedom to provide services to the activity carried on by Star Taxi App SRL? If the answer to that question is in the affirmative, do those provisions preclude rules such as those set out in Articles I, II, III, IV and V of [Decision No 626/2017]?
>
> (3) In the event that Directive [2000/31] applies to the service provided by Star Taxi App SRL, are restrictions imposed by a Member State on the freedom to provide Information Society services which make the provision of such services conditional on the possession of an authorisation or licence valid measures derogating from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) of that directive?
>
> (4) Do the provisions of Article 5 of Directive [2015/1535] preclude the adoption, without first notifying the European Commission, of regulations such as those set out in Articles I, II, III, IV and V of [Decision No 626/2017]?'

28. The request for a preliminary ruling was received at the Court on 29 January 2019. Written observations were submitted by Star Taxi App, Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General (Territorial Administrative Unit of Bucharest; 'the municipality of Bucharest'), the Netherlands Government and the Commission. Star Taxi App and the Commission also replied in writing to the questions put by the Court, which decided to rule on the case without a hearing owing to the risks associated with the Covid-19 pandemic.

Analysis

29. The national court has referred four questions for a preliminary ruling concerning the interpretation of several provisions of EU law in a context such as that at issue in the main proceedings. I will examine those questions in the order in which they have been put, dealing with the second and third questions together. It should be noted, however, that not all of the provisions of EU law mentioned by the national court are applicable in a situation such as this one. The questions referred must therefore be reformulated.

The first question referred

Preliminary observations

30. First of all, in the first question referred, the national court mentions Article 1(2) of Directive 98/34 as amended by Directive 98/48. However, Directive 98/34 was repealed and replaced by Directive 2015/1535 before Decision No 626/2017 was adopted. Under the second paragraph of Article 10 of Directive 2015/1535, references to the repealed directive are to be construed as references to Directive 2015/1535.

31. Next, as the Commission rightly points out in its observations, the concept of 'collaborative economy' has no legal meaning in EU law, since EU law confers a special status only on Information Society services.

32. Therefore, by its first question, the national court asks, in essence, whether Article 2(a) of Directive 2000/31, read in conjunction with Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers constitutes an 'Information Society service'.

Article 1(1)(b) of Directive 2015/1535

33. To recapitulate, Article 2(a) of Directive 2000/31 defines 'Information Society service' by reference to Article 1(1)(b) of Directive 2015/1535.

34. Under that latter provision, an Information Society service is 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. Those terms are themselves defined. In particular, a service is provided by electronic means where it is 'sent initially and received at its destination by means of electronic equipment for the processing … and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means'.

35. There appears to be no doubt that a service such as that offered by Star Taxi App meets the abovementioned definition.

36. First, that service is provided for remuneration, since taxi drivers pay a fee for its use. Although that use is free of charge for passengers, they must also be regarded as recipients of the service. That does not affect the fact that the service provided by Star Taxi App is paid for. It is sufficient if that service is subject to payment for one of the categories of users, in this case taxi drivers. (9)

37. Secondly, the service at issue is provided at a distance: it does not require the simultaneous presence of the service provider (Star Taxi App) and the recipients (drivers and passengers). The simultaneous presence of both categories of users of that service is, of course, necessary for the provision of the subsequent transport service. However, that service is separate from the connection service at issue in these proceedings.

38. Thirdly, the service at issue in the instant case is also provided at the individual request of a recipient of the service. Specifically, the simultaneous request of two recipients is needed here: the request of the driver when he or she is connected to the service and the request of a passenger wishing to obtain information on available drivers.

39. Fourthly, and lastly, the service is provided by electronic means. It operates via an application, namely smartphone software, and thus uses electronic equipment for the processing and storage of data. It is transmitted by cellular telephony or other forms of internet access, and thus uses means of electronic communication.

40. It is true that, according to the information submitted by the national court, Star Taxi App also supplies taxi drivers with smartphones on which its application is installed so that they can use the service at issue. That aspect of the service is not provided at a distance or by electronic means and does not therefore meet the abovementioned definition. The supply of smartphones is, however, an ancillary aspect of the service, the purpose of which is to facilitate the provision of the primary service of connecting drivers with passengers. It does not therefore affect the nature of Star Taxi App's activity as a service provided at a distance.

41. Accordingly, an activity such as that operated by Star Taxi App falls within the definition of 'Information Society service' within the meaning of Article 1(1)(b) of Directive 2015/1535. (10)

Judgment in Asociación Profesional Elite Taxi

42. It is nevertheless clear from the Court's case-law that, in some circumstances, a service may not be regarded as falling within the concept of 'Information Society service' even if it displays, at least as regards some of its constituent elements, the characteristics contained in the definition in Article 1(1)(b) of Directive 2015/1535. (11)

43. That is particularly the case where the service provided by electronic means is inherently linked to the provision of another service, which is the primary service and is not provided by electronic means, such as a transport service. (12)

44. According to the Court, that inherent link is characterised by the fact that the provider of the service provided by electronic means controls the essential aspects of the other service, including the selection (13) of the providers of that other service. (14)

45. However, the situation seems to be different in the case of a service such as that provided by Star Taxi App. First, Star Taxi App does not need to recruit taxi drivers because they are licensed and have the necessary means to provide urban transport services. Star Taxi App offers them nothing more than its service as an add-on to enhance the efficiency of their own services. According to Star Taxi App, the taxi drivers are not employees, like Uber's drivers, but customers, in other words, recipients of the service. Secondly, Star Taxi App does not exercise control or decisive influence over the conditions under which transport services are provided by the taxi drivers, who are free to determine those conditions subject to any limits imposed by the legislation in force. (15)

46. I do not therefore share the municipality of Bucharest's view that the situation in the main proceedings is comparable to that in the case which gave rise to the judgment in *Asociación Profesional Elite Taxi*. (16)

47. It is true that Star Taxi App's service is ancillary to the taxi transport services and is economically dependent on those services, since it would make no sense without them.

48. However, that dependence differs completely from the dependence which characterises the relationship between the operator of the UberPop application and the drivers operating within the framework of that application. In order to be able to provide its intermediation service by means of that application, Uber had to create *ex nihilo* the corresponding transport service provided by non-professional drivers – which previously did not exist – and, consequently, organise its general operation. (17) Thus, the UberPop application could not operate without the services provided by drivers and drivers could not offer those services in an economically viable way without that application. For that reason, Uber's economic model and commercial strategy require it to determine the essential terms of the transport service, starting with the price, so that it becomes, albeit indirectly, the de facto provider of those services. (18)

49. By contrast, the service provided by Star Taxi App is an adjunct to a pre-existing and organised taxi transport service. Star Taxi App's role is confined to that of an external provider of an ancillary service, which is important but not essential for the efficiency of the primary service, being the transport service. Although the service provided by Star Taxi App is thus economically dependent on the transport service, it may be functionally independent and be provided by a service provider other than the transport service providers. Those two services are therefore not inherently linked within the meaning of the Court's case-law referred to in the preceding point. (19)

50. The municipality of Bucharest submits that Star Taxi App's service must be regarded as an integral part of the taxi transport service, since national legislation classifies such a service as a 'dispatching service', which is mandatory for all taxi transport providers.

51. Suffice it to note that, within the framework of the rules on transport services, Member States are free to require carriers to have recourse to other services, including Information Society services. That requirement cannot, however, exclude the latter services from the ambit of the rules laid down in Directive 2000/31 and exempt Member States from the obligations flowing from them.

Answer to the first question referred

52. An intermediation service between professional taxi drivers and passengers by means of a smartphone application, such as that provided by Star Taxi App, therefore displays the characteristics of an Information Society service within the meaning of Article 1(1)(b) of Directive 2015/1535, without, however, being inherently linked to the transport service within the meaning of the case-law of the Court referred to above. (20)

53. I therefore propose that the answer to the first question referred for a preliminary ruling should be that Article 2(a) of Directive 2000/31, read in conjunction with Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers constitutes an Information Society service where that service is not inherently linked to the taxi transport service so that it does not form an integral part of the taxi transport service within the meaning of the judgment in *Asociación Profesional Elite Taxi*. (21)

The second and third questions referred

54. By its second and third questions, the national court asks the Court to assess Decision No 626/2017 in the light of Articles 3 and 4 of Directive 2000/31, Articles 9, 10 and 16 of Directive 2006/123 and Article 56 TFEU. I shall examine those questions in relation to each legislative act mentioned by the national court, beginning with the act whose provisions deal most closely with Information Society services, namely Directive 2000/31.

Directive 2000/31

55. By its second and third questions, the national court essentially asks, in particular, whether Articles 3 and 4 of Directive 2000/31 must be interpreted as precluding legislation of a Member State which, like Decision No 178/2008 as amended by Decision No 626/2017, makes intermediation services, provided by electronic means, between taxi drivers and potential passengers subject to the same requirement to obtain authorisation as that imposed on operators of taxi 'dispatching' services provided by other means, including radio.

– *Article 3 of Directive 2000/31*

56. It should be noted at the outset that, since Star Taxi App is a company incorporated under Romanian law with its registered office in Bucharest, the dispute in the main proceedings is confined within a single Member State.

57. Article 3(1) of Directive 2000/31 simply requires Member States to ensure that Information Society services provided by service providers established in their territory comply with the national provisions in force which fall within the coordinated field as defined in Article 2(h) thereof. Moreover, Article 3(2) of that directive prohibits Member States, as a rule, from restricting the freedom to provide Information Society services from another Member State, with Article 3(4) thereof introducing exceptions to that prohibition.

58. Article 3 of Directive 2000/31 therefore establishes a kind of principle of mutual recognition of Information Society services between Member States. It follows that that article does not apply in the situation of an Information Society service provider in its Member State of origin. Article 3 of Directive 2000/31 is thus not applicable to the dispute in the main proceedings.

– *Article 4 of Directive 2000/31*

59. Article 4 of Directive 2000/31 prohibits Member States from making the taking up and pursuit of the activity of an Information Society service provider subject to prior authorisation or any other requirement having equivalent effect.

60. That provision appears in Chapter II of Directive 2000/31, entitled 'Principles', in Section 1 'Establishment and information requirements'. Chapter II lays down a series of rights and obligations for Information Society service providers with which Member States must ensure compliance. The purpose of those provisions is to harmonise the laws of the Member States relating to those services to ensure the effectiveness of the principle of mutual recognition flowing from Article 3 of Directive 2000/31. The provisions of Chapter II of that directive therefore harmonise the rules which Member States impose on Information Society service providers established in their territory. (22)

61. It is a matter of logic that the same holds for the prohibition of any authorisation scheme for such services. That prohibition is therefore valid in the situation of Information Society service providers in their Member States of origin. Thus, Article 4(1) of Directive 2000/31 is, in principle, applicable to the dispute in the main proceedings.

62. However, under Article 4(2) of that directive, the prohibition laid down in Article 4(1) thereof is without prejudice to authorisation schemes which are not specifically and exclusively targeted at Information Society services. It is therefore necessary to determine whether the authorisation scheme at issue in the main proceedings is specifically and exclusively targeted at Information Society services.

63. I must state at the outset that Article 4(2) of Directive 2000/31 is more exacting than the similar proviso set out in Article 1(1)(e) of Directive 2015/1535 in the definition of 'rule on services'. The latter provision excludes any rules which are not *specifically* aimed at Information Society services. By contrast, under Article 4(2) of Directive 2000/31, the prohibition laid down in Article 4(1) thereof is to apply only to authorisation schemes which are both *specifically* and *exclusively* targeted at Information Society services.

64. According to the information in the request for a preliminary ruling, under Romanian law, the requirement to obtain authorisation for access to the activity of taxi dispatching follows from Article 15(1) of Law No 38/2003. The rest of that article sets out the requirements to be satisfied in order to obtain authorisation, the conditions for the grant of such authorisation and the rules applicable to the pursuit of the activity.

65. Those provisions are thereafter implemented at local level by the various authorities with power to grant authorisation, in this case the municipality of Bucharest. To that end, the municipality of Bucharest adopted Decision No 178/2008. That decision was subsequently amended by Decision No 626/2017, which, by introducing the concept of 'dispatching by any other means', (23) made clear that the requirement for authorisation applied to services of the kind provided by Star Taxi App, namely Information Society services consisting of intermediation between taxi drivers and passengers.

66. The legal question which must therefore be answered is whether a national provision which has the result of requiring Information Society service providers to obtain authorisation – a requirement that, moreover, already exists for providers of similar services which are not Information Society services – constitutes an authorisation scheme specifically and exclusively targeted at providers of that second category of services, within the meaning of Article 4(2) of Directive 2000/31.

67. I believe that question must be answered in the negative.

68. The rationale for Article 4(2) of Directive 2000/31 is to prevent unequal treatment between Information Society services and similar services which do not fall within that concept. Where a general authorisation scheme is intended to apply also to services supplied at a distance by electronic means, it is likely that those services constitute, in economic terms, substitutes for the services provided by 'traditional' means and are, as a result, in direct competition with that second category of services. In the absence of a requirement to obtain authorisation, Information Society services would be placed in a preferential competitive position, in breach of the principles of fair competition and equal treatment. (24) In other words, while the EU legislature's aim in adopting Directive 2000/31 was to encourage the development of Information Society services, its intention was not to enable economic operators to evade all legal obligations solely because they operate 'online'. It seems to

me that those concerns were implicit in the case which gave rise to the judgment in *Asociación Profesional Elite Taxi*. (25)

69. Since Information Society services are the result of the particularly rapid technological developments seen in recent years, they often enter markets already occupied by 'traditional' services. Those traditional services may be subject to authorisation schemes. Depending on the subject matter and wording of the national provisions at issue, it may be more or less obvious that some rules, including authorisation schemes, designed for services that are not provided at a distance and by electronic means, apply to similar services that are provided in that manner and thus fall within the concept of 'Information Society service'. It may therefore be necessary to clarify the existing rules, at legislative or implementation level, in order to confirm their application to Information Society services. Such legislative or administrative action, which makes Information Society services subject to existing rules, does not, however, amount to the creation of a new authorisation scheme specifically and exclusively targeting those services. It is more akin to an adjustment of the existing scheme to take account of new circumstances.

70. My view is that it would therefore run counter to the effectiveness of Article 4(2) of Directive 2000/31 if, as a result of such 'technical' action, the prohibition in paragraph 1 of that article precluded the application of some existing authorisation schemes to Information Society services, while other schemes could be applicable to them *proprio vigore*, thanks to Article 4(2).

71. The same reasoning applies where the extension of a pre-existing authorisation scheme to cover Information Society services requires adjustments because of the specific features of those services as compared with the services for which the scheme was initially designed. Those adjustments may concern, among other things, the conditions for obtaining authorisation. As I will show below, it is precisely the lack of such adjustments that may call into question the lawfulness of applying the authorisation scheme to Information Society services.

72. Finally, I do not think, as the Commission suggests, that the Court's approach in *Falbert and Others* (26) is applicable by analogy to the present case. In that judgment, (27) the Court held that a national rule which has the aim and object of extending an existing rule to cover Information Society services must be classified as a 'rule on services' within the meaning of Article 1(5) of Directive 98/34. (28) However, as I have already stated in point 63 of this Opinion, rules on services within the meaning of Directive 2015/1535 are rules which concern Information Society services specifically, while Article 4(1) of Directive 2000/31 prohibits only authorisation schemes which concern those services specifically *and* exclusively. Furthermore, the Court has consistently held that national provisions that merely lay down the conditions governing the establishment or provisions of services by undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, do not constitute technical regulations within the meaning of Directive 2015/1535, since that principle also applies to rules on services. (29) It would therefore be inconsistent to draw an interpretative analogy between Article 1(1)(e) of Directive 2015/1535 and Article 4(2) of Directive 2000/31, which precisely concerns authorisation schemes.

73. For those reasons, I consider that Article 4(2) of Directive 2000/31 must be interpreted as meaning that a national provision which extends the requirement to obtain authorisation to Information Society service providers – a requirement to which providers of similar services that are not Information Society services were already subject – does not constitute an authorisation scheme specifically and exclusively targeted at providers of that second category of services. The prohibition in Article 4(1) of that directive does not therefore preclude the application of such a scheme to Information Society services.

74. That finding is, however, subject to the condition that the services covered by the existing authorisation scheme which are not provided by electronic means and the Information Society services to which that scheme is extended are actually equivalent in economic terms. That equivalence must be assessed from the perspective of the user of the service, in other words, the services must be interchangeable from his or her perspective.

75. That issue appears to be in dispute between the parties to the main proceedings. The municipality of Bucharest submits in its observations that an activity such as that carried on by Star Taxi App is equivalent to the taxi dispatching activity within the meaning of Law No 38/2003 and is therefore caught by the requirement to obtain booking centre authorisation under that law. Consequently, Decision No 626/2017, like Decision No 178/2008, was adopted pursuant to that law. Star Taxi App, on the other hand, disputes that assertion,

maintaining that its activity is of a different nature, does no more than put taxi drivers in touch with customers and is therefore not caught by the provisions of Law No 38/2003.

76. Regrettably, that point does not appear to have been settled by the national court, which cites Law No 38/2003 as one of the relevant legal acts for resolution of the dispute in the main proceedings but also states that the extension of the concept of 'dispatching' to cover IT applications 'goes beyond the legal framework'. The Court's interpretation of Directive 2000/31 alone cannot resolve that dilemma, since it depends on findings of fact that only the national court is in a position to make.

77. Article 4(1) of Directive 2000/31 does not therefore preclude national provisions such as those of Decision No 178/2008, as amended by Decision No 626/2017, provided that the services governed by those provisions are found to be economically equivalent. If, however, the national court were to find that services such as those provided by Star Taxi App are not economically equivalent to taxi dispatching services, so that Decision No 626/2017 would have to be regarded de facto as a self-standing authorisation scheme, that scheme would be caught by the prohibition laid down in Article 4(1) of Directive 2000/31. (30)

– *Concluding remark*

78. In its observations, the Commission notes that the combined provisions of Decision No 626/2017, particularly those relating to the obligation to forward bookings to drivers by radio and the ban on drivers using mobile phones when providing transport services, (31) may be interpreted as prohibiting de facto the provision of services such as those offered by Star Taxi App.

79. However, that issue was not raised by the national court in its request, which concerns the requirement to obtain authorisation. In addition, in its reply to a specific question put by the Court on that subject, Star Taxi App acknowledged that it was able to continue its activity provided it complied with the requirements imposed on booking centres and obtained authorisation.

80. I therefore consider that any prohibition on Star Taxi App's activity is too hypothetical for the present case to be analysed from that standpoint. Furthermore, the Court does not have sufficient information on the issue.

Directive 2006/123

81. As I have stated, the prohibition of any authorisation scheme laid down in Article 4(1) of Directive 2000/31 must be considered not to apply to the scheme at issue in the main proceedings, since that scheme does not specifically and exclusively concern Information Society services but also concerns similar services not falling under that classification. However, those other services potentially fall under Directive 2006/123. It is therefore necessary to determine whether that directive is applicable to the present case and, if so, whether it precludes an authorisation scheme such as that at issue in the main proceedings.

– *Applicability of Directive 2006/123*

82. Under Article 2(1) of Directive 2006/123, that directive applies to services supplied by providers established in a Member State, which undoubtedly includes the services at issue in the main proceedings.

83. However, Article 2(2) of that directive excludes some services from the scope of the directive, particularly services in the field of transport falling within the scope of Title VI of the TFEU. (32) Recital 21 of Directive 2006/123 makes clear that 'transport' within the meaning of that provision includes taxis. Does that term also include intermediation services between taxi drivers and their customers?

84. Article 2(2)(d) of Directive 2006/123 has been interpreted by the Court before. It held that, as regards vehicle roadworthiness testing services, that provision covers not only any physical act of moving persons or goods from one place to another by means of a vehicle, aircraft or waterborne vessel, but also any service inherently linked to such an act. (33)

85. The Court found that roadworthiness testing services were inherently linked to transport services in the strict sense, in so far as they are an indispensable pre-condition for the latter by helping to ensure road safety. (34)

86. The Court also observed that the measures harmonising those roadworthiness testing services were adopted on the basis of the provisions of the TFEU on transport. (35) Contrary to the view expressed by the Commission in the instant case, that finding seems to me to be decisive for the interpretation of Article 2(2)(d) of Directive 2006/123. That provision expressly refers to the title of the TFEU relating to transport (now Title VI of the TFEU). This is because, under Article 58(1) TFEU, the freedom to provide services in the field of transport is governed by the title of the TFEU relating to transport. Directive 2006/123 cannot therefore regulate the freedom to provide services in that field. By adopting the directives relating to vehicle roadworthiness testing services on the basis of the provisions of Title VI of the TFEU, the EU legislature implicitly included those services in the field of transport within the meaning of both Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123. That choice of legal basis for the harmonisation measures is therefore decisive for the exclusion of the services at issue from the scope of Directive 2006/123. (36)

87. As regards intermediation services such as those at issue in the main proceedings, these do not appear to be inherently linked to taxi services within the meaning of the Court's case-law cited above, since they are not an indispensable pre-condition for the provision of the latter services in the same way as roadworthiness tests. It is true that Romanian legislation requires every taxi service provider to use dispatching services. However, such a requirement imposed at national level cannot determine the classification of a category of services from the standpoint of EU law.

88. Moreover, those intermediation services are not the subject of any specific harmonisation measure adopted on the basis of the provisions of the TFEU on transport.

89. I therefore see no reason to exclude those services from the scope of Directive 2006/123 under Article 2(2)(d) thereof.

90. In addition, Article 3(1) of Directive 2006/123 contains a rule according to which the provisions of specific acts of EU law governing access to and the exercise of services in specific sectors take precedence over those of Directive 2006/123 in the event of conflict. Although Article 3(1) of that directive does not expressly refer to Directive 2000/31 in its second sentence, which lists other directives, it nevertheless seems clear to me that that rule also concerns Directive 2000/31. Directive 2000/31, in so far as it regulates access to and the exercise of Information Society services, constitutes a *lex specialis* in relation to Directive 2006/123. (37)

91. However, since the prohibition of any authorisation scheme laid down in Article 4(1) of Directive 2000/31 does not apply to services such as those at issue in the main proceedings, there is no conflict between the two directives. The exclusion of the applicability of that prohibition which follows from Article 4(2) of Directive 2000/31 does not mean that Member States are given the unconditional power to apply authorisation schemes in the situations covered by that provision. Only Article 4(1) of Directive 2000/31 is inapplicable; those authorisation schemes remain subject to other rules of EU law, such as Directive 2006/123, including in so far as they concern Information Society services.

92. Article 3(1) of Directive 2006/123 does not therefore preclude the application of that directive to the authorisation scheme at issue in the main proceedings, including in so far as it concerns Information Society services.

93. In the question submitted for a preliminary ruling, the national court mentions Articles 9, 10 and 16 of Directive 2006/123. However, Article 16 of that directive concerns the freedom to provide services in Member States other than that of the place of establishment of the provider. As stated in point 56 of this Opinion, the dispute in the main proceedings concerns the exercise of a service activity by a Romanian company in Romanian territory. Article 16 of Directive 2006/123 is therefore not applicable to this dispute.

94. By contrast, the provisions of that directive relating to the freedom of establishment, namely Articles 9 to 15, do apply. The Court has held that those articles are applicable to purely internal situations. (38)

– *Articles 9 and 10 of Directive 2006/123*

95. Article 9 of Directive 2006/123 is based on the principle that service activities must not be subject to authorisation schemes. Nevertheless, under certain conditions, Member States may make access to a service activity subject to such a scheme. (39) Those conditions are as follows: the scheme must not be discriminatory, it must be justified by an overriding reason relating to the public interest, and there must not be less restrictive measures capable of achieving the same objective.

96. No information was provided in connection with the justification for the authorisation scheme for taxi dispatching activities flowing from Law No 38/2003. Concerning Decision No 626/2017, the municipality of Bucharest relies in its observations on the need to ensure equal conditions of competition between 'traditional' taxi booking centres and electronic intermediation services. However, that does not explain the rationale for the authorisation scheme as such.

97. It will therefore be for the national court to ascertain whether there are overriding reasons relating to the public interest justifying the authorisation scheme for taxi dispatching services. I would only point out that that scheme concerns an intermediation service on a market which is already subject to an authorisation scheme, namely that for the provision of taxi transport services. (40) It therefore appears that, for example, the public interest in consumer protection is already satisfied. Thus, the task of the national court will be to ascertain what other overriding reasons are capable of justifying that additional authorisation scheme.

98. The following final remarks should also be made. Article 10(1) and (2) of Directive 2006/123 requires authorisation to be granted on the basis of criteria that are justified by an overriding reason relating to the public interest and proportionate to that public interest objective.

99. In order to obtain authorisation, Article 15(2) of Law No 38/2003 requires the applicant, among other things, to have a two-way radio, a secure radio frequency, staff holding a radio telephony operator certificate and a licence to use radio frequencies. It is not clear from the documents before the Court whether those requirements apply to providers of intermediation services between taxi drivers and customers by means of a smartphone application. However, that possibility does not appear to be excluded.

100. Those requirements, designed for radio-based taxi booking centres, are plainly unsuited to services provided by electronic means, imposing as they do unjustified burdens and costs on providers. Accordingly, they cannot by definition be justified by any overriding reason relating to the public interest or be regarded as proportionate to any public interest objective when they apply to Information Society service providers. Under those requirements, providers must not only have the technologies they use, but must also be in possession of skills and equipment specific to a different technology.

101. For those reasons, I consider that an authorisation scheme is not based on criteria justified by an overriding reason relating to the public interest, as required by Article 10(1)(b) and (c) of Directive 2006/123, when the grant of authorisation is subject to requirements that are technologically unsuited to the applicant's intended service.

Article 56 TFEU

102. In the question submitted for a preliminary ruling, the national court also refers to Article 56 TFEU establishing the freedom to provide services. However, as observed in point 56 of this Opinion, the dispute in the main proceedings concerns the exercise of a service activity by a Romanian company in Romanian territory. The Court has consistently held that the provisions of the TFEU on the freedom to provide services do not apply to a situation which is confined in all respects within a single Member State. (41) Article 56 TFEU is therefore not applicable to the present case.

Answer to the second and third questions referred

103. I propose that the answer to the second and third questions referred for a preliminary ruling should be that Article 4 of Directive 2000/31 must be interpreted as not precluding the application to an Information Society service provider of an authorisation scheme applicable to providers of economically equivalent services that are not Information Society services. Articles 9 and 10 of Directive 2006/123 preclude the application of such an authorisation scheme unless it complies with the criteria laid down in those articles, which is a matter for the national court to determine. An authorisation scheme does not comply with the criteria laid down in

Article 10 of Directive 2006/123 when the grant of authorisation is subject to requirements that are technologically unsuited to the applicant's intended service. Article 3 of Directive 2000/31, Article 16 of Directive 2006/123 and Article 56 TFEU are not applicable in the situation of a provider wishing to provide Information Society services in the Member State in which he or she is established.

The fourth question referred

104. By its fourth question, the national court asks, in essence, whether Decision No 626/2017 constitutes a technical regulation within the meaning of Article 1(1)(f) of Directive 2015/1535 which ought to have been notified to the Commission under Article 5 of that directive.

105. Under the third paragraph of Article 1(1)(f) of Directive 2015/1535, that provision covers technical regulations imposed by the authorities designated by the Member States and appearing on a list drawn up and updated, where appropriate, by the Commission in the framework of the committee referred to in Article 2 of that directive. Such a list was published on 31 May 2006, (42) namely before Romania's accession to the European Union, and therefore does not include the Romanian authorities. Nonetheless, the Commission states in its observations that, at the time of its accession, Romania had notified that only its central authorities were empowered to prescribe technical regulations within the meaning of Directive 2015/1535. Acts of the municipality of Bucharest are thus not subject to the notification obligation under Article 5 of that directive.

106. That does not, however, fully resolve the problem since, as I have already mentioned, there is doubt as to whether the requirement to obtain authorisation in order to provide services such as those at issue in the main proceedings results solely from Decision No 626/2017 or Article 15 of Law No 38/2003, of which that decision is merely an implementing measure. It is therefore reasonable to enquire whether that law should have been notified to the Commission.

107. In my opinion, the answer must nonetheless be 'no'. Article 1(1)(e) of Directive 2015/1535 excludes from the concept of 'rule on services' – the only category of technical regulations that may come into play here – any rules which are not specifically aimed at Information Society services. The second paragraph of Article 1(1)(e) provides that rules are specifically aimed at such services where their specific aim and object is to regulate such services *in an explicit and targeted manner*. On the other hand, rules which affect them only *in an implicit or incidental manner* are not considered to be specifically aimed at them.

108. It must be pointed out that Law No 38/2003 does not contain any reference to Information Society services. On the contrary, it overlooks them to such an extent that it even requires every provider of taxi dispatching services to possess frequencies and radio equipment whether they operate by radio or by means of IT resources. It is therefore obvious in my view that if that law is applicable to Information Society services, as the municipality of Bucharest claims it is, its object is not to regulate those services in an explicit and targeted manner and it affects them only in an implicit manner, arguably by inertia.

109. That is moreover easily explained by the fact that Law No 38/2003 dates from 2003, whereas the company Uber, a pioneer in smartphone-based transport service bookings, was established only in 2009.

110. Article 15 of Law No 38/2003 is therefore not specifically aimed at Information Society services within the meaning of Article 1(1)(e) of Directive 2015/1535.

111. Consequently, the answer to the fourth question referred for a preliminary ruling should be that Decision No 626/2017 does not constitute a technical regulation within the meaning of Article 1(1)(f) of Directive 2015/1535.

Conclusion

112. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunalul București (Regional Court, Bucharest, Romania) as follows:

(1) Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), read in conjunction with Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, must be interpreted as meaning that a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers constitutes an Information Society service where that service is not inherently linked to the taxi transport service so that it does not form an integral part of the taxi transport service.

(2) Article 4 of Directive 2000/31 must be interpreted as not precluding the application to an Information Society service provider of an authorisation scheme applicable to providers of economically equivalent services that are not Information Society services.

Articles 9 and 10 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding the application of such an authorisation scheme unless it complies with the criteria laid down in those articles, which is a matter for the national court to determine. An authorisation scheme does not comply with the criteria laid down in Article 10 of Directive 2006/123 when the grant of authorisation is subject to requirements that are technologically unsuited to the applicant's intended service.

Article 3 of Directive 2000/31, Article 16 of Directive 2006/123 and Article 56 TFEU are not applicable in the situation of a provider wishing to provide Information Society services in the Member State in which he or she is established.

(3) The Hotărârea Consiliului General al Municipiului București nr. 626/2017 pentru modificarea și completarea Hotărârii Consiliului General al Municipiului București nr. 178/2008 privind aprobarea Regulamentului-cadru, a Caietului de sarcini și a contractului de atribuire în gestiune delegată pentru organizarea și executarea serviciului public de transport local în regim de taxi (Decision No 626/2017 of 19 December 2017 of Bucharest Municipal Council amending and supplementing Decision No 178/2008 of 21 April 2008 approving the framework regulation, contract documents and concession agreement for the delegated management of the organisation and provision of local public taxi services) does not constitute a technical regulation within the meaning of Article 1(1)(f) of Directive 2015/1535.

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1 Original language: French.

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2 Judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981).

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3 See, in connection with a similar doubt, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraphs 28 to 31), and my Opinion in that case (C-390/18, EU:C:2019:336, points 93 to 99).

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4 OJ 2000 L 178, p. 1.

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5 Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18).

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6 OJ 2006 L 376, p. 36.

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7 OJ 2015 L 241, p. 1.

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8 *Monitorul Oficial al României*, Part I, No 45, of 28 January 2003.

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9 See, to that effect, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 46).

10 See, also, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 35).

11 Judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraphs 38 to 42).

12 See, to that effect, judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, operative part).

13 Although the Court did not use the term 'recruitment', presumably to sidestep the controversy over the status of Uber's drivers under employment law, it is in that sense that the word 'selection' must be construed.

14 Judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 39).

15 The municipality of Bucharest submits in its observations that, on 1 February 2018, Star Taxi App launched new services enabling payments to be made by bank card and setting a minimum fare. However, Star Taxi App vigorously disputed that assertion in its reply to a specific question put by the Court on that subject. This is therefore a matter of fact which has not been established in the main proceedings. In any event, it does not appear that those additional services are capable of altering the overall assessment of Star Taxi App's activity (see, to that effect, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraphs 58 to 64)).

16 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

17 As the Court observed in paragraph 38 of its judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981). See, also, as regards the correlation between the creation of a supply of services and the exercise of control over those services, my Opinion in *Airbnb Ireland* (C-390/18, EU:C:2019:336, points 64 and 65).

18 For a fuller description of how Uber operates, I refer to my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

19 See, to that effect, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 55), and my Opinion in that case (C-390/18, EU:C:2019:336, points 57 to 59).

20 Judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981).

21 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

22 See, also, Article 1(2) of Directive 2000/31, under which '[that] Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States'.

23 That is to say, other than radio, in practice by means of IT resources.

24 I recall that although, under EU law, all authorisation schemes are prohibited for Information Society services pursuant to Article 4(1) of Directive 2000/31, such schemes are authorised, subject to certain conditions, for other categories of services in accordance with Articles 9 and 10 of Directive 2006/123 or Article 49 TFEU.

25 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

26 Judgment of 20 December 2017 (C-255/16, EU:C:2017:983).

27 Judgment of 20 December 2017, *Falbert and Others* (C-255/16, EU:C:2017:983, paragraph 35).

28 Now Article 1(1)(e) of Directive 2015/1535.

29 Judgment of 20 December 2017, *Falbert and Others* (C-255/16, EU:C:2017:983, paragraphs 16 to 18).

30 I must point out that, in that scenario, the question of the lawfulness of Decision No 626/2017 under national law would also arise, since Legea nr. 365/2002 privind comerțul electronic (Law No 365/2002 on electronic commerce) of 7 June 2002 (*Monitorul Oficial al României*, Part I, No 483, of 5 July 2002), which transposes Directive 2000/31 into Romanian law, reproduces, in Article 4(1) thereof, the prohibition laid down in Article 4(1) of that directive.

31 See points 18 and 19 of this Opinion.

32 Article 2(2)(d) of Directive 2006/123.

33 Judgment of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 46).

34 Judgment of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 47).

35 Judgment of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 49).

36 See, also, my Opinion in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, points 27 and 28).

37 See, to that effect, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraphs 40 to 42).

38 Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 3 of the operative part). See, also, my Opinions in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, points 44 to 57), and in Joined Cases *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 106 et seq.).

39 The term 'authorisation scheme' is defined in Article 4(6) of Directive 2006/123 as 'any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof'. In my view, there is no doubt that the activity of taxi dispatching is, under Romanian law, subject to an authorisation scheme within the meaning of that definition. That scheme is based on Article 15 of Law No 38/2003 and implemented at the level of the municipality of Bucharest by Decision No 178/2008, as amended by Decision No 626/2017.

40 Since we are dealing with a transport service on this occasion, that scheme is excluded from the scope of Directive 2006/123.

41 See, most recently, judgment of 13 December 2018, *France Télévisions* (C-298/17, EU:C:2018:1017, paragraph 30 and the case-law cited).

42 OJ 2006 C 127, p. 14.

JUDGMENT OF THE COURT (First Chamber)

18 November 2020 (*)

(Reference for a preliminary ruling – Social policy – Directive 2006/54/EC – Equal opportunities and equal treatment of men and women in employment and occupation – Articles 14 and 28 – National collective agreement granting the right to leave following the statutory maternity leave for female workers who bring up their children on their own – Exclusion of male workers from the right to that leave – Protection of female workers as regards both the consequences of pregnancy and the condition of maternity – Conditions under which applicable)

In Case C-463/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the conseil de prud'hommes de Metz (France), made by decision of 15 May 2019, received at the Court on 18 June 2019, in the proceedings

Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle

v

Caisse primaire d'assurance maladie de la Moselle,

intervening party:

Mission nationale de contrôle et d'audit des organismes de sécurité sociale,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan (Rapporteur) and N. Jääskinen, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle, by L. Pate, avocat,

– Caisse primaire d'assurance maladie de Moselle, by L. Besse, avocat,

– the French Government, by A.-L. Desjonquères, R. Coesme and A. Ferrand, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, A. Pimenta, P. Barros da Costa and J. Marques, acting as Agents,

– the European Commission, by A. Szmytkowska and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The reference has been made in the course of proceedings between Syndicat CFTC [Confédération Française des Travailleurs Chrétiens (French Confederation of Christian Workers)] du personnel de la Caisse primaire d'assurance maladie de la Moselle (CFTC Union of the Local Sickness Insurance Fund of the Moselle; 'Syndicat CFTC') and the Caisse primaire d'assurance maladie de Moselle (Local Sickness Insurance Fund of the Moselle; 'CPAM') concerning the latter's refusal to grant CY, the father of a child, the leave for female workers who bring up their children on their own, as provided for in Article 46 of the National Collective Labour Agreement for staff of social security bodies of 8 February 1957, in the version in force at the time material to the main proceedings ('the collective agreement').

Legal context

European Union law

Directive 92/85/EEC

3 Under the 14th to 18th recitals of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1):

'Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement;

Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited;

Whereas measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance;

Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance;

Whereas the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness.'

4 Article 1 of that directive, headed 'Purpose', states:

'1. 'The purpose of this directive, which is the tenth individual Directive within the meaning of Article 16(1) of [Council] Directive 89/391/EEC [of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1)], is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.

2. The provisions of Directive [89/391], except for Article 2(2) thereof, shall apply in full to the whole area covered by paragraph 1, without prejudice to any more stringent and/or specific provisions contained in this directive.

3. This directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this directive is adopted.'

5 Article 8 of Directive 92/85, entitled 'Maternity leave', provides:

'1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

6 Article 10 of that directive, entitled 'Prohibition of dismissal', provides:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this article, it shall be provided that:

(1) Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

(2) If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

(3) Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

7 Article 11 of that directive, entitled 'Employment rights', is worded as follows:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this article, it shall be provided that:

(1) in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;

(2) in the case referred to in Article 8, the following must be ensured:

(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2.

(3) the allowance referred to in point 2 (b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;

(4) Member States may make entitlement to pay or the allowance referred to in points 1 and 2 (b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.'

Directive 2006/54

8 Recitals 24 and 25 of Directive 2006/54 state:

'(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. Directive 2006/54 should therefore be without prejudice to Directive 92/85. This directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4).

(25) For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women on maternity leave and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence.'

9 Article 1 of Directive 2006/54, 'Purpose', provides:

'The purpose of this directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

10 Article 2 of that directive, entitled 'Definitions', provides, in paragraph 1(a):

'For the purposes of this directive, the following definitions shall apply:

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.'

11 Article 14 of that directive, entitled 'Prohibition of discrimination', provides, in paragraph 1:

'There shall be no direct or indirect discrimination on grounds of sex in the public or 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, as well as pay as provided for in Article 141 [EC];

(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.'

12 Article 15 of that directive, entitled 'Return from maternity leave', is worded as follows:

'A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.'

13 Article 28 of Directive 2006/54, entitled 'Relationship to Community and national provisions' provides:

'1. This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.'

French law

The code du travail

14 Article L. 1225-17 of the code du travail (Labour Code) states:

'A female employee shall be entitled to maternity leave for a period which shall begin 6 weeks before the expected date of confinement and end 10 weeks after that date.

On request by the female employee and subject to the favourable opinion of the healthcare professional monitoring the pregnancy, the period of suspension of the employment contract which shall begin before the expected date of confinement may be reduced by a maximum period of three weeks. The period subsequent to the expected date of confinement shall then be increased by the same amount of time.

Where the female employee has deferred part of the maternity leave until after the birth of the child, and is signed off work by a doctor during the period prior to the expected date of confinement, that deferral shall be cancelled and the period of suspension of the employment contract shall be reduced as from the first day on which the employee is signed off. The period initially deferred shall be reduced by the same amount of time.'

The collective agreement

15 Article 1 of the collective agreement provides:

'The present contract shall regulate relations between the social security and family benefit organisations and all other organisations under their control (Fédération nationale des organismes de sécurité sociale [(National Federation of Social Security Organisations)], Union nationale des Caisses d'Allocations Familiales [(Union of National Family Allowance Funds)], caisses primaires [(local insurance funds)], caisses régionales vieillesse et invalidité [(regional old age and invalidity insurance funds)], caisses d'allocations familiales [(family allowance funds)], organismes de recouvrement des cotisations [(contribution recovery organisations)], services sociaux [(social services)], caisses de prévoyance du personnel [(staff provident funds)], etc.) and the staff of those bodies and their establishments having their seat in France or the overseas *départements*.'

16 Articles 45 and 46 of the collective agreement fall within Section 'L.' of that agreement, entitled 'Maternity leave'.

17 Article 45 of the collective agreement stipulates:

'For the duration of the statutory maternity leave, salary shall be maintained for staff members who have at least six months' seniority. This cannot be combined with daily allowances payable to staff members as insured persons.

Such leave shall not be taken into account for the right to sick leave and cannot give rise to any reduction in the duration of annual leave.'

18 In accordance with Article 46 of the collective agreement:

'On expiry of the leave provided for in the preceding article, a female staff member who is bringing up her child on her own shall be entitled successively to:

– three months' leave on half pay, or one and a half month's leave on full pay;

– one year's unpaid leave.

However, where the staff member is a single woman or where her spouse or partner is deprived of his or her usual resources (invalidity, long-term illness, military service), she shall be entitled to three months' leave on full pay.

On expiry of the leave provided for above, the beneficiary shall be fully reinstated in her job.

Exceptionally, the management board may grant a further year's unpaid leave. In the latter case, the staff member shall be reinstated only subject to available posts, in respect of which she shall have priority, either within her organisation or within a sister organisation, subject to the provisions of Article 16 above.

When the said leave is renewed, the management board may, in specific cases, give a formal undertaking as to immediate reinstatement.

Unpaid leave, covered by the present article, shall have the same effects as the leave provided for in Article 40 above with regard to the provisions of the present agreement and the pension scheme.'

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

19 CY was engaged by CPAM to work as an employee as a 'benefits inspector in the employee or executive category'. He is the father of a child born in April 2016.

20 On that basis, he applied for the leave provided for in Article 46 of the collective agreement, under which, on expiry of the leave provided for in Article 45 of that collective agreement, an employee who is bringing up her child on her own is to be entitled successively to leave of three months on half-pay or to leave of one and a half months on full pay and to unpaid leave of one year.

21 CPAM refused to grant CY's application on the ground that the leave provided for in Article 46 of the collective agreement is reserved to female workers who bring up their child on their own.

22 Syndicat CFTC asked the Social Security Directorate to extend the benefit of the provisions of Article 46 of the collective agreement to male workers who are bringing up their child on their own.

23 That application was rejected on the ground that, under the wording of that article, the leave provided for is granted only to the child's mother, the term 'employee' being in the feminine, and that that article is not discriminatory in so far as it is ancillary to Article 45 of the collective agreement, which grants a benefit only to women.

24 On 27 December 2017, Syndicat CFTC, which acts in the interests of CY, brought an action against CPAM before the conseil de prud'hommes de Metz (Labour Tribunal, Metz, France), the referring court, arguing that the decision refusing to grant CY the benefit of the leave provided for in Article 46 of the collective agreement constituted discrimination on grounds of sex, prohibited both by EU law and by French law. In its submission, Article 46 of the collective agreement is not ancillary to Article 45 of that collective agreement, since, unlike Article 45, Article 46 is not linked to physiological considerations. Since men and women are equal as regards the burden of bringing up their children, male workers employed by CPAM should also have the benefit of the leave provided for in Article 46 of the collective agreement.

25 The referring court notes that, by judgment of 21 September 2017, the Cour de cassation (Court of Cassation, France) held that the purpose of Article 46 of the collective agreement is to grant supplementary maternity

leave on the expiry of the statutory maternity leave referred to in Article 45 of that collective agreement and that it is thus intended to protect the special relationship between a woman and her child during the period which follows pregnancy and childbirth.

26 In those circumstances, the conseil de prud'hommes de Metz (Labour Tribunal, Metz) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should Directive [2006/54], read in conjunction with Articles 8 and 157 TFEU, the general EU law principles of equal treatment and of the prohibition of discrimination, and Articles 20, 21[(1)] and 23 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the provisions of Article 46 of the [collective agreement], which grant female employees of [the] social security organisations [concerned] bringing up children on their own three months leave with half pay or one and a half months' leave with full pay and unpaid leave of up to a year after maternity leave, are excluded from the scope of application of that directive?'

Consideration of the question referred

The jurisdiction of the Court of Justice

27 CPAM submits, primarily, that the Court clearly has no jurisdiction to answer the question referred, in the light of Article 267 TFEU. Indeed, in the present case, the Court is not being asked to rule on the interpretation of the Treaties or on the validity or interpretation of any act adopted by an institution, body, office or agency of the European Union.

28 CPAM submits that, in the guise of a request for a preliminary ruling, Syndicat CFTC is, in reality, seeking to obtain a 'supranational invalidation' of Article 46 of the collective agreement, as interpreted by the Cour de cassation, in the light of the general principles of equal treatment and the prohibition of discrimination. However, the Court does not have jurisdiction to verify the conformity of national law, including the case-law of the Member States, with EU law, or to interpret national law.

29 In that regard, it must be borne in mind that the system of cooperation established by Article 267 TFEU is based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of rules of national law with EU law. However, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to determine whether those national rules are compatible with EU law (judgment of 30 April 2020, *CTT – Correios de Portugal*, C-661/18, EU:C:2020:335, paragraph 28 and the case-law cited).

30 Although it is true that a combined reading of the question referred and the grounds set out by the referring court requests the Court of Justice to rule on the compatibility of a provision of national law with EU law, there is nothing to prevent the Court from giving an answer that will be of use to the referring court, by providing the latter with guidance as to the interpretation of EU law that will enable that court itself to rule on the compatibility of the national rules with EU law. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, to that effect, judgment of 30 April 2020, *CTT – Correios de Portugal*, C-661/18, EU:C:2020:335, paragraph 29 and the case-law cited).

31 In the present case, it must be noted that the dispute in the main proceedings, which concerns the grant of leave on the basis of Article 46 of the collective agreement, concerns working conditions within the meaning of point (b) of the second paragraph of Article 1 of Directive 2006/54. Accordingly, the dispute falls within the scope of that directive, which is referred to in the question referred for a preliminary ruling.

32 Contrary to CPAM's assertions, the referring court is thus seeking an interpretation of an EU act.

33 It is therefore for the Court to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court itself to rule on the compatibility of its domestic law with EU law.

34 It must therefore be held that the Court has jurisdiction to answer the question referred.

Admissibility of the request for a preliminary ruling

35 The French Government submits that the order for reference does not satisfy the requirements laid down in Article 94 of the Rules of Procedure of the Court of Justice, since that order contains no statement of reasons concerning the need to refer a question to the Court in order to resolve the dispute in the main proceedings. The referring court merely reproduces the arguments put forward before it, without stating the precise reasons which lead it to consider it necessary to refer a question to the Court.

36 In addition, the referring court refers to a number of provisions of the FEU Treaty and of the Charter of Fundamental Rights of the European Union ('the Charter'), without, however, explaining their connection with the question referred. The French Government submits that, even if the request for a preliminary ruling were admissible, it would be appropriate to answer the question inasmuch as it relates to Directive 2006/54, but not with regard to Articles 8 and 157 TFEU and Articles 20, 21 and 23 of the Charter.

37 In that regard, it must be borne in mind that questions concerning the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (judgment of 2 April 2020, *Reliantco Investments and Reliantco Investments Limassol Sucursala Bucureşti*, C-500/18, EU:C:2020:264, paragraph 40 and the case-law cited).

38 However, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, 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, it may reject the request for a preliminary ruling as inadmissible (judgment of 2 April 2020, *Reliantco Investments and Reliantco Investments Limassol Sucursala Bucureşti*, C-500/18, EU:C:2020:264, paragraph 41 and the case-law cited).

39 Furthermore, in view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary-ruling proceedings, the fact that the referring court did not make certain initial findings does not necessarily mean that the request for a preliminary ruling is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the case file, considers that it is in a position to provide a useful answer to the referring court (judgment of 2 April 2020, *Reliantco Investments and Reliantco Investments Limassol Sucursala Bucureşti*, C-500/18, EU:C:2020:264, paragraph 42 and the case-law cited).

40 In the present case, it must be noted that the order for reference is admittedly succinct as regards the statement of the reasons which led the referring court to entertain doubts as to the interpretation of Directive 2006/54 and that the provisions of the FEU Treaty and of the Charter are referred to only in the question referred.

41 However, first, the referring court has repeated the arguments of Syndicat CFTC relating to the non-compliance of Article 46 of the collective agreement with EU law. As the French Government itself noted, the referring court, by posing the question referred as it was proposed to it by Syndicat CFTC, has impliedly adopted as its own the doubts expressed by that trade union concerning the compatibility of that article of the collective agreement with Directive 2006/54. Thus, the order for reference enables the reasons for which the referring court considered it necessary to refer that question to the Court to be understood.

42 Furthermore, CPAM, the French and Portuguese Governments and the European Commission have been perfectly able to submit their observations on the question referred.

43 Second, the question referred for a preliminary ruling is worded as referring to Directive 2006/54, which must be interpreted 'in the light of' Articles 8 and 157 TFEU and of Article 20, Article 21(1) and Article 23 of the Charter. Accordingly, the referring court does not request an autonomous interpretation of those provisions of the FEU Treaty and of the Charter, which are referred to solely in support of the interpretation of Directive 2006/54.

44 In those circumstances, it must be held that the order for reference satisfies the requirements laid down in Article 94 of the Rules of Procedure.

45 The reference for a preliminary ruling is therefore admissible.

Substance

46 By its question, the referring court asks, in essence, whether Directive 2006/54 must be interpreted as precluding a provision of a national collective agreement which reserves to female workers who bring up their children on their own the right to leave after the expiry of their statutory maternity leave, since male workers are refused the right to such leave.

47 In that regard, Article 14(1)(c) of Directive 2006/54 prohibits all direct or indirect discrimination on grounds of sex in relation to employment and working conditions.

48 In the context of that directive, the prohibition of discrimination between male and female workers extends to all agreements which are intended to regulate paid labour collectively (see, to that effect, judgment of 18 November 2004, *Sass*, C-284/02, EU:C:2004:722, paragraph 25 and the case-law cited).

49 Furthermore, although, under Article 2(1)(a) of Directive 2006/54, direct discrimination is constituted by 'a situation in which one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation', Article 28 of that directive states that it is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, and that that situation is without prejudice to the provisions of Directive 92/85.

50 With regard to the protection of the mother of a child, it follows from the settled case-law of the Court that the right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law. The EU legislature thus took the view that the fundamental changes to the living conditions of the persons concerned during the period of at least 14 weeks preceding and after childbirth constituted a legitimate ground on which they could suspend their employment, without the public authorities or employers being allowed in any way to call the legitimacy of that ground into question (judgments of 20 September 2007, *Kiiski*, C-116/06, EU:C:2007:536, paragraph 49, and of 21 May 2015, *Rosselle*, C-65/14, EU:C:2015:339, paragraph 30).

51 As the EU legislature acknowledged in the 14th recital of Directive 92/85, pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave (judgments of 27 October 1998, *Boyle and Others*, C-411/96, EU:C:1998:506, paragraph 40, and of 18 March 2014, *D.*, C-167/12, EU:C:2014:169, paragraph 33).

52 That maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (judgments of 12 July 1984, *Hofmann*, 184/83, EU:C:1984:273, paragraph 25, and of 4 October 2018, *Dicu*, C-12/17, EU:C:2018:799, paragraph 34).

53 Moreover, Directive 92/85, which lays down minimum requirements, in no way prevents Member States from providing for a higher level of protection for pregnant workers or workers who have recently given birth or who are breastfeeding by maintaining or introducing more favourable measures for those workers, provided that those measures are compatible with the provisions of EU law (judgments of 13 February 2014, *TSN and YTN*, C-512/11 and C-513/11, EU:C:2014:73, paragraph 37, and of 14 July 2016, *Ornano*, C-335/15, EU:C:2016:564, paragraph 35).

54 The Court added that a measure such as maternity leave, granted to the woman after expiry of the legal period of protection, falls within the scope of Article 28(1) of Directive 2006/54, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. On that basis, such leave

may legitimately be reserved to the mother, to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely (see, to that effect, judgment of 12 July 1984, *Hofmann*, 184/83, EU:C:1984:273, paragraph 26).

55 As regards the status of parent, the Court has stated that the situation of a male worker and that of a female worker both having that status are comparable so far as concerns the bringing up of children (judgments of 25 October 1988, *Commission* v *France*, 312/86, EU:C:1988:485, paragraph 14, and of 12 December 2019, *Instituto Nacional de la Seguridad Social (Mothers' Pension Supplement)*, C-450/18, EU:C:2019:1075, paragraph 51). Consequently, measures designed to protect women in their capacity as parents cannot be justified on the basis of Article 28(1) of Directive 2006/54 (see, to that effect, judgment of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 44).

56 It thus follows from the case-law of the Court that, after the expiry of the statutory maternity leave, a Member State may grant additional leave to the mother where that leave concerns her, not in her capacity as parent, but in connection with the effects of pregnancy and motherhood.

57 As is apparent from paragraph 52 of this judgment, such additional leave must be intended to protect the woman's biological condition and the special relationship between her and her child during the period following childbirth.

58 In that regard, as the Advocate General observed, in essence, in point 61 of his Opinion, the aim of protecting the special relationship between a woman and her child is not, however, sufficient in itself to exclude fathers from the benefit of a period of additional leave.

59 In the present case, Article 46 of the collective agreement states that, at the end of the statutory maternity leave referred to in Article 45 of that collective agreement, an employee who is bringing up her child on her own is entitled successively to three-months' leave on half pay or to one and a half months' leave on full pay and to unpaid leave of one year, renewal for a period of one year being possible for the latter leave.

60 It must be borne in mind that a collective agreement which excludes from the benefit of such additional leave a male worker who is bringing up a child on his own establishes a difference in treatment between male and female workers.

61 As is clear from paragraphs 52 and 54 of this judgment, it is only if such a difference in treatment seeks the protection of the mother in connection with the effects of pregnancy and motherhood, that is to say, if it is intended to protect the woman's biological condition and the special relationship between her and her child during the period following childbirth, that it appears to be compatible with Directive 2006/54. If Article 46 of the collective agreement were to apply to women solely in their capacity as parents, that article would institute, as regards male workers, direct discrimination prohibited under Article 14(1) of that directive.

62 As the Advocate General observed in point 70 of his Opinion, the factors to be taken into account in order that leave granted consecutive to the statutory maternity leave may be reserved to female workers concern, inter alia, the conditions for entitlement to the leave, its length and modalities of enjoyment, and the legal protection that attaches to that period of leave.

63 First of all, the conditions for granting such leave must be directly linked to the protection of the woman's biological and psychological condition and the special relationship between the woman and her child during the period following childbirth. Thus, in particular, that leave must be granted to all women covered by the national legislation at issue, irrespective of their length of service and without the need for the employer's consent.

64 Next, consequently, the duration of and the manner in which the supplementary maternity leave is exercised must also be appropriate to ensure the biological and psychological protection of the woman and of the special relationship between the woman and her child during the period after childbirth, without exceeding the period which appears necessary for that protection.

65 Finally, as regards the level of legal protection, since that leave has the same objective as that of statutory maternity leave, that protection must be in conformity with the minimum protection guaranteed for that statutory leave by Directives 92/85 and 2006/54. In particular, the legal system of supplementary leave must ensure protection against dismissal and the maintenance of a payment to and/or entitlement to an adequate allowance for the female workers, on conditions which conform to those set out in Articles 10 and 11 of Directive 92/85, and the right, such as that referred to in Article 15 of Directive 2006/54, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

66 It is for the referring court to determine whether the leave provided for in Article 46 of the collective agreement meets the conditions on which it may be considered that it is intended to protect female workers in connection with the effects of pregnancy and motherhood.

67 As has been pointed out in paragraph 29 of the present judgment, it is not for the Court to rule, in the present proceedings, on the compatibility of that article of the collective agreement with Directive 2006/54. However, it is for the Court to provide the referring court with all the guidance as to the interpretation of EU law necessary to enable that court to assess that compatibility.

68 In that regard, first, it should be noted that leave at the end of the statutory maternity leave could be regarded as forming an integral part of maternity leave of a longer period and more favourable to female workers than the statutory period.

69 Nevertheless, it must be borne in mind that, in the light of the case-law cited in paragraph 54 of the present judgment, the possibility of introducing a period of leave reserved for mothers after the expiry of the statutory maternity leave is subject to the condition that it is itself intended to protect women. Consequently, the mere fact that leave immediately follows the statutory maternity leave is not sufficient for it to be considered that it may be reserved for female workers who bring up their child on their own.

70 Second, the title of the chapter of the collective agreement within which the provision which provides for such additional leave falls is not a relevant factor in examining whether such a provision complies with EU law. The referring court must specifically ascertain whether the leave provided for is intended, in essence, to protect the mother in connection with the effects of pregnancy and motherhood.

71 Third, the French Government relies on the judgment of 30 April 1998, *Thibault* (C-136/95, EU:C:1998:178), in which the Court accepted that Article 46 of the collective agreement constituted maternity leave.

72 However, paragraph 12 of that judgment, to which the French Government refers, concerns not the Court's legal reasoning and interpretation, but only the facts as they result from the request for a preliminary ruling in the case which gave rise to that judgment.

73 Fourth, it must be noted that the duration of the leave provided for in Article 46 of the collective agreement may vary considerably, from one and a half months to up to two years and three months. That period may thus be considerably greater than that of the statutory maternity leave of sixteen weeks, provided for in Article L. 1225-17 of the Labour Code, to which Article 45 of the collective agreement refers. Furthermore, where the leave is taken for one or two years, it is 'unpaid', which does not appear to ensure maintenance of pay and/or entitlement to an adequate allowance for the female worker, a condition required for maternity leave by Article 11(2) of Directive 92/85.

74 In the light of all the foregoing considerations, the answer to the question referred is that Articles 14 and 28 of Directive 2006/54, read in the light of Directive 92/85, must be interpreted as meaning that they do not preclude a provision of a national collective agreement which reserves to female workers who bring up their child on their own the right to leave after the expiry of the statutory maternity leave, provided that such leave is intended to protect workers in connection with the effects of pregnancy and motherhood, which is for the referring court to ascertain, taking into account, inter alia, the conditions for entitlement to the leave, its length and modalities of enjoyment, and the legal protection that attaches to that period of leave.

Costs

75 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 (First Chamber) hereby rules:

Articles 14 and 28 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, read in the light of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), must be interpreted as meaning that they do not preclude a provision of a national collective agreement which reserves to female workers who bring up their child on their own the right to leave after the expiry of the statutory maternity leave, provided that such leave is intended to protect workers in connection with the effects of pregnancy and motherhood, which is for the referring court to ascertain, taking into account, inter alia, the conditions for entitlement to the leave, its length and modalities of enjoyment, and the legal protection that attaches to that period of leave.

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

3 December 2020 (*)

(Reference for a preliminary ruling – Article 56 TFEU – Applicability – Purely internal situation – Directive 2000/31/EC – Article 2(a) – Meaning of 'Information Society services' – Article 3(2) and (4) – Article 4 – Applicability – Directive 2006/123/EC – Services – Chapters III (Freedom of establishment for providers) and IV (Free movement of services) – Applicability – Articles 9 and 10 – Directive (EU) 2015/1535 – Article 1(1)(e) and (f) – Meaning of 'rule on services' – Meaning of 'technical regulation' – Article 5(1) – Failure to communicate in advance – Enforceability – Activity of connecting persons wishing to make urban journeys with authorised taxi drivers, by means of a smartphone application – Classification – National regulations subjecting that activity to prior authorisation)

In Case C-62/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Bucureşti (Regional Court, Bucharest, Romania), made by decision of 14 December 2018, received at the Court on 29 January 2019, in the proceedings

Star Taxi App SRL

v

Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General,

Consiliul General al Municipiului Bucureşti,

interested parties:

IB,

Camera Naţională a Taximetriştilor din România,

D'Artex Star SRL,

Auto Cobălcescu SRL,

Cristaxi Service SRL,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: R. Șereș, Administrator,

having regard to the written procedure,

having considered the observations submitted on behalf of:

– Star Taxi App SRL, initially by C. Băcanu, and subsequently by G.C.A. Ioniță, avocați,

– Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General, by M. Teodorescu, acting as Agent,

– the Netherlands Government, by M. Bulterman and J.M. Hoogveld, acting as Agents,

– the European Commission, by S.L. Kalėda, L. Malferrari, L. Nicolae and Y.G. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU, Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), Article 2(a), Article 3(2) and (4) and Article 4 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), Articles 9, 10 and 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), and, lastly, Article 5 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

2 The request has been made in proceedings between Star Taxi App SRL, on the one hand, and the Unitatea Administrativ Teritorială Municipiul București prin Primar General (Territorial Administrative Unit of the Municipality of Bucharest, Romania; 'the Municipality of Bucharest'), and the Consiliul General al Municipiului București (General Council of the Municipality of Bucharest, Romania), on the other, concerning regulations under which prior authorisation is required for the activity, carried out by means of a smartphone application, of putting persons wishing to make an urban journey in touch with authorised taxi drivers.

Legal background

European Union law

Directive 98/34

3 Directive 2015/1535 repealed and replaced Directive 98/34 with effect from 7 October 2015, and references to the latter are now to be construed as relating to Directive 2015/1535, pursuant to the second subparagraph of Article 10 of that directive.

4 In particular, point 2 of the first paragraph of Article 1 of Directive 98/34 has been replaced in identical terms by Article 1(1)(b) of Directive 2015/1535.

Directive 2000/31

5 Article 2(a) of Directive 2000/31 defines 'information society services' as 'services within the meaning of Article 1[(1)(b) of Directive 2015/1535]'.

6 Article 3(2) and (4) of Directive 2000/31 read as follows:

‘2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.’

7 Article 4 of that directive provides:

‘1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services [OJ 1997 L 117, p. 15].’

Directive 2006/123

8 Recital 21 of Directive 2006/123 states:

‘Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.’

9 Pursuant to Article 2(2)(d) of that directive, it does not apply to services in the field of transport, including port services, falling within the scope of Title V of Part Three of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

10 Article 3(1) of that directive provides:

‘If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. These include:

(a) Directive 96/71/EC [of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1)];

(b) Regulation (EEC) No 1408/71 [of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1)];

(c) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [OJ 1989 L 298, p. 23];

(d) Directive 2005/36/EC [of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22)].’

11 Article 4(1) of Directive 2006/123 defines ‘service’ as any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU.

12 Chapter III of that directive, which is headed ‘Freedom of Establishment for Providers’, contains Articles 9 to 15. Article 9 provides:

‘1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.’

13 Under Article 10(1) and (2) of Directive 2006/123:

‘1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.’

14 Chapter IV of that directive, relating to free movement of services, contains Article 16, which provides:

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

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

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

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

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

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

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

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

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

Directive 2015/1535

15 Article 1(1)(b), (e) and (f) of Directive 2015/1535 provides:

'1. For the purposes of this Directive, the following definitions apply:

…

(b) "service" means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

(i) "at a distance" means that the service is provided without the parties being simultaneously present;

(ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

…

(e) "rule on services" means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

For the purposes of this definition:

(i) a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner;

(ii) a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner;

(f) "technical regulation" means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

…'

16 The first subparagraph of Article 5(1) of that directive provides:

'Subject to Article 7, 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 those grounds have not already been made clear in the draft.'

17 Under the second paragraph of Article 10 of that directive:

'References to the repealed Directive [98/34] shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.'

Romanian law

Law No 38/2003

18 Article 1^1 of Legea nr. 38/2003 privind transportul în regim de taxi și în regim de închiriere (Law No 38/2003 on transport by taxi and hire vehicle) of 20 January 2003 (*Monitorul Oficial al României*, Part I, No 45 of 28 January 2003), in the version applicable to the facts of the main proceedings, provides:

'…

(j) taxi dispatching ("dispatching") means an activity related to transport by taxi consisting in receiving customer bookings by telephone or other means and forwarding them to a taxi driver via a two-way radio.'

19 Article 15 of that law provides:

'(1) Taxi dispatching may be carried on only within the area covered by the authorisation by any legal person ("the booking centre") holding an authorisation granted by the competent authority in accordance with this law.

(2) A taxi dispatching authorisation may be obtained by submitting the following documents:

(a) a copy of the registration certificate issued by the commercial register;

(b) a sworn declaration by the taxi or hire vehicle transport operator that the booking centre is equipped with the necessary technical means, a two-way radio, a secure radio frequency, authorised staff and the necessary spaces;

(c) a copy of the radio telephony operator certificate for the employees of the taxi booking centre issued by the competent communications authority;

(d) a copy of the licence to use radio frequencies issued by the competent authority.

…

(5) Authorised carriers providing taxi services shall use a booking centre in accordance with this law on the basis of a dispatching agreement concluded with that centre under non-discriminatory conditions.

(6) Dispatching services shall be mandatory for all taxis of authorised carriers operating in an area other than areas where less than 100 taxi licences have been issued, where that service is optional.

…

(8) Taxi dispatching agreements concluded with authorised carriers must contain terms setting out the parties' obligations to comply with the rules on quality and legality of the service provided and the agreed fares.

(9) Taxis served by a booking centre may provide transport services on the basis of a flat fare or fare scale depending on vehicle category, in accordance with the dispatching agreement.

(10) The booking centre shall supply the authorised carriers it serves with a two-way radio for installation in taxis on the basis of a lease agreement concluded under non-discriminatory conditions.'

Decision No 178/2008

20 In the municipality of Bucharest, taxi services are regulated by the Hotărârea Consiliului General al Municipiului București nr. 178/2008 privind aprobarea Regulamentului cadru, a Caietului de sarcini și a contractului de atribuire în gestiune delegată pentru organizarea și executarea serviciului public de transport local în regim de taxi (Decision No 178/2008 of the General Council of the Municipality of Bucharest approving the framework regulation, contract documents and concession agreement for the delegated management of the organisation and provision of local public taxi services) of 21 April 2008, as amended by Decision No 626/2017 of the General Council of the Municipality of Bucharest of 19 December 2017 ('Decision No 178/2008').

21 Article 3(1) of Annex 1 to Decision No 178/2008 provides:

'The terms and concepts used and defined in Law No 38/2003 have the same meaning herein and, for the purposes of this framework regulation, the following definitions shall apply:

…

(i^1) dispatching by any other means: activity carried out by a booking centre authorised by the competent authority to receive bookings from customers by means of an IT application or bookings made on the website of an authorised booking centre and to forward them to taxi drivers via a two-way radio.

(i^2) IT application: software installed and functioning on a mobile or fixed device, belonging exclusively to the authorised booking centre and bearing its name.

…'

22 Article 21 of that annex is worded as follows:

'(1) In the municipality of Bucharest, dispatching services shall be mandatory for all taxis of authorised carriers and may be provided only by booking centres authorised by the

competent authorisation authority of the municipality of Bucharest, under conditions ensuring that customers are able to request those services by telephone or other means, including through applications connected to the internet that must bear the name of the booking centre appearing in the dispatching authorisation granted by the competent authorisation authority of the municipality of Bucharest.

…

(3^1) Dispatching services shall be mandatory for all taxis of authorised carriers operating a taxi in the municipality of Bucharest and may be provided only by booking centres authorised by the competent authorisation authority of the municipality of Bucharest, under conditions ensuring that customers are able to request those services by telephone or other means (IT applications, bookings made on the website of a booking centre) and to forward them to taxi drivers via a two-way radio.'

23 Article 41(2^1) of that annex provides:

'In exercising the activity of providing taxi services, taxi drivers are required, inter alia, to refrain from using telephones or other mobile devices when providing the transport service.'

24 Point 6^1 of Article 59 of the same annex provides:

'Failure to comply with the obligations laid down in Article 21(3^1), which are applicable to all comparable activities irrespective of the way and the circumstances in which they are carried out, resulting in an unauthorised driver or an authorised taxi carrier being contacted to transport a person or group of persons in the municipality of Bucharest, shall be punishable by a fine of between 4 500 and 5 000 [Romanian lei (RON) (approximately EUR 925 and EUR 1 025)].'

The main proceedings and the questions referred for a preliminary ruling

25 Star Taxi App is a company incorporated under Romanian law, established in Bucharest, which operates a smartphone application of the same name connecting users of taxi services directly with taxi drivers.

26 The referring court describes the operation of the application, which can be downloaded free of charge, as follows.

27 A person wishing to make an urban journey searches using the application and is provided with a list of available taxi drivers showing five or six types of car at different rates. The passenger can choose a driver from the list on the basis of the comments and ratings provided by previous passengers, and also has the option not to proceed with the booking. Star Taxi App does not forward bookings to taxi drivers, however, nor does it set the fare, which is paid directly to the driver at the end of the journey.

28 Star Taxi App provides this service by entering into direct contracts for the provision of services with taxi drivers authorised to provide transport by taxi on a professional basis. It does not select those drivers. The purpose of the contracts is to provide the drivers with an IT application, called 'STAR TAXI – driver', a smartphone on which the application has been installed, and a SIM card including a limited amount of data, in exchange for a monthly subscription fee. Furthermore, Star Taxi App does not exercise any control over the quality of the vehicles or their drivers, or over the drivers' conduct.

29 On 19 December 2017, the General Council of the Municipality of Bucharest adopted Decision No 626/2017 on the basis of Law No 38/2003.

30 In that regard, the referring court states that that decision inserted points (i^1) and (i^2) into Article 3 of Annex 1 to Decision No 178/2008, expanding the definition of the 'dispatching' activity subjected to the prior authorisation provided for by Law No 38/2003 to activities of the same kind carried out by means of an IT application. Through an amendment to Article 21 of that annex, Decision No 626/2017 also made dispatching services mandatory for all taxis of authorised carriers. Accordingly, such services can be provided only by taxi booking centres authorised by the competent authority, under conditions ensuring that customers are able to request those services by telephone or other means, including applications connected to the internet. These must bear the name of the booking centre appearing in the dispatching authorisation granted by the competent authority. Finally, that same decision inserted Article 59 point (6^1) into Decision No 178/2008, providing that failure to comply with those obligations is to be punishable henceforth by a fine of between RON 4 500 and RON 5 000 (approximately EUR 925 and EUR 1 025).

31 Star Taxi App was fined RON 4 500 (approximately EUR 925) for infringement of those rules.

32 Taking the view, however, that its activity constituted an information society service, which, under Article 4 of Directive 2000/31, cannot be made subject to prior authorisation or any other requirement having equivalent effect, Star Taxi App made a prior administrative complaint seeking revocation of Decision No 626/2017. That complaint was rejected on the ground that the regulations at issue had been made necessary by the considerable number of bookings made with unauthorised legal entities, and that the regulations did not infringe the freedom to provide services by electronic means since they laid down a framework for an intermediation service relating to the transport of passengers by taxi.

33 Star Taxi App then brought an action for annulment of Decision No 626/2017 before the Tribunalul București (Regional Court, Bucharest, Romania).

34 The referring court observes that the service at issue in the proceedings it is dealing with differs from that at issue in the case which gave rise to the judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981), in which, it notes, the Court held that an intermediation service, the purpose of which was to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons wishing to make urban journeys, was to be classified as a 'service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123, and thus fell outside the scope of the freedom to provide services in general, and more specifically, that of Directive 2006/123 and Directive 2000/31. In contrast to the service provider at issue in that case, Star Taxi App does not select non-professional drivers using their own vehicle, but enters into contracts for the provision of services with drivers authorised to provide transport by taxi on a professional basis, not determining the fare for the journey or collecting it from the passenger, who pays it directly to the driver, or exercising control over the quality of the vehicles or their drivers, or over the conduct of the drivers.

35 Nevertheless, the referring court is uncertain whether the service provided by Star Taxi App is to be classified as an 'information society service' and, if so, whether regulations making the provision of such a service subject to prior authorisation are compatible with

Directive 2000/31 and must be communicated to the Commission prior to adoption, in accordance with Article 5 of Directive 2015/1535.

36 In those circumstances the Tribunalul București (Regional Court, Bucharest) decided to stay the proceedings before it and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) [Are the provisions of point 2 of the first paragraph of Article 1 of Directive 98/34 and Article 2(a) of Directive 2000/31], which state that an information society service is a "service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services", to be interpreted as meaning that an activity such as that carried on by Star Taxi App SRL (namely a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers) must be regarded specifically as an information society and collaborative economy service (bearing in mind that Star Taxi App SRL does not fulfil the criteria for being a transport undertaking considered by the Court of Justice of the European Union in paragraph 39 of its judgment [of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981)], with reference to Uber)?

(2) In the event that [the application operated by] Star Taxi App SRL is to be regarded as an information society service, do the provisions of Article 4 of Directive [2000/31], of Articles 9, 10 and 16 of Directive [2006/123] and of Article 56 TFEU entail the application of the principle of the freedom to provide services to the activity carried on by Star Taxi App SRL? If the answer to that question is in the affirmative, do those provisions preclude rules such as those set out in [Article 3, Article 21(1) and (3^1), Article 41(2^1) and Article 59, point 6^1 of Annex I to Decision No 178/2008]?

(3) In the event that Directive [2000/31] applies to the service provided by Star Taxi App SRL, are restrictions imposed by a Member State on the freedom to provide information society services, which make the provision of such services conditional on the possession of an authorisation or licence, measures [which may derogate from Article 3(2) of the directive, pursuant to Article 3(4) thereof]?

(4) Do the provisions of Article 5 of Directive [2015/1535] preclude the adoption, without first notifying the … Commission, of regulations such as [those set out in Article 3, Article 21(1) and (3^1), Article 41(2^1) and Article 59, point 6^1 of Annex I to Decision No 178/2008]?'

Procedure before the Court

37 Having decided to rule without a hearing owing to the health risks associated with the coronavirus pandemic, the Court sent a number of questions to the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, to be answered in writing. Answers were received from Star Taxi App and the Commission.

The questions

The first question

38 As a preliminary point, it should be noted, first, that the referring court refers in the first question to point 2 of the first paragraph of Article 1 of Directive 98/34. However, that directive was repealed and replaced, prior to the adoption of Decision No 626/2017, by Directive 2015/1535. The second paragraph of Article 10 of the latter directive provides

that references to Directive 98/34 are to be construed as references to Directive 2015/1535. Accordingly, for the purposes of this question reference must be made to Article 1(1)(b) of the latter directive.

39 Secondly, the referring court confines itself in its question to stating that the activity at issue in the main proceedings is a service which consists in putting taxi passengers directly in touch, via an electronic application, with taxi drivers, but which, nonetheless, does not meet the criteria identified by the Court in paragraph 39 of the judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981).

40 However, as set out in paragraphs 26 to 28 and 34 of this judgment, the court gives more detail as to the organisation of the activity at issue in the order for reference. What is in fact at issue in the main proceedings is an intermediation service, provided by way of a smartphone application, putting persons wishing to take taxis in touch with authorised taxi drivers. It also states that the drivers must pay a monthly subscription fee for the use of the application, but that the service provider does not forward bookings to them directly or determine the fare for the journey, and does not act as an intermediary for the payment. That information must thus be fully taken into account in answering the first question.

41 Hence, the first question must be understood as asking, in essence, whether Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that an intermediation service which consists in putting persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, for the purposes of which the service provider has entered into contracts for the provision of services with those drivers, in consideration of the payment of a monthly subscription fee, but does not forward the bookings to them, does not determine the fare for the journey or collect it from the passengers, who pay it directly to the taxi driver, and exercises no control over the quality of the vehicles and their drivers, or over the conduct of the drivers, constitutes an 'information society service' within the meaning of those provisions.

42 Under Article 1(1)(b) of Directive 2015/1535, an 'information society service' is 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

43 It should be stated – and this is not disputed by any of the parties or any of the other interested parties involved in the present proceedings – that the intermediation activity at issue in the main proceedings comes within the concept of 'service' within the meaning of Articles 56 and 57 TFEU.

44 Furthermore, it is clear, first, that such an intermediation service satisfies the first condition laid down in Article 1(1)(b) of Directive 2015/1535, namely that it is provided for remuneration (see, by analogy, judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 46).

45 In that regard, it is of no consequence that such a service is provided free of charge to the person wishing to make or making an urban journey, if it gives rise to the conclusion of a contract for the provision of services between the service provider and the individual authorised taxi driver, under which the driver pays a monthly subscription fee. It is settled case-law that the remuneration of a service supplied by a service provider within the course of its economic activity does not require the service to be paid for by all of those for whom it is performed (see, to that effect, judgments of 15 September 2016, *Mc Fadden*, C-484/14,

EU:C:2016:689, paragraph 41, and of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraph 36).

46 Next, in so far as the person wishing to make an urban journey and an authorised taxi driver are put in touch by means of an electronic platform, without the intermediation service provider, on the one hand, or the intending passenger or driver, on the other, being present at the same time, that service must be regarded as being provided electronically and at a distance (see, by analogy, judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 47), for the purposes of the second and third conditions laid down in Article 1(1)(b) of Directive 2015/1535.

47 Finally, a service such as that at issue in the main proceedings is supplied at the individual request of recipients of the service, for the purposes of the fourth condition laid down in that provision, since it involves, simultaneously, a request made by means of the Star Taxi software application, by the person wishing to make an urban journey, and a connection to that application by the authorised taxi driver, indicating that he or she is available.

48 Such a service therefore meets the four cumulative conditions laid down in Article 1(1)(b) of Directive 2015/1535 and accordingly, in principle, constitutes an 'information society service' within the meaning of Directive 2000/31.

49 However, as is apparent from the Court's case-law, although an intermediation service which satisfies all of those conditions, in principle, constitutes a service distinct from the subsequent service to which it relates, in the present case a transport service, and must therefore be classified as an 'information society service', that cannot be the case if it appears that that intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 50 and the case-law cited).

50 In that regard, the Court has held that, where the provider of an intermediation service offers urban transport services which it renders accessible, in particular, through software tools, and whose general operation it organises for the benefit of persons who wish to accept that offer, the intermediation service provided must be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' within the meaning of Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, but as 'a service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123, to which Directive 2000/31, Directive 2006/123 and Article 56 TFEU are inapplicable (judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981, paragraphs 38 to 44).

51 However, in view of its characteristics, an intermediation service such as that at issue in the main proceedings cannot be classified as 'a service in the field of transport', contrary to the submission of the municipality of Bucharest.

52 First, it is apparent from the order for reference that, unlike the intermediation service at issue in the case which gave rise to the judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981), which offered and rendered accessible urban transport services operated by non-professional drivers previously absent from the market, the service at issue in the main proceedings is confined, as the Advocate General observed in point 49 of his Opinion, to putting persons wishing to make urban journeys in

touch solely with authorised taxi drivers already engaged in that activity and for whom the intermediation service is merely one of a number of methods of acquiring customers, and not one, moreover, which they are in any way obliged to use.

53 Secondly, such an intermediation service cannot be regarded as organising the general operation of the urban transport service subsequently provided, since the service provider does not select the taxi drivers, or determine or receive the fare for the journey, or exercise control over the quality of the vehicles and their drivers or the drivers' conduct.

54 It follows that an intermediation service such as that provided by Star Taxi App cannot be regarded as an integral part of an overall service whose main component is a transport service and is, accordingly, to be classified as an 'information society service' within the meaning of Article 2(a) of Directive 2000/31.

55 In the light of the foregoing, the answer to the first question is that Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that an intermediation service which consists in putting persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, for the purposes of which the service provider has entered into contracts for the provision of services with those drivers, in consideration of the payment of a monthly subscription fee, but does not forward the bookings to them, does not determine the fare for the journey or collect it from the passengers, who pay it directly to the taxi driver, and exercises no control over the quality of the vehicles or their drivers, or over the conduct of the drivers, constitutes an 'information society service' within the meaning of those provisions.

The fourth question

56 By its fourth question, the referring court asks whether Article 5(1) of Directive 2015/1535 precludes the adoption, without first notifying the Commission, of regulations such as those at issue in the main proceedings, in the present case, those set out in Article 3, Article 21(1) and (3^1), Article 41(2^1) and Article 59, point 6^1 of Annex I to Decision No 178/2008.

57 It should be noted that Article 5(1) of Directive 2015/1535 provides that, in principle, the Member States must immediately communicate to the Commission any draft 'technical regulation', within the meaning of Article 1(1)(f) of that directive and that, in accordance with settled case-law, failure by a Member State to comply with its obligation to communicate such a draft regulation in advance renders the 'technical regulation' unenforceable against individuals (see, to that effect, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraphs 49 and 50), be it in criminal proceedings (see, inter alia, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 84), or in proceedings between individuals (see, inter alia, judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraph 64 and the case-law cited).

58 Hence, the obligation to communicate the draft in advance applies only where it relates to a technical regulation within the meaning of Article 1(1)(f) of that directive.

59 Accordingly, by its fourth question the referring court should be regarded as asking, in essence, whether Article 1(1)(f) of Directive 2015/1535 is to be interpreted as meaning that local authority legislation which makes the supply of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a

smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 1(1)(b) of Directive 2015/1535, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers, constitutes a 'technical regulation', within the meaning of that provision, and if so, whether Article 5(1) of Directive 2015/1535 must be interpreted as meaning that a failure to communicate the draft of that legislation to the Commission in advance renders the regulations unenforceable.

60 As to the classification of such regulations, it is apparent from the first subparagraph of Article 1(1)(f) of Directive 2015/1535 that a 'technical regulation' means 'technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator 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 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider'.

61 It follows that, in order for national legislation affecting an information society service to be classified as a 'technical regulation', it must not only be classified as a 'rule on services' as defined in Article 1(1)(e) of Directive 2015/1535, but must also be compulsory, de jure or de facto, in the case, inter alia, of the provision of the service in question or its use in a Member State or a major part of that State.

62 The first subparagraph of Article 1(1)(e) of that directive defines a 'rule on services' as 'a requirement of a general nature relating to the taking-up and pursuit of activities [relating to information society services], in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at [information society services]'.

63 The second subparagraph of that provision states that for the purposes of that definition, 'a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner'. It also adds that 'a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner'.

64 In the present case, it is apparent from the order for reference that the Romanian legislation at issue in the main proceedings, whether Law No 38/2003 or Decision No 178/2008, does not make any reference to information society services. Furthermore, Article 3, Article 21(1) and (3^1) and Article 41(2^1) of Annex I to Decision No 178/2008 relate indiscriminately to all types of dispatching services, whether supplied by telephone or any other means, such as a software application.

65 Furthermore, as the Advocate General pointed out in point 108 of his Opinion, Law No 38/2003 requires providers of dispatching services operating by means of a smartphone application, just like all other providers of dispatching services, to possess equipment, in this case two-way radios, which, given the technology used to provide the service, serves no useful purpose.

66 Accordingly, since it is not specifically aimed at information society services, regulations such as those at issue in the main proceedings affect such services only in an implicit or incidental manner. Such a rule cannot, therefore, be regarded as a 'rule on services' within the meaning of Article 1(1)(e) of Directive 2015/1535, or, consequently, as a 'technical regulation' within the meaning of Article 1(1)(f) of that directive.

67 It follows that the obligation to communicate drafts of 'technical regulations' to the Commission in advance, laid down in Article 5(1) of Directive 2015/1535, does not apply to such regulations, and accordingly that the failure to communicate a draft of that nature cannot, by virtue of that provision, have any consequences as regards the enforceability of the intended regulations in a case such as that at issue in the main proceedings.

68 In the light of the foregoing, the answer to the fourth question is that Article 1(1)(f) of Directive 2015/1535 must be interpreted as meaning that local authority legislation which makes the supply of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 1(1)(b) of Directive 2015/1535, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers, does not constitute a 'technical regulation' within the meaning of the former provision.

The second and third questions

69 By its second and third questions, the referring court asks, in essence, whether Article 3(2) and (4) and Article 4 of Directive 2000/31, Articles 9, 10 and 16 of Directive 2006/123 and Article 56 TFEU must be interpreted as precluding legislation of a Member State which makes the supply of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 1(1)(b) of Directive 2015/1535, which is referred to in Article 2(a) of Directive 2000/31, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers, such authorisation being conditional, inter alia, on bookings being communicated to drivers by two-way radio.

70 As a preliminary point, it should be observed that the dispute in the main proceedings is between Star Taxi App, a company incorporated under Romanian law and established in Romania, and two Romanian public authorities, namely the municipality of Bucharest and the General Council of the Municipality of Bucharest, and accordingly that the dispute is confined in all respects within Romania.

71 It is established case-law that the provisions of the FEU Treaty on the freedom to provide services do not apply to a situation which is confined in all respects within a single Member State (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15. EU:C:2016:874, paragraph 47 and the case-law cited).

72 It is also apparent from the wording of Article 3(2) of Directive 2000/31 that that provision only applies to information society services from another Member State, with Article 3(4) providing, subject to the conditions it sets out, for Member States to take measures derogating from that provision.

73 The same applies to Article 16 of Directive 2006/123, which appears in Chapter IV of that directive, concerning free movement of services, and which only applies to services supplied in a Member State other than that in which the service provider is established, in contrast to the provisions of Chapter III of that directive, concerning freedom of establishment for providers, namely Articles 9 to 15 of the directive, which also apply to a situation in which all the relevant elements are confined to a single Member State (judgment of 22 September 2020, *Cali Apartments and HX*, C-724/18 and C-727/18, EU:C:2020:743, paragraph 56 and the case-law cited).

74 Consequently, Article 56 TFEU, Article 3(2) and (4) of Directive 2000/31 and Article 16 of Directive 2006/123 are not applicable to a dispute such as that at issue in the main proceedings.

75 As regards the other provisions referred to by the referring court, namely Article 4 of Directive 2000/31, neither the wording nor the context of which indicate that it would apply only to providers of information services established in another Member State (see, by analogy, judgment of 30 January 2018, *X and Visser*, C-360/15 and C-31/16, EU:C:2018:44, paragraphs 99 and 100), and Articles 9 and 10 of Directive 2006/123, which, as has been observed in paragraph 73 above, also apply to purely internal situations, it must be stated that, in different ways, they lay down a principle of prohibiting authorisation schemes. In those circumstances, it has to be determined which of those provisions may be applicable to regulations such as those at issue in the main proceedings.

76 As is apparent from paragraphs 43 and 48 above, the intermediation service at issue in the main proceedings is not only a 'service' within the meaning of Article 57 TFEU, and therefore of Article 4(1) of Directive 2006/123, but is also an 'information society service' within the meaning of Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535.

77 Regulations of a Member State which govern such a service may therefore fall within the scope of Directive 2000/31, as well as that of Directive 2006/123, in so far as it follows from paragraphs 49 and 54 above that that service is not a 'service in the field of transport', expressly excluded from the scope of Directive 2006/123 by Article 2(2)(d), read in the light of recital 21 thereof.

78 However, under Article 3(1) of Directive 2006/123, that directive does not apply if its provisions conflict with a provision of another EU act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 41).

79 It is therefore important to determine whether regulations which make the supply of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 1(1)(b) of Directive 2015/1535, which is referred to in Article 2(a) of Directive 2000/31, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers, such authorisation being conditional, inter alia, on bookings being communicated to drivers over a two-way radio, fall within the scope of Article 4 of Directive 2000/31 and, if so, whether that latter provision conflicts with Articles 9 and 10 of Directive 2006/123.

80 As regards the applicability of Article 4 of Directive 2000/31, it is apparent from reading paragraphs 1 and 2 of that article together that while the Member States may not make the taking up and pursuit of the activity of an information society service provider subject to prior authorisation or any other requirement having equivalent effect, the prohibition contained in that provision nevertheless concerns only regulations of Member States which are specifically and exclusively targeted at 'information society services'.

81 It is apparent from the order for reference that, while it is undoubtedly the case that Decision No 626/2017 relates, principally if not exclusively, to intermediation services, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, it does no more, in broadening the scope of the term 'dispatching' as defined in Article 3 of Annex 1 to Decision No 178/2008 so as to encompass that type of service, than to extend to that information society service a pre-existing requirement for prior authorisation applicable to the activities of taxi reservation centres, activities which do not fall within the classification of 'information society services'.

82 Accordingly, as the Advocate General stated in point 69 of his Opinion, such regulations, which, the referring court observes, have the effect of requiring Star Taxi App to obtain prior authorisation for the pursuit of its activity from the competent authority, does not amount to the creation of a new prior authorisation scheme specifically and exclusively targeted at an information society service.

83 It follows that the prohibition on any prior authorisation or other requirement having equivalent effect, laid down in Article 4(1) of Directive 2000/31, does not apply to regulations such as those at issue in the main proceedings.

84 Accordingly, there is no possibility of conflict between that provision and Articles 9 and 10 of Directive 2006/123, which, therefore, are applicable to such regulations.

85 It must therefore be determined whether those articles are to be interpreted as precluding such regulations.

86 In that regard, it is apparent from Section 1 of Chapter III of Directive 2006/123 that the compliance of a national authorisation scheme with the requirements laid down by that directive presupposes, in particular, that such a scheme, which, by its very nature restricts the freedom to provide the service concerned, satisfies the conditions set out in Article 9(1) of that directive, namely it is non-discriminatory, justified by an overriding reason relating to the public interest, and proportionate, but also that the criteria for granting the authorisations provided for by that scheme are in line with Article 10(2) of that directive, namely they are non-discriminatory, justified by an overriding reason in the public interest, proportionate to that public interest objective, clear and unambiguous, objective, made public in advance, and transparent and accessible (judgment of 22 September 2020, *Cali Apartments and HX*, C-724/18 and C-727/18, EU:C:2020:743, paragraph 57).

87 It follows that the assessment of whether legislation of a Member State establishing such an authorisation scheme is in line with the two articles referred to in the preceding paragraph, which lay down clear, precise and unconditional obligations giving them direct effect, presupposes that separate and consecutive assessments must be made of, first, whether the very principle of establishing that scheme is justified, and, then, the criteria for granting the authorisations provided for by that scheme (judgment of 22 September 2020, *Cali Apartments and HX*, C-724/18 and C-727/18, EU:C:2020:743, paragraph 58).

88 In that regard, it must be observed that the order for reference provides little by way of information that might enable the Court to provide an answer that is of use to the referring court.

89 It will therefore be for that court to assess, having regard to all relevant matters, whether the prior authorisation scheme established by the regulations at issue in the main proceedings does in fact satisfy the two sets of requirements referred to in paragraphs 86 and 87 above (see, by analogy, judgment of 22 September 2020, *Cali Apartments and HX*, C-724/18 and C-727/18, EU:C:2020:743, paragraph 78).

90 In relation, however, to the assessment of whether the criteria governing the exercise of the discretion of the competent authorities are justified, it should be observed, as the Advocate General noted in points 99 and 100 of his Opinion, that making the grant of an authorisation to provide a service subject to meeting technical requirements which are inappropriate for the service in question, and which therefore engender unjustified burdens and costs on providers of the service, cannot be compliant with Article 10(2) of Directive 2006/123.

91 In particular, that may be the case, which it is, however, for the referring court to verify, of an obligation imposed on providers of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, to communicate bookings to the drivers over a two-way radio.

92 Not only does such an obligation, which requires both the intermediation service provider and the taxi drivers to possess such radio equipment, while also requiring the intermediation service provider to have specific personnel at its disposal to communicate bookings to the drivers, serve no useful purpose, but it also bears no relation to the characteristics of a service which relies entirely on the technical capacities of smartphones that make it possible, without direct human intervention, to determine the location of taxi drivers and their potential customers, and to put them in touch with one another automatically.

93 In the light of the foregoing, the second and third questions should be answered as follows:

– Article 56 TFEU, Article 3(2) and (4) of Directive 2000/31 and Article 16 of Directive 2006/123 must be interpreted as not applying to a dispute in which all the relevant elements are confined to a single Member State.

– Article 4 of Directive 2000/31 must be interpreted as not applying to regulations of a Member State which makes the provision of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers.

– Articles 9 and 10 of Directive 2006/123 must be interpreted as precluding regulations of a Member State which make the provision of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, subject to obtaining prior authorisation to pursue their

activity, where the conditions for obtaining the authorisation do not meet the requirements laid down in those articles, in that they impose, inter alia, technical requirements that are inappropriate for the service in question, which is a matter for the referring court to ascertain.

Costs

94 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 (Fourth Chamber) hereby rules:

1. **Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), which refers to Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, must be interpreted as meaning that an intermediation service which consists in putting persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, for the purposes of which the service provider has entered into contracts for the provision of services with those drivers, in consideration of the payment of a monthly subscription fee, but does not forward the bookings to them, does not determine the fare for the journey or collect it from the passengers, who pay it directly to the taxi driver, and exercises no control over the quality of the vehicles or their drivers, or over the conduct of the drivers, constitutes an 'information society service' within the meaning of those provisions.**

2. **Article 1(1)(f) of Directive 2015/1535 must be interpreted as meaning that local authority legislation which makes the supply of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 1(1)(b) of Directive 2015/1535, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers, does not constitute a 'technical regulation' within the meaning of the former provision.**

3. **Article 56 TFEU, Article 3(2) and (4) of Directive 2000/31, and Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, must be interpreted as not applying to a dispute in which all the relevant elements are confined to a single Member State.**

Article 4 of Directive 2000/31 must be interpreted as not applying to regulations of a Member State which makes the provision of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, and which is classified as an 'information society service' within the meaning of Article 2(a) of Directive 2000/31, which

refers to Article 1(1)(b) of Directive 2015/1535, subject to obtaining prior authorisation, which is already applicable to other taxi reservation service providers.

Articles 9 and 10 of Directive 2006/123 must be interpreted as precluding regulations of a Member State which make the provision of an intermediation service, the purpose of which is to put persons wishing to make urban journeys in touch, by means of a smartphone application and in exchange for remuneration, with authorised taxi drivers, subject to obtaining prior authorisation to pursue their activity, where the conditions for obtaining the authorisation do not meet the requirements laid down in those articles, in that they impose, inter alia, technical requirements that are inappropriate for the service in question, which is a matter for the referring court to ascertain.

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

25 March 2021 (*)

(Reference for a preliminary ruling – Deposit-guarantee schemes – Directive 94/19/EC – Article 1(3)(i) – Article 7(6) – Article 10(1) – Concept of 'unavailable deposit' – Determination of unavailability of deposits – Competent authority – Depositor's rights to compensation – Contractual clause contrary to Directive 94/19 – Principle of primacy of Union law – European System of Financial Supervision – European Banking Authority (EBA) – Regulation (EU) No 1093/2010 – Article 1(2) – Article 4(2)(iii) – Article 17(3) – EBA recommendation to a national banking authority on measures to comply with Directive 94/19 – Legal effects – Validity – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Article 2, seventh indent – Concept of 'reorganisation measures' – Compatibility with Article 17(1) and Article 52(1) of the Charter of Fundamental Rights of the European Union – Liability of Member States for breach of Union law – Conditions – Sufficiently serious breach of EU law – Procedural autonomy of Member States – Principle of sincere cooperation – Article 4(3) TEU – Principles of equivalence and effectiveness)

In Case C-501/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria), made by decision of 17 July 2018, received at the Court on 30 July 2018, in the proceedings

BT

v

Balgarska Narodna Banka

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Balgarska Narodna Banka, by A. Kalaydzhiev, advokat,

– the European Commission, initially by H. Krämer, Y. Marinova and A. Steiblytė, then by Y. Marinova and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of:

– Article 1(3)(i), Article 7(6) and of Article 10(1) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5), as amended by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 68, p. 3) ('Directive 94/19').

– Article 4(2)(iii), Article 17(3) and Article 26(2) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12);

– the seventh indent of Article 2 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 15), in the light of Article 17(1) and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter');

– the principle that Member States are liable for damage caused to individuals owing to infringements of EU law;

– Article 4(3) TEU, read in conjunction with the principles of procedural autonomy of the Member States, equivalence and effectiveness;

as well as the validity of Recommendation EBA/REC/2014/02 of the European Banking Authority (EBA) of 17 October 2014 addressed to the Balgarska Narodna Banka (Bulgarian National Bank; 'the BNB') and the Fund za garantirane na vlogovete v bankite (Bank Deposit Guarantee Fund; 'the FGVB') on the measures necessary to comply with Directive 94/19/EC.

2 The request has been made in proceedings between BT and the BNB concerning a claim for compensation for the loss which BT claims to have suffered as a result of several actions and omissions of the BNB in the context of supervisory measures taken against Korporativna targovska banka AD ('KTB').

Legal context

European Union law

Directive 94/19

3 Directive 94/19 was repealed by Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149). As that repeal took effect on 4 July 2015, Directive 94/19 remains applicable to the case in the main proceedings.

4 The first, second, eighth, ninth, twenty-fourth and twenty-fifth recitals of Directive 94/19 state that:

'… in accordance with the objectives of the Treaty, the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers;

… when restrictions on the activities of credit institutions are eliminated, consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States become unavailable; whereas it is indispensable to

ensure a harmonised minimum level of deposit protection wherever deposits are located in the Community; whereas such deposit protection is as essential as the prudential rules for the completion of the single banking market;

…

… harmonisation must be confined to the main elements of deposit-guarantee schemes and, within a very short period, ensure payments under a guarantee calculated on the basis of a harmonised minimum level;

… deposit-guarantee schemes must intervene as soon as deposits become unavailable;

…

… this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognised;

… deposit protection is an essential element in the completion of the internal market and an indispensable complement to the system of supervision of credit institutions on account of the solidarity it creates among all the institutions in a given financial market in the event of the failure of any of them'.

5 Article 1 of that directive provides:

'For the purposes of this Directive:

1. "deposit" shall mean any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.

…

3. "unavailable deposit" shall mean a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either:

   (i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.

   The competent authorities shall make that determination as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable; …

…'

6 Article 3(1) and (2) of Directive 94/19 provides:

'1. Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised. …

…

2. If a credit institution does not comply with the obligations incumbent on it as a member of a deposit-guarantee scheme, the competent authorities which issued its authorisation shall be notified and, in collaboration with the guarantee scheme, shall take all appropriate measures including the imposition of sanctions to ensure that the credit institution complies with its obligations.'

7 Article 7(1a), (2) and (6) of that directive provides:

'1a. By 31 December 2010, Member States shall ensure that the coverage for the aggregate deposits of each depositor shall be set at EUR 100 000 in the event of deposits being unavailable.

…

2. Member States may provide that certain depositors or deposits shall be excluded from guarantee or shall be granted a lower level of guarantee. …

…

6. Member States shall ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit-guarantee scheme.'

8 According to Article 10(1) of Directive 94/19:

'Deposit-guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within 20 working days of the date on which the competent authorities make a determination as referred to in Article 1(3)(i) or a judicial authority makes a ruling as referred to in Article 1(3)(ii). …'

Regulation No 1093/2010

9 Recitals 27 to 29 in the preamble to Regulation No 1093/2010 state:

'(27) Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Union. A mechanism should therefore be established whereby the [EBA] addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations.

(28) To allow for a proportionate response to instances of incorrect or insufficient application of Union law, a three-step mechanism should apply. First, the [EBA] should be empowered to investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. Second, where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account the [EBA]'s recommendation, requiring the competent authority to take the actions necessary to ensure compliance with Union law.

(29) Third, to overcome exceptional situations of persistent inaction by the competent authority concerned, the [EBA] should be empowered, as a last resort, to adopt decisions addressed to individual financial institutions. That power should be limited to exceptional circumstances in which a competent authority does not comply with

the formal opinion addressed to it and in which Union law is directly applicable to financial institutions by virtue of existing or future Union regulations.'

10 In accordance with Article 1(2) of that regulation, the EBA is to act in accordance with the powers conferred on it by that regulation and within the scope of, inter alia, Directive 94/19 to the extent that it applies to credit and financial institutions and the competent authorities responsible for their supervision.

11 Article 4 of that regulation states:

'For the purpose of this Regulation the following definitions apply:

…

(2) "competent authorities" means:

…

(iii) with regard to deposit guarantee schemes, bodies which administer deposit-guarantee schemes pursuant to Directive [94/19], or, where the operation of the deposit-guarantee scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive.'

12 Article 17 of Regulation No 1093/2010, entitled 'Breach of Union law', provides:

'1. Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the [EBA] shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.

2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the [EBA] may investigate the alleged breach or non-application of Union law.

…

3. The [EBA] may, not later than 2 months from initiating its investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law.

…

6. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the [EBA] may, where the relevant requirements of the acts referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.

…

7. Decisions adopted under paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter. …'

Directive 2001/24

13 Recitals 2, 5 and 6 of Directive 2001/24 are worded as follows:

(2) At the same time as those obstacles are eliminated, consideration should be given to the situation which might arise if a credit institution runs into difficulties, particularly where that institution has branches in other Member States.

…

(5) The adoption of Directive [94/19], which introduced the principle of compulsory membership by credit institutions of a guarantee scheme in their home Member State, brings out even more clearly the need for mutual recognition of reorganisation measures and winding-up proceedings.

(6) The administrative or judicial authorities of the home Member State must have sole power to decide upon and to implement the reorganisation measures provided for in the law and practices in force in that Member State. Owing to the difficulty of harmonising Member States' laws and practices, it is necessary to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised.'

14 According to Article 1(1) of that directive, the latter 'shall apply to credit institutions and their branches set up in Member States other than those in which they have their head offices, as defined in points (1) and (3) of Article 1 of Directive 2000/12/EC [of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1)], subject to the conditions and exemptions laid down in Article 2(3) of that Directive'.

15 Article 2, seventh indent, of Directive 2001/24 defines 'reorganisation measures' as 'measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims'.

16 Entitled 'Adoption of reorganisation measures – applicable law', Article 3 of that directive provides:

'1. The administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution, including branches established in other Member States.

2. The reorganisation measures shall be applied in accordance with the laws, regulations and proceedings applicable in the home Member State, unless otherwise provided in this Directive.

…

The reorganisation measures shall be effective throughout the [Union] once they become effective in the Member State where they have been taken.'

Recommendation EBA/REC/2014/02

17 In recital 25 of Recommendation EBA/REC/2014/02, the EBA held that the BNB breached Union law by failing to determine the unavailability of deposits held by KTB in accordance with Article 1(3)(i) of Directive 94/19 and by suspending the fulfilment of all the obligations of KTB, with the consequence of preventing depositors from accessing the guaranteed deposits through the system provided for by that directive.

18 According to recital 27 of that recommendation, although there was no express act determining the unavailability of KTB's deposits, within the meaning of that provision, such a determination was inherent in the BNB's decision of 20 June 2014 to place KTB under special supervision and to suspend its obligations.

19 In point 1 of that recommendation, the EBA asked the BNB and the FGVB to take, in accordance with Article 4(3) TEU, all appropriate measures to ensure compliance with their obligations under Articles 1(3)(i), 10(2) and 10(3) of Directive 94/19, including by interpreting, as far as possible, national law in accordance with those provisions.

20 Furthermore, in points 2 and 3 of that recommendation, the EBA asked the BNB to ensure that, until 21 October 2014, depositors have access to the guaranteed amounts of their deposits with KTB, either by removing or limiting the restriction on access to deposits resulting from the supervisory measures or by making the determination referred to in Article 1(3)(i) of Directive 94/19. In the event that the BNB did not take any of those measures within the time limit indicated, the EBA requested the FGVB to verify the claims of depositors with KTB and to return the guaranteed amounts of those deposits, in accordance with Article 10 of Directive 94/19, since the special supervisory measures taken in respect of KTB by the decision referred to in paragraph 18 of the present judgment amounted to a finding that those deposits were unavailable within the meaning of Article 1(3)(i) of Directive 94/19.

Bulgarian law

Law on bank-deposit insurance

21 According to Article 1 thereof, the Zakon za garantirane na vlogovete v bankite (Law on bank-deposit insurance) (DV No 49, of 29 April 1998), which transposed Directives 94/19 and 2009/14 into the Bulgarian legal order, 'regulates the establishment, tasks and activity of the [FGVB] as well as the procedure for the reimbursement of deposits up to the guaranteed level'.

22 Under Article 4(1) and (2) of that law:

'1. The [FGVB] shall guarantee the full repayment of amounts corresponding to a person's deposits with a bank, regardless of their number and amount, up to a maximum of 196 000 [leva (BGN) (approximately EUR 100 000)].

2. The amount mentioned also includes the interest due on the date of the decision adopted by the [BNB] pursuant to Article 23(1).'

23 Article 23 of that law is worded as follows:

'1. The [FGVB] shall cover the obligations of the bank in question up to the guaranteed amount where the [BNB] has withdrawn the banking licence issued to that commercial bank.

…

3. Within three working days from the date of the decision of the [BNB] pursuant to paragraph 1, the appointed receiver, liquidator or trustee shall submit to the Board of Directors of the [FGVB] information on the deposits made with the bank.

…

10. Depositors shall, in accordance with the applicable law, assert their claims in excess of the amount received from the [FGVB] against the assets of the bank.

…'

Law on credit institutions:

24 Article 36 of the Zakon za kreditnite institutsii (Law on credit institutions) (DV No 59, of 21 July 2006) provides:

'…

2. The [BNB] shall withdraw the licence issued to a bank in the event of its insolvency where:

(1) the bank has not paid a payable monetary obligation for more than seven working days, the non-payment is directly related to the financial situation of that bank and the [BNB] considers it improbable that the bank will pay payable monetary obligations within an appropriate time, or

(2) its equity capital is in deficit.

3. The [BNB] shall take the decision referred to in paragraph 2 within five working days from the declaration of insolvency.

…

7. With the withdrawal of the licence, the bank's activity is terminated and it is compulsorily wound up.

…'

25 Article 79(8) of that law provides:

'The [BNB], its bodies and agents shall not be liable for harm sustained in the performance of their duties of supervision, unless they have acted intentionally.'

26 Article 115 of the Law on credit institutions reads as follows:

'1. For the purposes of restructuring a bank exposed to a risk of insolvency, the [BNB] may place that bank under special supervision.

2. A bank shall be regarded as exposed to a risk of insolvency if:

…

(2) the [BNB] considers that the liquid assets of the bank will not be sufficient for the bank to perform its obligations on the day they become payable; or

(3) the bank has not paid one or several obligations payable to its creditors.

…'

27 Article 116 of that law provides:

‘1. In the cases referred to in Article 115(1), the [BNB] shall place the bank in question under special supervision …

2. In the cases referred to in paragraph 1, the [BNB] may:

(1) lower the rate of interest on the obligations of the bank to their average market value;

(2) suspend in full or in part the performance of all obligations or certain obligations of that bank for a specified period;

(3) restrict its activities in full or in part;

…’

28 Article 119(4) and (5) of that law provides:

‘4. In the cases referred to in Article 116(2)(2) and for the period during which the [BNB] has exercised this power, the bank shall be deemed not to be in default of performance of the pecuniary obligations whose performance has been suspended.

5. In the cases referred to in Article 116(2)(2), the bank shall not be financially liable for the non-performance of obligations the performance of which has been suspended following special supervision. During special supervision there shall be no late-payment interest or liquidated damages fixed in advance for the non-performance of the monetary obligations of a bank the performance of which has been suspended, whereas standard interest on such obligations shall be payable and paid after the bank is no longer under special supervision.’

Law on bank insolvency

29 According to Article 94(1) of the Zakon za bankovata nesastoyatelnost (Law on bank insolvency) (DV No 92, of 27 September 2002):

‘When the assets are divided, the claims are paid in the following order:

…

(4) … claims of depositors that are not covered by the deposit-guarantee scheme;

…’

Law on liability of the State and of municipalities for damage

30 Article 1 of the Zakon za otgovornostta na darzhavata i obshtinite za vredi (Law on liability of the State and of municipalities for damage) (DV No 60, of 5 August 1988) provides:

‘1. The State and the municipalities shall be liable for damage sustained by citizens and legal persons following illegal acts, actions or failure to act by their bodies and employees within the scope or at the time of administrative activity.

2. Actions brought under paragraph 1 shall be heard in accordance with the procedure laid down in the Administrativnoprotsesualen kodeks [(Code of Administrative Procedure)] …’

31 Article 4 of that law provides:

‘The State and municipalities are obliged to compensate all material and moral damage that is a direct and immediate consequence of the harmful event, regardless of whether that damage was caused by the fault of the employee.’

32 Article 8(3) of that law provides:

‘Where a law or decree provides for a specific form of compensation, this Law shall not apply.’

The APK

33 Under Article 204(1) of the Law on Administrative Procedure (DV No 30, of 11 April 2006; ‘the APK’):

‘An action [for compensation] may be lodged after the administrative act has been annulled in the applicable manner.’

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

34 During 2008, 2010 and 2011, BT concluded three contracts with KTB concerning unlimited deposits in euros and leva at preferential conditions. The amounts deposited were guaranteed in their entirety by the FGVB up to BGN 196 000 (approximately EUR 100 000).

35 By letters of 20 June 2014, KTB informed the BNB that it was suspending payments to its customers due to a lack of liquidity caused by a massive withdrawal of the deposits it held. By a decision of the same day, supplemented by a decision of 22 June 2014, both adopted on the basis of the Law on credit institutions, the BNB placed KTB under special supervision for a period of three months due to a risk of insolvency, appointed receivers, suspended the execution of all KTB’s commitments and prohibited KTB from carrying on all activities covered by its banking licence. By a press release of 22 June 2014, the BNB stated that the aim of those decisions was to preserve the country’s financial stability.

36 As is apparent from the reference for a preliminary ruling, the date of 20 June 2014 was chosen by the Sofiyski apelativen sad (Court of Appeal, Sofia, Bulgaria) as the start date of KTB’s insolvency, since, on that date, KTB’s own funds corresponded to a negative amount, within the meaning of Article 36(2)(2) of the Law on credit institutions.

37 By decision of 30 June 2014, the BNB, on the basis of that law, reduced, with effect from 1 July 2014, the interest rates applied to deposits at KTB, so that they correspond to the average market rate, and adopted a standard-interest-rate scale. In accordance with that scale, interest on BT deposits was calculated as contractual interest for the period until 6 November 2014.

38 By decision of 16 September 2014, the BNB extended the special surveillance measures until 20 November 2014, in view of the persistence of the reasons which initially justified the adoption of the decisions of 20 and 22 June 2014.

39 On 25 September 2014, the Commission sent a letter of formal notice to the Minister of Finance (Bulgaria) and the BNB on the basis of Article 258 TFEU, due to the incorrect transposition of Articles 1(3) and 10(1) of Directive 94/19, as well as the failure to respect the principle of free movement of capital provided for in Article 63 TFEU. In a press release of the same day, the Commission announced that it was initiating infringement proceedings. Those proceedings were closed on 10 December 2015.

40 Following Recommendation EBA/REC/2014/02, the BNB, by decision of 6 November 2014, withdrew the authorisation to increase KTB’s equity capital by means of funds provided

under a loan agreement, on the ground that, as KTB had financed the lender, those funds were provided by itself. In addition, by decision of the same day, the BNB withdrew KTB's banking licence on the basis of Article 36(2)(2) of the Law on credit institutions.

41 Pursuant to that decision, on 4 December 2014, BT was repaid, through the FGVB, an amount of BGN 196 000 (approximately EUR 100 000) together with contractual and remuneration interest for the period from 30 June to 6 November 2014. The remaining credit balances amounting to BGN 44 070.90 (approximately EUR 22 500) were included in the list of recognised claims, established in the context of the bankruptcy proceedings, in accordance with the order of precedence laid down in Article 94(1)(4) of the Law on bank insolvency.

42 BT brought an action before the referring court, on the basis of Article 1(1) of the Law on the liability of the State and municipalities for damage and Article 204(1) of the APK, for compensation for all damage resulting, directly and immediately, from actions and omissions of the BNB committed in breach of EU law.

43 By its first head of claim, BT claims that the BNB should be ordered to pay it the sum of BGN 8 627.96 (approximately EUR 4 400), corresponding to the statutory interest on the guaranteed amount of the deposits held by KTB for the period from 30 June to 4 December 2014. In support of that claim, BT submits that the BNB, as the competent authority, should have found, within the period prescribed in Article 1(3)(i) of Directive 94/19, that those deposits had become unavailable within the meaning of Article 10(1) of that directive. The BNB's failure to make such a finding had the effect of delaying until 4 December 2014 the repayment by the FGVB of the guaranteed deposits. The Commission's press release, referred to in paragraph 39 of the present judgment, as well as recital 25 of Recommendation EBA/REC/2014/02, confirm the unlawfulness of the BNB's failure to act.

44 By its second head of claim, BT asks the referring court to order the BNB to pay it the sum of BGN 44 070.90 (approximately EUR 22 500), corresponding to the amount exceeding the ceiling of the guaranteed amount of the deposits. In support of that request, BT submits, inter alia, that the special supervisory measures taken by the BNB in respect of KTB were unjustified and disproportionate to the situation of that bank on 20 June 2014. Those measures also allegedly disregarded Articles 63 to 65 TFEU and did not aim at the reorganisation of the bank, which only needed liquidity support. In the alternative, the damage referred to in the second head of claim should be compensated on the basis of the liability of the BNB for unlawful failure to act, consisting in the exercise of defective supervision, which aggravated the situation of KTB and which, moreover, was established by the Smetna palata (Court of Auditors, Bulgaria) in a report concerning the period from 1 January 2012 to 31 December 2014.

45 As regards the first head of claim, the referring court considers it essential to determine the rules of liability which are to be applied in the present case. In that context, it asks, in particular, whether the depositor's right to compensation, referred to in Article 7(6) of Directive 94/19, covers all damage resulting from the failure to repay the deposits within the prescribed time limits, including that resulting from inadequate supervision vis-à-vis the credit institution which holds the deposits, or whether that concept refers only to the right to repayment of the guaranteed amounts of the deposits, under Article 7(1a) of that directive.

46 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does it follow from the principles of EU law of equivalence and effectiveness that a national court is obliged to regard, of its own motion, an action as having been brought on the ground of a breach of an obligation arising from Article 4(3) of the Treaty on European Union (TEU) by a Member State if the action relates to the non-contractual liability of the Member State for losses arising from an infringement of EU law that were allegedly caused by an authority of a Member State, and

– Article 4(3) TEU was not expressly specified as a legal basis in the application, but it is clear from the grounds for the action that the loss is asserted on the ground of an infringement of provisions of EU law;

– the claim for damages was based on a national provision regarding State liability for losses that arise in the performance of administrative activity, and that liability is strict and was incurred under the following conditions: unlawfulness of a legal act, act or omission of an authority or official in the course of or in connection with the performance of administrative activity; material or non-material loss incurred; direct and immediate causal link between the loss and the unlawful conduct of the authority;

– under the law of the Member State, the court must determine, of its own motion, the legal basis for State liability for the activity of the judicial authorities on the basis of the circumstances on which the action is based?

(2) Does it follow from recital 27 of Regulation [No 1093/2010] that, under circumstances such as those of the main proceedings, the recommendation issued on the basis of Article 17(3) of the regulation, in which an infringement of EU law by the central bank of a Member State in connection with the deadlines for paying out guaranteed deposits to the depositors in the respective credit institution has been established:

– confers on the depositors at that credit institution the right to invoke the recommendation before a national court in order to substantiate an action for damages on the ground of that infringement of EU law, if account is taken of the [EBA]'s express power to establish infringements of EU law, and if it is considered that the depositors are not, and cannot be, the addressees of the recommendation and the latter does not establish any direct legal consequences for them;

– is valid, having regard to the requirement that the infringed provision must provide for clear and unconditional obligations, if consideration is given to the fact that point (i) of Article 1(3) of Directive [94/19], if it is interpreted in conjunction with recitals 12 and 13 of that directive, does not contain all the elements required to establish a clear and unconditional obligation for the Member States and does not confer direct rights on depositors, and taking account of the fact that that directive provides for only minimum harmonisation that does not cover the indications by means of which unavailable deposits are determined, and that the recommendation has not been substantiated by other clear and unconditional provisions of EU law in

relation to those indications, in particular the assessment of the lack of liquidity and the current lack of prospects of payout; an existing obligation to order early intervention measures and to maintain the business activity of the credit institution;

– in view of the subject matter, the deposit guarantee, and the power of the [EBA] to issue recommendations on the deposit guarantee scheme pursuant to Article 26(2) of Regulation [No 1093/2010], is valid in relation to the national central bank, which has no connection with the national deposit guarantee scheme and is not a competent authority pursuant to point [(iii)] of Article 4(2) of that regulation?

(3) Having regard also to the current state of the EU law relevant to the main proceedings, does it follow from the judgments of the Court of Justice of the European Union of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606, paragraphs 38, 39, 43 and 49 to 51), of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 42 and 51), of 15 June 2000, *Dorsch Consult* v *Council and Commission* (C-237/98 P, EU:C:2000:321, paragraph 19), and of 2 December 1971, *Zuckerfabrik Schöppenstedt* v *Council* (5/71, EU:C:1971:116 paragraph 11) that:

(a) the provisions of Directive 94/19, particularly Article 7(6), confer on depositors the right to assert claims for compensation against a Member State for defective supervision regarding the credit institution that administers their deposits, and are those rights restricted to the guaranteed amount of the deposits or is the term "rights to compensation" in that provision to be interpreted broadly?

(b) the supervisory measures adopted by the central bank of a Member State to reorganise a credit institution, such as those in the main proceedings, including the suspension of payments, which are provided for, in particular, in the seventh indent of Article 2 of Directive [2001/24], constitute an unjustified and unreasonable infringement of the depositors' right to property that incurs liability for losses arising from an infringement of EU law if, having regard to Article 116(5) of the Law on credit institutions and Article 4(2)(1) and Article 94(1)(4) of the Law on bank insolvency, the law of the respective Member State provides that contractual interest is calculated for the duration of the measures and the claims that exceed the guaranteed amount of the deposits can be satisfied in general insolvency proceedings, and provides that interest can be paid?

(c) the requirements provided for in the national law of a Member State for non-contractual liability for losses arising from an act or omission in connection with the exercise by a Member State's central bank of the supervisory powers covered by the scope of application of Article 65(1)(b) TFEU must not run counter to the requirements and principles of that liability that apply under EU law, specifically: the principle according to which actions for damages are independent of actions for annulment and the established illegality of a requirement under national law that a legal act or an omission on the basis of which compensation is sought must be annulled beforehand; the illegality of a requirement under national law regarding the culpability of authorities or officials for whose conduct compensation is sought; the requirement in respect

of actions for damages to compensate for material harm whereby the plaintiff must have suffered actual and certain damage at the time the action was brought?

(d) on the basis of the principle of EU law according to which actions for damages are independent of actions for annulment, the requirement that the relevant conduct of the authority be unlawful must be met, which is equivalent to the requirement under the national law of the Member State according to which the legal act or the omission on the basis of which compensation is sought, namely the measures to reorganise a credit institution, must be annulled, if consideration is given to the circumstances of the main proceedings and it is considered that:

– these measures are not directed at the applicant, which is a depositor at a credit institution, and that it is not entitled under national law and in accordance with the national case-law to apply for the annulment of the individual decisions by means of which these measures were ordered, and that those decisions have become final;

– EU law, specifically Directive 2001/24 in this area, does not impose an express obligation on the Member States to provide for the possibility of challenging the supervisory measures for the benefit of all creditors in order to establish the validity of the measures;

– the law of a Member State does not provide for non-contractual liability for losses incurred due to lawful conduct on the part of authorities or officials?

(e) In the event of an interpretation to the effect that, under the circumstances of the main proceedings, the requirement that the respective conduct of the authority be unlawful is not applicable to actions of depositors at a credit institution for compensation due to acts and omissions of the central bank of a Member State and, in particular, for the payment of interest for guaranteed deposits not having been paid out within the deadline and for the payment of deposits exceeding the guaranteed amount, which are brought to seek compensation for an infringement of Articles 63 to 65 and 120 TFEU, Article 3 TEU and Article 17 of the [Charter], are the requirements established by the Court of Justice of the European Union for non-contractual liability applicable to losses:

– that arose due to lawful conduct on the part of an authority, specifically the three cumulative requirements, namely the existence of actual loss, a causal link between that loss and the act concerned, and the abnormal and special nature of the loss, particularly in the case of actions for the payment of interest for guaranteed deposits not being paid out within the deadline, or

– in the domain of economic policy, particularly the requirement “only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals”, particularly in actions of depositors for the payment of deposits exceeding the guaranteed amount, which are asserted as a loss and to which the procedure provided for by national

law is applicable, if account is taken of the wide discretion enjoyed by the Member States in connection with Article 65(1)(b) TFEU and the measures under Directive 2001/24 and if the circumstances pertaining to the credit institution and the person seeking compensation relate to only one Member State but the same provisions and the constitutional principle of equality before the law apply to all depositors?

(4) Does it follow from the interpretation of Article 10(1) in conjunction with point (i) of Article 1(3) and Article 7(6) of Directive 94/19 and the legal considerations in the judgment of the Court of Justice of the European Union of 21 December 2016, *Vervloet and Others* (C-76/15, EU:C:2016:975, paragraphs 82 to 84), that the scope of application of the provisions of the directive cover depositors

– whose deposits were not repayable on the basis of contracts and statutory provisions during the period running from the suspension of payments of the credit institution to the withdrawal of its authorisation for banking business, and the respective depositor has not expressed that he or she seeks repayment,

– who have agreed to a clause that provides for the guaranteed amount of the deposits to be paid out in accordance with the procedure governed in the law of a Member State, and specifically after the withdrawal of the authorisation of that credit institution that manages the deposits, and that requirement has been met, and

– the aforementioned clause of the deposit contract has the force of law between the contracting parties under the law of the Member States?

Does it follow from the provisions of that directive or from other provisions of EU law that the national court may not take such a clause in the deposit contract into consideration and may not examine the action of a depositor for the payment of interest due to failure to pay out the guaranteed amount of deposits within the deadline pursuant to that contract on the basis of the requirements for non-contractual liability for loss arising from an infringement of EU law and on the basis of Article 7(6) of Directive 94/19?'

Procedure before the Court

47 By decision of the President of the Court of 18 September 2018, the present case was stayed pending delivery of the judgment to be delivered in Case C-571/16. Following the delivery of the judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807), the Court asked the referring court whether it intended to maintain the present reference for a preliminary ruling.

48 By order of 9 November 2018, the referring court informed the Court that it was maintaining its reference for a preliminary ruling, as the judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807), had not, in its view, answered all the questions raised in the present case.

Consideration of the questions referred

Question 3(a)

49 By its question 3(a), which should be examined in the first place, the referring court seeks, in essence, to ascertain whether Article 7(6) of Directive 94/19 must be interpreted as

meaning that the depositor's right to compensation which it provides for covers only the repayment, by the deposit-guarantee scheme, of deposits which are unavailable to that depositor, up to the amount laid down in Article 7(1a) of that directive, or if Article 7(6) of that directive also establishes, for the benefit of that depositor, a right to compensation for damage caused by the late repayment of the guaranteed amount of all his or her deposits or by inadequate supervision by the competent national authorities of the credit institution whose deposits have become unavailable.

50 It should be noted at the outset that the wording of Article 7(6) of Directive 94/19, which requires the Member States to ensure that the 'depositor's rights to compensation' may be the subject of an action by the depositor against the deposit-guarantee scheme, does not of itself make it possible to give an answer to the referring court's question, so that it is also necessary to take account of the context of that provision and the objectives pursued by that directive.

51 Directive 94/19 aims to establish within the Union protection for depositors in the event of unavailability of deposits made with a credit institution which is a member of a deposit-guarantee scheme (judgment of 12 October 2004, *Paul and Others*, C-222/02, EU:C:2004:606, paragraph 26). At the same time, its purpose is to ensure the stability of the banking system, by avoiding the phenomenon of massive withdrawal of deposits not only from a credit institution in difficulty but also from healthy institutions following a loss of public confidence in the soundness of that system (judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 56 and the case-law cited). Directive 94/19, however, as can be seen in particular from its eighth recital, merely provides for a minimum level of harmonisation in matters relating to deposit guarantees (see, to that effect, judgment of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 82).

52 In that context, Article 3 of Directive 94/19 requires Member States to ensure the establishment and official recognition within their territories of one or more deposit-guarantee schemes and provides for the obligation of the competent authorities which have granted a licence to credit institutions to ensure, in cooperation with the deposit-guarantee scheme, that the credit institutions fulfil their obligations as members of that scheme. The aim is to assure depositors that the credit institution in which they make their deposits belongs to a deposit-guarantee scheme, so that their right to be compensated in the event of unavailability of those deposits is safeguarded, in accordance with the rules laid down in particular in Article 7 of that directive (see, to that effect, judgment of 12 October 2004, *Paul and Others*, C-222/02, EU:C:2004:606, points 27 to 29).

53 In such a case, in accordance with Article 7(1a) of Directive 94/19, deposit-guarantee schemes must ensure a minimum level of cover of EUR 100 000 for each depositor, provided that the deposits in question are neither excluded from the guarantee, in accordance with Article 2 of that directive, nor excluded or granted a lower level of guarantee in the Member State concerned, in accordance with Article 7(2) of that directive.

54 Furthermore, in accordance with Article 10(1) of Directive 94/19, deposit-guarantee schemes must be able to pay duly verified claims of depositors, in respect of unavailable deposits, within 20 working days from the date on which the competent authorities made the determination of unavailability referred to in Article 1(3) of that directive.

55 It thus follows from the objectives pursued by Directive 94/19 and the context in which Article 7(6) of that directive is set out that the 'rights to compensation' provided for in that

provision, the amount of which is fixed in Article 7(1a), and the detailed rules specified in Article 10(1), of that directive, only cover the repayment, by the deposit-guarantee scheme, of duly verified claims of depositors where the competent authorities have established, in accordance with Article 1(3)(i) of Directive 94/19, the unavailability of deposits held by the credit institution concerned.

56 That strict interpretation of Article 7(6) of Directive 94/19 is corroborated by the twenty-fourth recital of that directive, which states that that directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in that directive have been introduced and officially recognised.

57 In that context, the Court has already specified in its judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606, paragraphs 50 and 51), that, since Directive 94/19 provides for compensation to depositors in the event of the unavailability of their deposits, it does not grant depositors rights which could give rise to State liability under Union law in the event of the unavailability of their deposits caused by inadequate supervision by the competent national authorities.

58 The fact, pointed out by the applicant in the main proceedings, that the credit institution at issue in the case giving rise to the judgment cited in the preceding paragraph did not participate in the deposit-guarantee scheme, unlike the credit institution at issue in the present case, cannot justify a different assessment.

59 Moreover, as the Court has already noted, it cannot be excluded that the practical effectiveness of the deposit guarantee imposed by Directive 94/19 would be compromised if risks which are not directly related to the objective of that system, such as those linked to a lack of supervision of credit institutions by the competent authorities, were to be borne by the national deposit-guarantee schemes. The higher the risks to be guaranteed, the more diluted the deposit guarantee becomes and the less likely the deposit-guarantee scheme is, from the same resources, to contribute to the achievement of the dual objective pursued by that directive, as recalled in paragraph 51 of the present judgment (see, to that effect, judgment of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 84).

60 In the light of the foregoing considerations, the answer to question 3(a) is that Article 7(6) of Directive 94/19 must be interpreted as meaning that the depositor's right to compensation which it provides for covers only the repayment, by the deposit-guarantee scheme, of deposits which are unavailable to that depositor, up to the amount laid down in Article 7(1a) of that directive, following a finding of unavailability, by the competent national authority, of deposits held by the credit institution concerned, in accordance with Article 1(3)(i) of that directive, so that Article 7(6) of that directive cannot establish, to the benefit of that depositor, a right to compensation for damage caused by the late repayment of the guaranteed amount of all his or her deposits or by inadequate supervision by the competent national authorities of the credit institution whose deposits have become unavailable.

The fourth question

61 By its fourth question, the referring court seeks, in essence, to ascertain whether the combined provisions of Article 1(3)(i), Article 7(6) and Article 10(1) of Directive 94/19 must

be interpreted as precluding national legislation or a contractual clause, under which a deposit made with a credit institution whose payments have been suspended becomes due only following the withdrawal, by the competent authority, of the banking licence issued to that institution and on condition that the depositor has expressly requested the repayment of that deposit. If the answer is in the affirmative, the referring court asks whether those provisions or other provisions of Union law require it to set aside that national legislation or contractual clause, for the purposes of deciding an action for damages allegedly caused by the repayment of the guaranteed amount of such a deposit outside the period laid down by that directive.

62 It should be recalled, in the first place, that under Article 1(3)(i) of Directive 94/19, the concept of 'unavailable deposit', within the meaning of that directive, refers to 'a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto', where the competent authorities have ascertained, no later than five working days after establishing for the first time that that credit institution has not repaid deposits due and payable, that, for reasons directly related to its financial circumstances, 'the credit institution concerned appears to be unable … to repay the deposit and to have no current prospect of being able to do so'.

63 As is clear from the wording of the first subparagraph of Article 1(3)(i) of Directive 94/19, the necessary and sufficient condition for establishing the unavailability of a deposit which is due and payable is that, in the view of the competent authority, for the time being and for reasons directly related to its financial situation, a credit institution does not appear to be in a position to repay the deposits and there is no current prospect that it will be able to do so (judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 49). Moreover, the maximum period of five days allowed to the competent authority to fulfil the unconditional and sufficiently precise obligation to make such a finding is, under the very terms of the second subparagraph of Article 1(3)(i) of that directive, a mandatory time limit, without any derogation from it being provided for in any other provision of that directive (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 60 and 100). It thus follows from the wording of Article 1(3)(i) of Directive 94/19 that it lays down an unconditional and sufficiently precise obligation conferring rights on individuals and therefore provides for a rule of direct effect (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 98 to 104).

64 In the second place, in the system of Directive 94/19, first, the finding of unavailability of a credit institution's deposits, which triggers the procedure leading to intervention by the national deposit-guarantee schemes, determines the repayment of the guaranteed amount of those deposits by those schemes, in accordance with Article 7 of that directive. Secondly, under Article 10(1) of the directive, that finding is the starting point for the period within which that repayment must be made, namely 20 working days (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 72).

65 Since that finding is linked to the objective financial position of the credit institution and generally relates to all deposits held by the credit institution and not to each individual deposit held by the institution, it is sufficient that it is established that the credit institution has not repaid certain deposits and that the conditions set out in Article 1(3)(i) of Directive 94/19 are met for the unavailability of all the deposits held by that institution to be established (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 82), including those which, at the date of that finding, were not

due and payable, in accordance with the applicable legal and contractual conditions, and which it was therefore not for the credit institution to repay.

66 As the Advocate General pointed out in point 71 of his Opinion, even if a deposit which is not due or payable, in accordance with the legal and contractual conditions applicable to it, cannot be taken into account by the competent authority in determining the unavailability of deposits, within the meaning of Article 1(3)(i) of Directive 94/19, such a deposit must, by contrast, be classified as a repayable deposit, under that provision, from the time when the competent authority has established the unavailability of the deposits held by the credit institution concerned.

67 That interpretation is corroborated by the dual objective pursued by Directive 94/19, as recalled in paragraph 51 of the present judgment. As the Advocate General pointed out in point 58 of his Opinion, if the deposits which are not due and payable, at the time when the competent authority finds, in accordance with Article 1(3)(i) of that directive, that certain deposits held by a credit institution are unavailable, were not covered by the deposit guarantee provided for by that directive, the depositors concerned would risk not being able to recover their deposits and the stability of the banking system would be put to the test because of the loss of public confidence in the guarantee of their deposits.

68 In those circumstances, it cannot be inferred from the fact that a deposit-guarantee scheme has repaid to a depositor amounts corresponding to deposits not yet due and payable, within the meaning of Article 1(3) of Directive 94/19, that that scheme has derogated from the obligation laid down in Article 10(1) of that directive.

69 It follows that Article 1(3)(i) of Directive 94/19, read in conjunction with Articles 7(6) and 10(1) of that directive, must be interpreted as meaning that the holder of a deposit which is neither due nor payable, under the legal and contractual conditions applicable to him or her, may assert his or her right to repayment of the guaranteed amount relating to that deposit once the competent authority has established the unavailability of the deposits held by the credit institution concerned.

70 In the third place, since it is exclusively determined by the conditions set out in Article 1(3)(i) of Directive 94/19, recalled in paragraph 62 of the present judgment, the finding of the unavailability of deposits held by a credit institution cannot depend on the withdrawal of the banking licence of the credit institution concerned, nor be made subject to the condition that the holder of such a deposit has previously made a request to the credit institution concerned to withdraw it, which has remained unsuccessful (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 69 and 87 and points 1 and 3 of the operative part). Those provisions of Directive 94/19 must therefore be interpreted as precluding national legislation imposing such requirements or authorising contractual clauses to provide for them.

71 In that context, it should be recalled that, in accordance with the Court's settled case-law, in all cases where the provisions of a directive appear, from the point of view of their content, to be unconditional and sufficiently precise, individuals are entitled to rely on them before the national courts against the State, either where the State has failed to transpose the directive into national law within the prescribed period or where it has transposed it incorrectly. The unconditional and sufficiently precise provisions of a directive may be invoked by individuals not only against a Member State and all the organs of its administration, but also against bodies or entities which are distinct from individuals and must be assimilated to the State, either because they are legal persons governed by public

law forming part of the State in the broad sense, or because they are subject to the authority or supervision of a public authority, or because they have been entrusted by such an authority with a task in the public interest and have been endowed with exorbitant powers for that purpose (see, to that effect, judgments of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraphs 32 to 34, and of 22 March 2018, *Anisimovienė and Others*, C-688/15 and C-109/16, EU:C:2018:209, paragraph 109).

72 Furthermore, any national court, seised within the framework of its jurisdiction, is obliged to disapply, on its own authority, any national provision contrary to a provision of Union law which has direct effect in the dispute before it, without it being necessary for that court to request or await the prior setting aside of such a provision by legislative or other constitutional means (see, to that effect, judgments of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 35, and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 160 and 161 and the case-law cited).

73 Accordingly, since, as recalled in paragraph 63 of the present judgment, Article 1(3)(i) of Directive 94/19 is of direct effect, a national court hearing an action brought by the holder of a deposit which has become unavailable, within the meaning of that provision, for compensation for damage caused by the late repayment of the guaranteed amount of that deposit, must, in accordance with the principle of primacy of Union law, set aside a provision of national law which makes the repayment of that amount subject to the conditions mentioned in paragraph 70 of the present judgment.

74 In the context of such an action, the national court may also not take account of a contractual clause which merely reflects a provision of national law incompatible with Article 1(3)(i) of Directive 94/19. As the Advocate General pointed out in point 69 of his Opinion, where that contractual clause incorporates the content of a provision of national law which is incompatible with Union law, the national court must extend to that clause the consequences arising from the incompatibility of that provision with Union law.

75 In the light of the foregoing considerations, the answer to the fourth question is that the combined provisions of Article 1(3)(i), Article 7(6) and Article 10(1) of Directive 94/19 must be interpreted as precluding national legislation or a contractual clause according to which a deposit made with a credit institution whose payments have been suspended are to become due only following the withdrawal, by the competent authority, of the banking licence issued to that institution and on condition that the depositor has expressly requested the repayment of that deposit. In accordance with the principle of primacy of Union law, any national court hearing an action for damages allegedly caused by the repayment of the guaranteed amount of such a deposit outside the period laid down in Article 10(1) of that directive is required to set aside such national legislation or such a contractual clause for the purposes of deciding that action.

The second question

76 By the first part of the second question, the referring court seeks, in essence, to ascertain whether Article 17(3) of Regulation No 1093/2010, read in the light of recital 27 thereof, must be interpreted as meaning that a recommendation of the EBA, adopted on the basis of that provision and finding an infringement of Article 1(3)(i) of Directive 94/19, such as Recommendation EBA/REC/2014/02, may be invoked by a depositor in support of a claim

for damages caused by that infringement of EU law, even though such a depositor is not an addressee of that recommendation.

77 By the second part of that question, the referring court asks whether Recommendation EBA/REC/2014/02 is valid, in that, first, it finds a breach of a provision of Union law which, according to that court, does not define a clear and unconditional obligation, for the purposes of recital 27 of that regulation, and, secondly, it is addressed to the BNB which, again according to the referring court, has no connection with the national deposit-guarantee scheme and is not a competent authority within the meaning of Article 4(2)(iii) of Regulation No 1093/2010.

The interpretation of Article 17(3) of Regulation No 1093/2010

78 The first subparagraph of Article 17(3) of Regulation No 1093/2010 provides that the EBA may, no later than two months after the initiation of the investigation referred to in paragraph 2 thereof, address a recommendation to the competent authority concerned setting out the measures to be taken to comply with Union law. Such a recommendation is to be issued following an investigation initiated by the EBA where national authorities are alleged to have failed to apply or to have applied incorrectly or insufficiently Union law, in particular the acts referred to in Article 1(2) of that regulation, including Directive 94/19, in their supervisory practices.

79 As the Advocate General noted in point 76 of his Opinion, a recommendation of the EBA based on Article 17(3) of Regulation No 1093/2010 falls within the category of acts of the Union provided for in the fifth paragraph of Article 288 TFEU, the latter provision conferring on the institutions empowered to adopt such acts a power to exhort and to persuade, distinct from the power to adopt acts having binding force (see, to that effect, judgment of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 26).

80 However, it is clear from the Court's case-law that, even if recommendations are not intended to produce binding legal effects, national courts are obliged to take them into consideration with a view to resolving the disputes submitted to them, in particular when they are intended to supplement binding European Union provisions (see, to that effect, judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 18; of 11 September 2003, *Altair Chimica*, C-207/01, EU:C:2003:451, paragraph 41; and of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraph 41 and the case-law cited).

81 In the light of the foregoing considerations, the answer to the first part of the second question referred for a preliminary ruling is that Article 17(3) of Regulation No 1093/2010, read in the light of recital 27 thereof, must be interpreted as meaning that a national court must take into consideration a recommendation of the EBA adopted on the basis of that provision, with a view to resolving the dispute before it, in particular in the context of an action seeking to establish the liability of a Member State for damage caused to an individual as a result of the non-application or incorrect or insufficient application of Union law giving rise to the investigation procedure which led to the adoption of that recommendation. Individuals harmed by the breach of Union law established by such a recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question.

The validity of Recommendation EBA/REC/2014/02

82 First of all, it should be noted that, while Article 263 TFEU excludes the Court's review of acts having the nature of a recommendation in the context of an action for annulment, it follows from Article 19(3)(b) TEU and the first paragraph of Article 267(b) TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation and validity of acts of the institutions of the Union, without any exception (see, to that effect, judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 8; of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 71; of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 44; and of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 71 and the case-law cited).

83 It follows that the Court has jurisdiction to give a preliminary ruling on the validity of Recommendation EBA/REC/2014/02, by which the EBA requested the BNB and the FGVB to take the measures necessary to comply with Directive 94/19, in particular to put an end to the infringement of Article 1(3)(i) thereof.

84 According to the referring court, since, contrary to recital 27 of Regulation No 1093/2010, that provision does not establish clear and unconditional obligations on the part of the Member States and does not directly create rights on the part of depositors, it could not be considered, in Recommendation EBA/REC/2014/02, that that provision had been infringed.

85 In that regard, it should be noted at the outset that Directive 94/19 is one of the Union acts referred to in Article 1(2) of Regulation No 1093/2010 and that, therefore, in accordance with Article 17(1) and the first paragraph of Article 17(2) of that regulation, the EBA may investigate the alleged non-application or incorrect or insufficient application of the provisions of that directive by a competent authority.

86 Furthermore, as was noted in paragraph 63 of the present judgment, Article 1(3)(i) of Directive 94/19, in addition to being of direct effect and constituting a rule of law intended to confer rights enabling depositors to seek compensation for damage caused by the late repayment of their deposits, in breach of that provision, imposes an unconditional and sufficiently precise obligation on the competent authority, within the meaning of Article 4(2)(iii) of Regulation No 1093/2010.

87 In those circumstances, as noted by the Advocate General in point 116 of his Opinion, the referring court's doubts as to the validity of Recommendation EBA/REC/2014/02, in that Article 1(3)(i) of Directive 94/19 does not establish clear and unconditional obligations, are unfounded.

88 It should be added that recital 27 of Regulation No 1093/2010, in so far as it states that the mechanism provided for in Article 17 of that regulation 'should apply in areas where Union law defines clear and unconditional obligations', cannot be understood as making the adoption of a recommendation on the basis of Article 17(3) of that regulation subject to the condition that the recommendation necessarily refers to a rule of Union law defining clear and unconditional obligations.

89 Only Article 17(6) of Regulation No 1093/2010, as stated in recital 29 of that regulation, makes the adoption, by the EBA, of an individual decision with regard to a financial institution subject to the condition that that decision is based on a provision contained in an act referred to in Article 1(2) of that regulation which is 'directly applicable to financial institutions'. By contrast, such a condition is not included either in Article 17(1) and (2) of

that regulation, which concerns the opening of the investigation procedure, or in Article 17(3) of that regulation, which concerns the issuing of a recommendation by the EBA. Thus, limiting the exercise of the powers conferred on the EBA by Article 17(2) and (3) of Regulation No 1093/2010 to cases involving clear and unconditional provisions of Union law would amount to establishing an additional condition not provided for by those provisions.

90 While the preamble to a Union act may explain the content of the provisions of that act and provides elements of interpretation which are likely to shed light on the intention of the author of that act, it has no binding legal value and cannot be relied upon to derogate from the provisions of the act itself or to interpret those provisions in a manner contrary to their wording (see, to that effect, judgment of 19 December 2019, *Puppinck and Others* v *Commission*, C-418/18 P, EU:C:2019:1113, paragraphs 75 and 76 and the case-law cited).

91 The referring court's doubts as to the validity of Recommendation EBA/REC/2014/02 relate, moreover, to the fact that it was addressed to the FGVB and the BNB, whereas, according to that court, at the date of that recommendation, the BNB had no connection with the national deposit-guarantee scheme and was not a competent authority within the meaning of Article 4(2)(iii) of Regulation No 1093/2010.

92 It follows from that provision that the concept of 'competent authorities', for the purposes of that regulation, covers, 'with regard to deposit guarantee schemes, bodies which administer deposit-guarantee schemes pursuant to Directive 94/19 …, or, where the operation of the deposit-guarantee scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive'.

93 Furthermore, that provision must be read in conjunction with Article 3(1) of Directive 94/19, which requires each Member State to ensure the establishment and official recognition within its territory of one or more deposit-guarantee schemes, as well as with Article 1(3)(i) of that directive, which leaves a margin of discretion to the Member States in order to designate the authority competent to establish the unavailability of deposits (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 99).

94 As the Advocate General pointed out in point 107 of his Opinion, in the context of the case giving rise to the judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807), it was established that the BNB was the competent authority for determining the unavailability of deposits in accordance with Article 1(3)(i) of Directive 94/19.

95 Therefore, it is for the referring court to ascertain, in the light of the Bulgarian legislation applicable on 17 October 2014, the date on which the EBA sent Recommendation EBA/REC/2014/02 to the BNB, whether the BNB was the body responsible for the management or, as the case may be, the supervision of the national deposit-guarantee scheme in accordance with Directive 94/19 and, in particular, whether it was the competent authority for determining the unavailability of deposits pursuant to Article 1(3)(i) of that directive.

96 To that end, it is incumbent upon it to verify, in particular, whether it is possible to interpret in conformity with that provision Article 36 of the Law on credit institutions, which gives the BNB the power compulsorily to withdraw the licence issued to a bank when it has not carried out its activities for more than seven working days, its monetary obligations having

become payable, where that non-performance is directly linked to the financial situation of that bank and where the BNB deems it unlikely that the latter will pay those monetary obligations within an acceptable period of time, and that withdrawal decision is to be taken within five working days of such a finding.

97 In any event, the failure to establish the unavailability of deposits, within the meaning of Article 1(3)(i) of Directive 94/19, is capable of constituting a sufficiently serious breach of Union law and of rendering a Member State liable for a breach of Union law (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 115).

98 It is true that, in Recommendation EBA/REC/2014/02, the EBA considered that, in the absence of an explicit act establishing the unavailability of KTB's deposits within the meaning of Article 1(3)(i) of Directive 94/19, the decision taken by the BNB to place KTB under special supervision and to suspend KTB's obligations was tantamount to such a finding.

99 However, as the Court has already held, the unavailability of deposits must be established by an explicit act of the competent national authority and cannot be inferred from other acts of the national authorities, such as the placing under special supervision of a bank whose deposits have become unavailable (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 73 and 77).

100 It follows that the referring court cannot, for the purpose of deciding the dispute in the main proceedings, rely on the premiss, contrary to Article 1(3)(i) of Directive 94/19, as interpreted by the Court, that the decision of the BNB to place KTB under special supervision and to suspend its obligations can be equated with a finding that KTB's deposits are unavailable.

101 In the light of the foregoing considerations, the answer to the second part of the second question is that Recommendation EBA/REC/2014/02 is invalid, in so far as it equated the decision of the BNB to place KTB under special supervision and to suspend its obligations to a finding of unavailability of deposits, within the meaning of Article 1(3)(i) of Directive 94/19.

Question 3(b)

102 By its question 3(b), the referring court seeks, in essence, to ascertain whether Article 2, seventh indent, of Directive 2001/24, read in the light of Article 17(1) and Article 52(1) of the Charter, must be interpreted as meaning that a measure suspending payments, as a supervisory measure applied by a national central bank for the reorganisation of a credit institution, constitutes an unjustified and disproportionate interference with the property rights of depositors with that credit institution which may give rise to a claim for compensation for damage caused by such a breach of Union law on the part of those depositors, even if contractual interest has been applied for the period covered by the measure and deposits exceeding the guaranteed amount may be recovered, together with interest, in the context of general bankruptcy proceedings under national law.

103 In that regard, it should be noted that Directive 2001/24, as is apparent from recital 6 thereof, establishes a system of mutual recognition of the measures taken by each Member State to restore the viability of the credit institutions it has authorised, without aiming to harmonise national legislation in this area (see, to that effect, judgments of 24 October 2013, *LBI*, C-85/12, EU:C:2013:697, paragraph 22, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 104).

104 Moreover, contrary to what the BNB claims, Directive 2001/24 may be applicable to a situation that is purely internal to a Member State. As is clear from the very wording of Article 1(1), read in the light of recital 2, of that directive, it applies to credit institutions, in particular where they have branches in a Member State other than that in which their registered office is situated, as well as to those branches. Furthermore, even if Directive 2001/24 aims at specifically regulating a situation which may arise in the event of difficulties in a credit institution with branches in other Member States, there is no indication that the reorganisation measures provided for in that directive apply only to such a cross-border situation.

105 In accordance with the seventh indent of Article 2 of Directive 2001/24, measures which, on the one hand, are intended to preserve or restore the financial situation of a credit institution and, on the other hand, are liable to affect the pre-existing rights of third parties, must be regarded as reorganisation measures within the meaning of that directive. Among those reorganisation measures must, in particular, be counted the measures suspending payments, provided, in particular, as is apparent from recital 6 and Article 3(1) of that directive, that they have been adopted by an administrative or judicial authority (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 110).

106 Moreover, since such measures suspending payments, within the meaning of the seventh indent of Article 2 of Directive 2001/24, must be regarded as implementing Union law, within the meaning of Article 51(1) of the Charter, they must comply with the fundamental rights enshrined in the Charter, in particular the right to property guaranteed in Article 17(1) thereof (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 19, and of 13 June 2019, *Moro*, C-646/17, EU:C:2019:489, paragraphs 66 and 67 and the case-law cited).

107 However, the right to property guaranteed in Article 17(1) of the Charter is not an absolute prerogative and its exercise may entail limitations, provided that they, in accordance with Article 52(1) of the Charter, are provided for by law, respect the essential content of that right and that, in accordance with the principle of proportionality, they are necessary and effectively meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others (see, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited).

108 Since measures suspending payments, such as those at issue in the main proceedings, are designed to preserve or restore the financial situation of a credit institution, they must be regarded as effectively meeting an objective of general interest recognised by the Union. Financial services play a central role in the EU economy, with banks and credit institutions being an essential source of financing for businesses operating in the various markets. In addition, banks are often interconnected and many of them operate internationally. For that reason, the failure of one or more banks risks spreading rapidly to other banks either in the Member State concerned or in other Member States. That is liable, in turn, to produce negative spill-over effects in other sectors of the economy (see, to that effect, judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 50, and of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 72).

109 It is for the referring court to determine, having regard to all the circumstances which characterise the main proceedings, whether the supervisory measures at issue constitute,

in the light of the objectives pursued, a disproportionate and intolerable interference with the very substance of the applicant's right to property, in particular if, in view of the imminent risk of financial loss to which the depositors with KTB would have been exposed in the event of KTB's bankruptcy, other less restrictive measures, such as a partial suspension of payments or a partial limitation of KTB's activities, would have achieved the same results.

110 It is apparent from the request for a preliminary ruling that the supervisory measures at issue in the main proceedings were limited in time and that, during that period, in accordance with national law, contractual interest accrued on the suspended pecuniary commitments. Moreover, in addition to the fact that the guaranteed amount of the deposits with KTB was repaid to the applicant in the main proceedings through the FGVB, the amount of its deposits exceeding the guaranteed amount remains recoverable in the context of the bankruptcy proceedings instituted in respect of that bank.

111 In light of the foregoing considerations, the answer to question 3(b) is that Article 2, seventh indent, of Directive 2001/24, read in the light of Article 17(1) and Article 52(1) of the Charter, must be interpreted as meaning that a measure suspending payments applied by a national central bank to a credit institution as a reorganisation measure intended to preserve or restore the financial situation of that institution constitutes an unjustified and disproportionate interference with the exercise of the right of ownership of depositors with that institution if it does not respect the essential content of that right and if, having regard to the imminent risk of financial loss to which the depositors would have been exposed in the event of its bankruptcy, other less restrictive measures would have made it possible to achieve the same results, which is for the national court to verify.

Questions 3(c) to (e)

112 By questions 3(c), (d) and (e), which should be considered together, the national court asks, in essence, whether the principles laid down by the Court in relation to the liability of a Member State for damage caused to individuals as a result of an infringement of Union law must be interpreted as precluding national legislation under which the right of individuals to obtain compensation for damage caused by the national authority concerned is subject, first, to the prior annulment of the act or omission causing the damage, secondly, to the intentional nature of the damage and, thirdly, to the obligation for the individual to prove the existence of real and certain material damage at the time of bringing the action for compensation.

113 First of all, it should be recalled that, according to settled case-law, the principle of State liability for damage caused to individuals by infringements of Union law for which it is responsible is inherent in the system of Treaties on which the Union is founded. Individuals who have suffered damage have a right to compensation if three conditions are met, namely that the rule of Union law infringed is intended to confer rights on them, that the infringement of that rule is sufficiently serious and that there is a direct causal link between that infringement and the damage suffered by those individuals (judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 92 and 94 and the case-law cited).

114 While Union law does not preclude the State liability for infringements of Union law from being incurred under less restrictive conditions on the basis of national law, it does, however, preclude national law from imposing additional conditions in that regard (judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 120 and 121 and the case-law cited).

115 As noted in paragraph 63 of the present judgment, Article 1(3)(i) of Directive 94/19 constitutes a rule of law intended to confer rights on individuals and enabling depositors to bring an action for compensation for damage caused by the late repayment of deposits, while leaving it to the national court hearing such an action to verify, first of all, whether that is the case, whether the failure to establish the unavailability of deposits within the five-working-day period provided for in that provision, despite the fact that the conditions clearly set out in that provision were met, constitutes, in the circumstances at issue, a sufficiently serious breach within the meaning of Union law, and, secondly, whether there is a direct causal link between that breach and the damage suffered by the depositor (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 117).

116 It is necessary, moreover, to note that, in accordance with the principle of procedural autonomy, in the absence of Union law on the subject, it is for the domestic legal order of each Member State to designate the courts having jurisdiction and to lay down the detailed rules governing legal proceedings designed to safeguard the rights which individuals derive from Union law. Thus, once the conditions for State liability have been met, which is to be determined by the national courts, it is within the framework of national liability law that it is incumbent on the State to make good the consequences of the damage caused to the individual by the breach of Union law in question, provided that the conditions laid down by the national laws applicable for that purpose are not less favourable than those applicable to similar claims based on a breach of national law (principle of equivalence) and are not so adjusted as to make it impossible or excessively difficult in practice to obtain reparation (principle of effectiveness) (judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 122 and 123 and the case-law cited). Compliance with those two principles must be examined in the light of the role of the rules concerned in the entire procedure, the conduct of the procedure and the particularities of those rules before the various national bodies (see, in this sense, judgment of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 31 and the case-law cited).

117 With regard, in particular, to the principle of effectiveness, whenever the question arises as to whether a national procedural provision makes it impossible or excessively difficult to exercise the rights conferred on individuals by the legal order of the Union, account must be taken, where appropriate, of the principles underlying the national court system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of proceedings (see, to that effect, judgments of 14 December 1995, *Peterbroeck*, C-312/93, EU:C:1995:437, paragraph 14; of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraph 19; of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 53; and of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 42).

118 The questions referred must be examined in the light of those considerations.

119 Concerning the first procedural requirement under national law, according to which the bringing of an action by an individual for damages allegedly caused by a breach of Union law is subject to the prior annulment of the act or omission causing the damage, the national court states that such a condition cannot be fulfilled in the main proceedings, since the supervisory and reorganisation measures taken by the BNB in respect of KTB were not aimed at private individuals, in particular depositors with that credit institution, and that, therefore, those individuals are not entitled to bring an action for annulment against such measures.

120 Such a condition may make it excessively difficult to obtain compensation for the damage caused by the infringement of Union law where, in practice, the annulment of the act or omission giving rise to that damage is excluded or very limited and, consequently, it is not reasonable to impose such a condition on the injured party (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 143, 146 and 147).

121 As regards the second condition laid down by national law, namely that the conduct of the public authority or official causing the damage must be intentional, Union law precludes national legislation which makes the right of individuals to obtain compensation subject to the additional condition, going beyond a sufficiently serious breach of Union law based on the intentional nature of the conduct, such as that arising from Article 79(8) of the Law on credit institutions (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraphs 126 to 128 and point 5, second indent, of the operative part).

122 As regards the third condition laid down by national law, requiring the applicant to prove that it suffered real and certain damage at the time when the action for damages was brought, it should be borne in mind that the obligation for injured individuals to establish to the requisite legal standard the extent of the damage suffered as a result of a breach of Union law constitutes, in principle, a condition for the State's liability for such damage.

123 It is apparent from the request for a preliminary ruling that the applicant in the main proceedings has clearly quantified the damage which it alleges to have suffered as a result of the infringements of Union law which it attributes to the BNB. Therefore, in the context of its first head of claim, the applicant assessed its loss by way of statutory interest on the guaranteed amount of its deposits with KTB at BGN 8 627.96 (approximately EUR 4 400) for the period between the date on which that bank became insolvent and the date on which the guaranteed amounts of its deposits were repaid to it. In the context of its second head of claim, the applicant in the main proceedings estimated at BGN 44 070.90 (approximately EUR 22 500) its loss in respect of the amount of its deposits exceeding the ceiling of the guaranteed amount.

124 The referring court considers that the second head of claim brought by the applicant in the main proceedings relates not to actual and certain damage but to damage which has not yet materialised, since the bankruptcy proceedings, in the context of which the applicant in the main proceedings could be reimbursed the amounts exceeding the guaranteed amount of its deposits, have not yet been closed. However, although such a circumstance must be taken into consideration in the examination of the merits of the action in the main proceedings, it is irrelevant as regards the admissibility of that action.

125 In that regard, it should be noted that, since compensation for damage caused to individuals by infringements of Union law must be commensurate with the loss or damage sustained so as to ensure the effective protection of their rights (judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 82, and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 46), the national courts are entitled to ensure that the protection of rights guaranteed by the legal order of the Union does not result in unjust enrichment of the persons concerned (see, to that effect, judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 94).

126 Nevertheless, it should also be noted that the effective protection of the right to compensation for damage caused to individuals by infringements of Union law must make it possible to bring an action for damages based on imminent damage foreseeable with

sufficient certainty, even if the damage cannot yet be precisely assessed (see, by analogy, judgment of 2 June 1976, *Kampffmeyer and Others* v *EEC*, 56/74 to 60/74, EU:C:1976:78, paragraph 6).

127 In the light of the foregoing considerations, the answer to question 3(c) to (e) is that Union law, in particular the principle of liability of the Member States for damage caused to individuals as a result of a breach of Union law, and the principles of equivalence and effectiveness, must be interpreted as meaning that:

– it does not preclude national legislation which makes the right of individuals to obtain compensation for damage suffered as a result of a breach of Union law subject to the prior annulment of the administrative act or omission which caused the damage, provided that such annulment, even if required in respect of similar claims based on a breach of national law, is not in practice precluded or very limited;

– it precludes national legislation which makes the right of individuals to obtain compensation for damage suffered as a result of a breach of Union law subject to the condition that the damage caused by the national authority in question be intentional;

– it does not preclude national legislation which makes the right of individuals to obtain compensation for damage suffered as a result of a breach of Union law subject to the condition of proving actual and certain damage at the time when the action is brought, provided that that condition is not less favourable than those applicable to similar claims based on a breach of national law and is not so designed as to make it impossible or excessively difficult, having regard to the particular features of specific cases, to exercise such a right.

The first question

128 By its first question, the national court asks, in essence, whether the principles of equivalence and effectiveness must be interpreted as meaning that they require a court seised of an action for damages formally based on a provision of national law relating to State liability for damage resulting from an administrative activity, but in support of which pleas are raised alleging infringement of Union law as a result of such activity, to regard that action of its own motion as being based on a failure to fulfil the obligations arising, for the Member States, from Article 4(3) TEU.

129 The referring court states, in that regard, that, in the context of an action for State liability resulting from judicial activity brought on the basis of the Grazhdanski protsesualen kodeks (Code of Civil Procedure), the competent court is required to classify such an action of its own motion, taking into account the circumstances on which it is based. By contrast, in the context of an action for damages brought on the basis of the APK, such as that at issue in the main proceedings, the competent court may not classify such an action of its own motion and, thus, where appropriate, apply Union law of its own motion.

130 It should be recalled at the outset that litigants must have a judicial remedy enabling them to defend the rights guaranteed to them by Union law (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 142 to 144), in particular the right to compensation which, where the conditions relating to State liability, referred to in paragraph 113 of the present judgment, are met, is directly based on Union law.

131 As pointed out in paragraph 116 of the present judgment, in the absence of rules of Union law on the subject, the question of the legal classification of an action is, by virtue of the principle of procedural autonomy, a matter for the domestic law of each Member State, subject to compliance with the principles of equivalence and effectiveness.

132 As regards, first, the principle of equivalence, it is irrelevant under national law that the court hearing an action brought under the APK, seeking to hold the State liable for damage resulting from an administrative activity, is not able to classify such an action of its own motion, taking into account the circumstances on which it is based, whereas a court ruling on an action brought under the Code of Civil Procedure, seeking to hold the State liable for damages resulting from judicial activity, is obliged to make such a classification.

133 The principle of equivalence implies equal treatment of actions based on an infringement of national law and similar actions based on an infringement of Union law, and not the equivalence of national procedural rules applicable to disputes of a different nature such as, as in the main proceedings, civil proceedings, on the one hand, and administrative proceedings, on the other hand (see, to that effect, judgment of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 34).

134 Secondly, the principle of effectiveness, noted in paragraph 117 of the present judgment, does not require the court seised under national law of an action for State liability for damage caused to individuals as a result of a breach of Union law to regard that action of its own motion as being based on Article 4(3) TEU, provided that nothing in national law prevents that court from examining the pleas in law alleging a breach of Union law relied on in support of the action. A solution to the contrary would be such as to make it impossible or excessively difficult for injured parties to exercise their right to compensation based on Union law.

135 That interpretation is not called into question by the Court's case-law according to which the principle of effectiveness does not, in principle, require national courts to raise of their own motion a plea alleging infringement of provisions of Union law, where the examination of that plea would require them to go beyond the limits of the dispute as defined by the parties, by relying on facts and circumstances other than those on which the party with an interest in the application of those provisions based its claim (judgments of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraph 22; of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraphs 36 and 41; and of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 32).

136 Since the applicant has in fact raised a plea in law alleging an infringement of Union law, in order to establish State liability, examination of that plea by the competent national court will not normally require it to go beyond the limits of the dispute as defined by that applicant.

137 In the light of the foregoing considerations, the answer to the first question is that the principles of equivalence and effectiveness must be interpreted as meaning that they do not oblige a court ruling on a claim for damages formally based on a provision of national law relating to State liability for damage resulting from an administrative activity, but in support of which pleas in law alleging infringement of Union law as a result of such activity are raised, to regard that action of its own motion as being based on Article 4(3) TEU, in so far as that court is not prevented, by the applicable provisions of national law, to examine the pleas in law alleging infringement of Union law relied on in support of that action.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 7(6) of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, as amended by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009, must be interpreted as meaning that the depositor's right to compensation which it provides for covers only the repayment, by the deposit-guarantee scheme, of deposits which are unavailable to that depositor, up to the amount laid down in Article 7(1a) of that directive, as amended by Directive 2009/14, following a finding of unavailability, by the competent national authority, of deposits held by the credit institution concerned, in accordance with Article 1(3)(i) of that directive, as amended by Directive 2009/14, so that Article 7(6) of that directive, as amended by Directive 2009/14, cannot establish, to the benefit of that depositor, a right to compensation for damage caused by the late repayment of the guaranteed amount of all his or her deposits or by inadequate supervision by the competent national authorities of the credit institution whose deposits have become unavailable.**

2. **The combined provisions of Article 1(3)(i), Article 7(6) and Article 10(1) of Directive 94/19, as amended by Directive 2009/14, must be interpreted as precluding national legislation or a contractual clause according to which a deposit made with a credit institution whose payments have been suspended are to become due only following the withdrawal, by the competent authority, of the banking licence issued to that institution and on condition that the depositor has expressly requested the repayment of that deposit. In accordance with the principle of primacy of Union law, any national court hearing an action for damages allegedly caused by the repayment of the guaranteed amount of such a deposit outside the period laid down in Article 10(1) of that directive, as amended by Directive 2009/14, is required to set aside such national legislation or such a contractual clause for the purposes of deciding that action.**

3. **Article 17(3) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, read in the light of recital 27 thereof, must be interpreted as meaning that a national court must take into consideration a recommendation of the European Banking Authority adopted on the basis of that provision, with a view to resolving the dispute before it, in particular in the context of an action seeking to establish the liability of a Member State for damage caused to an individual as a result of the non-application or incorrect or insufficient application of Union law giving rise to the investigation procedure which led to the adoption of that recommendation. Individuals harmed by the breach of Union law established by such a recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question;**

Recommendation EBA/REC/2014/02 of the European Banking Authority of 17 October 2014 addressed to the Balgarska Narodna Banka (Bulgarian National Bank) and the Fund za garantirane na vlogovete v bankite (Bank Deposit Guarantee Fund) on the measures necessary to comply with Directive 94/19/EC is invalid, in so far as it equated the decision of the Balgarska Narodna Banka (Bulgarian National Bank) to place Korporativna targovska banka AD under special supervision and to suspend its obligations to a finding

of unavailability of deposits, within the meaning of Article 1(3)(i) of Directive 94/19, as amended by Directive 2009/14.

4. Article 2, seventh indent, of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, read in the light of Article 17(1) and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a measure suspending payments applied by a national central bank to a credit institution as a reorganisation measure intended to preserve or restore the financial situation of that institution constitutes an unjustified and disproportionate interference with the exercise of the right of ownership of depositors with that institution if it does not respect the essential content of that right and if, having regard to the imminent risk of financial loss to which the depositors would have been exposed in the event of its bankruptcy, other less restrictive measures would have made it possible to achieve the same results, which is for the national court to verify.

5. Union law, in particular the principle of liability of the Member States for damage caused to individuals as a result of a breach of Union law, and the principles of equivalence and effectiveness, must be interpreted as meaning that:

– **it does not preclude national legislation which makes the right of individuals to obtain compensation for damage suffered as a result of a breach of Union law subject to the prior annulment of the administrative act or omission which caused the damage, provided that such annulment, even if required in respect of similar claims based on a breach of national law, is not in practice precluded or very limited;**

– **it precludes national legislation which makes the right of individuals to obtain compensation for damage suffered as a result of a breach of Union law subject to the condition that the damage caused by the national authority in question be intentional;**

– **it does not preclude national legislation which makes the right of individuals to obtain compensation for damage suffered as a result of a breach of Union law subject to the condition of proving actual and certain damage at the time when the action is brought, provided that that condition is not less favourable than those applicable to similar claims based on a breach of national law and is not so designed as to make it impossible or excessively difficult, having regard to the particular features of specific cases, to exercise such a right.**

6. The principles of equivalence and effectiveness must be interpreted as meaning that they do not oblige a court ruling on a claim for damages formally based on a provision of national law relating to State liability for damage resulting from an administrative activity, but in support of which pleas in law alleging infringement of Union law as a result of such activity are raised, to regard that action of its own motion as being based on Article 4(3) TEU, in so far as that court is not prevented, by the applicable provisions of national law, to examine the pleas in law alleging infringement of Union law relied on in support of that action.

JUDGMENT OF THE COURT (Second Chamber)

3 June 2021 (*)

(Reference for a preliminary ruling – Social policy – Equal pay for male and female workers – Article 157 TFEU – Direct effect – Concept of 'work of equal value' – Claims seeking equal pay for work of equal value – Single source – Workers of different sex having the same employer – Different establishments – Comparison)

In Case C-624/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Watford Employment Tribunal (United Kingdom), made by decision of 21 August 2019, received at the Court on 22 August 2019, in the proceedings

K and Others,

L, M, N and Others,

O, P, Q, R, S, T

v

Tesco Stores Ltd,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, A. Kumin, T. von Danwitz (Rapporteur), P.G. Xuereb and I. Ziemele, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– K and Others, by K. Daurka and B. Croft, Solicitors, S. Jones QC, A. Blake and N. Connor, Barristers, and C. Barnard,

– L, M, N and Others, by E. Parkes, Solicitor, K. Bryant QC and S. Butler, N. Cunningham and C. Bell, Barristers,

– Tesco Stores Ltd, by A. Taggart, Solicitor, and P. Epstein QC,

– the European Commission, by L. Flynn and A. Szmytkowska, 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 Article 157 TFEU.

2 The request has been made in proceedings between approximately 6 000 workers and Tesco Stores Ltd, which employs or employed those workers in its stores, concerning a claim for equal pay for male and female workers.

Legal context

EU law

Provisions relating to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union

3 By Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1), the Council of the European Union approved that agreement (OJ 2020 L 29, p. 7; 'the Withdrawal Agreement'), which was attached to the decision, on behalf of the European Union and the European Atomic Energy Community (EAEC).

4 Article 86 of the Withdrawal Agreement, headed 'Pending cases before the Court of Justice of the European Union', provides in paragraphs 2 and 3:

'2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union, and requests for preliminary rulings shall be considered as having been made, at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice …'

5 In accordance with Article 126 of the Withdrawal Agreement, the transition period started on the date of entry into force of that agreement and ended on 31 December 2020.

Provisions relating to the principle of equal pay for male and female workers

6 Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) was worded as follows:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

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:

…

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

7 Article 157 TFEU provides:

'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:

…

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

…'

United Kingdom law

8 Section 79 of the Equality Act 2010, relating to the question of comparability, provides:

'(1) This section applies for the purposes of this Chapter.

(2) If A is employed, B is a comparator if subsection (3) or (4) applies.

…

(4) This subsection applies if—

(a) B is employed by A's employer or an associate of A's employer,

(b) B works at an establishment other than the one at which A works, and

(c) common terms apply at the establishments (either generally or as between A and B).

…'

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

9 Tesco Stores is a retailer that sells its products online and in 3 200 stores located in the United Kingdom. The stores, of varying size, have a total of approximately 250 000 workers, who are hourly paid and carry out various types of jobs. That company also has a distribution network of 24 distribution centres with approximately 11 000 employees, who are also hourly paid and carry out various types of jobs.

10 The claimants in the main proceedings are employees or former employees of Tesco Stores, both female ('the female claimants in the main proceedings') and male, who work or used to work in its stores. They brought proceedings against Tesco Stores before the referring tribunal, the Watford Employment Tribunal (United Kingdom), from February 2018 onwards, on the ground that they had not received equal pay for equal work, contrary to the Equality Act 2010 and Article 157 TFEU.

11 The referring tribunal stayed the male parties' claims, since it took the view that their outcome depended on the outcome of the claims brought by the female claimants in the main proceedings.

12 In support of their equal pay claims, the female claimants in the main proceedings submit, first, that their work and that of the male workers employed by Tesco Stores in the distribution centres in its network are of equal value and, second, that they are entitled to compare their work and that of those workers, although the work is carried out in different establishments, under both the Equality Act 2010 and Article 157 TFEU. They contend that, in accordance with section 79(4) of the Equality Act 2010, common terms of employment are applicable in the stores and distribution centres. Furthermore, in accordance with Article 157 TFEU, there is a single source, namely Tesco Stores, for the terms and conditions of employment of the female claimants in the main proceedings and those workers.

13 Tesco Stores disputes that the female claimants in the main proceedings have any right to compare themselves with the male workers at the distribution centres in its network, on

the ground, first, that there are not common terms of employment, for the purposes of section 79(4) of the Equality Act 2010. It submits, next, that Article 157 TFEU is not directly effective in the context of claims based on work of equal value, and therefore the female claimants in the main proceedings cannot rely on that provision before the referring tribunal. Finally, and in any event, Tesco Stores contends that it cannot be classified as a 'single source' for the terms and conditions of employment in the stores and the distribution centres in its network.

14 The referring tribunal states that the female claimants in the main proceedings and the male workers taken as comparators, although employed in different establishments, have the same employer. It explains, furthermore, that it has adopted orders for the management of the claims, in order to determine, by means of expert reports, whether the jobs of the female claimants in the main proceedings are of equal value to those of their comparators.

15 The referring tribunal observes in respect of Article 157 TFEU that there is uncertainty, within United Kingdom courts and tribunals, regarding its direct effect, connected in particular with the distinction articulated in paragraph 18 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), between discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay and discrimination which can only be identified by reference to more explicit implementing provisions of EU or national law. The claims at issue in the main proceedings could fall within the latter category, where there is no direct effect.

16 In those circumstances, the Watford Employment Tribunal decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 157 [TFEU] directly effective in claims made on the basis that claimants are performing work of equal value to their comparators?

(2) If the answer to Question 1 is no, is the single source test for comparability in [Article] 157 [TFEU] distinct from the question of equal value, and if so, does that test have direct effect?'

Jurisdiction of the Court

17 As a preliminary point, it follows from Article 86 of the Withdrawal Agreement, which entered into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom which were made before the end of the transition period set at 31 December 2020, and this is so in the case of the present request for a preliminary ruling.

Consideration of the questions referred

First question

18 By its first question, the referring tribunal asks, in essence, whether Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for 'work of equal value', as referred to in that article, is pleaded.

19 As is apparent from the order for reference, Tesco Stores submitted in the main proceedings that Article 157 TFEU lacks direct effect in circumstances, such as those obtaining in those proceedings, in which the workers compared perform different work. In

support of that contention, the respondent company in the main proceedings maintains, in its observations submitted to the Court, that the criterion of 'work of equal value', unlike the criterion of 'equal work', requires definition by provisions of national or EU law. Furthermore, the findings of the Court in paragraphs 18 to 23 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), and the Court's subsequent case-law, are said to bear out such an interpretation. In particular, according to that company, in essence, reliance upon the principle of equal pay for male and female workers when work of equal value is being compared is founded on a claim of discrimination that is identifiable only by reference to provisions more explicit than those of Article 157 TFEU.

20 It must be pointed out at the outset that the very wording of Article 157 TFEU cannot support that interpretation. That article states that each Member State is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Therefore, it imposes, clearly and precisely, an obligation to achieve a particular result and is mandatory as regards both 'equal work' and 'work of equal value'.

21 Thus, the Court has already held that, since Article 157 TFEU is of such a mandatory nature, the prohibition on discrimination between male and female workers applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals (judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 67 and the case-law cited).

22 According to the Court's settled case-law, that provision produces direct effects by creating rights for individuals which the national courts are responsible for safeguarding (see, to that effect, judgment of 7 October 2019, *Safeway*, C-171/18, EU:C:2019:839, paragraph 23 and the case-law cited).

23 The principle established by that provision may be relied upon before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (see, to that effect, judgments of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 40, and of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 45).

24 In paragraphs 18 and 21 to 23 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), the Court stated, in particular, that discrimination which has its origin in legislative provisions or collective labour agreements is among the forms of discrimination which may be identified solely by reference to the criteria based on equal work and equal pay laid down by Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) – in contrast to those which can only be identified by reference to more explicit implementing provisions. It added that this is also the case where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private, and that in such a situation the court is in a position to establish all the facts enabling it to decide whether a female worker is receiving lower pay than a male worker performing the same tasks.

25 The Court has specified that, in a situation of that kind, the court is in a position to establish all the facts enabling it to decide whether a female worker is receiving lower pay than a male worker engaged in equal work or work of equal value (see, to that effect, judgment of 11 March 1981, *Worringham and Humphreys*, 69/80, EU:C:1981:63, paragraph 23).

26 Furthermore, the Court has held that Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) requires the application of the principle of equal pay for men and women in the case of equal work or, according to a consistent line of decisions of the Court, in the case of work of equal value (see, to that effect, judgment of 4 February 1988, *Murphy and Others*, 157/86, EU:C:1988:62, paragraph 9).

27 Moreover, that article lays down the principle that equal work or work to which equal value is attributed must be remunerated in the same way, whether it is performed by a man or a woman, a principle which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified (see, to that effect, judgment of 26 June 2001, *Brunnhofer*, C-381/99, EU:C:2001:358, paragraphs 27 and 28 and the case-law cited).

28 It should also be noted that the terms 'equal work', 'same job' and 'work of equal value' in Article 157 TFEU are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed (see, to that effect, judgment of 26 June 2001, *Brunnhofer*, C-381/99, EU:C:2001:358, paragraph 42 and the case-law cited).

29 Accordingly, it is apparent from settled case-law that, contrary to Tesco Stores' submissions, the direct effect of Article 157 TFEU is not limited to situations in which the workers of different sex who are compared perform 'equal work', to the exclusion of 'work of equal value'.

30 In that context, the question whether the workers concerned perform 'equal work' or 'work of equal value', as referred to in Article 157 TFEU, is a matter of factual assessment by the court. In that regard, it should be noted that it is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those workers, equal value can be attributed to them (see, to that effect, judgments of 31 May 1995, *Royal Copenhagen*, C-400/93, EU:C:1995:155, paragraph 42, and of 26 June 2001, *Brunnhofer*, C-381/99, EU:C:2001:358, paragraph 49 and the case-law cited).

31 It should, furthermore, be pointed out that such an assessment must be distinguished from the characterisation of the legal obligation resulting from Article 157 TFEU, which, as has been stated in paragraph 20 of the present judgment, imposes, clearly and precisely, an obligation to achieve a particular result.

32 The foregoing interpretation is borne out by the objective pursued by Article 157 TFEU, namely the elimination, for equal work or work of equal value, of all discrimination on grounds of sex as regards all aspects and conditions of remuneration.

33 In this connection, it is to be observed that the principle, referred to in that provision, of equal pay for male and female workers for equal work or work of equal value forms part of the foundations of the European Union (see, to that effect, judgment of 3 October 2006, *Cadman*, C-17/05, EU:C:2006:633, paragraph 28 and the case-law cited).

34 Moreover, it should be pointed out, first, that, in accordance with the second subparagraph of Article 3(3) TEU, the European Union is to promote, inter alia, equality between men and women. Second, Article 23 of the Charter of Fundamental Rights of the European Union states that equality between women and men must be ensured in all areas, including employment, work and pay.

35 In the light of those factors, it must be held that the interpretation that a distinction should be drawn, as regards the direct effect of Article 157 TFEU, according to whether the principle of equal pay for male and female workers is relied upon in respect of 'equal work' or of 'work of equal value' is such as to compromise the effectiveness of that article and attainment of the objective that it pursues.

36 Furthermore, it should be pointed out that, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no entity which is responsible for the inequality and which could restore equal treatment, with the result that such a situation does not come within the scope of Article 157 TFEU (see, to that effect, judgments of 17 September 2002, *Lawrence and Others*, C-320/00, EU:C:2002:498, paragraphs 17 and 18, and of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 46). It follows that a situation in which the pay conditions of workers of different sex performing equal work or work of equal value can be attributed to a single source comes within the scope of Article 157 TFEU and that the work and the pay of those workers can be compared on the basis of that article, even if they perform their work in different establishments.

37 Therefore, it must be held that Article 157 TFEU may be relied upon before national courts in proceedings concerning work of equal value carried out by workers of different sex having the same employer and in different establishments of that employer, provided that the latter constitutes such a single source.

38 In the present instance, it follows from the request for a preliminary ruling that Tesco Stores appears to constitute, in its capacity as employer, a single source to which the pay conditions of the workers performing their work in its stores and distribution centres may be attributed and which could be responsible for any discrimination prohibited pursuant to Article 157 TFEU, which it is for the referring tribunal to determine.

39 In the light of all the foregoing considerations, the answer to the first question is that Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for 'work of equal value', as referred to in that article, is pleaded.

Second question

40 In view of the answer given to the first question, there is no need to answer the second question.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. 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 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for 'work of equal value', as referred to in that article, is pleaded.

JUDGMENT OF THE COURT (First Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Social policy – Article 157 TFEU – Protocol (No 33) – Equal treatment of men and women in matters of employment and occupation – Directive 2006/54/EC – Article 5(c) and Article 12 – Prohibition of indirect discrimination on grounds of sex – Occupational social security scheme applicable after the date referred to in that Protocol and Article 12 – Retirement pensions of civil servants – National legislation providing for an annual adjustment of retirement pensions – Adjustment on a reducing scale depending on the amount of the retirement pension, with no adjustment at all above a certain amount – Justifications)

In **Case C-405/20**,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 31 July 2020, received at the Court on 28 August 2020, in the proceedings

EB,

JS,

DP

v

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB),

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, I. Ziemele, T. von Danwitz (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– JS and EB, by M. Riedl, Rechtsanwalt,

– DP, by M. Riedl, Rechtsanwalt, and by himself,

– the Austrian Government, by J. Schmoll and C. Leeb, acting as Agents,

– the European Commission, by B.-R. Killmann and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 157 TFEU, Protocol (No 33) concerning Article 157 TFEU, annexed to the FEU Treaty ('Protocol No 33'), and Articles 5 and 12 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The request has been made in three disputes between, respectively, EB, JS and DP, on the one hand, and the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB) (Insurance fund for civil servants and officials of the public authorities, the railways and the mining sector, Austria), on the other hand, regarding the annual adjustment of their retirement pensions.

Legal context

European Union law

3 Protocol No 33 provides:

'For the purposes of Article 157 [TFEU], benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

4 Under Article 1 of Directive 2006/54:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

…

(c) occupational social security schemes.

…'

5 Article 2(1) of that directive provides:

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

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

…

(f) "occupational social security schemes": schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [(OJ 1979 L 6, p. 24)] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.'

6 Under Article 3 of that directive, entitled 'Positive action':

‘Member States may maintain or adopt measures within the meaning of Article [157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.’

7 Chapter 2, entitled ‘Equal treatment in occupational social security schemes’, of Title II of the directive includes, in particular, Articles 5 and 12.

8 Article 5 of Directive 2006/54, entitled ‘Prohibition of discrimination’, states:

‘Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.’

9 Article 12 of that directive, entitled ‘Retroactive effect’, provides:

‘1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the [Union] after 8 April 1976 and before 17 May 1990, that date shall be replaced by the date on which Article [157 TFEU] became applicable in their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by [Union] law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.

4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article [157 TFEU] became applicable in their territory.’

Austrian law

10 Paragraph 41 of the Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965) (Federal Law on the pension entitlements of federal civil servants, their survivors and members of their family (Law on pensions 1965)) of 18 November 1965, (BGB1. 340/1965), in the version thereof in force at the date of the facts in the main proceedings (‘the PG 1965’), provides:

‘...

(2) Retirement pensions and survivors’ pensions payable under this Law ... shall be adjusted at the same time and in the same proportion as pensions covered by the statutory pension insurance scheme,

1. where the pension entitlement has already been established prior to 1 January of the year in question

...

(4) The adjustment method for pensions which is laid down in Paragraph 711 of the [Allgemeines Sozialversicherungsgesetz (General Law on social security)] for the 2018 calendar year shall apply by analogy …. In the event of an increase pursuant to Paragraph 711(1)(2) of [the General Law on social security], the total amount of the increase shall be applied to the retirement or survivor's pension.'

11 Paragraph 108f of the General Law on social security, in the versionthereof in force at the date of the facts in the main proceedings ('the ASVG'), provides:

'(1) The Federal Minister for Social Security, Generations and Consumer Protection shall determine the adjustment factor for each calendar year, taking into account the reference value.

(2) The reference value shall be determined in such a way that the increase in pensions resulting from the adjustment, taking into account the reference value, is in line with the increase in consumer prices in accordance with subparagraph 3. It shall be rounded to three decimal places.

(3) The increase in consumer prices shall be determined according to the average increase over 12 calendar months up to July of the year preceding the year of adjustment, using the Consumer Price Index for 2000 or any other index that has replaced it. To that end, the arithmetic average of the annual inflation rates published by Statistik Austria shall be calculated for the calculation period.'

12 Paragraph 108h of the ASVG reads as follows:

'(1) With effect from 1 January of each year,

(a) all pensions provided under pension insurance for which the reference date (Paragraph 223(2)) is before 1 January of that year

…

shall be multiplied by the adjustment factor. …

(2) The adjustment referred to in subparagraph 1 shall be made on the basis of the pension to which entitlement was established under the provisions in force on 31 December of the previous year …'

13 Paragraph 711 of the ASVG provides:

'(1) By derogation from the first sentence of subparagraph 1 and subparagraph 2 of Paragraph 108h, the pension increase for the 2018 calendar year shall not be made in line with the adjustment factor but as follows: the total amount of the pension (subparagraph 2) shall be increased by

1. 2.2%, where it does not exceed EUR 1 500 per month;

2. EUR 33, where it does not exceed EUR 2 000 per month;

3. 1.6%, where it is greater than EUR 2 000 but less than EUR 3 355 per month;

4. a percentage decreasing on a linear basis between the stated values of 1.6% and 0%, where it is greater than EUR 3 355 but less than EUR 4 980 per month.

An increase shall not be applied if the total amount of the pension is greater than EUR 4 980 per month.

…'

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

14 The appellants in the main proceedings, EB, JS and DP, are three men born before 1955 who worked as federal civil servants in Austria. They retired, respectively, in 2000, 2013 and 2006. In 2017, the gross monthly

amount of their retirement pension was EUR 6 872.43 in the case of the first appellant, EUR 4 676.48 in the case of the second appellant and EUR 5 713.22 in the case of the third appellant.

15 Each of the appellants in the main proceedings applied to the BVAEB for an increase in the amount of their retirement pension with effect from 1 January 2018. The BVAEB determined that the pensions of EB and DP were not eligible for an increase as they exceeded the upper limit of EUR 4 980 per month stated in Paragraph 711(1) of the ASVG. In the case of the retirement pension of JS, the adjustment was established by applying an increase of 0.2989%.

16 The appellants in the main proceedings each brought an action before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), claiming that Paragraph 41(4) of the PG 1965, read in conjunction with Paragraph 711(1)(4) and the last sentence of Paragraph 711(1) of the ASVG, which, given the amount of their pension, deprives them of an increase of that amount entirely, for two of them, or almost entirely, for the third, gave rise to indirect discrimination against them on grounds of sex, which is contrary to EU law.

17 In support of their actions, the appellants in the main proceedings submitted that the national legislation on the adjustment of pensions which was applicable to them had continuously adversely affected their situation since 1995 and that, between 2001 and 2017, higher levels of pension had been adjusted only to a lesser extent. In addition, they asserted that the legislation constituted indirect discrimination on grounds of sex, producing a statistical analysis which showed that recipients of retirement pensions under the PG 1965 of a monthly amount in excess of EUR 4 980 comprised 8 417 men and 1 040 women, whereas the number of recipients of a retirement pension from the federal civil service was 79 491 men and 22 470 women.

18 The Bundesverwaltungsgericht (Federal Administrative Court) dismissed the actions brought by the appellants in the main proceedings, holding that there were grounds of justification on the basis of which the argument of discrimination on grounds of sex could be rejected. As regards EB and DP only, that court also found that it was not contested that Paragraph 41(4) of the PG 1965, read in conjunction with the last sentence of Paragraph 711(1) of the ASVG, was of concern to far more men than women.

19 The appellants in the main proceedings lodged an appeal on a point of law against those decisions before the referring court, the Verwaltungsgerichtshof (Administrative Court, Austria).

20 The referring court states that the retirement pensions which are drawn by the appellants in the main proceedings under the PG 1965, in so far as they were born before 1955, fall within the scope of Article 157 TFEU, Protocol No 33 and Article 12 of Directive 2006/54. That court therefore raises the question of, first, the possible effect on their actions of the temporal limitation of the requirement of equal treatment of men and women laid down by that Protocol and by that article of Directive 2006/54, which applies to the period prior to 1 January 1994 in the case of the Republic of Austria. According to the referring court, although that limitation could be considered to be applicable to benefit components such as the adjustment of pensions contested by the appellants in the main proceedings, even partially, in proportion to the periods of employment which they completed prior to 1 January 1994, the Court's case-law following from, inter alia, the judgment of 6 October 1993, *Ten Oever* (C-109/91, EU:C:1993:833), militates in favour of the interpretation that that limitation is not applicable to such adjustment and cannot prevent the appellants in the main proceedings from relying on the requirement of equal treatment of men and women.

21 In that regard, the referring court explains, second, that, in the light of the national legislation at issue, retired federal civil servants in receipt of a gross monthly pension under the PG 1965 in excess of a certain amount are either entirely or almost entirely excluded from an increase of that pension for 2018, unlike beneficiaries of lower pensions. That disadvantage could give rise to discrimination on grounds of sex if it affects significantly more men than women. The referring court states that, since 1997, the annual adjustment of those pensions has no longer followed the trend of salaries of civil servants in active employment but, in principle, by virtue of a reference in Paragraph 41 of the PG 1965 to the ASVG, the rate of inflation, with the aim of preserving the purchasing power of recipients. Although this was intended to be a general, long-term scheme, the Austrian legislature has in some years regularly availed itself of the option of adopting legislation which derogates from the general indexation of pensions to inflation.

22 As regards the adjustment of pensions for 2018, the referring court states that the reason given by the Austrian Government for that derogation is the existence of a social component. The BVAEB also relied on that

social aim as justification for any indirect discrimination, asserting that the application each year of a uniform percentage would quickly give rise to an 'unjustifiable divide' between levels of retirement pensions and that very high pensions could withstand a lesser adjustment without jeopardising their value or the standard of living of their recipients, with the result that such adjustment, in the interest of funding the overall adjustment volume available to the State, was tolerable and necessary for the sake of solidarity.

23 The referring court is uncertain, however, whether those reasons are capable of justifying any indirect discrimination and whether the requirements of the principle of proportionality are complied with. In particular, that court has doubts whether the national legislation on the adjustment of the pensions at issue is necessary, appropriate and consistent. The measure under that legislation is thus limited to recipients of retirement pensions and, moreover, to certain categories of recipients, when there are other appropriate social-policy instruments, such as progressive income tax rates, transfers and other tax-funded assistance. In addition, under domestic law, the retired federal civil servants affected by Paragraph 41 of the PG 1965 are in a special position, which sets them apart from persons in receipt of pensions paid by social security schemes such as the ASVG. According to the case-law of the Verfassungsgerichtshof (Constitutional Court, Austria), the retirement pensions of such civil servants should be considered as pay under public law in compensation for services rendered during the period of active service within the framework of a lifelong employment relationship. Whereas pensions paid under social security schemes are based on the principle of contributions-based funding and are payable by an insurer, the contributions made by civil servants in active employment are paid to the State budget and the idea underlying the PG 1965 is not the same as that underlying such schemes.

24 The referring court further notes that the national legislature refrained from adopting the same 'social balancing' measure for civil servants in active employment, who received, for the year 2018, a non-degressive pay rise above inflation in order to share in the benefits of economic growth. Similarly, the national legislature did not make retirement pensions provided under other occupational social security schemes, for example private schemes, subject to the same adjustment arrangements, except for the limited category of pensions paid by State-linked undertakings. The court is also uncertain whether it is necessary, when examining the proportionality and the consistency of the alleged discriminatory measure, to take into consideration the fact that the measure was not the only one of its kind, the appellants in the main proceedings invoking the cumulative effects of different measures adjusting the amount of their pensions which had been adopted since their retirement.

25 Lastly, the referring court points out that the Bundesverwaltungsgericht (Federal Administrative Court) has stated that the unfavourable treatment experienced by the mostly male recipients of higher pensions had to be examined in the light of the fact that, historically, women had been treated unfavourably, that is to say, under-represented in the best paid positions. The referring court also asks what consequences should be drawn from such a finding for the main proceedings.

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

'(1) Must the limitation of the scope *ratione temporis* of the requirement of equal treatment for men and women laid down in the judgment [of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209)], as well as in [Protocol No 33] and Article 12 of Directive [2006/54], be interpreted as meaning that an (Austrian) pensioner cannot lawfully rely on the requirement of equal treatment for men and women, or can do so only (in part) in respect of that part of his entitlement that relates to periods of employment after 1 January 1994, in order to claim that he has been discriminated against by rules on an adjustment of civil servants' pensions laid down for 2018 such as that which was applied in the main proceedings?

(2) Must the requirement of equal treatment for men and women (pursuant to Article 157 TFEU in conjunction with Article 5 of Directive 2006/54) be interpreted as meaning that indirect discrimination such as that which – in some cases – results from the rules, at issue in the main proceedings, concerning the 2018 pension adjustment, even in the light of similar measures adopted previously and the considerable loss caused by the cumulative effect of those measures as compared with an adjustment of the actual value of pensions to take into account inflation (in this instance, a loss of 25%), is justified in particular

– in order to avoid a "divide" between higher and lower pensions (caused by periodic adjustment at a single rate), even though this would be purely nominal and would leave the differential between the two unchanged,

– in order to put in place a general "social component" in the form of steps to increase the purchasing power of those on lower pensions, even though (a) that objective could be attained even without limiting the adjustment of higher pensions and (b) the legislature does not also provide for the same type of measure to increase purchasing power when it comes to adjusting for inflation the salaries of lower-paid civil servants (to the detriment of the adjustment applied to the salaries of higher-paid civil servants), and has also not laid down rules for a comparable intervention in the adjustment applied to the value of pensions under other occupational social security schemes (in which the State does not participate) in order to increase the purchasing power of lower pensions (to the detriment of the adjustment of higher pensions),

– in order to maintain and finance "the scheme", even though civil service pensions are payable not by an insurer-operated scheme organised in the form of insurance and financed from contributions, but by the Federal Government as employer of retired civil servants and in consideration for work performed, so that the maintenance or financing of a scheme is not decisive, the only relevant considerations, ultimately, being budgetary,

– because the fact that the statistically much higher representation of men among recipients of higher pensions is to be regarded as the consequence of the lack of equal opportunities for women in matters of employment and occupation that was typical in the past in particular, constitutes an independent ground of justification or (upstream of that) rules out from the outset any assumption of indirect discrimination on grounds of sex, within the meaning of Directive 2006/54, to the detriment of men, or

– because the scheme is permissible as positive action for the purposes of Article 157(4) TFEU?'

The questions referred for a preliminary ruling

The first question

27 By its first question, the referring court asks, in essence, whether Protocol No 33 and Article 12 of Directive 2006/54 must be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions applies to national legislation which provides for an annual adjustment of the retirement pensions paid under an occupational social security scheme applicable after the date referred to in those provisions.

28 From the outset, it should be recalled that Article 157 TFEU enshrines the principle of equal pay for male and female workers for equal work or work of equal value.

29 As regards Directive 2006/54, Article 1 states that the directive contains provisions to implement the principle of equal treatment in relation to, inter alia, occupational social security schemes.

30 As is apparent from the request for a preliminary ruling and as has already been held by the Court, a retirement pension like that paid to Austrian federal civil servants under the PG 1965 comes under the notion of 'pay' within the meaning of Article 157 TFEU in so far as its amount depends on periods of service and equivalent periods and on the salary received by the civil servant and that pension constitutes a future cash payment, paid by the employer to his employees, as a direct consequence of their employment relationship. Under national law, that pension is regarded as pay which continues to be paid in the context of an employment relationship which continues after the civil servant becomes entitled to retirement benefits (see, to that effect, judgment of 21 January 2015, *Felber*, C-529/13, EU:C:2015:20, paragraph 23).

31 Furthermore, such a pension is paid under an 'occupational social security scheme' within the meaning of Article 2(1)(f) of Directive 2006/54, which provides workers of a given occupational sector with benefits designed to replace the benefits provided for by statutory social security schemes. In Austria, federal civil servants are excluded from the pension insurance scheme introduced by the ASVG because they are employed in the federal public administration, in so far as their employment relationship gives them a right to retirement benefits equal to those provided for by that retirement insurance scheme (see, to that effect, judgment of 16 June 2016, *Lesar*, C-159/15, EU:C:2016:451, paragraph 28).

32 First, it is important to recall that, according to the wording of Protocol No 33, for the purposes of Article 157 TFEU, benefits under occupational social security schemes are not to be considered as remuneration 'if and in so far as' they are attributable to periods of employment 'prior' to 17 May 1990. The same holds for the wording of Article 12(1) of Directive 2006/54, which provides that 'all' benefits under such schemes derived from periods of employment 'subsequent' to that date are covered by the measures implementing the provisions of Title II, Chapter 2, of that directive, on equal treatment in such schemes.

33 Since the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions constitutes a derogation from the general rule laid down by the FEU Treaty, it must be strictly interpreted.

34 Second, it should be noted that the wording of Protocol No 33 is identical to that of Protocol (No 17) on Article 141 EC, annexed to the EC Treaty; they have a clear link to the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), since they refer specifically to the date on which that judgment was delivered.

35 As the Court stated in the judgment of 6 October 1993, *Ten Oever* (C-109/91, EU:C:1993:833), by virtue of the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), the direct effect of Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990 (the date of the judgment in that case), subject to the exception in favour of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law (judgment of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 100 and the case-law cited).

36 Overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many pension schemes (see, to that effect, judgment of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 99).

37 This limitation is reproduced by Protocol No 33 and is also included in Article 12(1) of Directive 2006/54.

38 As far as the Republic of Austria is concerned, the reference date mentioned in the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), was replaced, under Article 12(3) of that directive, by 1 January 1994.

39 Third, it is to be observed that the principle of equal pay for male and female workers referred to in Article 157 TFEU forms part of the foundations of the European Union. Moreover, in accordance with the second subparagraph of Article 3(3) TEU, the European Union is to promote, inter alia, equality between men and women and, under Article 23 of the Charter of Fundamental Rights of the European Union, equality between women and men must be ensured in all areas, including employment, work and pay (see, to that effect, judgment of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, paragraphs 33 and 34 and the case-law cited).

40 In the present case, it is apparent from the request for a preliminary ruling that the annual adjustment of retirement pensions under the national legislation at issue in the main proceedings for the year 2018 is calculated on the basis of the amount of the retirement pension drawn by the recipient in the previous year, to which entitlement was already established, with that adjustment being made on a reducing scale such that it ceases to exist above a certain amount. In addition, the adjustment does not depend on the date of the periods of employment or of membership of the recipient in question.

41 Before the referring court, the appellants in the main proceedings claim an infringement of the principle of equal treatment of men and women only in respect of that national legislation, which does not have retroactive effect. Furthermore, they retired after 1 January 1994 and receive a pension for which they do not dispute either the date of entitlement or the initial amount. Nor do they contest the amount of their pension in connection with payments made in the past or with periods of employment prior to 1 January 1994.

42 Having regard to the considerations set out, in essence, in paragraphs 32 to 39 of this judgment, Protocol No 33 and Article 12 of Directive 2006/54 cannot be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions should apply to an annual adjustment of retirement pensions, in so far as such a mechanism does not have the effect of calling into

question acquired rights or payments made before the reference date laid down in those provisions. It follows that, in the present case, that limitation cannot be applied to the appellants in the main proceedings in respect of an annual adjustment of retirement pensions like that provided for by the national legislation at issue in the main proceedings for the year 2018 alone.

43 In the light of the foregoing, the answer to the first question is that Protocol No 33 and Article 12 of Directive 2006/54 must be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions does not apply to national legislation which provides for an annual adjustment of the retirement pensions paid under an occupational social security scheme applicable after the date referred to in those provisions.

The second question

44 By its second question, the referring court asks, in essence, whether Article 157 TFEU and Article 5 of Directive 2006/54 must be interpreted as precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that amount, with no adjustment at all above a certain pension amount.

45 Article 5(c) of that directive prohibits direct or indirect discrimination on grounds of sex in occupational social security schemes in respect of the calculation of benefits.

46 It must be stated at the outset that national legislation such as that at issue in the main proceedings does not entail direct discrimination, since it applies indiscriminately to male and female workers.

47 As regards the question whether such legislation gives rise to indirect discrimination, as defined for the purposes of that directive in Article 2(1)(b) thereof, it is clear from the request for a preliminary ruling that, under Paragraph 41(4) of the PG 1965, read in conjunction with Paragraph 711(1) of the ASVG, Austrian federal civil servants who receive a monthly retirement pension above a certain amount are disadvantaged as compared with those whose retirement pension is lower because the amounts of the pensions of the former were not increased or were increased only to a lesser extent. Such legislation thus establishes a difference in treatment between Austrian federal civil servants on the basis of an apparently neutral criterion, namely the amount of their pension.

48 With regard to the question whether that difference in treatment puts persons of one sex at a particular disadvantage compared with persons of the other sex, the referring court states that, according to evidence produced by the appellants in the main proceedings and the findings made by the Bundesverwaltungsgericht (Federal Administrative Court), it cannot be ruled out that the conditions for indirect discrimination on grounds of sex are met from a statistical point of view. In particular, in the case of two of the appellants in the main proceedings, it is common ground that Paragraph 41(4) of the PG 1965, read in conjunction with the last sentence of Paragraph 711(1) of the ASVG, is of concern to far more men than women in so far as more men are represented in the category of persons in receipt of pensions greater than the maximum amount laid down by that legislation.

49 In that regard, the Court has held that the existence of such a particular disadvantage can be established, for example, if it were proved that national legislation is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 49 and the case-law cited).

50 The appreciation of the facts from which it may be presumed that there has been indirect discrimination is the task of the national court, in accordance with national law or national practices which may provide, in particular, that indirect discrimination may be established by any means, including on the basis of statistical evidence. Thus, it is for that court to assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant (judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraphs 50 and 51 and the case-law cited).

51 Should the statistics to which the referring court may have regard actually show that the percentage of workers of one gender is affected by the national legislation at issue to a considerably higher degree than workers

of the other gender also coming within the scope of that legislation, it would be necessary to hold that that situation is evidence of indirect sex discrimination, contrary to Article 5(c) of Directive 2006/54, unless that legislation is justified by objective factors wholly unrelated to any discrimination based on sex (see, to that effect, judgments of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 42 and the case-law cited, and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 54).

52 In such a case, that court must then assess to what extent such difference in treatment can nonetheless be justified by objective factors wholly unrelated to any discrimination based on sex, as follows from Article 2(1)(b) of Directive 2006/54.

53 This is particularly the case, in accordance with the Court's case-law, where the means chosen reflect a legitimate social-policy objective, are appropriate to achieve the aim pursued by the legislation at issue and are necessary in order to do so, it being understood that they can be considered appropriate to achieve the stated aim only if they genuinely reflect a concern to attain that aim and are pursued in a consistent and systematic manner (see, to that effect, judgments of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraphs 53 and 54 and the case-law cited, and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 56).

54 In addition, the Court has held that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion (judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 57 and the case-law cited).

55 It also follows from the Court's case-law that, while it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent the legislative provision in question in the case before it is justified by such an objective reason, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance in order to enable the national court to give judgment (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 58).

56 In the present case, it is apparent from the file before the Court that the aim of the national legislation at issue in the main proceedings is to preserve the purchasing power of recipients of retirement pensions by favouring, by means of 'social balancing', lower retirement pensions compared with higher pensions, to prevent an excessively large gap opening between those pensions and to ensure their long-term funding.

57 According to the Court's case-law, while budgetary considerations cannot justify discrimination against one of the sexes, the objectives of ensuring the long-term funding of retirement benefits and narrowing the gap between State-funded pension levels can be considered to constitute legitimate social-policy objectives wholly unrelated to any discrimination based on sex (see, to that effect, judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 61, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 38).

58 It follows that the national legislation at issue in the main proceedings pursues legitimate social-policy objectives wholly unrelated to any discrimination based on sex.

59 With regard to the question whether that legislation satisfies the proportionality requirements set out in paragraph 53 of this judgment, in particular whether it is appropriate, according to the information available to the Court, it makes it possible to increase only moderate or low retirement pensions, while inter alia ensuring that the lowest amounts are increased above inflation, and thus to contribute to the long-term funding of those pensions and to narrow the gaps between them.

60 It is true that, as the referring court stated, the indexation of retirement pensions to the rate of inflation does not per se alter the differences in the level of the various pensions and the gap between them remains unchanged from a mathematical perspective. However, price rises place a greater burden on the standard of living of people in receipt of low retirement pensions. In addition, since it affects only benefits exceeding a certain amount, the national legislation at issue in the main proceedings has the effect of bringing those benefits closer to the level of lower pensions.

61 With regard to the question whether that legislation is pursued in a consistent and systematic manner, as was stated in the request for a preliminary ruling and in the written observations of the Austrian Government, it applies to all retirement pensions of civil servants, but also to recipients of retirement pensions provided under both the occupational social security schemes of State-controlled undertakings and the statutory pension insurance scheme provided for by the ASVG. The annual adjustment of the pensions at issue in the main proceedings thus applies to all recipients of State pensions, which is, however, a matter for the referring court to verify.

62 In view of the broad margin of discretion enjoyed by the Member States in choosing the measures capable of achieving the aims of their social and employment policy, as recalled in paragraph 54 of this judgment, the consistency with which the adjustment measure is pursued cannot be called into question by the mere fact that other specific social-policy instruments seeking to achieve the aim of supporting low incomes are already in place.

63 The same is true of the fact that neither the pensions of private occupational social security schemes nor the salaries of civil servants in active employment have been subject to the same adjustment measure.

64 On the one hand, those private schemes are not, subject to verification by the referring court, dependent on the State. On the other hand, as regards civil servants in active employment, while under national law their appointment establishes a lifelong employment relationship and their retirement pension corresponds to pay owed by the State in compensation for services rendered during the period of active service, it is also clear from the request for a preliminary ruling and from the written observations of the Austrian Government that the civil servants pension scheme has undergone various changes over the last couple of decades, with a view to aligning it with the scheme under the ASVG. In particular, the adjustment of their pensions has no longer followed the trend of salaries of civil servants in active employment but in principle, the rate of inflation, as with pensions provided under the latter scheme. Furthermore, having regard to the aims pursued by the national legislation at issue in the main proceedings, retired civil servants and civil servants in active employment do not appear to be in a comparable situation, since, in particular, the aim of narrowing the gap between retirement pensions so as to avoid a divide between those pension levels being created over time requires a distinction to be made between the administration of pensions and the administration of salaries.

65 The fact that retirement pensions of civil servants are paid not by an insurer to which they have paid their contributions but directly by the State likewise does not seem to be crucial in view of the aim of the long-term funding of retirement pensions and the narrowing of the gap between them, as pursued by the Austrian legislature in adopting the national legislation at issue in the main proceedings. Furthermore, an adjustment of pensions is not a benefit which represents consideration for the contributions paid (see, to that effect, judgment of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 79).

66 Consequently, that legislation appears to be implemented in a systematic and consistent manner, subject to verifications to be carried out by the referring court in this regard.

67 Nor does that legislation appear to go beyond what is necessary to attain the aims pursued. It is true that the appellants in the main proceedings claim a significant devaluation of their retirement pensions compared with a scenario whereby, under national law, they had received an adjustment equal to inflation each year since their retirement. It should be noted, however, that the national legislation at issue in the main proceedings takes account of the ability to contribute of the persons concerned. The limits on the increase of pensions laid down in Paragraph 711 of the ASVG, to which Paragraph 41(4) of the PG 1965 refers, are staggered according to the amounts of the benefits granted and it is only for the highest pensions that such an increase is precluded.

68 In those circumstances, there is no need to examine whether those limitations can be justified having regard to Article 157(4) TFEU or Article 3 of Directive 2006/54. In any event, in accordance with the Court's case-law, those provisions cannot be applied to national legislation which is limited to granting women a pension surplus, without providing a remedy for the problems which they may encounter in the course of their professional career, and which does not appear to compensate for the disadvantages to which women are exposed by helping them in that career and, thus, to ensure full equality in practice between men and women in working life (see, to that effect, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for women)*, C-450/18, EU:C:2019:1075, paragraph 65 and the case-law cited).

69 In the light of all those factors, the answer to the second question is that Article 157 TFEU and Article 5(c) of Directive 2006/54 must be interpreted as not precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that amount, with no adjustment at all above a certain pension amount, if that legislation is to the disadvantage of a significantly greater proportion of male beneficiaries than female beneficiaries, provided that the legislation pursues in a consistent and systematic manner the aims of ensuring the long-term funding of retirement pensions and of narrowing the gap between State-funded pension levels, without going beyond what is necessary to attain those aims.

Costs

70 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 (First Chamber) hereby rules:

1. Protocol (No 33) concerning Article 157 TFEU, annexed to the FEU Treaty, and Article 12 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions does not apply to national legislation which provides for an annual adjustment of the retirement pensions paid under an occupational social security scheme applicable after the date referred to in those provisions.

2. Article 157 TFEU and Article 5(c) of Directive 2006/54 must be interpreted as not precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that amount, with no adjustment at all above a certain pension amount, if that legislation is to the disadvantage of a significantly greater proportion of male beneficiaries than female beneficiaries, provided that the legislation pursues in a consistent and systematic manner the aims of ensuring the long-term funding of retirement pensions and of narrowing the gap between State-funded pension levels, without going beyond what is necessary to attain those aims.

[Signatures]